Public Accountants' & Auditors' Board
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(now Act 80/1991)

11 February 2005

The Honourable Minister of Finance
Mr Trevor A Manual MP
2nd Floor
40 Church Square
PRETORIA

Email: AuditingProfessionBill@treasury.gov.za

Dear Minister Manual

Draft Auditing Profession Bill 2004

We have pleasure in submitting herewith a hard copy of our comment on the above draft Bill. Our comment has been transmitted electronically to the Treasury website in accordance with the official communication channel that has been designated for all submissions.

The PAAB welcomes the opportunity to submit comment on this very important milestone in the quest for a new and improved regulatory system for the auditing profession.

We offer our comments and suggestions with the intention of contributing positively to assisting in the essential need for the new legislation to be clear, unambiguous and practical to enable the successor regulator to carry out its functions effectively and efficiently in the public interest.

We would appreciate the opportunity to be of assistance to Treasury in any way we can to finalize the Bill.

Yours sincerely

Claude O'Flaherty
Chief Executive Officer

PUBLIC ACCOUNTANTS' & AUDITORS' BOARD

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Introduction to the comment on the Draft Auditing Profession Bill submitted by the Public Accountants' and Auditors' Board to the Department of Finance on 11 February 2005

It is our understanding that the drafters were instructed to work from a pre-existing draft of this Bill, and that their remit was to update this to accommodate the Minister's recommendations, arising out of the Ministerial Review Panel. We understand that their remit was not to re-draft the Bill. Hence issues which did not form part of the brief to the Ministerial Review Panel, even if of importance to the profession in both the local and global arena, have not been debated. The most obvious example is that of multi disciplinary practices ('MDPs').

It is unfortunate that we were not involved in preparing the initial draft, nor consulted regarding the content, as many of the substantive issues which we raise here could have been clarified at an earlier stage. That being so, we are obliged to raise these issues now.

It is apparent that the initial Bill was drafted with an incomplete understanding of the functioning of both the profession and the regulator. We would like to voice concerns – largely administrative and practical – as to how this legislation as currently drafted will hinder the regulatory body's abilities to discharge its obligations.

From our many years of involvement in this regulatory function, we believe it to be essential that the legislation is clear, unambiguous and practical to avoid the regulator having to deploy its limited human and financial resources fighting clever legal challenges.

The current legislation has been 'fine tuned' over a period of fifty years and is as 'challenge resistant' as possible. It must also be remembered that the legislation will most certainly be the subject of legal challenge as soon it is sought to enforce some of the less popular sections. We wish to obviate any possible legal challenges, bearing in mind that these are on occasion initiated simply to 'buy-time'. We would prefer to make this process as difficult as possible. It is for this reason (and from years of experience, including that of meeting legal challenges) that we make very precise and detailed comment on the content of the Bill, including the "nuts and bolts" of the drafting style.

If some of our comments appear to be nit-picking or carping, we ask the readers of this memorandum to be generous in their understanding of our position, and we implore both them and the decision makers to take cognizance of our concerns and to take into account the practical issues which we address in this document.

Whilst we wish to make it perfectly clear that we are not opposed to change where such change effects an improvement, we would caution against change simply for the sake thereof, and urge that the good in the existing legislation is not discarded purely for the sake of appearances, but is incorporated into the new Bill.

Against these observations, and this background, we respectfully submit our concerns and comment.

If any of our comments and observations or the reasons for them is unclear in any way, we would urge the drafters of the final document to engage with us directly, so that these can be discussed and explained in an atmosphere of co-operation, to achieve the most efficient and effective results in the public interest.

PREFACE

This document represents the PAAB's formal comment on the draft Auditing Profession Bill ('the Bill') and comprises two parts:

PART 1: FUNDAMENTAL ISSUES AND COMMENT WHICH AFFECT THE WHOLE BILL

A: Introductory comments and premises on which these are based

In all matters, addressed by the Bill, other than education and training, registration as an auditor, and matters relating to global reciprocity, the PAAB is in substantial agreement. It must be stressed however that the PAAB has very serious concerns about matters relating to education, training and registration. We believe that the current Bill is inconsistent, incoherent and denies the IRBA the statutory power to enable it to "ensure that every registered auditor in South Africa is appropriately qualified (Preamble)".

B: History of the Bill

We believe it is necessary to have some understanding of how the Bill came into existence in order to understand the context of certain of our submissions.

C: Global implications

The global implications of this legislation, particularly with regard to funding and transparency and implications for mutual co-operation or reciprocity with foreign regulators, are addressed in this section.

D: Matters pertaining to education and training

The Bill is drafted on the principle of accreditation of professional bodies with the IRBA having no direct responsibility for the education and training of candidates to the profession. The PAAB has fully supported this principle in previous comment on the legislative proposals. This principle moves away from the current law that requires the PAAB to have the direct responsibility for training and education of candidates to the profession. However, the PAAB believes strongly that the IRBA should have the right, if not the obligation to test competency of applicants for registration or re-registration with the IRBA, which is also consistent with the recommendation of the Ministerial Panel.

E: Matters pertaining to discipline

Because of its importance, our concerns about the manner in which this section is drafted are addressed here as well as in the line-by-line commentary.

F: Matters pertaining to 'reportable irregularities'

We hold strong views about the practical implementation of the new §22, and these are addressed here as well as in the line by line commentary.

G: General comment on drafting style

Comment on the drafting style, and certain concerns in this regard, are addressed in this section.

PART 2: DETAILED COMMENT AFFECTING SPECIFIC SECTIONS OF THE BILL

Although not exhaustive, specific comment on the detail of sections of the Bill is presented in this section. We had hoped to check all cross references to ensure accuracy, check the harmonisation of words such as 'prescribed' and 'determined' to ensure consistency, and to check definitions to content, to ensure that the definition is always appropriate, but time has not permitted us to carry out this exercise.

For ease of reading we have reprinted the Bill and inserted our comment at the most appropriate place. Obviously certain comment is overarching and in those instances the specific comment should be read in the light of the broader comments which appear in part one.

Please note that for ease of reading we have prepared two versions of part two of this comment document:

- one is in colour which makes for easier reading, but is not mono-colour-printer-friendly
- the second is not in colour, specifically for printing on non-colour printers.

Pages 1 – 27 are common

Pages 28 - 87 are the black and white (mono colour) version of part two

Pages 88 – 147 are the full colour version of part two.

In the full colour version:

- Words in red indicate our comments and edits.
- ~~Crossing through~~ indicates our suggested deletions
- We have underlined all section references for convenience of cross-checking.
- All defined words are in blue except for references to auditor which are in green.
- Peremptory auxiliary verbs such as ‘shall’ and ‘may’ and also instances where peremptory verbs have been omitted have been hi-lited in yellow.
- Words indicating that something has to be done such as ‘determined’ and ‘prescribed’ have been hi-lited in green.
- In the trend to avoid any reference to gender by using the third person singular, various different conventions have been attempted. These are hi-lited in blue.

In the mono-colour version:

- *Italics* indicate comment.
- **[Bold type in square brackets]** indicates suggested insertions.
- Suggested deletions are ~~ruled through~~

PART 1: FUNDAMENTAL ISSUES AND COMMENT WHICH AFFECT THE WHOLE BILL

A: Introductory comments

The Public Accountants' and Auditors' Board (PAAB) welcomes the release of the Draft Auditing Profession Bill, 2004 for public comment. Our reaction is for the most part positive with respect to the principles underpinning the Bill. However, the PAAB does have some concerns that we believe need to be addressed before the Bill is finalized.

A major area of concern relates to the contradictory provisions of the Bill relating to the respective responsibilities of accredited professional bodies and the new regulatory body for the education and training of entrants into the practising profession.

Another area of major concern relates to the provisions of the Bill dealing with the proposed operational procedures and processes relating to the investigation and disciplinary functions of the new regulatory body.

The PAAB also has serious reservations about the drafting of the Bill which we believe contains areas of ambiguity and lack of precise meaning that, unless addressed, will result in serious problems of interpretation in the future.

An additional concern relates to the funding arrangements for the new regulatory structure which does not embody the concept of shared funding that is fundamental to establishing the new regulatory body as being independent of the profession. This has significant implications from a global perspective.

The PAAB/IRBA is not a public entity in terms of the Public Finance Management Act (PFMA). If this is a possibility, as appears from references to the PFMA in respect of timeframes for reporting to the Minister, and the setting of performance objectives (§47(1)), then the Bill should provide the IRBA with the necessary capacity and powers to comply with §6 of the PFMA**.**

The reportable irregularities provisions of the Bill are in our opinion cumbersome and confusing and are likely to result in auditors not clearly understanding their reporting responsibilities.

These and other concerns as well as our detailed comments on the Bill are fully articulated hereunder.

The comments contained in this response do not address the summary proposed amendments to the Companies Act, 1973 which we understand are intended to be submitted to Parliament concurrently with this Bill. It will be important to ensure that there is no overlap or contradiction for example, in respect of auditor independence issues.

B: History and context

We are frequently asked by people unfamiliar with the process which has been followed to date, why it is necessary to redraft the Public Accountants' and Auditors' Act ('PAA Act') at all, given that the currently proposed changes are not dramatic in concept, and why the process has taken so many years.

In order to understand this in context we set out briefly in this section the history of this particular piece of statutory reform.

1990

As early as 1990, the PAAB initiated the project styled the Future of Accounting Education in South Africa (FAESA), to investigate the range of accounting expertise needed by the country and the education and training to deliver it. The intention at that stage was to bring all accounting professionals under one Act, and to allow for upward mobility through a range of tiers, which commenced with the bookkeeper tier and culminated in the auditor tier, specifically to accommodate people from disadvantaged, or less privileged backgrounds.

The late Professor Peter de V Booysen was appointed to chair the project and provide the leadership for the investigation. It was felt that the investigation was necessary due to the burgeoning body of knowledge in the accounting field, rapid developments in information technology, the narrowness of the existing educational requirements, similar studies in other countries and changes in the socio-political environment. Prof Booysen's brief for the project was as follows:

- To analyse the need for accounting information and accounting services in the South African economy within its Southern African context;
- To identify and define the type of accounting expertise necessary to meet the accounting information and service needs; and
- To make recommendations regarding the structure, content and scope of education and training to provide the required range of accounting expertise and to enable accountants to fulfil their role in the private and public South African financial and business communities.

The implementation of the project was undertaken by a small central working group (CWG) supported by a large consultative body providing the mechanism for input from various concerned bodies, other interest groups and individuals.

The CWG was appointed by the PAAB to drive the project and execute the brief. It was constituted so that the spheres of interest most directly involved were represented and the individuals were selected for the relevance of their particular interests and expertise.

The necessity for keeping the CWG small in size made it imperative to constitute a large consultative body to provide the mechanism for input from the large number of relevant institutes and other interest groups. This body, known as the Consultative Council (CC), was constituted of approximately 25 bodies which represented business, education and accountancy structures.

The work of the project was undertaken by the CWG in three phases - first, gathering information, second, debating issues and formulating recommendations and third, writing the report. The CC was consulted in each of these phases.

Before considering the needs of the future, it was necessary to have a clear understanding of the structures and functions, past and present, relating to the accountancy profession. This was done by consulting the literature, by conducting information surveys, and by interview and enquiry.

The reviews of literature, both local and international, were for the most part conducted by Professor Jeff Rowlands, who acted as the research officer of CWG.

The information surveys were conducted on a consultancy basis by the Human Sciences Research Council. This turned out to be a massive undertaking and involved far more time and effort than was originally anticipated, leading to the development of three elaborate questionnaires in order to gather information of fact and opinion from three major sectors within the sphere of accounting – the business community in the South African economy including accounting practices, the accounting certifying and related bodies, and the tertiary educational institutions with accounting programmes. The questionnaires were exposed to CC members before being distributed and all CC members were invited to respond to whichever questionnaire they considered appropriate to their interests. Other constituencies were consulted by means of interview and enquiries by members of the CWG.

1994

The FAESA report was published in March 1994, and contained far-reaching proposals for the restructuring of the profession. Some of the more important recommendations were the following:

- The accountancy profession must be restructured in a manner which provides for:
  - access to the profession for all those with the ability and the desire to enter the profession;
  - mobility between levels of qualification and programmes of education;
  - the maintenance of high standards at all levels of qualification in the profession;
  - the retention of the strengths associated with the diversity which characterises the profession in South Africa; and
  - the redressing of the racial inequalities which are a consequence of the past and present circumstances of South Africa.
- The accountancy profession should be comprised of four tiers.
- Competencies must be identified for each level of the profession and, where appropriate, services provided at each level must be subject to statutory limitations.
- The tiered profession should be subject to a process of regulation.

Immediately thereafter a four person Action Committee was appointed to undertake a further consultative process with all interest groups, institutions and institutes. These discussions with some 15 accounting institutes and other key parties proved to be frank and open, with many crucial issues being aired. In the light of the comments received during this consultative process, the Action Committee prepared a final discussion document which was sent to all relevant role players.

At a discussion forum held in November 1994, the recommendations relating to changes to the structure of the accounting profession were accepted by all the stakeholders.

1995

As the first step towards restructuring the profession, an Interim Representative Council of Accountants (IRC) was formed comprising representatives of all South African accounting bodies as well as other stakeholders in the private and public sector, under the chairmanship of Mr Kobus Scheepers. Its brief was to consider the recommendations contained in the FAESA Report and to draft legislation to give effect thereto.

1997

After a rigorous consultation process, the IRC drafted a new Bill, the Accountancy Profession Bill ('APB') in 1997.

This was the first attempt at new legislation

The draft Bill envisaged a structure which would include two main bodies - a Representative Council of Accountants ('RCA') and a Regulatory Board for Auditors ('RBA'). The RCA would regulate the access to and mobility within the broad accountancy profession while the RBA would take over the functions of the PAAB and continue to regulate the auditing profession. New bodies to be known as the Independent Standards-setting Board for Ethics ('ISBE') and the Independent Standards-setting Board for Auditing ('ISBA') were to be established with broadly-representative memberships to ensure that the ethics and auditing standards of the auditing profession were in line with society's needs. The future role of the RBA as a purely regulatory body which recognised and accredited the educational and training programmes of professional institutes was confirmed in the draft bill. It would have continued to carry out its investigative and disciplinary functions as well as practice review.

1998

Thereafter a National Accountancy Consultative Forum ('NACF') was established under the direction of the then Deputy Minister of Finance, Ms Gill Marcus, who was overseeing the process, to facilitate the consultative process relative to the APB. She appointed Judge M Corbett, the retired Chief Justice and Adv Selby Baqa the then Public Protector, as co-chairs of the Forum.

All interested parties were invited through the media to attend a public workshop convened by the Forum, the main purpose of which was to consider the APB. Five theme committees were established, under chairpersons Jeff van Rooyen (subsequently the CEO of the FSB), Barbara Hogan (MP), Rick Cottrell (the then CEO of the FSB), Ismail Mamoojee (Department of Finance) and Kobus Scheepers (chairperson of the IRC), also appointed by Ms Marcus, to debate the following matters:

- Regulation (including the establishment of a tiered profession);
- Discipline;
- Ethics;
- Education and training; and
- Equity development.

On the day of the national forum workshop, the Deputy Minister explained the government's involvement, issues, short-term and long-term goals; each appointed chairperson gave a short synopsis of the important issues which his theme committee needed to discuss; and attendees then divided into the separate theme committees according to their specific preferences.

The NACF decided that changes were needed to the APB. Its co-ordinating committee, consisting of Rick Cottrell, Kobus Scheepers and Jeff van Rooyen, prepared a new Draft Accountancy Profession Bill ('DAPB') which was widely exposed for comment and went into many versions. Prof Dawid van Wyk of the UNISA Constitutional Law Department was retained to attend to the drafting process.

2000

The draft which emanated from the NACF encompassed a significant shift from the draft produced by the IRC, although it still sought to cover both auditors and accountants.

This draft was in its turn widely exposed for comment, and was ultimately submitted to the then Deputy Minister Mr Mandisi Mpahlwa at a meeting on 12 October 2000. It was the end result of a wide ranging and long process of debate and consultation, and represented the professions' thinking.

This was the second attempt at new legislation.

From this point on the PAAB was no longer involved in the process.

2002

As little was heard from Treasury, the PAAB was prompted in 2002 to prepare interim amendments to the existing Act, to achieve the proposed improvements to the education process, and to incorporate the suggested improvements to the disciplinary process, first mooted by the PAAB in its submissions to the Nel Commission in 1998, and endorsed by the Myburgh Commission in 2000.

Substantial work was done in this regard, but the proposed amendment was not proceeded with as the PAAB was assured that the long awaited DAPB would be released shortly.

In January 2002 the full media fury surrounding the Enron debacle and its international ramifications (from which South Africa was not immune), was unleashed.

The next development in the process was the appointment by the Minister of Finance on 5 December 2002 of a Ministerial Review Panel under the chairmanship of Professor Len Konar. The general objective of the MRP was to promote the continued integrity of the financial markets through the effective regulation of auditors and accountants (our emphasis). The MRP was to make recommendations to the Minister by the end of July 2003 on its nine terms of reference. It also furnished comment on education.

2003

The report of the MRP was published on 17 October 2003 and the closing date for comment was 28 November 2003. The PAAB submitted substantial comment. The MRP drew attention to the considerable task that remained to ensure that the recommendations contained in their report were implemented through a redrafting of the Draft Accountancy Profession Bill and changes to other legislation, including the Companies Act.

Possibly as a result of Enron, the focus shifted back sharply to the auditing profession exclusively. This is precisely the focus of the existing PAA Act.

The MRP report lead to a further – and vastly different - draft being produced which departed entirely from the concepts embraced in the IRC and NACF drafts. It is apparently this document, with which the current drafters are briefed.

This is the third attempt at new legislation.

2004

This latest Bill was published for comment on 8 November 2004 with a closing date of 11 February 2005.

We are not certain if the current drafters have been briefed with any of our previous comment documents, but we would be happy to provide them if it would be of any assistance.

C: Global implications

The funding arrangements for the IRBA are not clear from the Bill. §5(1)(d) makes it clear that the IRBA can levy registered auditors, but what does "any other fees which are to payable under this Act mean"? The IRBA should be specifically empowered to levy accredited bodies, both for the initial accreditation processes as well as for the ongoing accreditation monitoring processes. There is no provision in the Bill for any funding other than from the profession. This is contrary to the principle of shared funding proposed by the Ministerial Panel and accepted by the Minister of Finance in his response to the report of the Panel, specifically to change any perceptions of self-regulation. We quote from the Ministry's press release of 24 March 2004

> 'The Government of South Africa is committed to ensuring that the new authority would be entirely independent of the profession. Funding for such an authority would be sourced from the profession, relevant entities and the *fiscus'*

There are a number of South African companies listed in the USA and EU, as well as a number of global subsidiaries trading in South Africa. The auditors of these entities would be subject to regulation by the USA and EU regulatory bodies. An essential criterion in order for the regulation performed by the IRBA in terms of §24 to be recognised by the USA and EU regulators, is that the funding of the IRBA must be secure and free from any possible undue influence by the auditor or firm. This is one of the criteria which indicates the degree of independence of the regulator. Clearly if all the IRBA's income is derived from practitioners, it will not meet this requirement.

This has significant implications from a global perspective as it could result in the IRBA being unable to achieve reciprocity with the regulators of our major trading partners, namely the EU and the USA, regarding the inspection process.

If the IRBA regulation process is not recognised globally, the risk exists that the entities in question would require to be monitored by two regulators - one for South Africa, and one for the other global regulator.

D: Education and training

The Bill is drafted on the principle of accreditation of professional bodies with the IRBA having no direct responsibility for the education and training of candidates to the profession. The PAAB has fully supported this principle in previous comment on the legislative proposals. This principle moves away from the current law that requires the PAAB to have the direct responsibility for training and education of candidates to the profession. However, the PAAB believes strongly that the IRBA should have the right, if not the obligation to test competency of applicants for registration or re-registration with the IRBA.

The Bill in its current form reflects a lack of understanding of appropriate terminology, and is in many respects vague and inconsistent, such that if enacted as presently drafted, it would not enable the IRBA to carry out its functions regarding the education and training requirements for the registration of auditors.

1. Competence examinations

We are pleased that the drafters have seen fit to assign to the regulator, the power and duty to set and administer its own examination (§5(1)(b)). However, there appears to be no point at all in allowing this right as there are no circumstances in the Bill which allow for this right to be exercised. The Ministerial Review Panel appointed to comment on the previous draft of the Bill recommended that the IRBA retain the final public practice (competence) examination that must be passed by persons wishing to register as auditors. This has the following benefits:

- It places responsibility for ensuring assessing the competence of auditors squarely in the hands of the regulator who is to be held accountable for services rendered by registered individuals.
- It provides a mechanism which clearly distinguishes the registered auditor designation (licence) from other accounting designations such as CA(SA), and thus dispels the current confusion surrounding who may audit and who may not.
- It clearly demonstrates the independence of the regulator from accounting bodies and accountants, a principle which has been sought in other areas of the Bill. Independence will not be achieved where accountants determine who is to register and practice as an auditor.
- It enables the IRBA to assess the competence of every individual seeking registration, as opposed to the blanket more general accreditation of accounting bodies.
- It enables the statutory body to respond more effectively to changes in the auditing environment by ensuring that the entrance examination tests the most up-to-date requirements needed to practice as an auditor.

It is therefore recommended that the Bill empower the IRBA to prescribe, set and administer the examination to be passed by all those persons wishing to register as an auditor. As a consequence, an additional registration requirement must be added to §9(2)(a).

The nature of this examination should be prescribed by the committee contemplated in §5(4). The power to set and administer the examination is already catered for in §5(1)(b).

2. Education and Training requirements for Registration as an auditor

The Bill provides only a single requirement relating to education and training for registration as an auditor. §9(2)(a) " …. Certified by a professional body accredited by the IRBA … to have complied with the education and training requirements".

If this certification is forthcoming the IRBA must register the applicant (§9(2)(c)).

The Bill allows for no other way in which an applicant can meet the education and training requirements for registration.

This implies that:

- Should there be no professional body which meets the accreditation criteria determined by the IRBA, there will be no way in which an application for registration as an auditor can be successful.
- Should a professional body meet some but not all the accreditation requirements, the IRBA is not empowered to implement measures to supplement the education and training of an individual in order to enable registration as an auditor.

Example 1: If a professional body is deemed to have satisfied the IRBA with respect to its education but not with respect to its training programme, that body would not be accredited and applications for registration could not be entertained by the IRBA. The Bill does not give the IRBA the power to implement its own training programme which, combined with the satisfactory education programme of the professional body, would enable registration.

Example 2: If a professional body satisfied the IRBA with respect to both its education and training programmes in every respect except for the final assessment of professional competence, the professional body could not be accredited and no application for registration as auditors would be forthcoming from that professional body. The Bill does not give the IRBA the power to implement a test of professional competence, which together with the education and training programmes for the professional body would enable application for registration to succeed.

From the above it is clear that the Bill in its present form would place the IRBA in an untenable position. Should the education and training programmes of a professional body fall short of the requirements of the IRBA in any significant respect the IRBA would have to deny accreditation. The IRBA would have no other option in this regard given the very clear and appropriate responsibility given the IRBA to 'ensure that every registered auditor in South Africa is appropriately qualified…'(preamble para 3). Should the IRBA deny accreditation, this would mean that no applications for registration would be possible from members of that professional body.

This situation is particularly problematic as currently only one professional body (SAICA) has met the education and training requirements of the PAAB and at best there is only one other body whose application for accreditation could be considered seriously (ACCA).

Given the current position with regard to SAICA and should the Bill be enacted, the IRBA would either be forced to accredit SAICA, no matter the quality and appropriateness of its education and training, or contemplate no new applications for registration as an auditor at all.

We do not envisage that this situation is likely to occur in the case of SAICA but we believe that it would be irresponsible in the extreme to introduce legislation that would paralyse the auditing profession should education and training programmes at a professional body change at some time in the future in such a way as not to meet the requirements of an independent auditing profession.

3. Incoherent powers and duties

We believe that there are a number of inconsistencies in the Bill with regard to matters of education, training, accreditation and registration as an auditor.

§5(1)(l) 'ensure the standards of professional qualification'. Given that the IRBA has only the power to accredit (or deny accreditation) and given that registration as an auditor is dependent upon certification by an accredited professional body, there is no power given to the IRBA to 'ensure standards of professional qualification other than through denial of accreditation; the implications of denial of accreditation have been described in §s 1 and 2.

§5(1)(l) 'including the setting and administration of examinations.' We are unable to envisage any situation in terms of the Bill which would allow the IRBA to set or administer examinations. The Bill requires the IRBA to accredit professional bodies if the requirements for accreditation are met (§7(2)). Accreditation enables the professional body to certify that an applicant has complied with education and training requirements (§9(2)(a)). If such certification is forthcoming the IRBA **must** register an applicant (§9(2)(c)). No provision at all is made for partial accreditation. We are therefore unable to envisage any circumstance in which the IRBA would set or administer an examination.

§4(d) - the IRBA shall have the objective 'to implement appropriate standards of qualification in the auditing profession.' It is not clear what is envisaged by the use of the verb 'implement'. In our view the only opportunity for implementation is indirectly through developing and setting the requirements for the achievement of professional competence (§(4)) and then through the demonstration to the IRBA that a professional body complies with these requirements (§6(4)(a)). That this can be regarded as implementation of appropriate standards of qualification is, in our opinion, very doubtful.

We believe that the lack of clarity with regard to 'implementation' and the intention behind the inclusion of §5(1)(l) relating to setting and administration of examinations require very urgent attention before this Bill enters the parliamentary process.

4. Other aspects of the Bill relating to Education and Training

§5(4) requires the IRBA to 'develop and set the requirements for the development and achievement of professional competence.' We believe this to be an appropriate responsibility of the IRBA.

§6(4)(a) requires 'a professional body to demonstrate to the satisfaction of the IRBA that it complies with the requirements for the development and achievement of professional competence'. We believe that this section gives the power to the IRBA to prescribe to a professional body how it should 'demonstrate' that is complies. It is appropriate that as the accrediting body the IRBA should determine the process, criteria and requirements through which a professional body would demonstrate that it complies.

§6(4)(l) - we believe that it is entirely appropriate that the IRBA determine the level on the NQF at which the qualification of a professional body should be recognised.

§6(4)(c) - we believe that it is appropriate that the members of an accredited professional body should participate in continuing professional development. We are concerned however that the Bill gives the IRBA no power or duty to ensure that continuing professional education is appropriate for the auditing profession, both in terms of content and standard.

§6(4)(j) - it is vital that professional bodies have in place mechanisms 'to achieve the objective of being representative of all sectors of the South African population.' We are very concerned however that the achievement of this objective by professional bodies may not necessarily result in the auditing profession (registered auditors) achieving the same objective. We believe that the IRBA should be given the power to achieve these objectives.

To illustrate this point an example: SAICA currently has some 22,000 members of whom fewer that 4,000 are registered auditors. Achievement of equity targets by SAICA will not necessarily result in equity targets being met within the control of registered auditors.

5. Inconsistencies in terminology

It is a pity that the wording of sections demonstrates a number of inconsistencies, which renders them vague and ambiguous within the context of the Bill as a whole. For example:

- The Preamble to the bill states that the IRBA must ensure that every registered auditor is appropriately qualified.
- The IRBA has the power to ensure the standard of professional qualifications (§5(1)(b))
- The IRBA must establish a committee to develop and set the requirements for the development and assessment of professional competence (§5(4)).
- Accredited professional bodies must comply with the requirements for the development and achievement of professional competence (§6(4)(a)).
- Professional bodies must certify that their members have complied with the education and training requirements for registered auditors (§9(2)(a)).

There is therefore an indiscriminate use of the terms "qualification", "competence", "education and training".

We recommend that:

- The use of the words "qualification" "qualify" and "qualified" be avoided throughout the Bill. The use of the word "qualification" in the context of the Bill is inappropriate. Registered auditors are awarded a practice licence once they have demonstrated that they are professionally competent (i.e. a DESIGNATION, as opposed to a qualification).
- When referring to the role that professional bodies play in the learning path towards registration as an auditor, that the words "education and training" be used. Refer to our comments made under §s 6(4)(a), 5(4) and 9(2)(a)
- When referring to the role of the regulator to set and administer a final examination of competence, that the words "competence examination" be used. Refer to our comments under §5(1)(b) and the additional clause proposed under §9(2) relating to examinations.

E: Discipline

Whilst we unconditionally support what we believe to be the intentions of the drafters, as evidenced from our line by line comments, we have some reservations about whether the Bill as drafted achieves these. Our reservations are the following:

1. The prosecution of firms *per se.*

We assume that the definition of 'registered auditor' read with §s 11 and 12, is so drafted, in order to facilitate the disciplinary prosecution of firms, as distinct from individuals, as at present. We can see no other reason for this rather convoluted definition.

We believe if §s 4(f) and 5(1)(c) are amended to provide for a register of firms, and harmonised with an expanded definition of 'firm', this will easily allow for the disciplinary prosecution of (registered) individuals as well as of (registered) firms.

We believe this entire concept needs to be carefully thought through and properly drafted to prevent clever legal challenge to disciplinary actions.

2. The lack of any provision for a complaint to be discharged

We must assume that this is an oversight, and that it was never the intention of the drafters, that every prima facie allegation of improper conduct must form the subject of a hearing – the only decision being the forum in which it will be heard.

The section of the Bill dealing with discipline has incorporated substantial portions of what currently appears in the Disciplinary Rules – but not sufficient to do away with the Rules, and not enough to make sense.

As drafted, the Bill does not provide for complaints to be discharged. It confuses the concepts of

- a prima facie case being made out (the first stage), and
- the accused providing an acceptable explanation (for a variety of reasons), sufficient for the matter to be discharged (the second stage).

It also assumes that every 'prima facie' case must result in a hearing, which is clearly incorrect.

We presume that the IRBA will deem it necessary to prescribed Disciplinary Rules in terms of §50(1)(b), and for the sake of clarity we need to establish what should correctly be included in the Act, and what in the Rules. We would be interested to learn what the drafters had in mind.

3. The lack of an appropriate enabling section

We believe that either §5 or §25, or both, need to be amplified (as per our comments under §5) by the inclusion of another enabling subsection, as follows:

'[The IRBA/ISBE shall] .....determine the manner in which an allegation or a charge of improper conduct shall be investigated and, if necessary, heard, and the punishments, including a caution, a reprimand, a fine, suspension from practice for such period as the IRBA may determine, removal from the register or qualified or temporary or permanent disqualification for registration, which may be imposed by the IRBA after such an investigation or hearing;'

Certain, but not all of the existing procedural Disciplinary Rules have been incorporated into the Bill. We do however still need an equivalent of the existing §13(h)(i) which enables three things, the

- prescribing of what is unprofessional conduct (now falling under the ISBE),
- determination of the manner in which matters shall be investigated (currently set out in detail in the Disciplinary Rules and now partially set out in this section of the Bill), and
- prescribing of competent sanctions.

Current process

In order to place our comments in context, it might be helpful to understand the process currently followed regarding investigations. These fall into three categories:

- complaints lodged by a member of the public;
- complaints lodged by the PAAB itself, such as those arising out of the practice review process;
- matters where investigations are initiated by the PAAB itself as a result of information which comes to its attention, for example matters which appear in the press.

At present all complaints lodged with the PAAB are required to be on affidavit (as required by the Disciplinary Rules). To obtain the information on oath is an indication of seriousness of lodging a complaint, where the information is solely within the knowledge of the complainant. Where the information which forms the subject of the investigation is a matter of public record, it is not necessary for this to be on affidavit.

The Disciplinary Rules also stipulate that the affidavit should make it perfectly clear exactly what it is that is being complained of. Many complainants would be happy to submit hundreds of pages of documentation with the expectation that the PAAB itself trawl through the documents in order to extract the essence of the complaint. This is simply not feasible.

Once a complaint has been received in the appropriate format, or an investigation has been initiated, and there appears to be *prima facie* evidence of misconduct, the directorate will forthwith dispatch the complaint to the respondent auditor under cover of an appropriate letter (also dispatched in terms of the Disciplinary Rules) which invites the respondent to respond to the complaint and warns him that his response will be shown to the complainant.

On receipt, the response is, unless there are exceptional circumstances why this should not be done, shown to the complainant who in turn has an opportunity to comment on any new issues raised.

This is fairly similar to the ordinary civil pleading procedure.

Once this documentation has all been assembled, or if the respondent (or indeed the complainant) has declined to comment, the matter is then tabled before the Investigation Committee. The Investigation Committee meets seven times a year, approximately every six weeks, and comprises ten senior members of the profession, well versed in auditing.

In terms of the Disciplinary Rules the Investigation Committee can either:

- discharge a matter

- dismiss a matter
- refer a matter to the Disciplinary Committee, or
- where the respondent is prepared to accept guilt by way of a "consent order", and where this falls within the Investigation Committee's sentencing jurisdiction, find the respondent guilty and impose an appropriate punishment

The separate sentencing capacities are stipulated in a board resolution, wherein the Investigation and Disciplinary Committees are established and the PAAB's disciplinary obligations are delegated to them – with fairly limited sentencing powers for the Investigation Committee.

It should be remembered that numerous complaints are received by the PAAB and many investigations initiated. By way of illustration, at the last meeting of the Investigation Committee held on 26 November 2004, there were 84 matters on the agenda of which 19 were new matters and 65 were matters carried forward from previous meetings, as they were still under investigation. The number of new matters at this meeting is a fairly accurate reflection of the number of new matters tabled at every meeting.

A disciplinary hearing is a far more formal (and expensive) procedure and the PAAB appoints a senior lawyer to prosecute the matter. Until 1 January 2003, the PAAB also appointed a senior lawyer to sit with the disciplinary committee and advise it. As from the beginning of 2003, and in accordance with the recommendations of the Myburgh Commission, the Committee is now chaired by an independent legal chairman, and the necessity for a senior lawyer to advise the Committee therefore no longer exists. The respondent is entitled to legal representation.

If the investigation committee is divested of the ability to punish lesser offences, by way of consent order, we believe that this will result in extending the length of time which it takes to finalize a matter. We are very aware that the public expects matters to be dealt with quickly and we do everything within our power to ensure this.

By way of example, the 84 matters on the agenda of 26 November 2004 were dealt with by the Committee as follows:

- 2 matters were discharged in terms of Rule 3.9.1, being that the practitioner had given a reasonable explanation for his conduct;
- 1 matter was referred to the Disciplinary Committee for a formal disciplinary hearing;
- 1 matter was resolved, by consent, in that the practitioner pleaded guilty and was cautioned;
- 10 matters were resolved, by consent, in that the practitioners pleaded guilty and were fined.
  - the total amount of fines imposed which were immediately payable was R177,500.00;
  - the total amount of fines imposed which were suspended was R117,500.00;
- 21 matters were removed from the agenda, having been resolved at the previous meeting and on the agenda for this meeting for noting only;
- 49 matters were carried forward to the next meeting, meaning that the matters were still under investigation.

Our understanding has always been that the decision as to whether there is a *prima facie* case to answer must be taken when the initial complaint is received. The only instances where we would be of the opinion that there is no *prima facie* case to answer, is where the conduct clearly falls outside of the respondent auditor's professional obligations (such as cruelty to animals) or where the respondent is not registered with the PAAB.

If our interpretation is correct then the procedure proposed by the Bill is fraught with difficulty.

If, on the other hand, it is the understanding of the drafters that a decision as to whether there is a *prima facie* case to meet is taken only after the complaint has been put to the respondent auditor and his response received (much as currently occurs) than the proposed situation is more workable.

With reference to the Myburgh Commission, the PAAB decided, as far back as April 2000 as part of its strategic plan to see if and how the disciplinary process could be improved. This was part of a much larger strategic plan to "overhaul" and where possible improve all the processes at the PAAB.

As a result of discussions between the Chief Executives of both the PAAB and SAICA it was agreed that a joint investigation should be conducted. The investigating commission was headed by advocate John Myburgh SC. That commission endorsed the PAAB's proposed amendments to the PAA Act (subsequently included in the Bill under discussion).

As a direct result of the report of the Myburgh Commission, which was generally favourably impressed by the PAAB's procedures, the following changes were made to the disciplinary process:

- The South African Institute of Chartered Accountants have identified and nominated members to serve on both the Investigation and Disciplinary Committees.
- The Disciplinary Committee is now chaired by an independent legal chairman.
- Disciplinary Hearings are now heard in public, unless there are compelling reasons why the hearing should be heard in camera. This is a decision made by the Chairman of the Committee on consultation with the Committee at the commencement of the hearing.

We would repeat at this junction our earlier exhortation that processes which work are not discarded purely for the sake thereof, or out of a feeling of distrust of the existing procedures.

F: Reportable irregularities

§22 of the Bill deals with the auditors' duty to report on irregularities, and will replace the procedure presently governed by §20(5) of the existing PAA Act. We have serious reservations about the manner in which this section has been drafted, as follows.

§22(1) - Definitions

'Management Board'

It would be desirable to have consistency in the concept of management and control. This definition refers to the Board or individual:

> "having control and direction of the business."

The definition of "reportable irregularity" refers to the acts of a person in the conduct:-

> "of the management or control of an entity."

in the lead into the definition and to the "conduct or management" of the entity in sub-paragraph (c) dealing with fiduciary duties.

Concepts of "management" and "control" are relatively familiar stipulations which have interpretational support in the case law. The notion of what is constituted by "direction of the business of an entity" is less certain.

In addition to the inconsistency in the use of these terms, the proposed definition is also bound to create confusion between the operational running of the entity ('management') and the Board ('control'). The proposed definition combines these two concepts ('management board').

'Nominated Auditor'

Similarly, the definition of 'nominated auditor' is not comparable to the description of 'in the capacity of auditor of the entity' in current legislation and should be defined more clearly, or deleted.

'Reportable Irregularity'

The introductory sub-paragraph of this definition clearly indicates its application to acts or omissions in the conduct of the management or control of the entity. This is a welcome clarification of the confusion arising out of the use in the old section of activities "in the conduct of the affairs" of the business. It is now clear that it does not apply to isolated acts by employees or unauthorised acts by employees not involved in management or control.

Sub-Section (b) imposes an obligatory reporting obligation in respect of any unlawful act or omission by any person in the control or management of the company which is fraudulent or amounts to theft or is otherwise dishonest. It will be immediately apparent that there is no requirement of financial loss, nor is there any qualification that the act should be material. Interpreted literally, this will require an obligatory report to be made without delay upon the discovery of any such act or omission. The debate as to the appropriateness of management conduct in regard to such matters as:-

- expense accounts
- travel allowances

- questionable tax strategies
- statistical returns
- software licensing
- questionable commissions or incentives

and a myriad of other incidental management activities will all become everyday realities in the lives of every auditor. The unqualified reference to an act or omission which is "otherwise dishonest" will leave the auditor dealing with moral and ethical judgement calls in relation to business practices which may be regarded as questionable or not falling within acceptable business norms. Auditors may not be sufficiently qualified to make such determination.

One of the clearest yardsticks that has enabled the profession to deal with the practical implementation of §20(5) has been the requirement of materiality. Irrelevant or inconsequential irregularities have been dealt with appropriately by reports to management and an indication that the practice in question is wrong. In this manner an avalanche of bureaucratic reports has been avoided, with consequential reduction in the staffing required to process reports and, most importantly, this has enabled the Board to focus on material reports to it.

We fear that the implementation of an obligatory reporting obligation without any limitation will produce a flood of reporting of minor infractions, which will mask and dissipate efforts to identify matters requiring regulatory intervention.

The linkage of the reporting obligation to actual or foreseen material financial loss would ameliorate this position.

Sub-section (c) deals with material breaches of any fiduciary duty. The nature and extent of fiduciary duties are not crisply demarcated and the decision as to whether a duty exists and whether it has been breached will involve an understanding of the evolving law on the topic as it is developed by the courts.

Of particular relevance is the doubtful existence of any fiduciary duty upon company directors to members, shareholders and creditors of the company, each of which grouping are specifically referred to in this definition.

Given the limited civil remedies applicable to actions based upon breach of fiduciary duty, it is questionable why the process of creating a mechanism for registration of such breaches is justified. By and large most acts which amount to a breach of a recognised fiduciary duty would, in any event, fall within the ambit of sub-paragraphs (a) and (c) of the definition in any event.

The uncertain nature and extent of the concept of fiduciary duty and its breach will leave auditors struggling with the notion of what it is that they are obliged to report and what the test of materiality is, given that there is no link to financial loss. Certainly the present training of auditors does not equip them to deal with complex legal issues of this nature and they will be driven to continuously seeking legal advice in order to decide whether a reporting obligation exists. The reporting of this conduct, unrelated to financial loss, appears to place a burden on practitioners which is not generally within their sphere of expertise and not generally within

the regulatory environment in which the profession is expected to provide supervisory functions.

§22(2) – The Reporting Mechanism

The section seeks to address the weakness of the procedure followed under §20(5) by requiring the auditor to report to the IRBA "without delay". Under the old system the auditor was required to give the company thirty days in which to effectively rectify the irregularity. In urgent cases the delay involved in that notice period and in the subsequent submission of a report to the PAAB could produce unacceptable delays in the initiation of remedial steps by the regulators.

The Bill now requires that the auditor reports irregularities immediately to the IRBA without giving the client an opportunity to rectify the situation, and to notify the IRBA again even if it was found that the irregularity does not exist. This process could clearly become cumbersome. Furthermore, it will be extremely difficult to arrive at an opinion as to whether the irregularity will be rectified within a thirty day period, a situation which will be avoided if the client was first given the opportunity to rectify the situation. It is submitted that there may be situations where immediate reporting may be warranted, and it is therefore recommended that the relevant section be amended to allow the auditor to dispatch his report prior to the elapse of the thirty day period or even to extend the thirty day period, with the consent of the IRBA, and provide reasons for this.

The difficulty with the current proposal is the mechanism adopted to limit the burden which would be placed upon the regulators by the sudden influx of endless reports of irregularities. That mechanism is to impose on the auditor the obligation to express an opinion as to whether the irregularity will be "rectified within thirty days". There is no indication of what is meant by rectification in this context. Presumably, this must be linked to the matters canvassed in subsection (3), namely that the auditor should be satisfied that the irregularity has ceased and that "adequate steps" have been taken for the prevention or recovery of any loss consequent upon it.

The likelihood is that, in all but the most trivial of cases, auditors will be reluctant to express an opinion that "rectification" will occur within thirty days. That is particularly the case in regard to the requirement that "adequate steps have been taken for the prevention or recovery of any loss".

It would render the auditor's decision making process easier if the opinion required was that the auditor was reasonably satisfied that the relevant irregularity has ceased or that management would within thirty days take adequate steps to stop the irregular act or omission and to prevent such further activity and to commence the process of recovery of any loss consequent upon it.

If that reasonable expectation was not met within the thirty day period the subsequent reporting obligation under subsection (3) would follow.

By this process the prospect of defensive and conservative unqualified reporting by members would be reduced.

The proposal in §22(2)(b) that the auditor should not be required to advise the client of the making of a report if the auditor "considers it inappropriate in the circumstances of the case"

will again create difficulties for the profession. As a general principle the confidential professional relationship between the auditor and the client requires the professional to advise the client of the publication of information relevant to the professional relationship to any third party. We would consider it undesirable to require the profession to report its clients to the regulator without notifying the client of the fact that this has been done. We can understand the motion of the desirability of provoking regulatory intervention in cases involving conduct which may give rise to prejudice on the part of fraudulent or dishonest management, but if that is the intention then the circumstances under which the auditor is to report anonymously should be stated explicitly so that the profession is in no doubt as to the circumstances in which this extraordinary activity is required of them.

§22(3)

We refer to our comments in relation to the factors about which an auditor should be satisfied. Within the periods contemplated the auditor could generally only be in a position to report positively on action taken to stop a particular course of conduct or to initiate steps to prevent its repetition. In regard to recovery procedures, the initiation of appropriate steps can generally be reported - not the completion thereof.

§22(4)

We are troubled by the stipulation that the IRBA has an obligation to report to the regulator, but is forbidden to disclose the source of the report. Without any statutorily created special status of confidentiality or privilege, any report by an auditor to the IRBA will be a discoverable document in legal proceedings and under legislation affording parties the right to seek access to information in the hands of administrative bodies. It is also not clear how the regulator will be able to act upon anonymous information and how the source of that anonymous report will in fact be protected in the proceedings which flow from regulatory intervention. We do not understand what objective is sought to be achieved by rendering the source anonymous. There is also a direct conflict between this stipulation and the express provision of section §22(7) permitting the IRBA to disclose any information to a broad range of parties.

§s22(7) and (9)

We are concerned by this section which permits the IRBA to disclose the information relating to an entity provided to it under the section to a variety of parties (such as members, shareholders or creditors) who have no regulatory power or authority. In the context of the non-discretionary reporting obligations which §22 imposes, we are concerned that such disclosure may expose the auditors who make the report to actions by third parties. Such actions may not necessarily be covered by the indemnity contained under sub-section 9. It would be appropriate to extend the indemnity provisions contained in §22(9) to protect the auditor against any action arising out of the issue of a report under this section.

Conclusion

In conclusion, we recommend that the provisions in the current §20(5) of the PAA Act be retained, subject to some minor amendments. The provisions relating to Reportable Irregularities are, in our opinion, cumbersome and confusing and are likely to result in auditors not clearly understanding their reporting responsibilities.

Our overall view of this section is that the public interest would be better served by a revision of the existing § 20(5) of the PAAB Act.

For the benefit of those not familiar with the type of irregularities as reported under the current system, and to place the provisions of this section in context, we include some historical information, as well as a brief synopsis of the current procedure followed.

Current process

In practice "any person acting in the capacity of auditor to any undertaking" is the person appointed as the auditor to an undertaking in terms of statute or regulation, founding document or other such similar instrument.

Where a firm is appointed as auditor to an undertaking the responsibility to report a material irregularity rests with the person who is responsible for the audit work, i.e. the person who signs the audit report.

In practice the auditor considers all information which comes to his attention which may indicate the possibly of the existence of a material irregularity. The source of the information is not relevant.

In deciding whether an irregularity is a material irregularity an auditor considers the following:

- whether it is material; and
- whether it has or is likely to cause financial loss to the entity or its members or its creditors.

The auditor has a duty to report a material irregularity as soon as he is satisfied or has reason to believe that a material irregularity is taking place or has taken place.

The auditor sends a report concerning the material irregularity to the 'person in charge' of the client drawing his attention to §s20(5)(b) and (c) and requesting an acknowledgement of receipt of the report. The client then has 30 days to satisfy the auditor that no material irregularity is or has taken place or that adequate steps have been taken for the recovery of any loss or the prevention of any loss which may occur. It must be remembered that management is often unaware of irregularities being perpetrated within the undertaking.

If the auditor is not satisfied by the client's response to his report within the 30 day period, the auditor forwards the report and any acknowledgement of receipt by the client to the PAAB.

Where the auditor has reported a material irregularity during any financial period and the material irregularity remains unresolved at the date on which the audit report is signed the auditor is obliged to modify or qualify the auditor's report accordingly. This serves to inform members and creditors of the undertaking that an unresolved material irregularity existed at the date of the auditor's report.

Once the PAAB receives the report from the auditor it considers the report and where necessary requests additional information from the auditor and then forwards the report and any other correspondence to the appropriate regulator, supervisor, government institution or the SAPS with a request that the PAAB is kept abreast of any actions taken as result of the report. Frequently this does not happen. By way of illustration, the PAAB received approximately five responses in the last six months of 2004, none of which indicated any kind of resolution or outcome of an investigation, which serves to create a perception that no action may have been taken.

It should always be remembered, as will be apparent from the following table, that the majority of matters referred in terms of this section relate to entities which are trading whilst

factually insolvent. Although this is an irregularity as defined, it is not an offence and we suspect that the regulator (CIPRO) to whom these matters are conventionally reported, is at a loss as to what to do with the reports. The proposed legislation will not address this particular situation.

Summary of material irregularities reported to the PAAB in 2002, 2003 and 2004

	2002	2003	2004
Total material irregularities reported	**56**	**59**	**52**
General classification of the material irregularities:			
Insolvent trading	20	32	33
Contravention of Banks Act	0	0	1
Contravention of Companies Act	4	1	2
No Annual General Meeting or Annual Financial Statements	3	2	2
Miscellaneous, eg Trusts, Societies, and Foundations	6	8	5
Proper books of account not kept	1	1	0
Contravention of the VAT Act	10	8	6
Misappropriation of funds	2	0	1
Contravention of exchange control regulations	1	1	0
Fraud/theft	3	0	0
Contravention of the Income Tax Act	5	4	2
Contravention of Estate Agents Act	0	2	0
Contravention of Sectional Title Act	1	0	0

G: Drafting style

We understand that the drafting style was inherited, but there are certain aspects thereof which appear variously in the Bill which are of concern to us. We appreciate that the Bill is drafted in the so-called new style which, we understand, is intended to be less formalistic and to render legislation more comprehensible to the lay person, but we do not believe that the omission of verbs, or the use of terms (such as 'person') in a highly legalistic way, achieves this. We are also firmly of the belief that ease of reading can never be a justification for lack of precision in language.

1. The reference to vague and subjective concepts.

These are largely to be found in the 'objectives' sections, for example §4(a), which states that the IRBA shall have the objective

> 'to protect the public interest in the Republic through services rendered by auditors'

which is extremely onerous to discharge.

See also the use of the words 'co-operate' in §s5(2) & (3), 'misconduct' in §9(3)(a) and 'otherwise dishonest' in §22(1)(b).

2. The lack of standardisation of peremptory auxiliary verbs.

Certain words appear to be used interchangeably and indiscriminately. We believe it would produce a more elegant document (as well as obviating debate as to why different words were used) if the use of these was standardised.

It is not appropriate to list every instance in a document such as this, but we have listed instances of the most common and obvious examples of this which are:

'Shall', 'must' and 'may'.

Although 'shall' and 'must' do not have exactly the same nuance or meaning, they appear to have been used interchangeably in certain instances

> see for example §26(3) 'shall', contra §26(4) 'must'

and we have thus assumed for the purpose of this comment that these words are ascribed exactly the same meaning.

We understand that 'shall' is the more traditional term, but which ever term is ultimately favoured by the drafters, should be used throughout. If there is a reason for both words to be used, in different contexts, this use must be consistent.

In addition, 'may' is also used -

* where – perhaps – 'should' is what was intended: see for example §16,
* sometimes to mean 'might': see for example §22(3)(a), and
* sometimes to mean 'is permitted to': see for example §22(7) (we submit this is the best use).

In a few instances auxiliary peremptory verbs have been left out altogether, which we believe is a legacy from the previous drafters who resisted the use of 'must' or 'shall' altogether. For example

> §30(5) 'is open to the public...' contra
>
> §31(4) 'shall be recoverable' contra
>
> §41 'a Board meets...' (no auxiliary verb at all)

We feel that this style does not enhance the Bill in any way at all, and that such verbs should be introduced wherever they have been omitted.

3. Inconsistencies in terminology

The most obvious examples of this are:

'person', 'individual' and 'member of the public'.

We initially assumed from our reading of Chapter V, that in certain instances 'person' was used deliberately to include a juristic person, as distinct from an individual, but on a closer reading of the entire Bill, we are not certain that this is so. In any event, even if this were so, it should be made clear for ease of understanding, if the intention is to produce a 'reader-friendly' piece of legislation. If however, it is intended to produce succinct legislation (which we would prefer) then we accept that certain words have a legal meaning.

We see no reason to distinguish members of the public from any other individuals.

Certain recent litigation (which was exclusively concerned with the interpretation of the wording of certain sections of the current Act and the precise meaning of those sections) has alerted us to the fact that the language of a statute must be absolutely clear.

'qualification', 'competence' and 'education and training'

See our comment in this regard in section **C.**

cross references

These are not uniform and we submit that this is an opportunity to standardise these. For example (and we have listed only one instance in each case)

'paragraphs (a) and (b) of section 12(1)' (in the definition of 'firm') contra

'section 12(2)(b)' (in the definition of 'SBA')

and

'under subsection (1)' (in §3(4)) contra

'in subsection (4) of this section' (in §6(1))

'auditor' and 'registered auditor'

We appreciate that there is good reason for the use of both these terms. However we do believe that if firms are separated from individuals and dealt with as we suggest, this will overcome a number of the drafting issues around this term.

4. The absence of empowering clauses.

We do not wish to belabour the virtues of the existing Act, particularly as it has been deemed necessary to draft a new one. However, the current situation where there is an empowering clause for every action which the regulator is empowered to take (eg to effect registration) followed by a detailed section fleshing out and giving effect to this empowering clause, allows for ease of reading and unambiguity.

Certain of the IRBA's powers and duties are listed in §5, but other obvious ones are left out altogether, and reliance must then be placed on the 'catchall' clause contained in §5(1). We believe it would be simple, and desirable, to add empowering clauses where they do not exist. Alternatively they should be omitted altogether, with only the general power remaining.

Editing protocol:

For ease of reading we have prepared two versions of **part two** of this comment document. One is in colour which makes for easier reading, but is not mono-colour-printer-friendly. Accordingly, we have prepared a second version, specifically for printing on non-colour printers.

What follows from pages 29 to 87 is the **mono-colour version** in which:

- *Italics* indicate comment.
- **[Bold type in square brackets]** indicates suggested insertions.
- Suggested deletions are ~~ruled through~~

MONO COLOUR VERSION

PART 2: DETAILED COMMENT

Please note that any reference by us in the body of this document to 'RA' is to a registered auditor, as envisaged in the Bill, and to 'RAA' is to a registered accountant and auditor as referred to in the existing Act

Reference to the 'PAA Act', 'the existing Act', or 'the current legislation' is to the Public Accountants' and Auditors' Act 80 of 1991.

DRAFT AUDITING PROFESSION BILL, 2004

BILL

To regulate the auditing profession; to make provision for an Independent Regulatory Board for Auditors, a Standard-Setting Board for Auditor Ethics and a Standard-Setting Board for Auditing; to replace the Public Accountants' and Auditors' Act, 1991, as amended, and to provide for incidental matters.

PREAMBLE

SINCE the auditing profession in South Africa is in agreement that -

The primary responsibility of the profession is to protect and promote the public interest through services rendered;

To offer auditing services or services of a public accountant a person must be registered with, and subject to the jurisdiction of, an Independent Regulatory Board for Auditors;

The Independent Regulatory Board for Auditors must ensure that every registered auditor in South Africa is appropriately qualified and held accountable for their professional conduct, adherence to ethical practices, and the implementation of standards comparable to international standards;

The use of the word "qualification" in the context of the bill is inappropriate. Registered auditors are awarded a practice licence once they have demonstrated that they are professionally competent (i.e. a DESIGNATION, as opposed to a qualification). Therefore, the IRBA must "ensure that every registered auditor in South Africa is professionally competent and held accountable …".

As noted in our general comments, the Bill does not provide the necessary mechanisms for the IRBA to be able to ensure that every registered auditor is professionally competent. This is a serious concern.

The IRBA must have the power to monitor the education and training of programmes of professional bodies on a continuous basis, to cancel the accreditation of professional bodies that do not meet its requirements. In addition, the IRBA must be able to set and administer the final examination that grants the licence to practice. Passing this examination must be a requirement for registration in terms of §9.

All disciplinary proceedings brought against a registered auditor by the Independent Regulatory Board for Auditors should be conducted by independent persons, suitably skilled and qualified to ensure a fair hearing and an appropriate sanction for any wrong doing by auditors;

The Government of South Africa, represented by the National Treasury, should perform an oversight function with regard to the operations, decisions, and objectives of the Independent Regulatory Board for Auditors;

AND SINCE the efficient fulfilment of its role in the South African economy and society requires a fundamental reorganisation of the profession,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:

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CHAPTER I

DEFINITIONS AND ESTABLISHMENT OF BOARDS

Definitions

1. In this Act, unless the context otherwise indicates -

"accreditation", in relation to a professional body, means accreditation under sections 6 and 7 by the IRBA and **"accrediting", "accredit",** and **"accredited",** respectively, have corresponding meanings;

"audit" means the examination of –

(a) financial statements with the objective of expressing an opinion as to their fairness and as to their compliance with an identified financial reporting framework and any applicable statutory requirements, or

(b) financial and other information, prepared in accordance with appropriate criteria, with the objective of expressing an opinion on the financial information.

"auditing pronouncements" include Statements of South African Auditing Standards, practice statements, guides and circulars developed or adopted and issued by the SBA;
These technical definitions are crucial and we suggest rather

"audit" *means the examination of:*

(a) financial statements with the objective of expressing an opinion with a high level of assurance as to their fairness and as to their compliance with an identified financial reporting framework and any applicable statutory requirements, or
(b) financial and other information, prepared in accordance with identified suitable criteria, with the objective of expressing an opinion with a high or moderate level of assurance on the financial and other information.

"auditing pronouncements" *are those standards, practice statements, guidelines and circulars developed or adopted and issued by the SBA and which the auditor is obligated to comply with in the performance of an audit.*

"Board" means one of the Boards described in section 2;

"company" has the same meaning as in the Companies Act 1973 (Act No. 61 of 1973);

"ensure", where it appears in a provision of this Act, means to take all reasonably necessary and expedient steps in order that the clear objectives of the provision can be achieved;

"firm" means a partnership or company such as is described in paragraphs (a) and (b) of section 12(1);

This should be expanded to include a sole practitioner

§12 deals with the registration of firms as auditors. As mentioned elsewhere, we assume that the reason for this was to bring firms within the disciplinary net of the

IRBA. We have indicated that there is a simpler way of doing this, namely to compel the IRBA to maintain a register of firms, and by defining 'firm' as follows:

***"firm"** means a registered auditor, a number of registered auditors in partnership or a company referred to in section 12(3), and registered as such in terms of section 5(1)(c);*

In addition, the concept of 'firm' is important to accommodate the new, additional, type pf practice review, which is a review of the firm.

"IFAC" means the International Federation of Accountants and, in relation to IFAC, any reference to a successor body is a reference to a body equivalent to IFAC which is recognised internationally;

"IRBA" means the Independent Regulatory Board for Auditors established under section 2(1);

"**the Minister"** means the Minister of Finance;

"NQF" means the National Qualifications Framework approved by the Minister of Education for the registration of national standards and qualifications under the South African Qualifications Authority Act 1995 (Act No.58 of 1995);

*Perhaps the word **'person'** has been used (as defined in the Interpretation Act) specifically to include a jurisdic person – such as a firm. However sometimes 'member of the public', or 'individual', or some other word is used instead. This might be deliberate. Depending on the intention of the drafters, it might be helpful to define 'person'.*

"practice", in relation to an auditor means the practice of the auditor who holds out to be qualified, and where required, registered, and places professional services at the disposal of the public for reward;

This is a crucial definition as it is the lynchpin for the prosecution of people who hold out as auditors, when they are not - something we view in an extremely serious light. We submit that it is essential that we refer only to the practice of a registered auditor. we are not here concerned with other 'auditors'. The confusion is compounded by the use of the term 'qualified auditor'. Historically we have been very clear that 'auditor' is not a qualification. To the extent that it might be perceived as such, registration was an essential part of this 'qualification'. Unless there is some reason for the present wording, which we have failed to grasp, we would prefer

***"practice"**, means the practice of a registered auditor'*

"prescribe" means prescribe by rule; and "prescribed" and "prescribing" have corresponding meanings;

'Prescribe' means by rule, and 'rule means a rule under section 50, and section 50 says it must be published in the Gazette. The definition of 'publish' in the definitions section however, allows a discretion to publish in the Gazette or elsewhere. Is it really necessary that everything which has been 'prescribed' – and there are many – to have to be published in the Gazette. Bear in mind also that section 50 requires any publication by the IRBA to be approved by the Minister – which could be time consuming.

"professional body" means a body of, or representing, auditors or both accountants and auditors;

"Public Accountants' and Auditors' Board" [and "PAAB"]means the board established under the Public Accountants' and Auditors' Act, 1991(Act No. 80 of 1991);

"publish" means to publish in the ~~Government~~ Gazette, or in any official publication dealing with the auditing profession and distributed or circulated on a national basis to members of that profession; and "publishing" and "published" have corresponding meanings;

We are not certain what is envisaged by this definition in the context of §19(2), regarding publication of auditing pronouncements. Due to their enormous volume, auditing pronouncements are currently published on our website and are distributed by SAICA, at a fee, electronically on CD, and in the students' handbook.

The above definition envisages that the full pronouncement must be reproduced in the Gazette (or in a publication such as Maneo, or the Manual). This is not really practical.

As this is one of the few instances where publication is required for something which has been developed and not prescribed, and hence publication in the Gazette is not compulsory, we would prefer the definition to include electronic publication as an option

"**registered auditor"** means a~~n individual~~ **[person]** ~~or firm~~ registered as **[such]** ~~an auditor~~ with the IRBA;

"rule" means a rule made under section 50 by a Board; and

"SBA" means the Standard-Setting Board for Auditing referred to in section 2(2)(b);

"SBE" means the Standard-Setting Board for Auditor Ethics referred to in section 2(2)(a);

"Statements of South African Auditing Standards" mean statements of generally accepted auditing standards developed and issued by **[the]** SBA.

This definition no longer required if our suggested definition of 'auditing pronouncements' finds favour.

Regulatory and ~~other~~ [subsidiary] bodies for the regulation of the auditing profession

2. (1) This Act establishes a juristic person known as the Independent Regulatory Board for Auditors (IRBA) for the regulation of the auditing profession.

(2) This Act also provides for the appointment of the following subsidiary Boards, namely -

(a) the Standard-Setting Board for Auditor Ethics (SBE); and

(b) the Standard-Setting Board for Auditing (SBA).

(3) The SBE and the SBA shall pursue their objectives, exercise their powers, and carry out their duties according to the provisions of this Act and shall be accountable to the IRBA for what they do.

CHAPTER II

INDEPENDENT REGULATORY BOARD FOR AUDITORS,

ACCREDITATION AND REGISTRATION

IRBA

IRBA: composition and succession [issues] ~~to property etc~~.

3. (1) The IRBA shall consist of not more than ten members **[who shall be]** appointed by the Minister from among persons with suitable qualifications or experience.

(2) In the making of appointments under subsection (1), the Minister must secure that, disregarding any temporary vacancy in its membership, not more than two-fifths of the members of the IRBA are registered auditors.

(3) The Minister shall appoint a member of the IRBA as the chairperson and another as the deputy chairperson and may appoint an alternate member for every member of the IRBA appointed under subsection (1).

Is it envisaged that the Minister has complete discretion as to what constitutes 'suitable qualifications or experience'?

What happens if the Minister, for whatever reason, simply fails to make the appointment? We suggest the inclusion of the words 'who shall be' in §3(1)

We believe there should there be some parameters for the Minister to follow in making these appointments to the Board to ensure the Board is representative of the stakeholders. However, we also believe that once appointed, the Board members act independently. Although appointed from various interest groups (we assume), they should not be seen to be representatives of those constituencies but rather as acting in their own right, in the general public interest.

(4) The Minister may appoint an official of the Treasury as an additional member of the IRBA, and a member so appointed shall have the same rights as members appointed under subsection (1) other than a right to vote.

(5) If the IRBA considers it necessary for its proper functioning, it may invite one or more suitable persons to serve in an advisory capacity, which persons may participate in all the proceedings of the IRBA, but may not vote.

(6) On and after the date this section comes into force, the IRBA shall be regarded as the successor to the Public Accountants' and Auditors' Board ~~(in this subsection and subsection (7) referred to as "the PAAB")~~ *[see our suggested amendment to the definition]* and, in order to give effect to that succession, -

(a) all property which, immediately before the date this section comes into force, was property of the PAAB shall, by virtue of this Act (and without any assignment or other form of transfer or the need for any consent) become on that date property of the IRBA;

(b) all rights or obligations of the PAAB (whether contractual or otherwise) which were in existence immediately before the date this section comes into force and do not fall within paragraph (a) shall become, on that date, rights or obligations of the IRBA and, in their application or construction, be treated for all purposes as if the PAAB and the IRBA were the same person in law; and

(c) ~~as respects~~ **[regarding]** anything done or falling to be done, or any other thing occurring, on or after the date this section comes into force, any reference in an existing document to the PAAB shall be construed as or, as the case may require, as including a reference to the IRBA;

and in this subsection "property" means property of any description, whether real or personal, movable or immovable, and wherever situated.

(7) For the purposes only of section 197 of the Labour Relations Act 1995 (Act No.66 of 1995) (protection of staff on transfer of employment) the provisions of subsection (6) shall be regarded as the transfer of a business from the PAAB to the IRBA.

IRBA: objectives

The concept of 'objectives' being legislated (rather than being in a preamble or a Mission Statement) is a novel one for us. We are concerned that open ended and unrealistic potential liability might flow from this.

4. The IRBA shall have the following objectives:

(a) to protect the public interest in the Republic through services rendered by auditors;

We suggest this wording is harmonised with the wording in the preamble

(b) to oversee the SBE in the promotion and maintenance of internationally comparable standards of professional ethics by registered auditors;

(c) to oversee the SBA in the development and maintenance of internationally comparable auditing standards in the Republic;

(d) to implement appropriate standards of qualification in the auditing profession;

Again the use of the word "qualification" in this context is incorrect. (Refer to comments under the Preamble).

The use of the verb "implement" is incorrect and inconsistent. It appears to be the responsibility of the accredited bodies ***to implement*** *education and training programmes for auditors - refer to §6(4)(a). It is the responsibility of the IRBA to monitor these bodies to ensure that what they have implemented meets the requirements of the IRBA, and to then set the final entrance examination of professional competence as per §5(1)(b) - refer to our earlier comments in* ***D2*** *relating to incoherent requirements.*

We recommend that this objective be replaced with something more relevant and measurable; for example: "to ensure the maintenance of appropriate and consistent standards of education and training for candidates for the auditing profession".

(e) to ensure disciplinary action under this Act;

(f) to maintain a registration system and a register *why split this – a register implies a system* for registered auditors **[and registered firms]** *[see comment later];* and

(g) to liaise with all accredited professional bodies on matters of common interest.

IRBA: powers and duties

*We would expect to see certain specific powers here – please refer to our comment in **G** in this regard. These are:*

1. The power to accredit a professional body as contemplated in §s 6 and 7?

*The IRBA must have the power to partially accredit a professional body that meets some but not all of its requirements. Refer to our earlier comments in **D** in this regard. This is essential to ensure that there is a continuous supply of competent auditors.*

2. The power to de-accredit (cancel) a professional body that fails to meet the accreditation requirements as contemplated in §7(5)?

3. The power to carry out such procedures as are necessary to monitor, on a continuous basis, the extent to which the accredited professional bodies continue to meet the accreditation requirements of the IRBA? We believe that the wording in §6(4) ought to more explicitly give the IRBA the power to monitor its requirements on a continual basis.

*What will happen if the accreditation of a professional body either lapses or is cancelled and there is no other accredited body? The implication is that there will be no new registered auditors. Therefore, it is essential that the IRBA have the power, in such instances, to establish the necessary education, training and assessment programmes that will ensure a continuous supply of auditors. Refer to our comments under section 5 in this regard as well as to our general comments relating to education and training made earlier in **D**.*

4. The power to prescribe the examinations that the IRBA is empowered to set and administer in terms of §5(1)(b)?

5. (1) The IRBA must carry out the obligations imposed on it by this Act, and may do anything which is reasonable or necessary to achieve its objectives and, in accordance with the provisions of this Act, may do all or any of the following -

We are a little concerned that the way in which the general right is stated, and specific, listed and numbered, rights follow, might give rise to a challenge in terms of the expressio unius est exclusio alterius rule. As mentioned frequently in this document, we prefer not to invite challenge. The 'catch all' clauses in the existing Act are specifically numbered and come at the end, as follows:

***"13. General powers of board.—**(1) The board may—*

(p) take any steps which it may consider expedient for the maintenance of the integrity, the enhancement of the status and the maintenance and improvement of the standards of professional qualifications and of the competence, of accountants and auditors, and encourage research in connection with problems relating to any matter affecting the accounting profession;

(q) generally exercise the powers and perform the functions and duties specified in this Act."

Is there any advantage in maintaining similar wording and a similar style?

(a) take any steps to promote the integrity of the auditing profession, including –

(i) the investigation of alleged improper conduct, the conduct of disciplinary hearings and the prescribing of guidelines for punishments to be imposed;

*This section appears to confuse the concepts of **competent sanctions** which need to be set out somewhere (as in the existing §13(h)) and **sentencing guidelines**, which is what are dealt with here.*

The existing §13(h) has served us well, although we do envisage the need for these competent sanctions to be expanded. It reads as follows

"The board may—

prescribe conduct constituting improper conduct by an accountant and auditor or other person registered in terms of this Act, the manner in which an allegation or a charge of improper conduct shall be investigated and, if necessary, heard, and the punishments, including a caution, a reprimand, a fine, suspension from practice for such period as the board may determine, removal from the register or qualified or temporary or permanent disqualification for registration, which may be imposed by the board after such an investigation or hearing;"

and should be incorporated, with expanded sanctions, into this section

*We make this point again at the beginning of Chapter 5, and in **E**.*

(ii) the declaration, in the prescribed manner and with the consent of the Minister, of any particular business practice to be undesirable for all or a particular category of auditors, or any specific auditor; and

(iii) making application to any court of competent jurisdiction for an order prohibiting any person not registered as an auditor from committing or continuing to commit any act reserved for a registered auditor under this Act, or in conflict with any law, and which the IRBA has reason to believe is to be committed or is being committed by the person concerned;

Where are the appropriate criminal sanctions to be found for a person who holds out as an auditor, or is it intended that the IRBA must apply to court (which will have severe cost implications) each time it becomes aware of a person 'holding out'? We are not certain that all aspects relating to the prohibition on 'holding out', and the consequences thereof, have been fully thought through.

(b) ensure the standards of professional qualifications, competence, ethics and service of registered auditors, including the setting and administration of examinations;

*The use of the word "ensure" is incoherent in the light of the remaining aspects of the Bill. Notwithstanding the definition of 'ensure' (and we are not convinced that the average reader would look in the definitions to understand the use of this perfectly ordinary word), how does the Bill provide the IRBA with the statutory powers to **ensure** these things?*

Here is another example of the indiscriminate use of terminology. As explained under the Preamble, the IRBA does not award a qualification but rather issues a practising licence i.e. a designation. The designation implies that a person is professionally competent. Therefore, this should read: " ensure the standards of professional competence, ethics …".

Reference to examinations should be made more explicit: "…including the prescription, setting and administration of competence examinations required for registration under section 9(2)."

We are pleased that the Bill empowers the IRBA to set and administer examinations. Refer to our earlier comment in this regard. However, this power is meaningless in the context of the

rest of the Bill. As it is not a requirement for registration that a person must pass such an examination, what therefore is the purpose of this power? Refer to comments under §9(2)(a).

In our view it would also be preferable if the provisions of this section were modified to make reference to the powers to conduct practice review. (See our expanded comments under §24). Under the old §13(p) it is clear that the board has the power to take any steps which it considers expedient for "the maintenance and improvement of these standards of professional qualification" with the clear connotation of ongoing obligations which continue after registration. In our view §5(1)(b) could be modified to include the words "...and the conduct and administration of practice reviews" at the end of the subsection.

*(*c) establish and maintain a registration system and a register for registered auditors *what is the distinction that was envisaged*, which register must at all reasonable times be open to inspection by any member of the public;

As indicated in our comments under the proposed definition of 'firm', we believe that the IRBA should also be compelled to maintain a register of firms (sole practitioners, partnerships or Incs). We believe it would then be a fairly simple process to institute disciplinary action against a 'registered firm' – rather than try and incorporate a firm in the definition of auditor.

We suggest that §5(1)(c) be substituted as follows:

[(c) establish and maintain separate registers in respect of registered auditors and registered firms, which registers must at all reasonable times be open to inspection by any person;]

(d) determine and levy –

(i) registration and other fees payable by registered auditors;

(ii) any other fees which are to be payable under this Act; and

(iii) charges for any services provided to registered auditors by the IRBA, the SBA or the SBE;

*Refer to our remarks about funding in **C**. If the IRBA is not to receive funding from sources outside of the profession, it must at least have the power to levy accredited bodies, in addition to members. The accreditation of professional bodies will require resources. The process of accreditation is likely to be rigorous and therefore costly. It is also a good marketing tool for these bodies. Surely the relevant professional body should be required to pay an initial accreditation fee as well as an annual fee for continued accreditation. The IRBA should therefore determine and levy an initial accreditation fee and an annual "subscription". §5(d)(ii) is simply not adequate to cover such an important levy.*

*Refer to our remarks about funding in **C** also for the global implications of not receiving independent funding, as these are serious.*

(e) determine the need for, and the nature and level of indemnity or fidelity insurance to be carried by, a registered auditor;

This must be amplified to allow for this to be prescribed, if it is found to be needed. We are not certain that it is appropriate for the IRBA to determine the level of indemnity, as this will differ for each auditor depending on their professional risk profile.

(f) determine what portion of any fee is payable in respect of any part of a year and the date on which the fee or portion thereof becomes payable;

(g) establish, oversee, fund and provide secretarial and administrative support for the SBE and the SBA;

(h) participate in the activities of bodies –

(i) registered under the South African Qualifications Authority Act 1995 (Act No.58 of 1995) and responsible for establishing education and training standards or qualifications in respect of the auditing **[and accounting]** profession; or

(ii) accredited under that Act and responsible for monitoring and auditing achievements under standards or qualifications referred to in subparagraph (i);

The word "auditing" in the above sub-section should be replaced with "quality assuring", otherwise there will be confusion between auditing as defined for the purposes of this Act, and ensuring compliance. It is not clear, however, what is meant by 'achievements' – is the intention to refer to quality assuring compliance?

(i) participate in the activities of bodies whose main purpose is the development and setting of auditing standards **[or regulation of auditors]**, whether national or international;

(j) employ persons to assist it in the performance of its functions;

(k) hire, purchase or otherwise acquire movable or immovable property for the effective performance of its functions, and let, sell or otherwise dispose of such property;

(m) borrow or raise money in accordance with the Public Finance Management Act, 1999 (No.1 of 1999);

Is it definite that the IRBA will be listed as a public entity in terms of the PFMA –particularly if it receives no funding from the fiscus?

(n) invest its funds in a manner it deems fit;

(o) publish a journal or any other publication, and issue newsletters and circulars containing information and guidelines relating to the auditing profession; and

(p) encourage, and in appropriate circumstances finance, education in connection with, and research into any matter affecting, the auditing profession.

Are its powers adequate for the IRBA to carry out it duties as a supervisory body in terms of FICA. The relevant section in that legislation reads

Responsibility for supervision of accountable institutions

45. (1) Each supervisory body is responsible for supervising compliance with the provisions of this Chapter by each accountable institution regulated or supervised by it.

(2) In pursuing its objectives the IRBA may formally or informally co-operate with or assist any other organisation with similar objectives, whether inside or outside the Republic.

(3) The IRBA must at all times, on its own or in co-operation with any other appropriate body, ensure the existence of clear and appropriate requirements to be complied with by any person wishing to register as an auditor.

What is intended with this clause? The requirements for registration are clearly set out in §9. That section does not provide the IRBA with the discretion to determine any other additional requirements that must be met for registration purposes, other than those listed in the Bill under §9.

What other appropriate body is contemplated here? Accredited professional bodies certify their members for having met the education and training requirements. The use of the word "co-operate" when dealing with registration requirements is also vague and subjective. We suggest that this section be replaced with: "The IRBA must at all times ensure that the education, training and examination requirements to be met for registration purposes are clear and appropriate".

(4) The IRBA must establish a committee to develop and set the requirements for the development and achievement of professional competence for registered auditors contemplated in this Act.

We presume that "registered auditors" in the above clause actually refers to those persons "wishing to register as auditors".

*This wording is again inconsistent with the remainder of the Bill. This committee should "develop, set and **monitor** the education and training requirements to be complied with by professional bodies seeking to achieve and retain accreditation as contemplated in section 6(4)(a)". In addition, this committee should set the competence examination required for registration in terms of our suggestion under §9.*

(5) Where the IRBA has assigned the power to a committee –

(a) to decide whether or not a person may be registered as an auditor, or

(b) to inquire into any case of alleged improper conduct, and to impose any punishment in respect thereof,

the IRBA may not overrule any such action or decision by the committee concerned.

It would appear as if the only 'entrenched' powers (ie delegations which may not be interfered with or overruled by the Board concerned) are registration (which is not usually in a committee) and discipline. These have been substantially reduced, and we are not certain if this was intended.

The IRBA may set and administer its own examination (refer §5((1)(b). The power to decide who passes or fails that examination must be entrenched.

Accreditation of professional bodies

Requirements for accreditation

6. (1) In order to qualify for accreditation, a professional body must meet the requirements of subsection (4) of this section.

The requirements listed in subsection (4) are insufficient in themselves to avoid subjectivity. The IRBA may believe that the requirements are not met while the applicant body may believe that they do meet the requirements. Thus, the IRBA should be able to flesh out these requirements in the form of regulations, which describe in detail its interpretation of the requirements listed in subsection (4)

~~(2) At the commencement of its functions by the IRBA, any body which at that time is accredited to by the PAAB shall be considered to be a professional body accredited by the IRBA.~~

The previous DAPB envisaged SAICA as the initial accredited body, recognising the reality of the situation. However this did not come to pass and the PAAB has thus not accredited any professional body; in fact, the current legislation governing the PAAB does not provide for this right or duty at all. Currently, the PAAB ***recognises*** *the education and training programmes of account bodies (such as SAICA). Persons who complete the* ***recognised*** *programmes have access to the PAAB's final entrance examination. This section should either be deleted, alternatively SAICA should be mentioned by name.*

(3) Any professional body to which subsection (2) applies must within one year after the commencement of the IRBA's functions provide proof to the IRBA that it complies with the requirements for accreditation listed in subsection (4).

(4) In order to be accredited, a professional body must demonstrate, to the satisfaction of the IRBA that –

(a) it complies with the requirements for the development and achievement of professional competence determined by the IRBA;

There is a fundamental inconsistency in the wording of this accreditation requirement in relation to the section dealing with the registration of individuals as auditors (§(9)). Professional bodies must "certify their members that they have ***"complied with the education and training requirements for a registered auditor"*** *(§9(2)(a)). But in order to be accredited, the professional body must* ***"comply with the requirements for the development and achievement of professional competence".***

We suggest that this accreditation requirement be reworded to state: "…its relevant programmes comply with the education and training requirements for a registered auditor". This then makes sense in the context of §9(2)(a), dealing with registration.

(b) its qualifications are registered at and meet the requirements of the applicable level of the NQF as determined by the IRBA;

(c) it has appropriate mechanisms for ensuring that its members participate in continuing professional education;

The internationally acceptable terminology should be continuous professional ***DEVELOPMENT*** *and not EDUCATION, as the latter is more restrictive in terms of the type of learning interventions that qualify for CPD.*

(d) it has mechanisms to ensure that its members are disciplined where appropriate;

(e) it is, and is likely to continue to be financially and operationally viable for the foreseeable future;

(f) it keeps a register of its members in the form determined by the IRBA;

(g) it has in place appropriate programmes and structures to ensure that it is actively endeavouring to achieve the objective of being representative of all sectors of the South African population; and

(h) it meets any other requirement determined by the IRBA from time to time.

Accreditation of professional bodies

7. (1) In order to obtain accreditation, a professional body must apply in writing to the IRBA.

(2) If the IRBA is satisfied that the professional body complies with its requirements for accreditation, it must grant the application.

We presume that in order to satisfy itself as to the extent to which the accreditation requirements are met, the IRBA may carry out any procedures and request any information which it believes are necessary in the circumstances.

(3) In order to retain its accreditation, an accredited professional body must at least once a year at a time to be determined by the IRBA, satisfy the IRBA that it continues to comply with the requirements for accreditation listed in section 6(4).

How exactly is it envisaged that the professional body demonstrates that it continues to meet the requirements? If it is simply by way of a written report, this would not be sufficient for the IRBA to place assurance on. Surely, the regulator should have the power to monitor, on a continual basis, in any manner it deems appropriate, the extent to which the accreditation requirements continue to be met

(4) The accreditation of an accredited professional body ~~lapses~~ **[shall lapse]** if it ceases to exist and the IRBA has confirmed that the professional body is no longer in existence.

(5) The IRBA must cancel the accreditation by it of a professional body if that body -

(a) ceases to comply with any requirement for accreditation; or

(b) fails to pay any annual fee or portion thereof within three months after it has become payable as mentioned in section 5(1)(f).

Provided that, prior to the cancellation, the IRBA must give notice in writing to the professional body concerned of its intention to cancel and the reasons on which it is based, and afford the professional body a period, of not less than 21 days and not more than 30 days, in which to submit grounds for not proceeding to cancellation.

What will happen if the accreditation of a professional body either lapses or is cancelled and there is no other accredited body? The implication is that there will be no new registered auditors. Therefore, it is essential that the IRBA have the power, in such instances, to establish the necessary education and training programmes that will ensure a continuous supply of auditors. Refer to our comments under §5 in this regard

(6) If the IRBA considers that cancellation of accreditation would not be in the best interests of the public or the auditing profession or the members of a professional body referred to in subsection (5), it may extend the accreditation of the professional body concerned on such conditions as, after consultation with the Minister, it considers appropriate.

(7) A professional body may by written notice to the IRBA renounce its accreditation.

(8) A professional body which is no longer accredited is not relieved of any outstanding financial obligation towards the IRBA.

Effect of termination of accreditation on members who are registered auditors

8. (1) The fact that the accreditation of a professional body has ended as mentioned in section 7(4) or (5), does not affect the registration under this Act of any auditor who was a member of the professional body at the time of the termination.

(2) Auditors referred to in subsection (1) must within six months of the termination of the accreditation, or within such other period as may be determined by the IRBA, provide written proof to the IRBA that they have become members of another accredited professional body.

(3) On the termination of the accreditation of a professional body, the IRBA must inform all the registered auditors who were members at the time of the termination, and advise them of their duty to provide the IRBA with the written proof referred to in subsection (2).

(4) Where a registered auditor referred to in subsection (1) fails to comply with the requirements of this section, the IRBA may cancel the registration of the auditor under this Act:

Provided that, prior to the cancellation, the IRBA must give notice in writing to the auditor concerned of its intention to cancel and the reasons on which it is based, and afford the auditor a period, of not less than 21 days and not more than 30 days, in which to submit grounds for not proceeding to cancellation.

No-where does the Bill state that ongoing membership of an accredited professional body (colloquially referred to as an Institute), is required. It is required at the time of initial registration (perhaps) but not thereafter. One of the underlying assumptions of the 'accreditation model' was that of continuing Institute membership (hence provisions such as those in this section. We are aware that this is a sensitive issue, and assume that the drafters have weighed the delicate constitutional issue of balancing the public's right to a properly regulated profession, against the individual's right to the exercise of his or her profession without continuing compulsory membership of an Institute (by definition a voluntary association), in addition to licensing by a regulator. This is particularly relevant if there is not a variety of Institutes to choose from.

Registration of individual auditors and firms

This section requires very careful drafting, and more consideration needs to be given to the following specific, but related, issues:

- *Initial registration*
- *Subsequent re-registration (after lapsing or after removal)*
- *Lapsing (as distinct from voluntary removal)*
- *Payment of outstanding fees prior to re-registration*
- *Institute membership*
- *Residence*
- *'Grandfather' situations*

Registration of ~~individuals as~~ auditors

9. (1) An individual who wishes to be registered as an auditor must lodge with the IRBA a written application for registration, accompanied by the required fee and such information as the IRBA may require.

Is there a reason why the term 'required fee' is used? §11(2) refers to a 'determined' fee.

(2) If, after considering an application, the IRBA is satisfied that the applicant -

(a) has been certified by a professional body accredited by the IRBA, and of which the applicant is a member, to have complied with the education and training requirements for a registered auditor,

We are unsure of the precise implications of §9(2)(a). Who determines these requirements, and how. Does the professional body determine what is good enough for an auditor, or does the IRBA have a say? In any event, we suggest the deletion of the words 'of which the applicant is a member' as the applicant might be a member of a different body to that through which he or she 'qualified'.

In terms of the above, a person wishing to register as an auditor need not pass any examination, yet §5(1)(b) specifically assigns the IRBA the right to set and administer this examination. What therefore is the purpose of this right? We believe that the regulator should be the final determinant of competence and that all registered auditors should pass the same competence examination. (Refer to our introductory comments where the need for this is expanded.)

Therefore, we believe that the following additional registration requirement is essential: Requirement (e) – pass the competence examination prescribed by the IRBA for registration purposes from time to time. The inclusion of such a clause would then make sense in the context of §5(1)(b) wherein the IRBA is assigned the power to set and administer examinations.

It appears as if Institute membership is required only at the time of initial registration.

(b) is a fit and proper person,

We are not certain if this section envisages competence as part of the 'fit and proper' test. Perhaps it should be more specific. We are concerned about 'grandfathering' for current registered members as well as those who currently would qualify for registration under PAAB, but who have not sought registration. Should the section provide for a person to have passed the regulator's prescribed exam, unless exempted.

(c) is not less than 21 years of age, and

(d) where a period of more than five years has elapsed between the date of complying with the education and training requirements for a registered auditor and the date of the application, has the necessary competence to practise as an auditor,

Does this mean 5 years since both education and training were completed? Is it sufficient if the applicant passed the equivalent of the old QE 8 years previously, but finished training within the 5 year period? The section should also be amplified to include the words 'or since the applicant was last registered with the IRBA, or its predecessor, the PAAB' to cater for people who qualified long ago, but were until recently registered.

This section does not clearly state what is required.

We note that residence requirement which was previously a part of this section, has been deleted. We are not certain if the implications of this have been thought through. Effectively, a person may now conduct a South African audit practice in another country, or purport to run a local practice, but be resident abroad. We have had a few such instances in the recent past which have been most undesirable – particularly as usually unqualified staff are running the office, clients are unable to get hold of their auditor, and practice review becomes a farce. We do not believe that auditing is a profession ideally conducted from a distance. We believe the residence requirement should be re-introduced.

then, subject to subsections (3) and (4), the IRBA must register the applicant, enter the applicant's name in the register *what is the difference*, and issue to the applicant a certificate of registration in the prescribed form.
We are trying to move away from fancy certificates – a 'prescribed form' is really not necessary. We would prefer to issue a 'licence' on an annual basis. It would do away with the necessity of trying to retrieve old certificates, as 'licences' would be valid until the end of the registration year only.

(3) The IRBA may not register an individual if the individual –

We believe this should say 'must not' or 'shall not', whichever term is ultimately decided on, to preclude any hint of a discretion

(a) has at any time been removed from an office of trust on account of misconduct related to a discharge of that office;

This is very vague, possibly unenforceable. Removed by whom? At what level? After what sort of hearing? What sort of misconduct?

(b) has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery, uttering a forged document, perjury, an offence under the Corruption Act, 1992 (Act No. 94 of 1992), or any offence involving dishonesty, and has been sentenced therefor to imprisonment without the option of a fine or to a fine exceeding such an amount as may be prescribed by the Minister from time to time;

What are the implications if an otherwise refusable application is received prior to the Minister prescribing the amount? We suggest that an amount be fixed in the Bill, subject to the Minister's right to amend it.

(c) is for the time being declared by a competent court to be of unsound mind or unable to manage the person's own affairs; or

(d) is disqualified from registration under a disciplinary punishment imposed under this Act.

(4) The IRBA may decline to register a person who is an unrehabilitated insolvent or who has entered into a compromise with creditors or who has been provisionally sequestrated.

We believe it might still be necessary to include a section here to provide for re-registrations, as follows:

'(5) Subject to the provisions of subsection (3), the IRBA shall on application to it register as an auditor any person who was previously registered as an auditor in terms of this Act, if the person is a member of an accredited professional body and has paid the prescribed registration fees and any arrear annual fees.'

Do we not want to promote the use of the designation 'RA' (Registered Auditor)? – If we do, it will be advisable to include a section such as :

'(6) Any person who is registered in terms of this section as an auditor may affix the abbreviation "RA" after their name.'

10. ~~Cancellation and removal~~ [Termination] of registration

You do not remove registration – you remove a person's name from the register. Cancellation and lapsing are two distinct types of removal. Cancellation is either specifically requested or ordered – usually by the person themself, or by a disciplinary committee. Lapsing occurs automatically on the happening of a readily and independently ascertainable fact, ascertainable at a given time, the obvious examples under the existing Act being the failure to pay fees by a certain date, or the termination of residence.

We suggest that the two concepts should not be confused, and that lapsing be re-introduced, certainly for non-payment of fees, and possibly for non-compliance with a minimum residence requirement.

(1) Subject to subsection (3), the IRBA must cancel the registration of any registered auditor -

(a) who subsequent to registration becomes subject to any of the disqualifications mentioned in paragraphs (a) to (d) of section *9(3)*;

(b) whose registration was made in error or on information subsequently proved to be false; or

(c) who prior to registration has been guilty of conduct by reason of which the auditor is in the opinion of the IRBA not a fit and proper person to be registered.

(2) Subject to subsection (3), the IRBA may cancel the registration of any registered auditor –

(a) whose estate is sequestrated or provisionally sequestrated or who enters into a compromise with creditors;

(b) who fails to pay any fee or portion thereof after it has become payable as mentioned in section 5(1)(f); or

It is simply not feasible to apply one's mind to each and every case of a person who has not paid their fees by due date. There are 100s. In addition, it has taken many years of stringent application of the existing lapsing provisions to persuade people to pay their fees on time. The current Act grants a three month period during which fees must be paid and, if not, the practitioner lapses automatically and must apply for re-registration

Under the new proposal, we would need to send out accounts much earlier (which has budget implications) in order for fees to be paid by 1 January. Thereafter we would need to apply our minds to each person who had not paid, as to whether they should be stuck off or not, and then write to them in terms of §10(3). The existing section works extremely well and promotes disciplined payment. We see no reason to tinker with it, and suggest that §10(2)(b) be substituted with the existing §15(7) which states

"The registration of any person as an accountant and auditor shall lapse if such person—

(b) fails to pay any annual fees or portion thereof prescribed or determined under section 13(1)(e) and payable by him within three months after such fees or portion thereof become due or within such further period as the board may in any particular case allow."

and which should appear after the cancellation section.

Striking from the register is a serious act, with potentially far reaching implications for the practitioner and his clients, and should be clearly understood as such.

(c) who ceases to be a member of an accredited professional body.

(3) Prior to cancelling a registration under subsection (1) or (2), the IRBA must give notice in writing to the auditor concerned of its intention to cancel and the reasons on which it is based, and afford the auditor a period, of not less than 21 days and not more than 30 days, in which to submit grounds for not proceeding to cancellation.

Previous drafts made it compulsory to cancel the registration of people who did not pay (as is the current position). We do not know what caused the drafters to change their minds and make it discretionary. In our understanding, a discretion has to be exercised specifically in each case – one cannot have a blanket decision to 'lapse' people. We would need to consider each case. See our further comments in this regard under §10(2)(b).

(4) At the written request of a registered auditor, the IRBA must remove the auditor's name from the register, but the removal does not affect any liability incurred by the auditor prior to the date of the removal.

(5) The fact that an auditor's registration has been cancelled or removed *not correct – see comment above*, does not prevent the IRBA from instituting disciplinary proceedings for conduct committed prior to the cancellation or removal.

(6) As soon as ~~practicable~~ **[practical]** after an auditor's registration has been cancelled or removed the IRBA shall publish notice of the cancellation or removal, specifying the auditor's name.

Practice by registered auditor

This section appears to re-introduce the concept of an 'auditor in practice' which confuses the issue.

Perhaps this section should, in order not to conflict with section 188 of the Constitution and various sections of the Auditor General Act and other legislation, contain an exception similar to §14(b)(iv) of the present Act, regarding the Auditor General.

11. (1) No person except a registered auditor may engage in practice or hold out as an auditor in practice or use the description "certified public accountant" or any other designation or description likely to create the impression of being an auditor in practice.

It does not seem correct to list only this specific prohibited designation. Laws should be general. Should it not at least be expanded, possibly to '… or use any description such as registered auditor, public auditor, certified public auditor, certified practicing accountant, certified public accountant, auditor in public practice or any other designation……..'

In any event, we believe that this section is more clearly stated in the positive, and we believe it should go much further, to include the current prohibition on accepting work which where the appointment of an auditor, or an audit, is required by law.

(2) In order to engage in practice, a registered auditor must have paid all applicable fees determined by the IRBA under this Act.

We believe this section confuses the concepts of registration and practice. One must be registered in order to practice. Registration presupposes the payment of applicable fees. The fact that a person is registered does not automatically mean they are in practice. With this in mind, we believe this subsection would better read:
'(1) Only a registered auditor may -

'(a) engage in practice, or hold out as a registered auditor, or use any designation(including any designation prescribed by the Minister in terms of this section as being misleading) or do anything else, likely to cause the impression that such a person is a registered auditor; or

(b) accept an appointment or act as an auditor where the appointment of an auditor or the performance of an audit is required in terms of any law, or otherwise.

We are pleased to note that the section does away with all the existing provisos currently included in §14, and seeks to ensure that only an auditor may audit. It is essential that other legislation does not erode this in the manner of eg the Sectional Titles Act, which provides that an audit may be conducted by an accounting officer. Otherwise you have the situation where a garden club must be audited by an auditor, but a complex (or a school) may be 'audited' by an accounting officer.

(3) Nothing in this section prohibits any person in the employment of an entity from using the description "internal auditor" in relation to that entity.

How does this affect other composite descriptions such as 'forensic auditor'. Are we protecting the term 'registered auditor' or 'auditor' or what exactly. We do not believe this subsection is necessary.

(4) A registered auditor who is not in practice as an individual practitioner may practise as a member of a firm only if, by virtue of section 12, the firm is itself a registered auditor.

No. We firmly believe that it is better to deal with firms and registered auditors as two separate issues, otherwise the concepts become muddled and unclear. Firms do also include sole practitioners, and this should be acknowledged. We believe there should be a register of auditors and a register of firms. If the reason for this inclusion of firms in the definition of auditor is to bring firms per se into the disciplinary net, as we suspect it is, there are more elegant ways to achieve this. How do firms lapse if they are 'auditors'?

Also it implies that one must have two registrations – one personally and one for your firm (provided your firm is a partnership or an inc). The present situation relies on the offences clause to compel RAs to furnish firm details, and we compile our unofficial firm register from that information. The current trend of firms merging and 'de-merging' on an ongoing basis (and a number of them not giving us the details) will make this sort of provision very hard to enforce.

This might be an opportunity to address the issue of firms practicing under the same name, which causes so much confusion.

12. ~~Registration of firms which are partnerships or companies~~ [Form of practice]

We disagree with the structure of this section. We believe that individuals are auditors (and should be registered as such) and that they may practise through different types of firms, as listed. [Has the time come to make reference to limited liability partnerships?]

This concept is supported by the commentary on the Treasury website on the proposed amendments to the Companies Act. Paragraph 2.3.4 thereof states:

'The appointment of a firm as the auditor ..... will be valid only if in addition to the name of the firm, the appointment specifies the name of the individual registered auditor ... that will undertake the audit.' This emphasises the importance of the individual.

We appreciate that it is competent to appoint firms as auditors in terms of the Companies Act, but we believe that the manner in which this type of appointment is permitted is adequately handled in the Companies Act.

We believe this section should be amended as follows:

(1) ~~The only firms which may become registered auditors are –~~

[(1) A registered auditor may practise

(a) by himself, or

(b) in partnership with other registered auditors, or]

(c) in a ~~companies~~ **[company]** which ~~comply~~ **[complies]** with subsection (3).

At present, the Office of the Auditor General is registered as a firm because it offers training. We are not sure if a similar registration must be entertained or not – as presumably the IRBA will not be regulating training any longer.

(2) On an application by a firm which is a partnership fulfilling the conditions in subsection (1)~~(a)~~**[(b)]**, the IRBA must register the firm ~~as a registered auditor~~.

(3) The IRBA must register a **[firm which is a company]** ~~as a registered auditor~~ if, and only if, the following conditions are fulfilled -

(a) the company is incorporated and registered as a company under the Companies Act, 1973, with a share capital, and its memorandum of association provides that its directors and past directors shall be liable jointly and severally, together with the company, for its debts and liabilities contracted during their periods of office;

(b) only individuals who are registered auditors are ~~members~~ or shareholders of the company;

The word 'member' is not used anywhere else in the section – is it needed?

(c) every shareholder of the company is a director thereof, and every director is a shareholder except that -

(i) where a shareholder of the company dies, the estate of the shareholder may continue to hold the relevant shares for a period of six months as from the date of the death or for such longer period as the IRBA may approve; or

(ii) where a shareholder of the company ceases to conform to any requirement of paragraph (b), the shareholder may continue to hold the relevant shares for a period of six months as from the date on which the shareholder ceases so to conform or for such longer period as the IRBA may approve;

(d) no voting rights attach to any share contemplated in paragraph (c)(i) and (ii), and a shareholder mentioned in that paragraph does not act as a director of the company or receive, directly or indirectly, any director's fees or remuneration or participate in the income of or profits earned by the company in its business;

(e) the articles of association of the company provide that the company may, without confirmation by a court, purchase on such terms as it may deem expedient any shares held in it;

(f) shares purchased under paragraph (e) are available for allotment in accordance with the company's articles of association;

(g) the company's articles of association provide, notwithstanding any provision to the contrary in any other law, that a member of the company may not appoint a person who is not a member of the company to attend or speak or vote on behalf of the member at any meeting of the company; and

(h) the company ceases to engage in practice immediately ~~when~~ **[that]** it ceases to conform to paragraph (a) or (b):

*We are not sure to what extent the drafters have considered and rejected the possibility of multi disciplinary practices ('MDP')s. If MDPs **are** to be permitted (and in practice they are a reality), then another clause should be considered, such as:*

(i) each shareholder must obtain professional indemnity insurance, or provide other financial guarantees, of such a type as the RBA may from time to time prescribe, to cover such liability which he or she may incur as a result of negligence or recklessness in the conduct of such practice.

Provided that, at a time when paragraph (c)(i) or (c)(ii) applies, the provisions of paragraph (h) do not apply to the company by reason only of the fact that a shareholder of the company is the estate of a deceased shareholder or, as the case may be, has ceased to be a registered auditor.

(4) In its application to a company which is a registered auditor, section 20 of the Companies Act, 1973 (qualifications to be a private company), has effect with the omission of subsection (1)(b) (limit on number of members).

Information to be furnished by registered firm and auditor

See comments above. This section will also read more easily if firms and auditors (individuals) are dealt with separately.

13. (1) Every firm which is a registered auditor must notify the IRBA of any change in its name, composition or address not later than 30 days after the date on which the change takes place.

(2) Within fourteen days of the receipt of a written request from any person for whom a registered auditor or the auditor's firm acts as auditor or who proposes to appoint the registered auditor or the auditor's firm as its auditor, the registered auditor must furnish the following information -

(a) every firm name or title under which the auditor or the firm practises;

(b) the place or places of business of all firms in which the auditor is in practice as a partner, director or member;

(c) the full names of all (if any) of the auditor’s partners, co-directors or co-~~members~~ **[shareholders]**; and

(d) the auditor’s first names or initials, surname, ordinary business address and ordinary residential address.

(3) In subsection (2) "the auditor's firm" means the partnership or company of which the auditor is a partner or member; and where, under that subsection, a registered auditor is required to supply information relating to a firm, the supply of the information in the name of the firm shall be a sufficient compliance (so far as relates to the details of the firm) with the obligation of the individual auditor.

This sub-section could be done away with if the two concepts are separated.

CHAPTER III

FUNCTIONS AND COMPOSITION OF SUBSIDIARY BOARDS

Standard-Setting Board for Auditor Ethics: composition

14. (1) The SBE consists of the following members appointed by the IRBA:

(a) five registered auditors;

(b) three persons *see our previous comment on the interchangeable use of the words 'person' and 'individual'* representing users of audit services;

(c) one person representing an exchange which is the holder of a stock exchange licence issued under the Stock Exchange Control Act, 1985 (No.1 of 1985); and

(d) one advocate or attorney with at least ten years' experience in the practice of law.

(2) The IRBA must appoint an alternate member for every member of the SBE.

Should this be an obligation, or just a right – we suggest it should be a right., in other words, substitute 'must' with 'may'.

SBE: objectives

15. The SBE has the following objectives in respect of registered auditors:

(a) to promote high and internationally comparable standards of professional ethics;

(b) to promote an understanding of professional ethics amongst professional bodies accredited by the IRBA and registered auditors; **[and users]**

(c) to ensure that rules and guidelines for professional ethics developed by the SBE are responsive to the expectations of business, financial institutions and the general public.

SBE: powers and duties

16. The SBE may do anything that is reasonable or necessary to achieve its objectives, and in particular must –

Is this where we will prescribe rules of procedure for hearings, and punishments?
See §50

(a) determine what constitutes improper conduct by registered auditors by developing rules and guidelines for professional ethics and prescribing a code of professional conduct**;**

Is it really necessary to develop rules and guidelines, then determine what constitutes improper conduct, and then prescribe (with the attendant publication) a Code?

Should the section not rather state that the SBE shall prescribe disciplinary rules which set out procedure, and shall prescribe a Code of Conduct which sets out what constitutes unprofessional conduct. Developing and determining these happens as part of arriving at what should be prescribed.

(b) interact on any matter relating to its objectives with professional bodies and any other body or organ of state (as defined in section 239 of the Constitution) with an interest in the auditing profession;

(c) provide advice to registered auditors on matters of professional ethics and conduct;

(d) refer to the IRBA any matter which it considers should be dealt with under Chapter V as an allegation of improper conduct; and

(e) provide such information as may be required by the IRBA to enable it to perform its functions under section *47*.

Standard-Setting Board for Auditing: composition

17. (1) The SBA consists of the following members appointed by the IRBA:

(a) five registered auditors;

(b) one person with experience of business;

(c) the incumbent of the office of the Auditor-General, or a person nominated by that incumbent;

(d) the incumbent of the office of Executive Officer of the Financial Services Board, or a person nominated by that incumbent;

(e) one person with experience in the teaching of auditing at a University recognised or established under the Higher Education Act, 1997 (Act No.101 of 1997); and

(f) the incumbent of the office of the Registrar of Banks, or a person nominated by that incumbent.

(2) The IRBA must appoint an alternate member for every member of the SBA.

We do not believe this should be compulsory. In fact, for reasons of continuity, the SBA does not encourage alternates

SBA: objectives

18. The SBA has the following objectives in respect of registered auditors:

(a) to promote high and internationally comparable auditing standards;

(b) to ensure rules and guidelines for auditing standards developed by the SBA are responsive to the expectations of business, financial institutions and the general public.

SBA: powers and duties

19. (1) The SBA may do anything that is reasonable or necessary to achieve its objectives, and in particular must -

(a) develop and maintain auditing pronouncements;

(b) consider relevant changes in South Africa and internationally by -

(i) monitoring developments by other auditing standard-setting bodies and sharing information where requested; and

(ii) making recommendations on other assurance services that can be provided by registered auditors;

How will these 'recommendations' be given effect to If the SBA recommends that registered auditors can provide a specific service, how does such recommendation get approved/authorised/enforced? The current wording does not give the SBA sufficient powers to do this.

(c) promote and ensure the relevance of auditing pronouncements by -

(i) considering the needs of users of audit **[and other assurance]** reports;

(ii) liaising with any committee established by the SBA for this purpose on standards to be maintained by registered auditors and to receive feedback on areas where auditing pronouncements are needed;

(iii) ensuring the greatest possible consistency between such pronouncements and accepted international pronouncements; and

(iv) consulting with professional bodies on the direction and appropriateness of auditing pronouncements;

It must be made clear that these'professional bodies' may not direct the SBA regarding the direction and appropriateness of auditing pronouncements. Our direction is taken from international developments and the needs of users in the various industries (CAG set up to provide inputs here – refer to §(c)(ii) above).

(d) influence the nature of international auditing pronouncements by -

(i) preparing and submitting comment on exposure drafts or discussion papers and replies to questionnaires prepared by the ~~International Auditing Practices Committee~~ **[International Auditing and Assurance Standards Board]** of IFAC or a successor body; and

(ii) nominating representatives to committees of the ~~International Auditing Practices Committee~~ **[International Auditing and Assurance Standards Board]** of IFAC or a successor body when requested to do so; and

(e) refer to the IRBA any matter which it considers should be dealt with under Chapter V as an allegation of improper conduct.

(2) The SBA must publish all auditing pronouncements.

See comments under definition of 'publish' – this is a classic case for electronic publication.

(3) The SBA must provide such information as may be required by the IRBA to enable it to perform its functions under section 47***.***

CHAPTER IV

POWERS AND DUTIES OF REGISTERED AUDITORS AND REVIEWS BY IRBA

General obligation of registered auditors in relation to audit

20. (1) Unless a registered auditor who is conducting the audit of an entity is satisfied about the criteria specified in subsection (2), the auditor may not, without such qualifications or modifications as may be appropriate in the circumstances, express an opinion to the effect that any financial statement, including any annex thereto, which relates to the entity, fairly represents, in all material respects, the financial position of the entity and the results of its operations and cashflow.

(2) The criteria referred to in subsection (1) are –

(a) that the auditor has carried out the audit free from any restrictions whatsoever and in compliance, so far as applicable, with ~~Statements of South African Auditing Standards~~ **[auditing pronouncements developed and adopted by the SBA]** relating to the conduct of the audit; and

(b) that proper accounting records in one of the official languages of the Republic have been kept in connection with the entity in question so as to reflect and explain all its transactions and record all its assets and liabilities correctly and adequately; and

(c) that the auditor has obtained all information, vouchers and other documents which in the auditor's opinion were necessary for the performance of the auditor's duties; and

(d) that the auditor has not had occasion, in the course of the audit or otherwise during the period to which the audit relates, to send a report to the IRBA under section 22(2) relating to a reportable irregularity, or that, if such a report was so sent, the auditor has been able, prior to expressing the opinion referred to in subsection (1), to send to the IRBA a notification under section 22(3) that the auditor has become satisfied that no reportable irregularity has taken place or is taking place.

(3) If a registered auditor or, where the registered auditor is a member of a firm, any other member of that firm was responsible for keeping the books, records or accounts of an entity, the auditor must, in reporting on anything in connection with the business or financial affairs of the entity, indicate that the auditor or that other member of the firm was responsible for keeping those accounting records. *This is what happens when a firm is defined as an auditor – it becomes unwieldy.*

(4) For the purpose of subsection (3), a person shall not be regarded as responsible for keeping the books, records or accounts of an entity by reason only that that person makes closing entries or assists with any adjusting entries or frames any financial statements or other document from existing records.

Auditor having financial interest in entity excluded from audit

21. (1) A registered auditor may not conduct the audit of any financial statements of an entity (whether as an individual auditor or as a member of a firm) if, at any time during a period to

which those financial statements relate or at any time during the two years ending at the beginning of that period the auditor has or had a financial interest in the entity.

(2) In subsection (1) "financial interest" means a financial interest of any description whatsoever (and whether direct or indirect), other than -

(a) a right to fees or charges earned by the auditor (or the firm of which the auditor is a member) in respect of services**;** or

(b) in the case of an entity which is or includes a pension fund organisation or which provides a collective investment scheme, any interest in the fund or scheme which gives the auditor no greater right to participate in the making of decisions as to the management of the entity than any other member of the fund or scheme.

This section is very restrictive - is this intended? If a registered auditor who is a partner in a firm or is practicing on his own held say one share in a listed company in the two year window period, the individual or his firm would be precluded from taking up an appointment as auditor. Threats to independence are exhaustively covered in the Code of Conduct - do they need to be legislated. Why is financial interest singled out as an independence threat?
Our understanding is that these issues are to be dealt with in the proposed corporate law reform.

(3) In subsection (2)(b), -

(a) "pension fund organisation" has the same meaning as in the Pension Fund Act 1956 (Act No. 24 of 1956); and

(b) "collective investment scheme" has the same meaning as in the Collective Investment Schemes Control Act 2002 (Act No. 45 of 2002).

If we must have sectional definitions, can they not appear consistently at the beginning of the section.

Auditor's duty to report on irregularities

22. (1) In this section –

"management board", in relation to an entity which is a company, means the board of directors of the company and, in relation to any other entity, means the body or individual having control and direction of the business of the entity;

"nominated auditor" means the individual who is for the time being appointed to perform the relevant auditing functions, whether by virtue of being personally appointed as auditor or by virtue of being a member of a firm which is so appointed;

*See our comments in **F.***

"reportable irregularity" means any unlawful act or omission committed by any person in the conduct of the management or control of an entity, which -

(a) has caused or is likely to cause financial loss which is material to the entity or to any partner, member, shareholder or creditor of the entity; or

This requires that the auditor consider materiality in relation to parties in respect of whom the auditor has no access to financial information, and it is accordingly incapable of being

implemented. It also has the effect of reducing materiality to that applicable to the most insignificant partner, member, shareholder or creditor, which is inappropriate, and surely cannot have been intended.

(b) is fraudulent or amounts to theft or is otherwise dishonest; or

This requires that irrespective of whether the amount is material or not, acts or omissions which are 'fraudulent' or 'amount to theft' or are 'otherwise dishonest' are reportable. Auditors cannot be expected to make such subjective decisions. If this section is intended to make instances of theft or fraud reportable, it should say so unambiguously, although we submit that such instances will usually be covered, in any event, by the provisions of §22(1)(a). If the section is intended to cover bribery or corruption, as we think it might, then similarly it should say so unambiguously.

In any event, we submit that materiality must be a consideration.

The concept of 'otherwise dishonest' (which is not defined) is simply incapable of interpretation - the potential instances of 'otherwise dishonest' are limitless.

(c) represents a material breach of any fiduciary duty owed by such person to any entity itself or any partner, member, shareholder or creditor of the entity, or under any law applying to the entity or the conduct or management thereof;

This provides that a 'material breach of any fiduciary duty owed' …. to various parties, or 'under any law applying to the entity or the conduct or management thereof' is reportable. No attempt is made to define materiality and it is not clear what is intended by the proposed legislation.

"appropriate regulator", in relation to an entity which is a financial institution, as defined in the Financial Services Board Act 1990 (Act No. 97 of 1990), means the Financial Services Board and, in relation to any other entity regulated by any law, means such regulator or other authority (if any) as appears to the IRBA to be appropriate in relation to the entity.

Why are the FSB and financial institutions isolated? The definition should be more general and encompass all authorities to which the IRBA could report a reportable irregularity, alternatively it should be left out altogether, and a clause similar to the existing §20(5)(c) which reads as follows – be substituted:

"(c) The board may disclose any information supplied to it in terms of paragraph (b) to any attorney-general or the Registrar of Banks or any officer in the public service or any member or creditor of the undertaking concerned or any juristic person of whom the undertaking is a member or who has control over the undertaking or who has the power to take disciplinary steps against the undertaking, or to the committee of any stock exchange on which shares of the undertaking are listed, or, if the board believes it to be in the best interests of the public, to any other person, institution or body."

(2) Where the nominated auditor of an entity is satisfied or has reason to believe that a reportable irregularity has taken place or is taking place in respect of the entity-

(a) the auditor shall, without delay, send a report in writing to the IRBA giving particulars of the irregularity, together with such other information and

particulars as the auditor considers appropriate and stating whether, in the auditor's opinion, it is likely that the irregularity will be rectified within 30 days; and

We do not support this new process. The previous §20(5) required the auditor to send a report to the PAAB only after the auditor had taken reasonable steps and given the client the opportunity to rectify the situation, but was still not satisfied with the outcome.

The Bill now requires the auditor to send such a report before taking any steps to satisfy himself that such a reportable irregularity has not taken place.

This will, without any doubt, result in a huge administrative burden on the IRBA, to no good reason.

It will be extremely difficult for the auditor to arrive at an opinion as to whether the irregularity will be rectified within the 30 day period. It would be far better if the client was first given the opportunity to rectify the situation and for the auditor then to arrive at an opinion as to whether the client's action was reasonable or not. There is no need for the IRBA to be made aware of situations that have been rectified, and if the auditor considers it necessary to bring these to the attention of users of the audit report (which will include the regulator of that client) this can still be included in an emphasis of matter paragraph.

The persuasive value of the threat of reporting, as happens at present when a client is given the opportunity to rectify the irregularity, on a delinquent client, should not be underestimated.

(b) unless the auditor considers it inappropriate in the circumstances of the case, the auditor shall also, without delay, send a copy of the report to the members of the management board of the entity at the same time drawing the attention of the board to the provisions of this section, and requesting all of them, individually or collectively, to acknowledge receipt of the copy of the report.

(3) If, within the period of 30 days after the date of sending the report referred to in subsection (2)(a), the nominated auditor has become satisfied that no reportable irregularity has taken place or is taking place, or that the relevant irregularity has ceased and that adequate steps have been taken for the prevention or recovery of any loss consequent upon it, the auditor must, not later than the expiry of that period of 30 days, send to the IRBA -

(a) notification to that effect, together with such explanatory information and particulars as the auditor ~~may think~~ **[thinks]** fit; and

(b) if a copy of the report was sent as mentioned in paragraph (b) of subsection (2), acknowledgements of receipt received from the persons mentioned in that paragraph, and of any replies received from them.

(4) Subject to subsection (5), if the IRBA receives a report under subsection (2)(a) relating to any entity, the IRBA shall, by notice in writing, inform the appropriate regulator of the details of the reportable irregularity to which the report relates and of any other information relevant to it; but, without the consent of the nominated auditor by whom the report was provided, the IRBA shall not disclose the source of the report to the regulator.

Why should the IRBA need the consent of the auditor? The IRBA is independent. This situation will be avoided if the auditor first satisfies himself that no irregularity had taken place and, if none, no report is issued to the IRBA - as is the case with the current §20(5).

(5) A notice under subsection (4) shall be sent as follows –

(a) if the report under subsection (2)(a) contains a statement that, in the auditor's opinion, it is likely that the irregularity will be rectified within 30 days but no relevant notification is received under subsection (3), then at the end of those 30 days; and

This process will be extremely difficult to manage by the IRBA unless its capacity is extended

(b) if the report under subsection (2)(a) does not contain such a statement, then as soon as ~~practicable~~ **[practical]** after receiving the report.

(6) If, at a time after the IRBA has informed the appropriate regulator as required by subsections (4) and (5)(b), the IRBA receives a notification under subsection (3) with respect to the reportable irregularity concerned, the IRBA shall forthwith inform the regulator of the receipt of the notification and of the accompanying explanatory information and particulars.

(7) The IRBA may disclose any information relating to an entity and provided to it under this section to all or any of the following -

(a) any state official vested with a statutory interest in the entity;

(b) any partner, member, shareholder or creditor of the entity;

(c) any juristic person of whom the entity is a member or who is vested with authority over the entity or who has the power to take disciplinary steps in respect of the entity;

(d) the committee of any stock exchange on which securities of the entity are listed; and

(e) any other person to whom the IRBA believes it to be in the public interest to disclose.

(8) For the purpose of determining whether any reportable irregularity has taken place or is taking place, an auditor may carry out such investigations as the auditor ~~may deem~~ **[deems]** fit and, in performing any duty referred to in the preceding provisions of this section, the auditor must have regard to all the information which comes to the knowledge of the auditor from any source.

(9) Nothing in this section confers upon any person any right of action against a registered auditor which, but for the provisions of this section, that person would not have had.

(10) Where any entity is sequestrated or liquidated (whether provisionally or finally) and a registered auditor who is the nominated auditor at the time of the sequestration or liquidation has sent or is about to send a report about the entity to the IRBA under subsection (2)(a), then, as soon as a provisional trustee or trustee, or a provisional liquidator or liquidator, as the case may be, has been appointed, the nominated auditor must forthwith (or at the same time as the report is sent to the IRBA) send to the trustee or liquidator concerned a copy of the report and of the information and particulars referred to in subsection (2)(a).

Limitation of liability of auditor for opinions, reports, statements etc

23. (1) In respect of any opinion expressed or report or statement made by a registered auditor in the ordinary course of duties, -

(a) the auditor does not incur any liability to a client of the auditor or any third party, unless it is proved that the opinion was expressed, or the report or statement made, maliciously or pursuant to a negligent performance of the auditor's duties; and

(b) where it is proved that the opinion was expressed or the report or statement was made pursuant to a negligent performance of the auditor's duties, the auditor does not incur any liability to any third party who has relied on the opinion, report or statement, for financial loss suffered as a result of having relied thereon, unless subsection (2) applies.

(2) This subsection applies if it is proved that the auditor -

(a) knew or could in the particular circumstances reasonably have been expected to know, at the time when the negligence occurred in the performance of the duties pursuant to which the opinion was expressed or the report or statement was made, -

(i) that the opinion, report or statement would be used by a client to induce the third party to act or refrain from acting in some way or to enter into the specific transaction into which the third party entered, or any other transaction of a similar nature, with the client or any other person; or

(ii) that the third party would rely on the opinion, report or statement for the purpose of acting or refraining from acting in some way or of entering into the specific transaction into which the third party entered, or any other transaction of a similar nature, with the client or any other person; or

(b) in any way represented, at any time after the opinion was expressed or the report or statement was made, to the third party that the opinion, report or statement was correct, while at that time the auditor knew or could in the particular circumstances reasonably have been expected to know that the third party would rely on that representation for the purpose of acting or refraining from acting in some way or of entering into the specific transaction into which the third party entered, or any other transaction of a similar nature, with the client or any other person.

(3) Nothing in subsections (1) and (2) confers upon any person any right of action against a registered auditor which, but for the provisions of those subsections, the person would not have had.

(4) For the purposes of subsection (2) the fact that a registered auditor performed the functions of an auditor is not in itself proof that the auditor could reasonably have been expected to know that -

(a) the client would act as contemplated in paragraph (a)(i) of that subsection; or

(b) the third party would act as contemplated in paragraphs (a)(ii) or paragraph (b) of that subsection.

(5) The provisions of subsections (1) and (2) do not affect -

(a) any liability of a registered auditor arising from -

(i) a contract between a third party and the auditor; or

(ii) any statutory provision; or

(b) any disclaimer of liability by an auditor.

In South Africa auditors may not disclaim disclaim liability. Does the Bill seek to change that situation?

(6) In this section -

(a) "client**"** means the person for whom a registered auditor or the firm of the auditor has performed the duties concerned;

(b) "third party" means any person other than the client concerned;

and any reference to a report or statement made includes a reference to a certificate given or a statement, account or document certified and corresponding expressions shall be construed accordingly.

Practice reviews

This section aims to replace the existing §22A of the PAA Act entitled "Inspection by Board", which makes explicit reference to the fact that these inspections are conducted "for the purposes of section 13(p)". §13(p) in turn reflects the board's power to "take any steps which it may consider expedient for the maintenance of the integrity, the enhancement of the status and the maintenance and improvement of standards of professional qualifications and of the competence, of accountants and auditors and encourage research in connection with problems relating to any matter affecting the accounting profession;"

In terms of the Bill, the powers and duties of the IRBA include §5(1)(b) which provides for the IRBA to "Ensure the standards of professional qualifications, competence, ethics, service of registered auditors, including the setting and administration of examinations;"

In our view it would be preferable if the provisions of §5(1)(b) were modified to make reference to the powers to conduct practice review. Under the existing §13(p) it is clear that the board has the power to take any steps which it considers expedient for "the maintenance and improvement of these standards of professional qualification" with the clear connotation of ongoing obligations which continue after registration. In our view §5(1)(b) could be modified by the inclusion of the following words " and the conduct and administration of practice review" at the end of the subsection.

From January 2005 there are significant changes envisaged in relation to the third practice review cycle. The changes include changing the frequency of reviews for individual practitioners and a new process to review the overall systems of qualify control in place for firms.

This section will need careful consideration to ensure that it is still competent for the firms to be reviewed, in terms of this new process, if our suggestions regarding the definition of auditor, and the registration of firms, are accepted.

24. (1) The IRBA, or any person authorised by it, may review the practice of a registered auditor and may inspect and make copies of any book, document or thing in the possession or under the control of a registered auditor.

In addition to the conventional maintenance of standards practice review as conducted at present, we believe it might be advantageous to widen the inspection powers of the IRBA and thus to expand the provisions of this section to allow for investigations – still for the broader purpose of ensuring standards - but which are not part of the routine practice review procedure. We suggest that the following wording might achieve this:

"Inspections by the IRBA

24. *(1) The IRBA, or any person authorised by it, may for the purposes of obtaining assurance on the maintenance of standards, or in response to a complaint lodged with the IRBA, carry out any review or inspection and make copies of any book, document or thing in the possession or under the control of any registered auditor or firm."*

(2) The IRBA may recover the costs of a review or inspection under this section from the registered auditor **[or firm]** concerned.

(3) A registered auditor **[or firm]** must, at the request of the IRBA, or the person authorised by it, produce a book, document or thing and, subject to the provisions of the common law or any other law (including that relating to professional privilege), may not refuse to produce such book, document or thing, even though the auditor is of the opinion that the book, document or thing contains confidential information of a client.

It has always been a feature of practice review that auditors who are subject to practice review are required to hand over documentation in their possession to the board. The existing provision is to be found in §22A(2) which stipulates that:

> *"An accountant and auditor shall, at the request of the board, or a person authorised thereto by the board, produce a book, document or things and shall not, subject to the provisions of any other law, refuse to produce such book, document or things even though he is of the opinion that that book, document or thing contains confidential information of his client."*

§24(3) of the Bill clearly has the same purpose. There is one significant difference and that is the reference to "any other law (including that relating to professional privilege)", where professional privilege is referred to as a basis for refusing to produce documentation for the purpose of practice review.

As currently formulated, §22A(2) precludes an auditor from declining to hand over documentation for the purposes of practice review on a basis of client confidentiality. In referring to the provisions "of any other law" the section recognises that there may be other statutory prohibitions against the disclosure of information. Amongst the statutes which contain limitations/prohibitions on the disclosure of information are the Nuclear Energy Act 46 of 1999, §10 of the National Key Points Act 102 of 1980, §104(7) of the Defence Act 42 of 2002, §8A and 8B of the National Supplies Procurement Act 89 of 1970 and §17 of the Hazardous Substances Act 15 of 1978.

The primary basis which an auditor would have for objecting to handing over documentation in the course of a practice review is the obligation to respect a client's confidential information. Confidentiality is dealt with explicitly in the section and is not a basis for declining to hand over documentation. We can think of no other common law basis which would limit an auditor's obligation under this statutory provision to make the documentation available.

Furthermore, the reference to professional privilege is misleading. There is no recognised professional privilege which attaches to an auditor. The concept of professional privilege

exists in the context of the legal profession and entitles a person to refuse to disclose certain kinds of confidential information which might otherwise be relevant in proceedings and otherwise admissible.

In our view, the provision relating to the common law and professional privilege should be excluded and there would then be no difference between the existing §22A(2) and §24(3) in the Bill.

(4) A registered auditor **[or firm]** who acts in good faith during the review of the practice of the auditor **[or firm]** or such an inspection, and who produces a book, document or thing under subsection (3) may not be held liable criminally or under civil law as a result of the production of the book, document or thing.

(5) No person who is or was concerned with the performance of any function under this section may disclose any information obtained in the performance of that function except –

(a) for the purpose of an investigation or a hearing under Chapter V;

(b) to a person authorised for the purpose by the IRBA and who of necessity requires it for the performance of functions under this Act;

(c) if the person of necessity supplies it in the performance of functions under this Act;

(d) when required to do so by order of a court of law;

(e) at the written request of, and to, any competent authority established by law which requires it for the institution, or an investigation with a view to the institution, of any criminal prosecution **[or**

(f) when expressly authorised to do so in writing by the registered auditor or firm in question]

It is accordingly clear that this section as well as the definition of 'practice' and of 'firm' must all be scrupulously harmonised to enable this. This is another section where terminology must be 'challenge proof'.

CHAPTER V

DISCIPLINARY MATTERS

We believe that either this section or §5, or both, need to be amplified (as per our comments under §5) by the inclusion of another enabling subsection, as follows:

> *'[The IRBA/ISBE shall] .....determine the manner in which an allegation or a charge of improper conduct shall be investigated and, if necessary, heard, and the punishments, including a caution, a reprimand, a fine, suspension from practice for such period as the IRBA may determine, removal from the register or qualified or temporary or permanent disqualification for registration, which may be imposed by the IRBA after such an investigation or hearing;'*

We cannot find a specific clause which envisages and empowers the publication of Disciplinary Rules; nor is there an equivalent of the existing §13(h) – the punishment-enabling section. See our comments under §5(a)(i) in this regard.

Certain, but not all of the existing procedural Disciplinary Rules have been incorporated into the Bill. For the sake of clarity we need to establish what should correctly be included in the Act, and what in the Rules.

We do however still need an equivalent of the existing §13(h)(i) which enables three things, the

- *prescribing of what is unprofessional conduct (now falling under the ISBE),*
- *determination of the manner in which matters shall be investigated (currently set out in detail in the Disciplinary Rules and now partially set out in this section of the Bill), and*
- *prescribing of competent sanctions.*

Appointment of tribunal and committees to carry out disciplinary functions

25. (1) For the purpose of carrying out their disciplinary functions in relation to registered auditors, ~~that is to say, their functions~~ under section 5(1)(a)(i), the IRBA shall establish -

(a) a disciplinary tribunal;

(b) one or more investigatory committees; and

(c) one or more disciplinary committees, each consisting solely of registered auditors;

We believe this is a step backwards. We have had a year of disciplinary committees chaired by a legal person (as per the Myburgh Commission recommendations) and we believe it has improved the process.

The pool/panel system is essential and must be accommodated.

and section 42 applies to the membership of investigatory and disciplinary committees as it applies in relation to other committees.

Is it necessary to state this? If we are to refer to other sections, is it not more important to refer to the entrenchment section?

We believe it is more important that this section continues, to read 'and must assign to those committees its powers in terms of section 5(1)(a)(i)'.

(2) The members of the disciplinary tribunal shall be appointed as follows -

(a) the IRBA shall appoint as president of the disciplinary tribunal a person with experience as a judge or senior counsel; and the person so appointed is referred to in this Chapter as "the Tribunal President"; and,

(b) the IRBA shall appoint the other members of the disciplinary tribunal in equal numbers from among persons who are or have been registered auditors and from among other persons appearing to the IRBA to be suitably qualified having regard to the functions conferred on the tribunal under this Chapter;

and, in the event of an equality of votes among the members of the disciplinary tribunal on any issue, the Tribunal President shall have a second or casting vote.

Is there no minimum or maximum number?

Allegations of improper conduct

26. (1) The IRBA shall refer to an investigatory committee any allegation, complaint or charge of improper conduct, whether prescribed or not, ~~which it receives~~ in respect of a person who is or was a registered auditor unless it appears to the IRBA that the allegation, complaint or charge relates to conduct at a time when that person was not so registered.

What about a truly frivolous complaint, or one that is not in the correct format (or is it intended to do away with any formality).

Does the IRBA (and consequently the directorate) have no discretion at all? Is there no room for conciliation?

How does one distinguish between the matters which can be conciliated and those which cannot if there is neither a minimum requirement for a 'complaint', nor any discretion?

(2) If it appears to the IRBA that a registered auditor -

(a) is failing or has failed to perform any duties devolving upon the auditor in his or her capacity as an auditor of any entity with such degree of care and skill as in the opinion of the IRBA may reasonably be expected, or

(b) is or has been negligent in the performance of any such duties,

What is the difference between (a) and (b) – we have traditionally used the two expressions interchangeably.

What about someone who was registered at the time but no is longer – as envisaged in (1) above.

then, whether or not the auditor is liable to be or has been criminally charged or has been convicted in respect of the failure or negligence, the IRBA shall refer the matter to an investigatory committee as an allegation of improper conduct

What is the point of this last paragraph (see reference in §27(3) to the fact that proceedings are not stayed). Also does it not make the mistake of perpetuating the belief that negligent conduct is criminal conduct?

(3) If, in the course of any proceedings before any court of law, it appears to the court that there is prima facie proof of improper conduct on the part of a registered auditor the court

shall direct a copy of the record of the proceedings or such part thereof as relates to that conduct, to be sent to the IRBA.

(4) Notwithstanding the provisions of any other law, whenever it appears to an official of any body charged with the regulation or supervision of any entity that there is prima facie proof of improper conduct on the part of a registered auditor, the official must forthwith send a report of that conduct to the IRBA.

What if he doesn't? Is the word 'must' used to denote something which must be done, but there is no sanction if it is not – as distinct from 'shall' which carries a sanction? Is this perhaps the reason for the use of different words? .

(5) The IRBA shall refer to an investigatory committee any record or report received by it under subsection (3) or (4).

Investigation of allegations

27 (1) In the following provisions of this Chapter an "allegation of improper conduct" means -

(a) any such allegation, complaint or charge of improper conduct as is referred to in section 26(1)***;***

(b) any matter referred as an allegation of improper conduct under section 26(2); or

(c) any court record or report referred under section 26(5).

(2) An investigatory committee shall investigate or cause to be investigated any allegation of improper conduct which is referred to it under section 26 and, if the investigatory committee considers that there is a prima facie case to be answered, it shall refer the results of its investigation to the Tribunal President.

No. There must be provision for someone to plead guilty at this stage, or for a consent order. We cannot have every single potential guilty situation having to be heard by a disciplinary committee. This will cause enormous delays, and we are already criticised for proceedings taking too long, and will add substantially to the costs.

The section as drafted does not even make provision allow for a discharge. It confuses the concepts of

- *a prima facie case being made out (the first stage), and*
- *the accused providing an acceptable explanation (for a variety of reasons), sufficient for the matter to be discharged (the second stage).*

It also assumes that every 'prima facie' case must result in a hearing, which is wrong.

We either need to include the provisions of Disciplinary Rule 3 (discharge) here – or else leave all of this for Rules, as at present.

(3) The fact that any alleged improper conduct forms (or that the IRBA has reason to believe is likely to form) the subject of criminal or civil proceedings in a court of law, shall not of itself prevent the continuation of an investigation, **[prior to the finalisation of]** ~~before~~ any such proceedings ~~have been concluded.~~

(4) For the purpose of investigating any allegation of improper conduct an investigatory committee may -

(a) require the registered auditor to whom the allegation relates or any other person to produce to the committee any book, document or thing which is the possession or under the control of that auditor or other person and which relates to the subject-matter of the allegation, including specifically, but without limitation, any working papers of the registered auditor; and

(b) inspect and, if the investigatory committee considers it appropriate, retain any such book, document or other thing for the purposes of its investigations;

(c) make copies of and take extracts from, any such book, document or other thing;

and the provisions of this subsection apply notwithstanding that the registered auditor is of the opinion that the book, document or other thing contains confidential information about a client **[and any such book, document or thing may be admitted in evidence in any investigation or hearing concerning the allegation or charge of improper conduct.]**

(5) Nothing in this section affects the law relating to professional privilege or the right of any professional body to take disciplinary or other action against any of its members in accordance with its constitution and rules.

This seems to be in conflict with the proviso above.

Allocation of allegations to disciplinary tribunal or disciplinary committee

28. (1) Where the results of an investigation of an allegation of improper conduct are referred to the Tribunal President under section *27(2)*, the Tribunal President shall consider whether the alleged conduct is of such a nature that, if proved, it would affect public trust in the auditing profession.

(2) If the Tribunal President concludes that the alleged conduct is of the nature mentioned in subsection (1), the alleged conduct shall be referred for hearing before the disciplinary tribunal and, in any other case, the alleged conduct shall be referred for hearing before a disciplinary committee.

Notice and evidential provisions applicable to investigations and hearings

29. (1) A person whose conduct forms the subject of a hearing must be informed of the nature of the complaint made against the person and is entitled to appear personally or to be represented by some other person duly authorised in writing to produce evidence, call and examine witnesses and cross-examine other witnesses.

Should this notice be in a prescribed form?

(2) Neither evidence given ~~for the purpose of~~ **[pusuant to]** any investigation or hearing nor any decision on *is this the right word* a hearing may be used by or against a person *can we not say 'an 'RA' – who else are we hearing?* whose conduct is the subject of the investigation or hearing in any subsequent civil or criminal proceedings in any court, but may be used in disciplinary proceedings before ~~any~~ **[a]** professional body.

We are concerned about the use of the word 'subsequent'. What about concurrent proceedings?

Does 'evidence given' mean only oral evidence or would it cover document evidence?

We heartily support the sentiments in this section, which we presume was introduced

- *to overcome the delay in disciplinary matters being heard, while other litigation is first finalised, so as not to cause prejudice, and*
- *to prevent complainants using a finding of a committee (obtained at little or not cost, and with a very different onus) to found an action against the respondent RA.*

However, we are not certain that adequate consideration been given to the way in which the Promotion of Access to Information Act will impact this, as it (PAIA) overrides any other legislation (and thus this legislation), and the IRBA will be a public body in terms of that Act, obliged to produce information on demand.

(3) In any investigation or hearing it is sufficient, for the purpose of proving the proper execution or the terms or the content or the authenticity of a document, for a copy of the document purporting to be a copy of the original to be used in evidence, subject to the right of any person to adduce evidence that any copy so presented in evidence is not authentic.

(4) Any book, document or other thing which is retained in connection with an allegation of improper conduct as mentioned in section 27(4)(b) may be admitted in evidence in any investigation or hearing concerning the allegation.

(5) In this section "hearing" means a hearing by the disciplinary tribunal or a disciplinary committee under section 30.

Should sectional definitions not go at the beginning of the relevant section?

Disciplinary hearings

30. (1) This section applies where the matter of any alleged conduct is referred under section 28 for hearing before the disciplinary tribunal or a disciplinary committee; and in the following provisions of this section and section 31 "disciplinary body" means the disciplinary tribunal or, as the case may require, the disciplinary committee to whom the matter is referred.

(2) The disciplinary body may -

(a) summon any person who, in its opinion, may be able to give material information concerning the subject of the hearing or who is believed to be in possession or have custody or control of any book, document or thing which has any bearing on the subject of the hearing, to appear before it at a time and place specified in the summons, and to be interrogated or to produce that book, document or thing and may retain that book, document or thing for examination;

(b) call any person present who was or could have been summoned under paragraph (a) to give evidence at the hearing;

(c) administer an oath to, or accept an affirmation from any such person;

(d) interrogate any such person and require the person to produce any book, document or thing in possession or custody or under control of the person; and

(e) appoint any person to advise it at the hearing on matters pertaining to law, procedure or evidence;

This takes us back to the previous situation, where chairman was an RAA and had an advisor. We prefer the current situation where the chairman is drawn from a panel of legal people – which cuts out the need for this advisor, as well as cutting out the consequent

convolutions in the following line (if the lawyer is part of the committee, he doesn't need this dispensation).

and, if the Tribunal President or, as the case may be, the chairperson of the disciplinary committee so requests, a person appointed under paragraph (e) may interrogate any such person as is referred to in paragraph (b).

(3) A summons for the attendance before the disciplinary body of any person or for the production of any book, document or thing must -

(a) be in the form prescribed by the IRBA,

(b) be signed by the Tribunal President or the chairperson of the IRBA or a person authorised by the IRBA for the purpose; and

(c) be served in the same manner as it would have been served if it had been a subpoena in a civil matter in a magistrate's court.

There should be provision for this to be waived, for example where it is a subpoena for the accused.

(4) In a hearing before a disciplinary body, the provisions of the law relating to privilege, as applicable to a witness subpoenaed to give evidence or to produce any book, document or thing before a court of law, applies.

(5) A hearing before a disciplinary body is open to the public except where, in the opinion of the Tribunal President or, as the case may require, the chairperson of a disciplinary committee, any part of the hearing should be held in camera.

(6) On a hearing before a disciplinary body of an allegation which was referred to an investigatory committee under section 26, section 27(4**)** applies in relation to the disciplinary body as it applies in relation to an investigatory committee.

(7) If the disciplinary body makes a finding of guilt against the person whose alleged conduct is the subject matter of the hearing, the disciplinary body may impose any prescribed punishment in respect of that finding.

This is not well conceptualised. There is no provision to prescribe punishment. See comment under §5(1)(a) and at the beginning of this chapter. In addition, 'prescribed' means by rule, and 'rule' is defined as a rule made in terms of §50 – which we believe is a mistake – as §50 specifically requires this rule in turn to be published in the Gazette. We are moving away from the Gazette as a publishing vehicle, although §50 has a reason to insist on it, in so far as it anticipates the provisions of the Administrative Justice Act..

Costs, publicity and recovery of monetary penalties and costs

31. (1) A disciplinary body which makes a finding of guilt as mentioned in subsection (7) of section 30 shall order any person upon whom any punishment is imposed under that subsection to pay such reasonable costs as have been incurred by an investigatory committee and the disciplinary body in connection with the investigation and hearing in question, or such part thereof as the disciplinary body considers just.

'Shall' in this case should be 'may'. It is too prescriptive. What if the committee decides for good reason that it is not appropriate to recover any costs at all.

(2) In any case where -

(a) a person whose conduct has been the subject of a hearing under section 30 has not been found guilty of improper conduct, or

(b) on a hearing no punishment has been imposed on the person whose conduct was the subject of the hearing,

What is the envisaged difference between (a) and (b)? Is it intended to cover a finding of guilty but with no punishment? This seems odd, if they are obliged to recover costs – but not obliged to impose a punishment. We suspect that this might have to do with the concept of 'caution and discharge'. At the moment a caution is viewed as a punishment.

the disciplinary body by which the hearing was conducted may nevertheless order that person to pay any costs unnecessarily incurred by the disciplinary body or an investigating committee as a result of the conduct of that person.

(3) In any case where -

(a) any punishment has been imposed on a person by the disciplinary tribunal, or

(b) any punishment has been imposed on a person by a disciplinary committee and the Tribunal President so directs on the grounds that in the circumstances of the case it is appropriate to do so,

the IRBA shall cause to be made known in any journal or other publication such as is referred to in section 5(1)(o) and in at least one national newspaper and such other newspapers (if any) as the IRBA considers appropriate, -

We believe this is too prescriptive. It does not envisage, for example, web publication. We believe this should be left to the discretion of the IRBA to publish in whatever manner it deems fit.

(i) the name of the person concerned and, where that person is an individual who at any relevant time was associated as auditor with a firm, the name of that firm;

This seems a little convoluted. If as we suspect 'person' is intended to include a jurisdic person, such as a firm (or else why has it been used instead of individual), then why is it necessary to make separate reference to the firm, here. Also, we would like to be able to publish the name of the firm without the name of the individual if appropriate.

(ii) the details of the punishment so imposed; and

(iii) ~~concise~~ **[appropriate]** details of the finding pursuant to which the punishment was imposed.

What exactly will be permitted in publication, particularly as there is an increasing desire for fairly detailed (quite the opposite of concise) reasons why the particular sanction was imposed, to be published. In our experience, the lighter the punishment, the more detail as to why it was imposed is required. The cost of publishing in a national newspaper is prohibitive and so one would need to be concise. Not necessarily so with other forms of publication which are frequently more appropriate, in any event.

(4) Whenever –

(a) any punishment imposed under section 30(7) consists of, or includes, a monetary penalty, or

(b) an order as to costs has been made under subsection (1) or subsection (2),

the amount thereof shall be recoverable by the IRBA from the person concerned, and any amount so recovered shall be paid into the funds of the IRBA**.**

CHAPTER VI

OFFENCES

False statements in connection with audits

32. (1) A registered auditor who, for the purposes of, or in connection with, the audit of any financial statement, knowingly or recklessly expresses any opinion or makes any report or other statement which is false in a material particular shall be guilty of an offence.

(2) Where the auditor conducting an audit is a firm, subsection (1) applies to the member of the firm conducting the audit; but nothing in this subsection prevents the taking of disciplinary action under Chapter V ~~in respect of~~ **[against]** the firm concerned, in addition to or instead of the individual auditor conducting the audit.

(3) A person convicted of an offence under this section is liable to a fine or to imprisonment for a term not exceeding ten years or both.

Offences relating to disciplinary hearings

33. (1) Subject to section 30(4), a person is guilty of an offence if -

(a) having been duly summoned under section 30, the person fails, without sufficient cause, to attend at the time and place specified in the summons, or to remain in attendance until excused from further attendance by the Tribunal President or, as the case may be, the chairperson of the disciplinary committee; or

(b) having been called under section 30(2)(b), the person refuses to be sworn or to affirm as a witness or fails without sufficient cause to answer fully and satisfactorily to the best of the person's knowledge and belief all questions lawfully put concerning the subject of the hearing; or

(c) having been called under section 30(2)(b) and having possession, custody or control of, any book, document or thing refuses to produce it when required to do so.

(2) A witness before the disciplinary tribunal or a disciplinary committee who, having been duly sworn or having made an affirmation, gives a false answer to any question lawfully put to the witness or makes a false statement on any matter, knowing the answer or statement to be false, is guilty of an offence.

(3) Any person who wilfully hinders any person acting in the capacity of a member of the disciplinary tribunal or of a disciplinary committee in the exercise of any power conferred upon that person by or under section 30, is guilty of an offence.

(4) A person convicted of an offence under this section is liable to a fine to be prescribed by the Minister by regulation from time to time.

This is the first reference to 'regulation' – we are not certain to what regulations this refers.

Offences relating to practice by auditors

It appears from §12, relating to firms, that MDPs are not envisaged either at the large firm level (for example lawyer or IT partners) or the small firm level (for example bookkeeper or

CFA partners) – should thus fee-sharing with non-registered people not be an offence, as at present.

34. (1) Except with the consent of the IRBA, a registered auditor may not knowingly employ in connection with the practice of the auditor -

(a) any person who is for the time being suspended from practice under any provision of this Act; or

We are not certain the Bill in fact makes provision for this. The current Act specifically provides for suspension both as a competent punishment (see our comment under §5(1)), and in a separate section dealing with subsequent mental disability.

(b) any person who is no longer registered as an auditor as a result of the name of the person having been removed from the register or being disqualified from registration by virtue of a finding of misconduct and punishment imposed on the person under section 30(7)***;*** or

(c) any person who applied for registration under this Act, but whose application was declined by the IRBA under section 9(3) or (4).

(2) A registered auditor may not -

(a) practise under a firm name or title unless on every letterhead bearing the firm name or title there appears -

(i) the auditor's present first names, or initials, and surname; or

(ii) in the case of a partnership, at least the present first names, or initials, and surnames of the managing partners or, if there are no managing partners, of the active partners or, where such a letterhead is used only by a branch office of the partnership, at least the present first names, or initials, and surnames of the managing partners at that branch office or, if there are no such resident partners, of the partners assigned to that branch office; or

(iii) in the case of a company, the names of the directors as required by section 171 of the Companies Act 1973 (Act No.61 of 1973);

(b) sign any account, statement, report or other document which purports to represent work performed by the auditor, unless the work was performed by the auditor, or under the personal supervision or direction of the auditor, or by or under the personal supervision or directions of one or more of the partners, co-directors or co-members *why reference to member* of the auditor, as the case may be;

(c) perform professional work in connection with any matter which is the subject of a dispute or litigation on condition that payment for the work may be made only if the dispute or litigation ends favourably for the party for whom the work is performed;

(d) engage in practice during any period in respect of which the auditor has been suspended from practice; or

(e) engage in practice without carrying such professional indemnity or fidelity insurance as ~~is~~ **[might have]** been determined by the IRBA.

But the empowering section does not give it this power

(3) The provisions of subsection (2)(b) do not apply in respect of work -

(a) performed on behalf of a registered auditor by another registered auditor; or

(b) performed by another registered auditor ("the previous auditor") in a partially completed assignment which the previous auditor was unable to complete as a result of death, disability or other fortuitous cause not under the control of the previous auditor, and which assignment the successor auditor is engaged to complete; or

(c) performed outside the Republic by a member of a professional body of auditors outside the Republic whose status, in the opinion of the IRBA, is at least equal to that demanded by the IRBA for the profession in the Republic.

(4) Nothing in subsection (2)(b) prevents any registered auditor from signing the firm name or title *what's this* under which the auditor practises.

(5) For the purposes of section 171 of the Companies Act, 1973 (names of directors to be stated on trade catalogues, **[trade circulars and business letters]** ~~etc~~), in relation to such a company as is described in section 12(1), it shall be regarded as sufficient if a catalogue, circular or letter to which the said section 171 applies and which emanates from a branch office of any company contains the required particulars in respect of directors attached to that branch office.

(6) Any person who -

(a) contravenes or fails to comply with any provision of this section, or

(b) contravenes subsection (1) or subsection (4) of section 11,

is guilty of an offence and on conviction liable to a fine or in default of payment, to imprisonment not exceeding five years, or to both such fine and such imprisonment.

(7) Any person who -

(a) contravenes any provision of subsections (3) and (5) of section 24; or

(b) obstructs or hinders any person in the performance of functions under that section,

is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding one year.

If MDPs are not to be permitted, then it must be an offence to share professional fees (or some such term, which must be defined) with non RAs.

These punishments do appear to be a little excessive.

CHAPTER VII

PROCEDURAL AND FINANCIAL MATTERS, AND REPORTING

Appointment of members of Boards

35. (1) Any appointment by the Minister to the IRBA or by the IRBA to the SBE or the SBA must indicate the date on which it takes effect, as well as its duration, but no such appointment may be for a period of more than three years (without prejudice *is this the right word* to the possibility of re-appointment for a further period or periods).

(2) Any office-holder entitled to nominate a person to the SBA does so according to the rules and procedures applicable to the office-holder

Does this mean or add anything – how else could they nominate.

(3) When the need for an appointment to the SBA arises and the appointment depends on a nomination, the SBA must provide the IRBA with the name of the nominated person, the name of any nominated alternate and any further relevant information, whereupon the IRBA must in writing appoint the nominated persons within three months of receipt of the nominations.

(4) Where any person's appointment to the SBA is dependent on a nomination, the IRBA may make the duration of the appointment terminable on notice given by the nominating office-holder to the IRBA withdrawing the nomination.

(5) Immediately upon receipt from the Minister of a notice of an appointment, the IRBA must publish a notice in the *Gazette*, containing the name of the appointed person and the person's alternate, the date from which the appointment takes effect and the duration of the appointment.

(6) Immediately upon receipt from the IRBA of a notice of an appointment, the SBE or the SBA, as the case may be, must publish a notice in the *Gazette*, containing the name of the appointed person and the person's alternate, the date from which the appointment takes effect and the duration of the appointment.

(7) A member of a Board whose term has expired continues to serve until a successor has been appointed.

Alternate members

It should be made clear at the outset that it is not compulsory to appoint alternates to each committee or board member. In fact, in most cases it is not practical at all. The only situation where alternates might have a real role to play is in the IRBA where, presumably, the Minister will appoint members from various constituencies – but even here in §3(3) it is optional for the Minister to appoint alternates. (Again the absence of the peremptory auxiliary in §36(1) compounds the uncertainty).

36. (1) The procedure for the appointment to a Board of an alternate member is the same as that for the appointment of the relevant principal member.

(2) Subject to subsection (3), an alternate member may attend a meeting of a Board only where the principal member is absent, and is at any such meeting entitled to participate in all the proceedings and to vote in such proceedings.

(3) The Chairperson of a Board may, at *no possessive pronoun at all* discretion, allow an alternate member to attend a meeting of the Board even though the principal member is present at the meeting but, in such a case, the alternate may not vote in any of the proceedings.

Disqualification from membership

37. No person may serve as a member or alternate member of a Board if ~~the~~ **[that]** person *or simply 'they'-*

(a) is an unrehabilitated insolvent;

(b) has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, corruption, money-laundering, forgery (including uttering a forged document) perjury, or any other offence **[of]** which ~~involves~~ dishonesty **[is an element]**; or

(c) is for the time being declared by a competent court to be of unsound mind or unable to manage ~~the person's~~ **[their]** own affairs.

Vacancies

38 (1) A member of a Board vacates membership -

(a) by resigning in writing to the Board;

(b) by becoming subject to any of the disqualifications referred to in section 37;

(c) when the member is replaced by the office-holder by whom the member was nominated; or

(d) when the member has ~~without leave~~ been absent **[without leave]** from two consecutive meetings of the Board.

(2) A vacancy is filled by the Minister or, as the case may be, the IRBA in accordance with the procedure set out in section 35.

Chairperson and deputy chairperson

39. (1) At the first meeting of the SBE or, as the case may be, the SBA after it is appointed, the members of the Board must elect a chairperson and a deputy chairperson from their own ranks.

(2) If neither the chairperson nor the deputy-chairperson is available at a properly constituted meeting of a Board, the members present must elect from their own ranks a chairperson for the meeting concerned.

Meetings

40. (1) A Board meets as often as circumstances require, but at least twice every year, and at such time and place as ~~the Board~~ **[it]** may from time to time determine.

(2) The chairperson of a Board may at any time convene a special meeting at a time and place determined by the chairperson.

(3) Upon a written request signed by not less than three members of a Board, the chairperson concerned must convene a special meeting to be held within three weeks after the receipt of the request, and the meeting shall take place at a time and place determined by the chairperson.

(4) A Board must determine rules of procedure for the conduct of its meetings and the meetings of its committees, including rules on the taking of decisions in written form when the relevant members are not gathered at a meeting.

(5) At any meeting of a Board a majority of the members of the Board constitutes a quorum.

(6) Every member of a Board, including the chairperson, has one vote.

(7) In the event of an equality of votes, the chairperson of the meeting has a second or casting vote.

Decisions

41. (1) A decision of a Board requires the support of a majority of the members of the Board at a meeting where a quorum for the meeting is present but, where a meeting is not held, subject to any rules made under section 40(4)

(2) No decision taken by or act authorised by a Board is invalid by reason only of –

(a) a casual vacancy; or

(b) the fact that any person not entitled to sit or act as a member of the Board participated in the meeting or the act at the time the decision was taken or the act was authorised, if the members of the Board who were present and acted at the time followed the required procedure for decisions.

(3) The IRBA may not amend, withdraw or interfere with decisions taken by the SBE or the SBA on issues of standards of professional competence and ethics.

Other entrenched sections appear at §5(5). Should they not all be together

Committees

42. (1) A Board may establish one or more committees to assist it in the performance of its functions and duties, and it may at any time dissolve or reconstitute any such committee.

(2) A committee consists of as many persons as the Board considers necessary.

(3) The members of a committee may be appointed from outside the ranks of the Board and the auditing profession.

(4) A Board may assign to a committee such of its powers as it may deem fit, excluding the power to make rules but, subject to section 5(5), is not divested of any power so assigned, and may amend or withdraw any such power.

(5) The provisions of sections 36, 37, 39, 40, 41, and 45 relating to alternate members, disqualification from membership, chairperson and deputy chairperson, meetings, decisions and reimbursement for expenses, respectively, shall with the necessary changes apply in respect of any committee.

(6) Unless clearly inappropriate, any reference in this Act to a Board in relation to the exercise of a power assigned to a committee, shall be construed as including a reference to that committee

Funds and accounting

43. (1) The funds of the IRBA consist of fees and monies payable and received under this Act.

(2) All monies received by the IRBA must be paid into one or more accounts kept at one or more registered financial institutions.

(3) The IRBA must ensure that full and correct account is kept of all amounts received and expended.

(4) The IRBA must ensure that annual financial statements are prepared in accordance with Statements of Generally Accepted Accounting Practice issued by the Accounting Practices Board or its successor body as at the last day of every calendar year.

Statements of GAAP have been superseded by International Financial Reporting Standards (IFRSs)

(5) After any such annual financial statements have been audited by a registered auditor appointed by the IRBA, copies of the audited statements must be made available to all members of the IRBA, all accredited professional bodies, and to any other person on request.

§43(5) implies that it is not necessary to send the IRBA's annual financial statements (effectively its Annual Report) to RAs, except on request; they should be entitled to receive copies of the audited AFS that they are funding.

Funding of committees and ~~related~~ Boards

44. The IRBA must provide funding to its committees and **[the other]** ~~its related~~ Boards, in such a way that the committees and ~~related~~ Boards can perform their functions effectively.

Remuneration and re-imbursement for expenses

45. (1) To such extent as may be determined by the Minister, a member and an alternate member of a Board may be reimbursed for expenses reasonably incurred by them.

This we support, but are not certain that it requires Ministerial determination.

(2) A member of a Board who is not in full-time employment of the State shall be paid such remuneration as may be determined by the Minister (in addition to any reimbursement due to the member under subsection (1)).

We have grave reservations about this. It has severe cost implications. The only exception which might be permitted is for the firm or company of a Board member to be briefed to perform certain professional work on behalf of the Board, which should be permissible.(but not necessarily in the Bill). Perhaps the intention is to pay Board members (IRBA, SBE & SBA) who are not State employees fees for attending meetings, since they are now to be drawn (in the majority) from outside the profession. However, this creates an expensive and undesirable precedent which should certainly not extend to members of other committees. It becomes even more cloudy when one tries to understand what remuneration is intended for

the Disciplinary Tribunal (and especially the President) - is this a committee? The only person who is paid under the current dispensation is the chairman of the Disciplinary Committee (a senior lawyer).

(3) Any remuneration or reimbursement payable under this section shall be paid out of funds provided by the IRBA.

This should not need ministerial approval. The Board might well wish to remunerate someone their time, in an extraordinary situation, and do it quickly. Ministerial consent can take a very long time. Similarly, re-imbursement should be allowed as matter of course or people are simply not going to serve, if they are obliged to pay their own travel.

There does not appear to be an empowering clause for this - is one needed?

CHAPTER VIII

OVERSIGHT AND REPORTING

Oversight by Government through Treasury

46. (1) The Government of South Africa, acting through the National Treasury, shall have a general oversight of the carrying out by the IRBA of its powers and duties under this Act.

(2) The Minister may appoint persons to investigate on behalf of the Treasury any matter ~~with respect to~~ **[regarding]** the functioning of the IRBA; and the persons so appointed may, if the Minister thinks it appropriate, include ~~persons who are~~ qualified *what exactly does this mean* ~~as~~ auditors; but all persons who are so appointed shall be persons who are independent of any Board or committee established by or under this Act.

Reports to Minister

47. (1) The IRBA must, within three months after the close of its financial year, submit to the Minister a report on its affairs and functions during that financial year, which report must include the following:

(a) a copy of its audited annual financial statements;

(b) an overview of the activities of the IRBA, of its committees and its related Boards, and

(c) an account of the extent to which the objectives set by this Act had been achieved in that financial year by the IRBA, its committees and related Boards.

§47(1)(c) imposes perhaps a more onerous obligation than was intended. The various objectives are quite broad; laudable but difficult to articulate concepts, in a few instances. They are a vision, to some extent, rather than a blue print. We are not certain how one reports on an annual basis on these issues.

This section refers to performance information, similar to the requirements in the PFMA. It is really the setting of specific targets and reporting on the achievement thereof. For example, in the public sector, such performance information would include the Department of housing's targets in respect of number of houses to be built in a particular financial year. In our case, it might be more difficult as we cannot predict the number of cases which will be heard, standards issued or students who will pass. It is therefore an onerous requirement.

(2) The Minister must table the report in Parliament as soon as possible after its receipt.

(3) In addition to the **[financial year end]** report ~~with respect to a financial year~~ required by subsection (1), the IRBA must, at the end of the third, sixth and ninth month of each of its financial years, submit to the Minister a report giving such information concerning its finances and operations, disciplinary proceedings and other matters as the Minister may determine.

See comment above

CHAPTER IX

MISCELLANEOUS MATTERS

Temporary control of firm by IRBA

48. (1) Where a firm *this usually happens with sole practitioners, who are currently excluded from the definition of firm* which is a registered auditor is for any reason whatsoever unable to carry out its professional duties, and -

(a) reasonable attempts have failed to make arrangements with another registered auditor to come to the assistance of the firm, or

(b) where it will not be in the public interest to expect any such arrangements to be made,

the IRBA may take temporary control, or appoint a registered auditor to take temporary control of the firm concerned, and must by notice in the *Gazette* give notice thereof.

(2) The IRBA must determine conditions and set guidelines for the temporary control of a firm under this section and may prescribe any matter relating to that temporary control which it deems necessary or appropriate.

(3) Temporary control of a firm must be terminated as soon as is reasonably ~~practicable~~ **[practical]**, and the IRBA must by notice in the *Gazette* give notice of the termination.

(4) This section applies in relation to a registered auditor who is in practice as an individual practitioner as it applies in relation to a firm and references to a firm shall be construed accordingly.

We do not believe it is necessary to provide so much detail on this concept. We believe the single line in §13(1)(o) of the existing Act is more than adequate. It reads as follows: "The Board may take control or appoint a person to take control of the practice of any accountant and auditor in circumstances which the board deems to be in the public interest" It has only been necessary twice in the last 17 years to gain access to the premises, or take into custody the files, of an RA (one who had absconded and one who was in jail) and it proved not to be a major issue, but certainly we had to act really quickly. Devoting an entire section to this situation and having to publish in the Gazette and set guidelines is overstating the case somewhat, and will act as a deterrent to intervention. We suggest that this section is deleted in its entirety and replaced by a simple empowering clause in §5.

Indemnity

49. Neither a Board or any member or employee thereof, nor a committee of a Board or any member thereof, nor the Public Accountants' and Auditors' Board or any member thereof, incurs any liability in respect of any act or omission performed *how do you perform an omission* in good faith under or by virtue of a provision in this Act, unless that performance was grossly negligent.

Rules and administrative matters

50. (1) With the appropriate consent, the IRBA, the SBE and SBA, may each make rules –

(a) on any matter which is under this Act required or permitted to be prescribed by the relevant Board; and

(b) on any matter which the relevant Board deems necessary or expedient to be prescribed for the better achieving of the objects of the Board and of this Act;

and a Board may make different rules ~~as regards~~ **[regarding]** different persons, firms or bodies, or different matters relevant to the functions of the Board under this Act, provided that no such differentiation ~~may amount~~ **[amounts]** to unfair discrimination.

(2) The appropriate consent referred to in subsection (1) is –

(a) in the case of the IRBA, the consent of the Minister; and

(b) in the case of the SBE and the SBA, the consent of the IRBA

(3) Rules made under this section must be published in the *Gazette*.

(4) Subject to the provisions of this Act, where a Board takes any decision or any other step of an administrative nature under this Act which affects the rights and duties of any other person, Board or body, the Board concerned must –

(a) publish or otherwise make known the nature and effect thereof in a written, printed or electronic manner to any affected persons, Boards and bodies in a manner designed to ensure that they acquire full knowledge thereof; and

(b) comply with any applicable requirement of just administrative action, including the furnishing of reasons for discretionary decisions imposed by, under or by virtue of any law.

This is presumably in response to the Administrative Justice Act – but we are not quite sure what types of rights are envisaged here. This needs to be clarified. This section on publication media is better worded than the one in §31(3). We suggest that subsection (4) be deleted as unnecessary.

Repeal of laws

51. (1) The laws mentioned in the Schedule are hereby, subject to section 52, repealed to the extent set out in the third column of that Schedule.

(2) With effect from the date on which this subsection come into force, and in respect of damages suffered by any person as a result of an act or omission of a registered auditor committed on or after that date, the reference in section 1 of the Apportionment of Damages Act, 1956 (Act No 34 of 1956), to "damage" shall be construed as a reference also to damage caused by a breach, by the auditor, of a term of a contract concluded with the auditor.

This is most welcome.

Transitional provisions

52. (1) For the purposes of constituting the first SBE and SBA, the Minister and the Public Accountants' and Auditors' Board are hereby empowered to perform all administrative functions.

(2) Any unfinished business of the Public Accountants' and Auditors' Board on the date of promulgation of this Act, including new business to be dealt with after that date, which is dealt with by that Board under a provision of the Public Accountants' and Auditors' Act, 1991, and

for which no corresponding provision appears in this Act, must be completed by that Board during the period between that date and the commencement date:

Provided –

(a) that proceedings in connection with an application for registration as accountant and auditor still pending on the commencement date shall, with effect from that date, be deemed to be proceedings for registration as an auditor contemplated in this Act and shall further be administered, considered and completed by the IRBA; and

(b) that in the case of any such proceedings, and in the case of any new applications for registration as an auditor received by the IRBA, the requirements for registration set out in section 15(2) and (4) of the Public Accountants' and Auditors' Act, 1991, shall notwithstanding the repeal of that Act and any inconsistency with a provision of this Act, be deemed to be still applicable until a date notified by the Minister by notice in the *Gazette*.

(3) Any person who immediately prior to the commencement date was registered as an accountant and auditor under the Public Accountants' and Auditors' Act, 1991, is deemed to be registered as an auditor under this Act.

How does this impact a person who was eligible for registration under the old dispensation (that is, the PAAB's QE and Articles) but was not actually registered at the time of the coming into effect of the new Act. Presumably he does not require any sort of 'certification' from an institute as envisaged in §9(2)(a)? We believe that the 'grandfather' situation needs to be addressed specifically.

(4) The following provisions shall apply for the purpose of securing continuity -

(a) The Examination Regulations as contained in the *Manual of Information: Guidelines for Registered Accountants and Auditors*, issued by the Public Accountants' and Auditors' Board as at the commencement date, shall be deemed to have been prescribed by the IRBA in respect of registered auditors.

Note that the Examination Regulations are published in the Candidates guide to the Public Practice Examination and not the Manual of Information as stated above.

(b) The Disciplinary Regulations as contained in the said *Manual* (excluding paragraphs 2.1 to 2.1.21, inclusive, thereof) shall be deemed to have been prescribed by the IRBA.

(c) The Code of Professional Conduct as contained in the said *Manual* (including paragraphs 1 to 2.1.21, inclusive, of the Disciplinary Regulations) shall be deemed to have been prescribed by the ISBE.

(d) The Circulars as contained in the said *Manual* shall be deemed to have been issued by the IRBA.

(e) The Recognition Model as contained in the said Manual, shall be deemed to have been prescribed by the IRBA.

(5) The Education and Training Committee of the Public Accountants' and Auditors' Board, as it exists immediately prior to the commencement date, is deemed to be a committee

established by the IRBA under section 5(4) to determine the requirements for the development and achievement of professional competence.

(6) Any committee performing, immediately prior to the commencement date, an investigating or disciplinary function under the Public Accountants' and Auditors' Act, 1991, remains validly constituted and must complete its functions after that date as if this Act has not been passed.

(7) The auditing pronouncements issued by the Public Accountants' and Auditors' Board are, with effect from the commencement date, deemed to have been issued by the SBA.

(8) Subject to the provisions of this Act, on and after the commencement date, anything which was done under a provision of a law repealed by section 51 and which could be done under a corresponding provision of this Act, is deemed to have been done under that corresponding provision.

(9) A reference in any of the preceding subsections to the commencement date is a reference to the date that subsection comes into force.

Short title and commencement

53. (1) This Act is called the Auditing Profession Act, 2004.

(2) This Act shall come into force on a date to be determined by the President by notice in the *Gazette*; and different dates may be ~~so~~ determined in relation to different provisions and for different purposes.

SCHEDULE

LAWS REPEALED

(Section 52)

No and year of Act	Short title	Extent of repeal
Act 80 of 1991	Public Accountants' and Auditors; Act, 1991	The repeal of the whole.
Act 70 of 1993	Public Accountants' and Auditors' Amendment Act. 1993	The repeal of the whole.
Act 23 of 1995	Public Accountants' and Auditors' Amendment Act, 1995	The repeal of the whole.
Act 88 of 1996	Abolition of Restrictions on the Jurisdiction of Courts Act, 1996	The repeal of section 107.
Act 5 of 1997	Public Accountants' and Auditors' Amendment Act, 1997	The repeal of the whole.
Act 47 of 1997	Public Service Laws Amendment Act, 1997	The repeal of section 35 to the extent to which it refers to the Public Accountants' and Auditors' Act, 1991.

Should the relevant section of the Apportionment of Damages Act not be referred to?

Editing protocol:

For ease of reading we have prepared two versions of **part two** of this comment document. One is in colour which makes for easier reading, but is not mono-colour-printer-friendly. Accordingly, we have prepared a second version, specifically for printing on non-colour printers.

What follows from pages 89 to 147 is the **full colour version** in which:

- Words in red indicate our comments and edits.
- ~~Crossing through~~ indicates our suggested deletions
- We have underlined all section references for convenience of cross-checking.
- All defined words are in blue except for references to auditor which are in green.
- Peremptory auxiliary verbs such as 'shall' and 'may' and also instances where peremptory verbs have been omitted have been hi-lited in yellow.
- Words indicating that something has to be done such as 'determined' and 'prescribed' have been hi-lited in green.
- In the trend to avoid any reference to gender by using the third person singular, various different conventions have been attempted. These are hi-lited in blue.

FULL COLOUR VERSION

PART 2: DETAILED COMMENT

Please note that any reference by us in the body of this document to 'RA' is to a registered auditor, as envisaged in the Bill, and to 'RAA' is to a registered accountant and auditor as referred to in the existing Act

Reference to the 'PAA Act', 'the existing Act', or 'the current legislation' is to the Public Accountants' and Auditors' Act 80 of 1991.

DRAFT AUDITING PROFESSION BILL, 2004

BILL

To regulate the auditing profession; to make provision for an Independent Regulatory Board for Auditors, a Standard-Setting Board for Auditor Ethics and a Standard-Setting Board for Auditing; to replace the Public Accountants' and Auditors' Act, 1991, as amended, and to provide for incidental matters.

PREAMBLE

SINCE the auditing profession in South Africa is in agreement that -

The primary responsibility of the profession is to protect and promote the public interest through services rendered;

To offer auditing services or services of a public accountant a person must be registered with, and subject to the jurisdiction of, an Independent Regulatory Board for Auditors;

The Independent Regulatory Board for Auditors must ensure that every registered auditor in South Africa is appropriately qualified and held accountable for their professional conduct, adherence to ethical practices, and the implementation of standards comparable to international standards;

The use of the word "qualification" in the context of the bill is inappropriate. Registered auditors are awarded a practice licence once they have demonstrated that they are professionally competent (i.e. a DESIGNATION, as opposed to a qualification). Therefore, the IRBA must "ensure that every registered auditor in South Africa is professionally competent and held accountable …".

As noted in our general comments, the Bill does not provide the necessary mechanisms for the IRBA to be able to ensure that every registered auditor is professionally competent. This is a serious concern.

The IRBA must have the power to monitor the education and training of programmes of professional bodies on a continuous basis, to cancel the accreditation of professional bodies that do not meet its requirements. In addition, the IRBA must be able to set and administer the final examination that grants the licence to practice. Passing this examination must be a requirement for registration in terms of §9.

All disciplinary proceedings brought against a registered auditor by the Independent Regulatory Board for Auditors should be conducted by independent persons, suitably skilled and qualified to ensure a fair hearing and an appropriate sanction for any wrong doing by auditors;

The Government of South Africa, represented by the National Treasury, should perform an oversight function with regard to the operations, decisions, and objectives of the Independent Regulatory Board for Auditors;

AND SINCE the efficient fulfilment of its role in the South African economy and society requires a fundamental reorganisation of the profession,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:

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CHAPTER I

DEFINITIONS AND ESTABLISHMENT OF BOARDS

Definitions

1. In this Act, unless the context otherwise indicates -

"accreditation", in relation to a professional body, means accreditation under sections 6 and 7 by the IRBA and **"accrediting", "accredit",** and **"accredited",** respectively, have corresponding meanings;

"audit" means the examination of –

(a) financial statements with the objective of expressing an opinion as to their fairness and as to their compliance with an identified financial reporting framework and any applicable statutory requirements, or

(b) financial and other information, prepared in accordance with appropriate criteria, with the objective of expressing an opinion on the financial information.

"auditing pronouncements" include Statements of South African Auditing Standards, practice statements, guides and circulars developed or adopted and issued by the SBA;

These technical definitions are crucial and we suggest rather
"audit" means the examination of:

(c) financial statements with the objective of expressing an opinion with a high level of assurance as to their fairness and as to their compliance with an identified financial reporting framework and any applicable statutory requirements, or
(d) financial and other information, prepared in accordance with identified suitable criteria, with the objective of expressing an opinion with a high or moderate level of assurance on the financial and other information.

"auditing pronouncements" are those standards, practice statements, guidelines and circulars developed or adopted and issued by the SBA and which the auditor is obligated to comply with in the performance of an audit.

"Board" means one of the Boards described in section 2;

"company" has the same meaning as in the Companies Act 1973 (Act No. 61 of 1973);

"ensure", where it appears in a provision of this Act, means to take all reasonably necessary and expedient steps in order that the clear objectives of the provision can be achieved;

"firm" means a partnership or company such as is described in paragraphs (a) and (b) of section 12(1);

This should be expanded to include a sole practitioner

§12 deals with the registration of firms as auditors. As mentioned elsewhere, we assume that the reason for this was to bring firms within the disciplinary net of the

IRBA. We have indicated that there is a simpler way of doing this, namely to compel the IRBA to maintain a register of firms, and by defining 'firm' as follows:

"firm" means a registered auditor, a number of registered auditors in partnership or a company referred to in section 12(3), and registered as such in terms of section 5(1)(c);

In addition, the concept of 'firm' is important to accommodate the new, additional, type of practice review, which is a review of the firm.

"IFAC" means the International Federation of Accountants and, in relation to IFAC, any reference to a successor body is a reference to a body equivalent to IFAC which is recognised internationally;

"IRBA" means the Independent Regulatory Board for Auditors established under section 2(1);

"**the Minister**" means the Minister of Finance;

"NQF" means the National Qualifications Framework approved by the Minister of Education for the registration of national standards and qualifications under the South African Qualifications Authority Act 1995 (Act No.58 of 1995);

Perhaps the word **'person'** has been used (as defined in the Interpretation Act) specifically to include a jurisdic person – such as a firm. However sometimes 'member of the public', or 'individual', or some other word is used instead. This might be deliberate. Depending on the intention of the drafters, it might be helpful to define 'person'.

"practice", in relation to an auditor means the practice of the auditor who holds out to be qualified, and where required, registered, and places professional services at the disposal of the public for reward;

This is a crucial definition as it is the lynchpin for the prosecution of people who hold out as auditors, when they are not - something we view in an extremely serious light. We submit that it is essential that we refer only to the practice of a registered auditor. We are not here concerned with other 'auditors'. The confusion is compounded by the use of the term 'qualified auditor'. Historically we have been very clear that 'auditor' is not a qualification. To the extent that it might be perceived as such, registration was an essential part of this 'qualification'. Unless there is some reason for the present wording, which we have failed to grasp, we would prefer

"practice", means the practice of a registered auditor'

"prescribe" means prescribe by rule; and "prescribed" and "prescribing" have corresponding meanings;

'Prescribe' means by rule, and 'rule means a rule under section 50, and section 50 says it must be published in the Gazette. The definition of 'publish' in the definitions section however, allows a discretion to publish in the Gazette or elsewhere. Is it really necessary that everything which has been 'prescribed' – and there are many – to have to be published in the Gazette. Bear in mind also that section 50 requires any publication by the IRBA to be approved by the Minister – which could be time consuming.

"professional body" means a body of, or representing, auditors or both accountants and auditors;

"Public Accountants' and Auditors' Board" and "PAAB" means the board established under the Public Accountants' and Auditors' Act, 1991(Act No. 80 of 1991);

"publish" means to publish in the ~~Government~~ Gazette, or in any official publication dealing with the auditing profession and distributed or circulated on a national basis to members of that profession; and "publishing" and "published" have corresponding meanings;

We are not certain what is envisaged by this definition in the context of §19(2), regarding publication of auditing pronouncements. Due to their enormous volume, auditing pronouncements are currently published on our website and are distributed by SAICA, at a fee, electronically on CD, and in the students' handbook.

The above definition envisages that the full pronouncement must be reproduced in the Gazette (or in a publication such as Maneo, or the Manual). This is not really practical.

As this is one of the few instances where publication is required for something which has been developed and not prescribed, and hence publication in the Gazette is not compulsory, we would prefer the definition to include electronic publication as an option.

"**registered auditor**" means a~~n individual~~ person ~~or firm~~ registered as such ~~an auditor~~ with the IRBA;

"rule" means a rule made under section 50 by a Board; and

"SBA" means the Standard-Setting Board for Auditing referred to in section 2(2)(b);

"SBE" means the Standard-Setting Board for Auditor Ethics referred to in section 2(2)(a);

"Statements of South African Auditing Standards" mean statements of generally accepted auditing standards developed and issued by the SBA.

This definition no longer required if our suggested definition of 'auditing pronouncements' finds favour.

Regulatory and ~~other~~ subsidiary bodies for the regulation of the auditing profession

2. (1) This Act establishes a juristic person known as the Independent Regulatory Board for Auditors (IRBA) for the regulation of the auditing profession.

(2) This Act also provides for the appointment of the following subsidiary Boards, namely -

(a) the Standard-Setting Board for Auditor Ethics (SBE); and

(b) the Standard-Setting Board for Auditing (SBA).

(3) The SBE and the SBA shall pursue their objectives, exercise their powers, and carry out their duties according to the provisions of this Act and shall be accountable to the IRBA for what they do.

CHAPTER II

INDEPENDENT REGULATORY BOARD FOR AUDITORS,

ACCREDITATION AND REGISTRATION

IRBA

IRBA: composition and succession issues ~~to property etc~~.

3. (1) The IRBA shall consist of not more than ten members who shall be appointed by the Minister from among persons with suitable qualifications or experience.

(2) In the making of appointments under subsection (1), the Minister must secure that, disregarding any temporary vacancy in its membership, not more than two-fifths of the members of the IRBA are registered auditors.

(3) The Minister shall appoint a member of the IRBA as the chairperson and another as the deputy chairperson and may appoint an alternate member for every member of the IRBA appointed under subsection (1).

Is it envisaged that the Minister has complete discretion as to what constitutes 'suitable qualifications or experience'?

What happens if the Minister, for whatever reason, simply fails to make the appointment? We suggest the inclusion of the words 'who shall be' in §3(1)

We believe there should there be some parameters for the Minister to follow in making these appointments to the Board to ensure the Board is representative of the stakeholders. However, we also believe that once appointed, the Board members act independently. Although appointed from various interest groups (we assume), they should not be seen to be representatives of those constituencies but rather as acting in their own right, in the general public interest.

(4) The Minister may appoint an official of the Treasury as an additional member of the IRBA, and a member so appointed shall have the same rights as members appointed under subsection (1) other than a right to vote.

(5) If the IRBA considers it necessary for its proper functioning, it may invite one or more suitable persons to serve in an advisory capacity, which persons may participate in all the proceedings of the IRBA, but may not vote.

(6) On and after the date this section comes into force, the IRBA shall be regarded as the successor to the Public Accountants' and Auditors' Board ~~(in this subsection and subsection (7) referred to as "the PAAB")~~ [see our suggested amendment to the definition] and, in order to give effect to that succession, -

(a) all property which, immediately before the date this section comes into force, was property of the PAAB shall, by virtue of this Act (and without any assignment or other form of transfer or the need for any consent) become on that date property of the IRBA;

(b) all rights or obligations of the PAAB (whether contractual or otherwise) which were in existence immediately before the date this section comes into force and do not fall within paragraph (a) shall become, on that date, rights or obligations of the IRBA and, in their application or construction, be treated for all purposes as if the PAAB and the IRBA were the same person in law; and

(c) ~~as respects~~ regarding anything done or falling to be done, or any other thing occurring, on or after the date this section comes into force, any reference in an existing document to the PAAB shall be construed as or, as the case may require, as including a reference to the IRBA;

and in this subsection "property" means property of any description, whether real or personal, movable or immovable, and wherever situated.

(7) For the purposes only of section 197 of the Labour Relations Act 1995 (Act No.66 of 1995) (protection of staff on transfer of employment) the provisions of subsection (6) shall be regarded as the transfer of a business from the PAAB to the IRBA.

IRBA: objectives

The concept of 'objectives' being legislated (rather than being in a preamble or a Mission Statement) is a novel one for us. We are concerned that open ended and unrealistic potential liability might flow from this.

4. The IRBA shall have the following objectives:

(a) to protect the public interest in the Republic through services rendered by auditors;

We suggest this wording is harmonised with the wording in the preamble

(b) to oversee the SBE in the promotion and maintenance of internationally comparable standards of professional ethics by registered auditors;

(c) to oversee the SBA in the development and maintenance of internationally comparable auditing standards in the Republic;

(d) to implement appropriate standards of qualification in the auditing profession;

Again the use of the word "qualification" in this context is incorrect. (Refer to comments under the Preamble).

The use of the verb "implement" is incorrect and inconsistent. It appears to be the responsibility of the accredited bodies **to implement** education and training programmes for auditors - refer to §6(4)(a). It is the responsibility of the IRBA to monitor these bodies to ensure that what they have implemented meets the requirements of the IRBA, and to then set the final entrance examination of professional competence as per §5(1)(b) - refer to our earlier comments in **D2** relating to incoherent requirements.

We recommend that this objective be replaced with something more relevant and measurable; for example: "to ensure the maintenance of appropriate and consistent standards of education and training for candidates for the auditing profession".

(e) to ensure disciplinary action under this Act;

(f) to maintain a registration system and a register [why split this – a register implies a system] for registered auditors and registered firms [see comment later]; and

(g) to liaise with all accredited professional bodies on matters of common interest.

IRBA: powers and duties

We would expect to see certain specific powers here – please refer to our comment in **G** in this regard. These are:

1. The power to accredit a professional body as contemplated in §s 6 and 7?

The IRBA must have the power to partially accredit a professional body that meets some but not all of its requirements. Refer to our earlier comments in **D** in this regard. This is essential to ensure that there is a continuous supply of competent auditors.

2. The power to de-accredit (cancel) a professional body that fails to meet the accreditation requirements as contemplated in §7(5)?

3. The power to carry out such procedures as are necessary to monitor, on a continuous basis, the extent to which the accredited professional bodies continue to meet the accreditation requirements of the IRBA? We believe that the wording in §6(4) ought to more explicitly give the IRBA the power to monitor its requirements on a continual basis.

What will happen if the accreditation of a professional body either lapses or is cancelled and there is no other accredited body? The implication is that there will be no new registered auditors. Therefore, it is essential that the IRBA have the power, in such instances, to establish the necessary education, training and assessment programmes that will ensure a continuous supply of auditors. Refer to our comments under section 5 in this regard as well as to our general comments relating to education and training made earlier in **D**.

4. The power to prescribe the examinations that the IRBA is empowered to set and administer in terms of §5(1)(b)?

5. (1) The IRBA must carry out the obligations imposed on it by this Act, and may do anything which is reasonable or necessary to achieve its objectives and, in accordance with the provisions of this Act, may do all or any of the following -

We are a little concerned that the way in which the general right is stated, and specific, listed and numbered, rights follow, might give rise to a challenge in terms of the *expressio unius est exclusio alterius* rule. As mentioned frequently in this document, we prefer not to invite challenge. The 'catch all' clauses in the existing Act are specifically numbered and come at the end, as follows:

"13. General powers of board.—(1) The board may—

(p) take any steps which it may consider expedient for the maintenance of the integrity, the enhancement of the status and the maintenance and improvement of the standards of professional qualifications and of the competence, of accountants and auditors, and encourage research in connection with problems relating to any matter affecting the accounting profession;

(q) generally exercise the powers and perform the functions and duties specified in this Act."

Is there any advantage in maintaining similar wording and a similar style?

(a) take any steps to promote the integrity of the auditing profession, including –

(i) the investigation of alleged improper conduct, the conduct of disciplinary hearings and the prescribing of guidelines for punishments to be imposed;

This section appears to confuse the concepts of **competent sanctions** which need to be set out somewhere (as in the existing §13(h)) and **sentencing guidelines**, which is what are dealt with here.

The existing §13(h) has served us well, although we do envisage the need for these competent sanctions to be expanded. It reads as follows

"The board may—

prescribe conduct constituting improper conduct by an accountant and auditor or other person registered in terms of this Act, the manner in which an allegation or a charge of improper conduct shall be investigated and, if necessary, heard, and the punishments, including a caution, a reprimand, a fine, suspension from practice for such period as the board may determine, removal from the register or qualified or temporary or permanent disqualification for registration, which may be imposed by the board after such an investigation or hearing;"

and should be incorporated, with expanded sanctions, into this section

We make this point again at the beginning of Chapter 5, and in **E**.

(ii) the declaration, in the prescribed manner and with the consent of the Minister, of any particular business practice to be undesirable for all or a particular category of auditors, or any specific auditor; and

(iii) making application to any court of competent jurisdiction for an order prohibiting any person not registered as an auditor from committing or continuing to commit any act reserved for a registered auditor under this Act, or in conflict with any law, and which the IRBA has reason to believe is to be committed or is being committed by the person concerned;

Where are the appropriate criminal sanctions to be found for a person who holds out as an auditor, or is it intended that the IRBA must apply to court (which will have severe cost implications) each time it becomes aware of a person 'holding out'? We are not certain that all aspects relating to the prohibition on 'holding out', and the consequences thereof, have been fully thought through.

(b) ensure the standards of professional qualifications, competence, ethics and service of registered auditors, including the setting and administration of examinations;

The use of the word "ensure" is incoherent in the light of the remaining aspects of the Bill. Notwithstanding the definition of 'ensure' (and we are not convinced that the average reader would look in the definitions to understand the use of this perfectly ordinary word), how does the Bill provide the IRBA with the statutory powers to **ensure** these things?

Here is another example of the indiscriminate use of terminology. As explained under the Preamble, the IRBA does not award a qualification but rather issues a practising licence i.e. a designation. The designation implies that a person is professionally competent. Therefore, this should read: " ensure the standards of professional competence, ethics …".

Reference to examinations should be made more explicit: " including the prescription, setting and administration of competence examinations required for registration under section 9(2)."

We are pleased that the Bill empowers the IRBA to set and administer examinations. Refer to our earlier comment in this regard. However, this power is meaningless in the context of the

rest of the Bill. As it is not a requirement for registration that a person must pass such an examination, what therefore is the purpose of this power? Refer to comments under §9(2)(a).

In our view it would also be preferable if the provisions of this section were modified to make reference to the powers to conduct practice review. (See our expanded comments under §24). Under the old §13(p) it is clear that the board has the power to take any steps which it considers expedient for "the maintenance and improvement of these standards of professional qualification" with the clear connotation of ongoing obligations which continue after registration. In our view §5(1)(b) could be modified to include the words "...and the conduct and administration of practice reviews" at the end of the subsection.

(c) establish and maintain a registration system and a register for registered auditors [what is the distinction that was envisaged], which register must at all reasonable times be open to inspection by any member of the public;

As indicated in our comments under the proposed definition of 'firm', we believe that the IRBA should also be compelled to maintain a register of firms (sole practitioners, partnerships or Incs). We believe it would then be a fairly simple process to institute disciplinary action against a 'registered firm' – rather than try and incorporate a firm in the definition of auditor.

We suggest that §5(1)(c) be substituted as follows:

(c) establish and maintain separate registers in respect of registered auditors and registered firms, which registers must at all reasonable times be open to inspection by any person;

(d) determine and levy –

(i) registration and other fees payable by registered auditors;

(ii) any other fees which are to be payable under this Act; and

(iii) charges for any services provided to registered auditors by the IRBA, the SBA or the SBE;

Refer to our remarks about funding in **C**. If the IRBA is not to receive funding from sources outside of the profession, it must at least have the power to levy accredited bodies, in addition to members. The accreditation of professional bodies will require resources. The process of accreditation is likely to be rigorous and therefore costly. It is also a good marketing tool for these bodies. Surely the relevant professional body should be required to pay an initial accreditation fee as well as an annual fee for continued accreditation. The IRBA should therefore determine and levy an initial accreditation fee and an annual "subscription". §5(d)(ii) is simply not adequate to cover such an important levy.

Refer to our remarks about funding in **C** also for the global implications of not receiving independent funding, as these are serious.

(e) determine the need for, and the nature and level of indemnity or fidelity insurance to be carried by, a registered auditor;

This must be amplified to allow for this to be prescribed, if it is found to be needed. We are not certain that it is appropriate for the IRBA to determine the level of indemnity, as this will differ for each auditor depending on their professional risk profile.

(f) determine what portion of any fee is payable in respect of any part of a year and the date on which the fee or portion thereof becomes payable;

(g) establish, oversee, fund and provide secretarial and administrative support for the SBE and the SBA;

(h) participate in the activities of bodies –

(i) registered under the South African Qualifications Authority Act 1995 (Act No.58 of 1995) and responsible for establishing education and training standards or qualifications in respect of the auditing and accounting profession; or

(ii) accredited under that Act and responsible for monitoring and auditing achievements under standards or qualifications referred to in subparagraph (i);

The word “auditing” in the above sub-section should be replaced with “quality assuring”, otherwise there will be confusion between auditing as defined for the purposes of this Act, and ensuring compliance. It is not clear, however, what is meant by ‘achievements’ – is the intention to refer to quality assuring compliance?

(i) participate in the activities of bodies whose main purpose is the development and setting of auditing standards or regulation of auditors, whether national or international;

(j) employ persons to assist it in the performance of its functions;

(k) hire, purchase or otherwise acquire movable or immovable property for the effective performance of its functions, and let, sell or otherwise dispose of such property;

(m) borrow or raise money in accordance with the Public Finance Management Act, 1999 (No.1 of 1999);

Is it definite that the IRBA will be listed as a public entity in terms of the PFMA –particularly if it receives no funding from the fiscus?

(n) invest its funds in a manner it deems fit;

(o) publish a journal or any other publication, and issue newsletters and circulars containing information and guidelines relating to the auditing profession; and

(p) encourage, and in appropriate circumstances finance, education in connection with, and research into any matter affecting, the auditing profession.

Are its powers adequate for the IRBA to carry out it duties as a supervisory body in terms of FICA. The relevant section in that legislation reads

Responsibility for supervision of accountable institutions

46. (1) Each supervisory body is responsible for supervising compliance with the provisions of this Chapter by each accountable institution regulated or supervised by it.

(2) In pursuing its objectives the IRBA may formally or informally co-operate with or assist any other organisation with similar objectives, whether inside or outside the Republic.

(3) The IRBA must at all times, on its own or in co-operation with any other appropriate body, ensure the existence of clear and appropriate requirements to be complied with by any person wishing to register as an auditor.

What is intended with this clause? The requirements for registration are clearly set out in §9. That section does not provide the IRBA with the discretion to determine any other additional requirements that must be met for registration purposes, other than those listed in the Bill under §9.

What other appropriate body is contemplated here? Accredited professional bodies certify their members for having met the education and training requirements. The use of the word "co-operate" when dealing with registration requirements is also vague and subjective. We suggest that this section be replaced with: "The IRBA must at all times ensure that the education, training and examination requirements to be met for registration purposes are clear and appropriate".

(4) The IRBA must establish a committee to develop and set the requirements for the development and achievement of professional competence for registered auditors contemplated in this Act.

We presume that "registered auditors" in the above clause actually refers to those persons "wishing to register as auditors".

This wording is again inconsistent with the remainder of the Bill. This committee should "develop, set and **monitor** the education and training requirements to be complied with by professional bodies seeking to achieve and retain accreditation as contemplated in section 6(4)(a)". In addition, this committee should set the competence examination required for registration in terms of our suggestion under §9.

(5) Where the IRBA has assigned the power to a committee –

(a) to decide whether or not a person may be registered as an auditor, or

(b) to inquire into any case of alleged improper conduct, and to impose any punishment in respect thereof,

the IRBA may not overrule any such action or decision by the committee concerned.

It would appear as if the only 'entrenched' powers (ie delegations which may not be interfered with or overuled by the Board concerned) are registration (which is not usually in a committee) and discipline. These have been substantially reduced, and we are not certain if this was intended.

The IRBA may set and administer its own examination (refer §5((1)(b). The power to decide who passes or fails that examination must be entrenched.

Accreditation of professional bodies

Requirements for accreditation

6. (1) In order to qualify for accreditation, a professional body must meet the requirements of subsection (4) of this section.

The requirements listed in subsection (4) are insufficient in themselves to avoid subjectivity. The IRBA may believe that the requirements are not met while the applicant body may believe that they do meet the requirements. Thus, the IRBA should be able to flesh out these requirements in the form of regulations, which describe in detail its interpretation of the requirements listed in subsection (4)

~~(2) At the commencement of its functions by the IRBA, any body which at that time is accredited to by the PAAB shall be considered to be a professional body accredited by the IRBA.~~

The previous DAPB envisaged SAICA as the initial accredited body, recognising the reality of the situation. However this did not come to pass and the PAAB has thus not accredited any professional body; in fact, the current legislation governing the PAAB does not provide for this right or duty at all. Currently, the PAAB **recognises** the education and training programmes of account bodies (such as SAICA). Persons who complete the **recognised** programmes have access to the PAAB's final entrance examination. This section should either be deleted, alternatively SAICA should be mentioned by name.

(3) Any professional body to which subsection (2) applies must within one year after the commencement of the IRBA's functions provide proof to the IRBA that it complies with the requirements for accreditation listed in subsection (4).

(4) In order to be accredited, a professional body must demonstrate, to the satisfaction of the IRBA that –

(a) it complies with the requirements for the development and achievement of professional competence determined by the IRBA;

There is a fundamental inconsistency in the wording of this accreditation requirement in relation to the section dealing with the registration of individuals as auditors (§(9)). Professional bodies must "certify their members that they have **"complied with the education and training requirements for a registered auditor"** (§9(2)(a)). But in order to be accredited, the professional body must **"comply with the requirements for the development and achievement of professional competence".**

We suggest that this accreditation requirement be reworded to state: "…its relevant programmes comply with the education and training requirements for a registered auditor". This then makes sense in the context of §9(2)(a), dealing with registration.

(b) its qualifications are registered at and meet the requirements of the applicable level of the NQF as determined by the IRBA;

(c) it has appropriate mechanisms for ensuring that its members participate in continuing professional education;

The internationally acceptable terminology should be continuous professional **DEVELOPMENT** and not EDUCATION, as the latter is more restrictive in terms of the type of learning interventions that qualify for CPD.

(d) it has mechanisms to ensure that its members are disciplined where appropriate;

(e) it is, and is likely to continue to be financially and operationally viable for the foreseeable future;

(f) it keeps a register of its members in the form determined by the IRBA;

(g) it has in place appropriate programmes and structures to ensure that it is actively endeavouring to achieve the objective of being representative of all sectors of the South African population; and

(h) it meets any other requirement determined by the IRBA from time to time.

Accreditation of professional bodies

7. (1) In order to obtain accreditation, a professional body must apply in writing to the IRBA.

(2) If the IRBA is satisfied that the professional body complies with its requirements for accreditation, it must grant the application.

We presume that in order to satisfy itself as to the extent to which the accreditation requirements are met, the IRBA may carry out any procedures and request any information which it believes are necessary in the circumstances.

(3) In order to retain its accreditation, an accredited professional body must at least once a year at a time to be determined by the IRBA, satisfy the IRBA that it continues to comply with the requirements for accreditation listed in section 6(4).

How exactly is it envisaged that the professional body demonstrates that it continues to meet the requirements? If it is simply by way of a written report, this would not be sufficient for the IRBA to place assurance on. Surely, the regulator should have the power to monitor, on a continual basis, in any manner it deems appropriate, the extent to which the accreditation requirements continue to be met

(4) The accreditation of an accredited professional body ~~lapses~~ shall lapse if it ceases to exist and the IRBA has confirmed that the professional body is no longer in existence.

(5) The IRBA must cancel the accreditation by it of a professional body if that body -

(a) ceases to comply with any requirement for accreditation; or

(b) fails to pay any annual fee or portion thereof within three months after it has become payable as mentioned in section 5(1)(f).

Provided that, prior to the cancellation, the IRBA must give notice in writing to the professional body concerned of its intention to cancel and the reasons on which it is based, and afford the professional body a period, of not less than 21 days and not more than 30 days, in which to submit grounds for not proceeding to cancellation.

What will happen if the accreditation of a professional body either lapses or is cancelled and there is no other accredited body? The implication is that there will be no new registered auditors. Therefore, it is essential that the IRBA have the power, in such instances, to establish the necessary education and training programmes that will ensure a continuous supply of auditors. Refer to our comments under §5 in this regard

(6) If the IRBA considers that cancellation of accreditation would not be in the best interests of the public or the auditing profession or the members of a professional body referred to in subsection (5), it may extend the accreditation of the professional body concerned on such conditions as, after consultation with the Minister, it considers appropriate.

(7) A professional body may by written notice to the IRBA renounce its accreditation.

(8) A professional body which is no longer accredited is not relieved of any outstanding financial obligation towards the IRBA.

Effect of termination of accreditation on members who are registered auditors

8. (1) The fact that the accreditation of a professional body has ended as mentioned in section 7(4) or (5), does not affect the registration under this Act of any auditor who was a member of the professional body at the time of the termination.

(2) Auditors referred to in subsection (1) must within six months of the termination of the accreditation, or within such other period as may be determined by the IRBA, provide written proof to the IRBA that they have become members of another accredited professional body.

(3) On the termination of the accreditation of a professional body, the IRBA must inform all the registered auditors who were members at the time of the termination, and advise them of their duty to provide the IRBA with the written proof referred to in subsection (2).

(4) Where a registered auditor referred to in subsection (1) fails to comply with the requirements of this section, the IRBA may cancel the registration of the auditor under this Act:

Provided that, prior to the cancellation, the IRBA must give notice in writing to the auditor concerned of its intention to cancel and the reasons on which it is based, and afford the auditor a period, of not less than 21 days and not more than 30 days, in which to submit grounds for not proceeding to cancellation.

No-where does the Bill state that ongoing membership of an accredited professional body (colloquially referred to as an Institute), is required. It is required at the time of initial registration (perhaps) but not thereafter. One of the underlying assumptions of the 'accreditation model' was that of continuing Institute membership (hence provisions such as those in this section. We are aware that this is a sensitive issue, and assume that the drafters have weighed the delicate constitutional issue of balancing the public's right to a properly regulated profession, against the individual's right to the exercise of his or her profession without continuing compulsory membership of an Institute (by definition a voluntary association), in addition to licensing by a regulator. This is particularly relevant if there is not a variety of Institutes to choose from.

Registration of individual auditors and firms

This section requires very careful drafting, and more consideration needs to be given to the following specific, but related, issues:

- Initial registration
- Subsequent re-registration (after lapsing or after removal)
- Lapsing (as distinct from voluntary removal)
- Payment of outstanding fees prior to re-registration
- Institute membership
- Residence
- 'Grandfather' situations

Registration of ~~individuals as~~ auditors

9. (1) An individual who wishes to be registered as an auditor must lodge with the IRBA a written application for registration, accompanied by the required fee and such information as the IRBA may require.

Is there a reason why the term 'required fee' is used? §11(2) refers to a 'determined' fee.

(2) If, after considering an application, the IRBA is satisfied that the applicant -

(a) has been certified by a professional body accredited by the IRBA, and of which the applicant is a member, to have complied with the education and training requirements for a registered auditor,

We are unsure of the precise implications of §9(2)(a). Who determines these requirements, and how. Does the professional body determine what is good enough for an auditor, or does the IRBA have a say? In any event, we suggest the deletion of the words 'of which the applicant is a member' as the applicant might be a member of a different body to that through which he or she 'qualified'.

In terms of the above, a person wishing to register as an auditor need not pass any examination, yet §5(1)(b) specifically assigns the IRBA the right to set and administer this examination. What therefore is the purpose of this right? We believe that the regulator should be the final determinant of competence and that all registered auditors should pass the same competence examination. (Refer to our introductory comments where the need for this is expanded.)

Therefore, we believe that the following additional registration requirement is essential: Requirement (e) – *pass the competence examination prescribed by the IRBA for registration purposes from time to time*. The inclusion of such a clause would then make sense in the context of §5(1)(b) wherein the IRBA is assigned the power to set and administer examinations.

It appears as if Institute membership is required only at the time of initial registration.

(b) is a fit and proper person,

We are not certain if this section envisages competence as part of the 'fit and proper' test. Perhaps it should be more specific. We are concerned about 'grandfathering' for current registered members as well as those who currently would qualify for registration under PAAB, but who have not sought registration. Should the section provide for a person to have passed the regulator's prescribed exam, unless exempted.

(c) is not less than 21 years of age, and

(d) where a period of more than five years has elapsed between the date of complying with the education and training requirements for a registered auditor and the date of the application, has the necessary competence to practise as an auditor,

Does this mean 5 years since both education and training were completed? Is it sufficient if the applicant passed the equivalent of the old QE 8 years previously, but finished training within the 5 year period? The section should also be amplified to include the words 'or since the applicant was last registered with the IRBA, or its predecessor, the PAAB' to cater for people who qualified long ago, but were until recently registered.

This section does not clearly state what is required.

We note that residence requirement which was previously a part of this section, has been deleted. We are not certain if the implications of this have been thought through. Effectively, a person may now conduct a South African audit practice in another country, or purport to run a local practice, but be resident abroad. We have had a few such instances in the recent past which have been most undesirable – particularly as usually unqualified staff are running the office, clients are unable to get hold of their auditor, and practice review becomes a farce. We do not believe that auditing is a profession ideally conducted from a distance. We believe the residence requirement should be re-introduced.

then, subject to subsections (3) and (4), the IRBA must register the applicant, enter the applicant's name in the register [what is the difference], and issue to the applicant a certificate of registration in the prescribed form.

We are trying to move away from fancy certificates – a 'prescribed form' is really not necessary. We would prefer to issue a 'licence' on an annual basis. It would do away with the necessity of trying to retrieve old certificates, as 'licences' would be valid until the end of the registration year only.

(3) The IRBA may not register an individual if the individual –

We believe this should say 'must not' or 'shall not', whichever term is ultimately decided on, to preclude any hint of a discretion

(a) has at any time been removed from an office of trust on account of misconduct related to a discharge of that office;

This is very vague, possibly unenforceable. Removed by whom? At what level? After what sort of hearing? What sort of misconduct?

(b) has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery, uttering a forged document, perjury, an offence under the Corruption Act, 1992 (Act No. 94 of 1992), or any offence involving dishonesty, and has been sentenced therefor to imprisonment without the option of a fine or to a fine exceeding such an amount as may be prescribed by the Minister from time to time;

What are the implications if an otherwise refusable application is received prior to the Minister prescribing the amount? We suggest that an amount be fixed in the Bill, subject to the Minister's right to amend it.

(c) is for the time being declared by a competent court to be of unsound mind or unable to manage the person's own affairs; or

(d) is disqualified from registration under a disciplinary punishment imposed under this Act.

(4) The IRBA may decline to register a person who is an unrehabilitated insolvent or who has entered into a compromise with creditors or who has been provisionally sequestrated.

We believe it might still be necessary to include a section here to provide for re-registrations, as follows:

'(5) Subject to the provisions of subsection (3), the IRBA shall on application to it register as an auditor any person who was previously registered as an auditor in terms of this Act, if the person is a member of an accredited professional body and has paid the prescribed registration fees and any arrear annual fees.'

Do we not want to promote the use of the designation 'RA' (Registered Auditor)? – If we do, it will be advisable to include a section such as :

'(6) Any person who is registered in terms of this section as an auditor may affix the abbreviation "RA" after their name.'

10. ~~Cancellation and removal~~ Termination of registration

You do not remove registration – you remove a person's name from the register. Cancellation and lapsing are two distinct types of removal. Cancellation is either specifically requested or ordered – usually by the person themself, or by a disciplinary committee. Lapsing occurs automatically on the happening of a readily and independently ascertainable fact, ascertainable at a given time, the obvious examples under the existing Act being the failure to pay fees by a certain date, or the termination of residence.

We suggest that the two concepts should not be confused, and that lapsing be re-introduced, certainly for non-payment of fees, and possibly for non-compliance with a minimum residence requirement.

(1) Subject to subsection (3), the IRBA must cancel the registration of any registered auditor -

(a) who subsequent to registration becomes subject to any of the disqualifications mentioned in paragraphs (a) to (d) of section *9(3)*;

(b) whose registration was made in error or on information subsequently proved to be false; or

(c) who prior to registration has been guilty of conduct by reason of which the auditor is in the opinion of the IRBA not a fit and proper person to be registered.

(2) Subject to subsection (3), the IRBA may cancel the registration of any registered auditor –

(a) whose estate is sequestrated or provisionally sequestrated or who enters into a compromise with creditors;

(b) who fails to pay any fee or portion thereof after it has become payable as mentioned in section 5(1)(f); or

It is simply not feasible to apply one's mind to each and every case of a person who has not paid their fees by due date. There are 100s. In addition, it has taken many years of stringent application of the existing lapsing provisions to persuade people to pay their fees on time. The current Act grants a three month period during which fees must be paid and, if not, the practitioner lapses automatically and must apply for re-registration

Under the new proposal, we would need to send out accounts much earlier (which has budget implications) in order for fees to be paid by 1 January. Thereafter we would need to apply our minds to each person who had not paid, as to whether they should be stuck off or not, and then write to them in terms of §10(3). The existing section works extremely well and promotes disciplined payment. We see no reason to tinker with it, and suggest that §10(2)(b) be substituted with the existing §15(7) which states

"The registration of any person as an accountant and auditor shall lapse if such person—

(b) fails to pay any annual fees or portion thereof prescribed or determined under section 13(1)(e) and payable by him within three months after such fees or portion thereof become due or within such further period as the board may in any particular case allow."

and which should appear after the cancellation section.

Striking from the register is a serious act, with potentially far reaching implications for the practitioner and his clients, and should be clearly understood as such.

(c) who ceases to be a member of an accredited professional body.

(3) Prior to cancelling a registration under subsection (1) or (2), the IRBA must give notice in writing to the auditor concerned of its intention to cancel and the reasons on which it is based, and afford the auditor a period, of not less than 21 days and not more than 30 days, in which to submit grounds for not proceeding to cancellation.

Previous drafts made it compulsory to cancel the registration of people who did not pay (as is the current position). We do not know what caused the drafters to change their minds and make it discretionary. In our understanding, a discretion has to be exercised specifically in each case – one cannot have a blanket decision to 'lapse' people. We would need to consider each case. See our further comments in this regard under §10(2)(b).

(4) At the written request of a registered auditor, the IRBA must remove the auditor's name from the register, but the removal does not affect any liability incurred by the auditor prior to the date of the removal.

(5) The fact that an auditor's registration has been cancelled or removed [not correct – see comment above], does not prevent the IRBA from instituting disciplinary proceedings for conduct committed prior to the cancellation or removal.

(6) As soon as ~~practicable~~ practical after an auditor's registration has been cancelled or removed the IRBA shall publish notice of the cancellation or removal, specifying the auditor's name.

Practice by registered auditor

This section appears to re-introduce the concept of an 'auditor in practice' which confuses the issue.

Perhaps this section should, in order not to conflict with section 188 of the Constitution and various sections of the Auditor General Act and other legislation, contain an exception similar to §14(b)(iv) of the present Act, regarding the Auditor General.

11. (1) No person except a registered auditor may engage in practice or hold out as an auditor in practice or use the description "certified public accountant" or any other designation or description likely to create the impression of being an auditor in practice.

It does not seem correct to list only this specific prohibited designation. Laws should be general. Should it not at least be expanded, possibly to '… or use any description such as registered auditor, public auditor, certified public auditor, certified practicing accountant, certified public accountant, auditor in public practice or any other designation……..'

In any event, we believe that this section is more clearly stated in the positive, and we believe it should go much further, to include the current prohibition on accepting work which where the appointment of an auditor, or an audit, is required by law.

(2) In order to engage in practice, a registered auditor must have paid all applicable fees determined by the IRBA under this Act.

We believe this section confuses the concepts of registration and practice. One must be registered in order to practice. Registration presupposes the payment of applicable fees. The fact that a person is registered does not automatically mean they are in practice. With this in mind, we believe this subsection would better read:

'(1) Only a registered auditor may -

'(a) engage in practice, or hold out as a registered auditor, or use any designation(including any designation prescribed by the Minister in terms of this section as being misleading) or do anything else, likely to cause the impression that such a person is a registered auditor; or

(b) accept an appointment or act as an auditor where the appointment of an auditor or the performance of an audit is required in terms of any law, or otherwise.

We are pleased to note that the section does away with all the existing provisos currently included in §14, and seeks to ensure that only an auditor may audit. It is essential that other legislation does not erode this in the manner of eg the Sectional Titles Act, which provides that an audit may be conducted by an accounting officer. Otherwise you have the situation where a garden club must be audited by an auditor, but a complex (or a school) may be 'audited' by an accounting officer.

(3) Nothing in this section prohibits any person in the employment of an entity from using the description "internal auditor" in relation to that entity.

How does this affect other composite descriptions such as 'forensic auditor'. Are we protecting the term 'registered auditor' or 'auditor' or what exactly. We do not believe this subsection is necessary.

(4) A registered auditor who is not in practice as an individual practitioner may practise as a member of a firm only if, by virtue of section 12, the firm is itself a registered auditor.

No. We firmly believe that it is better to deal with firms and registered auditors as two separate issues, otherwise the concepts become muddled and unclear. Firms do also include sole practitioners, and this should be acknowledged. We believe there should be a register of auditors and a register of firms. If the reason for this inclusion of firms in the definition of auditor is to bring firms per se into the disciplinary net, as we suspect it is, there are more elegant ways to achieve this. How do firms lapse if they are 'auditors'?

Also it implies that one must have two registrations – one personally and one for your firm (provided your firm is a partnership or an inc). The present situation relies on the offences clause to compel RAs to furnish firm details, and we compile our unofficial firm register from that information. The current trend of firms merging and 'de-merging' on an ongoing basis (and a number of them not giving us the details) will make this sort of provision very hard to enforce.

This might be an opportunity to address the issue of firms practicing under the same name, which causes so much confusion.

12. ~~Registration of firms which are partnerships or companies~~ Form of practice

We disagree with the structure of this section. We believe that individuals are auditors (and should be registered as such) and that they may practise through different types of firms, as listed. [Has the time come to make reference to limited liability partnerships?]

This concept is supported by the commentary on the Treasury website on the proposed amendments to the Companies Act. Paragraph 2.3.4 thereof states:

'The appointment of a firm as the auditor ..... will be valid only if in addition to the name of the firm, the appointment specifies the name of the individual registered auditor ... that will undertake the audit.' This emphasises the importance of the individual.

We appreciate that it is competent to appoint firms as auditors in terms of the Companies Act, but we believe that the manner in which this type of appointment is permitted is adequately handled in the Companies Act.

We believe this section should be amended as follows:

(1) ~~The only firms which may become registered auditors are –~~

(1) A registered auditor may practise

(a) by himself, or

(b) in partnership with other registered auditors, or

(c) in a ~~companies~~ company which ~~comply~~ complies with subsection (3).

At present, the Office of the Auditor General is registered as a firm because it offers training. We are not sure if a similar registration must be entertained or not – as presumably the IRBA will not be regulating training any longer.

(2) On an application by a firm which is a partnership fulfilling the conditions in subsection (1)~~(a)~~(b), the IRBA must register the firm ~~as a registered auditor~~.

(3) The IRBA must register a firm which is a company ~~as a registered auditor~~ if, and only if, the following conditions are fulfilled -

(a) the company is incorporated and registered as a company under the Companies Act, 1973, with a share capital, and its memorandum of association provides that its directors and past directors shall be liable jointly and severally, together with the company, for its debts and liabilities contracted during their periods of office;

(b) only individuals who are registered auditors are ~~members~~ or shareholders of the company;

The word 'member' is not used anywhere else in the section – is it needed?

(c) every shareholder of the company is a director thereof, and every director is a shareholder except that -

(i) where a shareholder of the company dies, the estate of the shareholder may continue to hold the relevant shares for a period of six months as from the date of the death or for such longer period as the IRBA may approve; or

(ii) where a shareholder of the company ceases to conform to any requirement of paragraph (b), the shareholder may continue to hold the relevant shares for a period of six months as from the date on which the shareholder ceases so to conform or for such longer period as the IRBA may approve;

(d) no voting rights attach to any share contemplated in paragraph (c)(i) and (ii), and a shareholder mentioned in that paragraph does not act as a director of the company or receive, directly or indirectly, any director's fees or remuneration or participate in the income of or profits earned by the company in its business;

(e) the articles of association of the company provide that the company may, without confirmation by a court, purchase on such terms as it may deem expedient any shares held in it;

(f) shares purchased under paragraph (e) are available for allotment in accordance with the company's articles of association;

(g) the company's articles of association provide, notwithstanding any provision to the contrary in any other law, that a member of the company may not appoint a person who is not a member of the company to attend or speak or vote on behalf of the member at any meeting of the company; and

(h) the company ceases to engage in practice immediately ~~when~~ that it ceases to conform to paragraph (a) or (b):

We are not sure to what extent the drafters have considered and rejected the possibility of multi disciplinary practices ('MDP')s. If MDPs **are** to be permitted (and in practice they are a reality), then another clause should be considered, such as:

(i) each shareholder must obtain professional indemnity insurance, or provide other financial guarantees, of such a type as the RBA may from time to time prescribe, to cover such liability which he or she may incur as a result of negligence or recklessness in the conduct of such practice.

Provided that, at a time when paragraph (c)(i) or (c)(ii) applies, the provisions of paragraph (h) do not apply to the company by reason only of the fact that a shareholder of the company is the estate of a deceased shareholder or, as the case may be, has ceased to be a registered auditor.

(4) In its application to a company which is a registered auditor, section 20 of the Companies Act, 1973 (qualifications to be a private company), has effect with the omission of subsection (1)(b) (limit on number of members).

Information to be furnished by registered firm and auditor

See comments above. This section will also read more easily if firms and auditors (individuals) are dealt with separately.

13. (1) Every firm which is a registered auditor must notify the IRBA of any change in its name, composition or address not later than 30 days after the date on which the change takes place.

(2) Within fourteen days of the receipt of a written request from any person for whom a registered auditor or the auditor's firm acts as auditor or who proposes to appoint the registered auditor or the auditor's firm as its auditor, the registered auditor must furnish the following information -

(a) every firm name or title under which the auditor or the firm practises;

(b) the place or places of business of all firms in which the auditor is in practice as a partner, director or member;

(c) the full names of all (if any) of the auditor’s partners, co-directors or co-~~members~~ shareholders; and

(d) the auditor’s first names or initials, surname, ordinary business address and ordinary residential address.

(3) In subsection (2) "the auditor's firm" means the partnership or company of which the auditor is a partner or member; and where, under that subsection, a registered auditor is required to supply information relating to a firm, the supply of the information in the name of the firm shall be a sufficient compliance (so far as relates to the details of the firm) with the obligation of the individual auditor.

This sub-section could be done away with if the two concepts are separated.

CHAPTER III

FUNCTIONS AND COMPOSITION OF SUBSIDIARY BOARDS

Standard-Setting Board for Auditor Ethics: composition

14. (1) The SBE consists of the following members appointed by the IRBA:

(a) five registered auditors;

(b) three persons [see our previous comment on the interchangeable use of the words 'person' and 'individual'] representing users of audit services;

(c) one person representing an exchange which is the holder of a stock exchange licence issued under the Stock Exchange Control Act, 1985 (No.1 of 1985); and

(d) one advocate or attorney with at least ten years' experience in the practice of law.

(2) The IRBA must appoint an alternate member for every member of the SBE.

Should this be an obligation, or just a right – we suggest it should be a right., in other words, substitute 'must' with 'may'.

SBE: objectives

15. The SBE has the following objectives in respect of registered auditors:

(a) to promote high and internationally comparable standards of professional ethics;

(b) to promote an understanding of professional ethics amongst professional bodies accredited by the IRBA and registered auditors; and users

(c) to ensure that rules and guidelines for professional ethics developed by the SBE are responsive to the expectations of business, financial institutions and the general public.

SBE: powers and duties

16. The SBE may do anything that is reasonable or necessary to achieve its objectives, and in particular must –

Is this where we will prescribe rules of procedure for hearings, and punishments?
See §50

(a) determine what constitutes improper conduct by registered auditors by developing rules and guidelines for professional ethics and prescribing a code of professional conduct**;**

Is it really necessary to develop rules and guidelines, then determine what constitutes improper conduct, and then prescribe (with the attendant publication) a Code?

Should the section not rather state that the SBE shall prescribe disciplinary rules which set out procedure, and shall prescribe a Code of Conduct which sets out what constitutes unprofessional conduct. Developing and determining these happens as part of arriving at what should be prescribed.

(b) interact on any matter relating to its objectives with professional bodies and any other body or organ of state (as defined in section 239 of the Constitution) with an interest in the auditing profession;

(c) provide advice to registered auditors on matters of professional ethics and conduct;

(d) refer to the IRBA any matter which it considers should be dealt with under Chapter V as an allegation of improper conduct; and

(e) provide such information as may be required by the IRBA to enable it to perform its functions under section *47*.

Standard-Setting Board for Auditing: composition

17. (1) The SBA consists of the following members appointed by the IRBA:

(a) five registered auditors;

(b) one person with experience of business;

(c) the incumbent of the office of the Auditor-General, or a person nominated by that incumbent;

(d) the incumbent of the office of Executive Officer of the Financial Services Board, or a person nominated by that incumbent;

(e) one person with experience in the teaching of auditing at a University recognised or established under the Higher Education Act, 1997 (Act No.101 of 1997); and

(f) the incumbent of the office of the Registrar of Banks, or a person nominated by that incumbent.

(2) The IRBA must appoint an alternate member for every member of the SBA.

We do not believe this should be compulsory. In fact, for reasons of continuity, the SBA does not encourage alternates

SBA: objectives

18. The SBA has the following objectives in respect of registered auditors:

(a) to promote high and internationally comparable auditing standards;

(b) to ensure rules and guidelines for auditing standards developed by the SBA are responsive to the expectations of business, financial institutions and the general public.

SBA: powers and duties

19. (1) The SBA may do anything that is reasonable or necessary to achieve its objectives, and in particular must -

(a) develop and maintain auditing pronouncements;

(b) consider relevant changes in South Africa and internationally by -

(i) monitoring developments by other auditing standard-setting bodies and sharing information where requested; and

(ii) making recommendations on other assurance services that can be provided by registered auditors;

How will these 'recommendations' be given effect to If the SBA recommends that registered auditors can provide a specific service, how does such recommendation get approved/authorised/enforced? The current wording does not give the SBA sufficient powers to do this.

(c) promote and ensure the relevance of auditing pronouncements by -

(i) considering the needs of users of audit and other assurance reports;

(ii) liaising with any committee established by the SBA for this purpose on standards to be maintained by registered auditors and to receive feedback on areas where auditing pronouncements are needed;

(iii) ensuring the greatest possible consistency between such pronouncements and accepted international pronouncements; and

(iv) consulting with professional bodies on the direction and appropriateness of auditing pronouncements;

It must be made clear that these'professional bodies' may not direct the SBA regarding the direction and appropriateness of auditing pronouncements. Our direction is taken from international developments and the needs of users in the various industries (CAG set up to provide inputs here – refer to §(c)(ii) above).

(d) influence the nature of international auditing pronouncements by -

(i) preparing and submitting comment on exposure drafts or discussion papers and replies to questionnaires prepared by the ~~International Auditing Practices Committee~~ International Auditing and Assurance Standards Board of IFAC or a successor body; and

(ii) nominating representatives to committees of the ~~International Auditing Practices Committee~~ International Auditing and Assurance Standards Board of IFAC or a successor body when requested to do so; and

(e) refer to the IRBA any matter which it considers should be dealt with under Chapter V as an allegation of improper conduct.

(2) The SBA must publish all auditing pronouncements.

See comments under definition of 'publish' – this is a classic case for electronic publication.

(3) The SBA must provide such information as may be required by the IRBA to enable it to perform its functions under section 47**.**

CHAPTER IV

POWERS AND DUTIES OF REGISTERED AUDITORS AND REVIEWS BY IRBA

General obligation of registered auditors in relation to audit

20. (1) Unless a registered auditor who is conducting the audit of an entity is satisfied about the criteria specified in subsection (2), the auditor may not, without such qualifications or modifications as may be appropriate in the circumstances, express an opinion to the effect that any financial statement, including any annex thereto, which relates to the entity, fairly represents, in all material respects, the financial position of the entity and the results of its operations and cashflow.

(2) The criteria referred to in subsection (1) are –

(a) that the auditor has carried out the audit free from any restrictions whatsoever and in compliance, so far as applicable, with ~~Statements of South African Auditing Standards~~ auditing pronouncements developed and adopted by the SBA relating to the conduct of the audit; and

(b) that proper accounting records in one of the official languages of the Republic have been kept in connection with the entity in question so as to reflect and explain all its transactions and record all its assets and liabilities correctly and adequately; and

(c) that the auditor has obtained all information, vouchers and other documents which in the auditor's opinion were necessary for the performance of the auditor's duties; and

(d) that the auditor has not had occasion, in the course of the audit or otherwise during the period to which the audit relates, to send a report to the IRBA under section 22(2) relating to a reportable irregularity, or that, if such a report was so sent, the auditor has been able, prior to expressing the opinion referred to in subsection (1), to send to the IRBA a notification under section 22(3) that the auditor has become satisfied that no reportable irregularity has taken place or is taking place.

(3) If a registered auditor or, where the registered auditor is a member of a firm, any other member of that firm was responsible for keeping the books, records or accounts of an entity, the auditor must, in reporting on anything in connection with the business or financial affairs of the entity, indicate that the auditor or that other member of the firm was responsible for keeping those accounting records. This is what happens when a firm is defined as an auditor – it becomes unwieldy.

(4) For the purpose of subsection (3), a person shall not be regarded as responsible for keeping the books, records or accounts of an entity by reason only that that person makes closing entries or assists with any adjusting entries or frames any financial statements or other document from existing records.

Auditor having financial interest in entity excluded from audit

21. (1) A registered auditor may not conduct the audit of any financial statements of an entity (whether as an individual auditor or as a member of a firm) if, at any time during a period to

which those financial statements relate or at any time during the two years ending at the beginning of that period the auditor has or had a financial interest in the entity.

(2) In subsection (1) "financial interest" means a financial interest of any description whatsoever (and whether direct or indirect), other than -

(a) a right to fees or charges earned by the auditor (or the firm of which the auditor is a member) in respect of services**;** or

(b) in the case of an entity which is or includes a pension fund organisation or which provides a collective investment scheme, any interest in the fund or scheme which gives the auditor no greater right to participate in the making of decisions as to the management of the entity than any other member of the fund or scheme.

This section is very restrictive - is this intended? If a registered auditor who is a partner in a firm or is practicing on his own held say one share in a listed company in the two year window period, the individual or his firm would be precluded from taking up an appointment as auditor. Threats to independence are exhaustively covered in the Code of Conduct - do they need to be legislated. Why is financial interest singled out as an independence threat?
Our understanding is that these issues are to be dealt with in the proposed corporate law reform.

(3) In subsection (2)(b), -

(a) "pension fund organisation" has the same meaning as in the Pension Fund Act 1956 (Act No. 24 of 1956); and

(b) "collective investment scheme" has the same meaning as in the Collective Investment Schemes Control Act 2002 (Act No. 45 of 2002).

If we must have sectional definitions, can they not appear consistently at the beginning of the section.

Auditor's duty to report on irregularities

22. (1) In this section –

"management board", in relation to an entity which is a company, means the board of directors of the company and, in relation to any other entity, means the body or individual having control and direction of the business of the entity;

"nominated auditor" means the individual who is for the time being appointed to perform the relevant auditing functions, whether by virtue of being personally appointed as auditor or by virtue of being a member of a firm which is so appointed;

See our comments in **F.**

"reportable irregularity" means any unlawful act or omission committed by any person in the conduct of the management or control of an entity, which -

(a) has caused or is likely to cause financial loss which is material to the entity or to any partner, member, shareholder or creditor of the entity; or

This requires that the auditor consider materiality in relation to parties in respect of whom the auditor has no access to financial information, and it is accordingly incapable of being

implemented. It also has the effect of reducing materiality to that applicable to the most insignificant partner, member, shareholder or creditor, which is inappropriate, and surely cannot have been intended.

(b) is fraudulent or amounts to theft or is otherwise dishonest; or

This requires that irrespective of whether the amount is material or not, acts or omissions which are 'fraudulent' or 'amount to theft' or are 'otherwise dishonest' are reportable. Auditors cannot be expected to make such subjective decisions. If this section is intended to make instances of theft or fraud reportable, it should say so unambiguously, although we submit that such instances will usually be covered, in any event, by the provisions of §22(1)(a). If the section is intended to cover bribery or corruption, as we think it might, then similarly it should say so unambiguously.

In any event, we submit that materiality must be a consideration.

The concept of 'otherwise dishonest' (which is not defined) is simply incapable of interpretation - the potential instances of 'otherwise dishonest' are limitless.

(c) represents a material breach of any fiduciary duty owed by such person to any entity itself or any partner, member, shareholder or creditor of the entity, or under any law applying to the entity or the conduct or management thereof;

This provides that a 'material breach of any fiduciary duty owed' …. to various parties, or 'under any law applying to the entity or the conduct or management thereof' is reportable. No attempt is made to define materiality and it is not clear what is intended by the proposed legislation.

"appropriate regulator", in relation to an entity which is a financial institution, as defined in the Financial Services Board Act 1990 (Act No. 97 of 1990), means the Financial Services Board and, in relation to any other entity regulated by any law, means such regulator or other authority (if any) as appears to the IRBA to be appropriate in relation to the entity.

Why are the FSB and financial institutions isolated? The definition should be more general and encompass all authorities to which the IRBA could report a reportable irregularity, alternatively it should be left out altogether, and a clause similar to the existing §20(5)(c) which reads as follows – be substituted:

"(c) The board may disclose any information supplied to it in terms of paragraph (b) to any attorney-general or the Registrar of Banks or any officer in the public service or any member or creditor of the undertaking concerned or any juristic person of whom the undertaking is a member or who has control over the undertaking or who has the power to take disciplinary steps against the undertaking, or to the committee of any stock exchange on which shares of the undertaking are listed, or, if the board believes it to be in the best interests of the public, to any other person, institution or body."

(2) Where the nominated auditor of an entity is satisfied or has reason to believe that a reportable irregularity has taken place or is taking place in respect of the entity-

(a) the auditor shall, without delay, send a report in writing to the IRBA giving particulars of the irregularity, together with such other information and

particulars as the auditor considers appropriate and stating whether, in the auditor's opinion, it is likely that the irregularity will be rectified within 30 days; and

We do not support this new process. The previous §20(5) required the auditor to send a report to the PAAB only after the auditor had taken reasonable steps and given the client the opportunity to rectify the situation, but was still not satisfied with the outcome.

The Bill now requires the auditor to send such a report before taking any steps to satisfy himself that such a reportable irregularity has not taken place.

This will, without any doubt, result in a huge administrative burden on the IRBA, to no good reason.

It will be extremely difficult for the auditor to arrive at an opinion as to whether the irregularity will be rectified within the 30 day period. It would be far better if the client was first given the opportunity to rectify the situation and for the auditor then to arrive at an opinion as to whether the client's action was reasonable or not. There is no need for the IRBA to be made aware of situations that have been rectified, and if the auditor considers it necessary to bring these to the attention of users of the audit report (which will include the regulator of that client) this can still be included in an emphasis of matter paragraph.

The persuasive value of the threat of reporting, as happens at present when a client is given the opportunity to rectify the irregularity, on a delinquent client, should not be underestimated.

(b) unless the auditor considers it inappropriate in the circumstances of the case, the auditor shall also, without delay, send a copy of the report to the members of the management board of the entity at the same time drawing the attention of the board to the provisions of this section, and requesting all of them, individually or collectively, to acknowledge receipt of the copy of the report.

(3) If, within the period of 30 days after the date of sending the report referred to in subsection (2)(a), the nominated auditor has become satisfied that no reportable irregularity has taken place or is taking place, or that the relevant irregularity has ceased and that adequate steps have been taken for the prevention or recovery of any loss consequent upon it, the auditor must, not later than the expiry of that period of 30 days, send to the IRBA -

(a) notification to that effect, together with such explanatory information and particulars as the auditor ~~may think~~ thinks fit; and

(b) if a copy of the report was sent as mentioned in paragraph (b) of subsection (2), acknowledgements of receipt received from the persons mentioned in that paragraph, and of any replies received from them.

(4) Subject to subsection (5), if the IRBA receives a report under subsection (2)(a) relating to any entity, the IRBA shall, by notice in writing, inform the appropriate regulator of the details of the reportable irregularity to which the report relates and of any other information relevant to it; but, without the consent of the nominated auditor by whom the report was provided, the IRBA shall not disclose the source of the report to the regulator.

Why should the IRBA need the consent of the auditor? The IRBA is independent. This situation will be avoided if the auditor first satisfies himself that no irregularity had taken place and, if none, no report is issued to the IRBA - as is the case with the current §20(5).

(5) A notice under subsection (4) shall be sent as follows –

(a) if the report under subsection (2)(a) contains a statement that, in the auditor's opinion, it is likely that the irregularity will be rectified within 30 days but no relevant notification is received under subsection (3), then at the end of those 30 days; and

This process will be extremely difficult to manage by the IRBA unless its capacity is extended

(b) if the report under subsection (2)(a) does not contain such a statement, then as soon as ~~practicable~~ practical after receiving the report.

(6) If, at a time after the IRBA has informed the appropriate regulator as required by subsections (4) and (5)(b), the IRBA receives a notification under subsection (3) with respect to the reportable irregularity concerned, the IRBA shall forthwith inform the regulator of the receipt of the notification and of the accompanying explanatory information and particulars.

(7) The IRBA may disclose any information relating to an entity and provided to it under this section to all or any of the following -

(a) any state official vested with a statutory interest in the entity;

(b) any partner, member, shareholder or creditor of the entity;

(c) any juristic person of whom the entity is a member or who is vested with authority over the entity or who has the power to take disciplinary steps in respect of the entity;

(d) the committee of any stock exchange on which securities of the entity are listed; and

(e) any other person to whom the IRBA believes it to be in the public interest to disclose.

(8) For the purpose of determining whether any reportable irregularity has taken place or is taking place, an auditor may carry out such investigations as the auditor ~~may deem~~ deems fit and, in performing any duty referred to in the preceding provisions of this section, the auditor must have regard to all the information which comes to the knowledge of the auditor from any source.

(9) Nothing in this section confers upon any person any right of action against a registered auditor which, but for the provisions of this section, that person would not have had.

(10) Where any entity is sequestrated or liquidated (whether provisionally or finally) and a registered auditor who is the nominated auditor at the time of the sequestration or liquidation has sent or is about to send a report about the entity to the IRBA under subsection (2)(a), then, as soon as a provisional trustee or trustee, or a provisional liquidator or liquidator, as the case may be, has been appointed, the nominated auditor must forthwith (or at the same time as the report is sent to the IRBA) send to the trustee or liquidator concerned a copy of the report and of the information and particulars referred to in subsection (2)(a).

Limitation of liability of auditor for opinions, reports, statements etc

23. (1) In respect of any opinion expressed or report or statement made by a registered auditor in the ordinary course of duties, -

(a) the auditor does not incur any liability to a client of the auditor or any third party, unless it is proved that the opinion was expressed, or the report or statement made, maliciously or pursuant to a negligent performance of the auditor's duties; and

(b) where it is proved that the opinion was expressed or the report or statement was made pursuant to a negligent performance of the auditor's duties, the auditor does not incur any liability to any third party who has relied on the opinion, report or statement, for financial loss suffered as a result of having relied thereon, unless subsection (2) applies.

(2) This subsection applies if it is proved that the auditor -

(a) knew or could in the particular circumstances reasonably have been expected to know, at the time when the negligence occurred in the performance of the duties pursuant to which the opinion was expressed or the report or statement was made, -

(i) that the opinion, report or statement would be used by a client to induce the third party to act or refrain from acting in some way or to enter into the specific transaction into which the third party entered, or any other transaction of a similar nature, with the client or any other person; or

(ii) that the third party would rely on the opinion, report or statement for the purpose of acting or refraining from acting in some way or of entering into the specific transaction into which the third party entered, or any other transaction of a similar nature, with the client or any other person; or

(b) in any way represented, at any time after the opinion was expressed or the report or statement was made, to the third party that the opinion, report or statement was correct, while at that time the auditor knew or could in the particular circumstances reasonably have been expected to know that the third party would rely on that representation for the purpose of acting or refraining from acting in some way or of entering into the specific transaction into which the third party entered, or any other transaction of a similar nature, with the client or any other person.

(3) Nothing in subsections (1) and (2) confers upon any person any right of action against a registered auditor which, but for the provisions of those subsections, the person would not have had.

(4) For the purposes of subsection (2) the fact that a registered auditor performed the functions of an auditor is not in itself proof that the auditor could reasonably have been expected to know that -

(a) the client would act as contemplated in paragraph (a)(i) of that subsection; or

(b) the third party would act as contemplated in paragraphs (a)(ii) or paragraph (b) of that subsection.

(5) The provisions of subsections (1) and (2) do not affect -

(a) any liability of a registered auditor arising from -

(i) a contract between a third party and the auditor; or

(ii) any statutory provision; or

(b) any disclaimer of liability by an auditor.

In South Africa auditors may not disclaim disclaim liability. Does the Bill seek to change that situation?

(6) In this section -

(a) "client" means the person for whom a registered auditor or the firm of the auditor has performed the duties concerned;

(b) "third party" means any person other than the client concerned;

and any reference to a report or statement made includes a reference to a certificate given or a statement, account or document certified and corresponding expressions shall be construed accordingly.

Practice reviews

This section aims to replace the existing §22A of the PAA Act entitled “Inspection by Board”, which makes explicit reference to the fact that these inspections are conducted “for the purposes of section 13(p)”. §13(p) in turn reflects the board’s power to “take any steps which it may consider expedient for the maintenance of the integrity, the enhancement of the status and the maintenance and improvement of standards of professional qualifications and of the competence, of accountants and auditors and encourage research in connection with problems relating to any matter affecting the accounting profession;”

In terms of the Bill, the powers and duties of the IRBA include §5(1)(b) which provides for the IRBA to “Ensure the standards of professional qualifications, competence, ethics, service of registered auditors, including the setting and administration of examinations;”

In our view it would be preferable if the provisions of §5(1)(b) were modified to make reference to the powers to conduct practice review. Under the existing §13(p) it is clear that the board has the power to take any steps which it considers expedient for “the maintenance and improvement of these standards of professional qualification” with the clear connotation of ongoing obligations which continue after registration. In our view §5(1)(b) could be modified by the inclusion of the following words “ and the conduct and administration of practice review” at the end of the subsection.

From January 2005 there are significant changes envisaged in relation to the third practice review cycle. The changes include changing the frequency of reviews for individual practitioners and a new process to review the overall systems of quality control in place for firms.

This section will need careful consideration to ensure that it is still competent for the firms to be reviewed, in terms of this new process, if our suggestions regarding the definition of auditor, and the registration of firms, are accepted.

24. (1) The IRBA, or any person authorised by it, may review the practice of a registered auditor and may inspect and make copies of any book, document or thing in the possession or under the control of a registered auditor.

In addition to the conventional maintenance of standards practice review as conducted at present, we believe it might be advantageous to widen the inspection powers of the IRBA and thus to expand the provisions of this section to allow for investigations – still for the broader purpose of ensuring standards - but which are not part of the routine practice review procedure. We suggest that the following wording might achieve this:

"Inspections by the IRBA

24. (1) The IRBA, or any person authorised by it, may for the purposes of obtaining assurance on the maintenance of standards, or in response to a complaint lodged with the IRBA, carry out any review or inspection and make copies of any book, document or thing in the possession or under the control of any registered auditor or firm."

(2) The IRBA may recover the costs of a review or inspection under this section from the registered auditor or firm concerned.

(3) A registered auditor or firm must, at the request of the IRBA, or the person authorised by it, produce a book, document or thing and, subject to the provisions of the common law or any other law (including that relating to professional privilege), may not refuse to produce such book, document or thing, even though the auditor is of the opinion that the book, document or thing contains confidential information of a client.

It has always been a feature of practice review that auditors who are subject to practice review are required to hand over documentation in their possession to the board. The existing provision is to be found in §22A(2) which stipulates that:

> "An accountant and auditor shall, at the request of the board, or a person authorised thereto by the board, produce a book, document or things and shall not, subject to the provisions of any other law, refuse to produce such book, document or things even though he is of the opinion that that book, document or thing contains confidential information of his client."

§24(3) of the Bill clearly has the same purpose. There is one significant difference and that is the reference to "any other law (including that relating to professional privilege)", where professional privilege is referred to as a basis for refusing to produce documentation for the purpose of practice review.

As currently formulated, §22A(2) precludes an auditor from declining to hand over documentation for the purposes of practice review on a basis of client confidentiality. In referring to the provisions "of any other law" the section recognises that there may be other statutory prohibitions against the disclosure of information. Amongst the statutes which contain limitations/prohibitions on the disclosure of information are the Nuclear Energy Act 46 of 1999, §10 of the National Key Points Act 102 of 1980, §104(7) of the Defence Act 42 of 2002, §8A and 8B of the National Supplies Procurement Act 89 of 1970 and §17 of the Hazardous Substances Act 15 of 1978.

The primary basis which an auditor would have for objecting to handing over documentation in the course of a practice review is the obligation to respect a client's confidential information. Confidentiality is dealt with explicitly in the section and is not a basis for declining to hand over documentation. We can think of no other common law basis which would limit an auditor's obligation under this statutory provision to make the documentation available.

Furthermore, the reference to professional privilege is misleading. There is no recognised professional privilege which attaches to an auditor. The concept of professional privilege

exists in the context of the legal profession and entitles a person to refuse to disclose certain kinds of confidential information which might otherwise be relevant in proceedings and otherwise admissible.

In our view, the provision relating to the common law and professional privilege should be excluded and there would then be no difference between the existing §22A(2) and §24(3) in the Bill.

(4) A registered auditor or firm who acts in good faith during the review of the practice of the auditor or firm or such an inspection, and who produces a book, document or thing under subsection (3) may not be held liable criminally or under civil law as a result of the production of the book, document or thing.

(5) No person who is or was concerned with the performance of any function under this section may disclose any information obtained in the performance of that function except –

(a) for the purpose of an investigation or a hearing under Chapter V;

(b) to a person authorised for the purpose by the IRBA and who of necessity requires it for the performance of functions under this Act;

(c) if the person of necessity supplies it in the performance of functions under this Act;

(d) when required to do so by order of a court of law;

(e) at the written request of, and to, any competent authority established by law which requires it for the institution, or an investigation with a view to the institution, of any criminal prosecution or

(f) when expressly authorised to do so in writing by the registered auditor or firm in question

It is accordingly clear that this section as well as the definition of ‘practice’ and of ‘firm’ must all be scrupulously harmonised to enable this. This is another section where terminology must be ‘challenge proof’.

CHAPTER V

DISCIPLINARY MATTERS

We believe that either this section or §5, or both, need to be amplified (as per our comments under §5) by the inclusion of another enabling subsection, as follows:

> '[The IRBA/ISBE shall] .....determine the manner in which an allegation or a charge of improper conduct shall be investigated and, if necessary, heard, and the punishments, including a caution, a reprimand, a fine, suspension from practice for such period as the IRBA may determine, removal from the register or qualified or temporary or permanent disqualification for registration, which may be imposed by the IRBA after such an investigation or hearing;'

We cannot find a specific clause which envisages and empowers the publication of Disciplinary Rules; nor is there an equivalent of the existing §13(h) – the punishment-enabling section. See our comments under §5(a)(i) in this regard.

Certain, but not all of the existing procedural Disciplinary Rules have been incorporated into the Bill. For the sake of clarity we need to establish what should correctly be included in the Act, and what in the Rules.

We do however still need an equivalent of the existing §13(h)(i) which enables three things, the

- prescribing of what is unprofessional conduct (now falling under the ISBE),
- determination of the manner in which matters shall be investigated (currently set out in detail in the Disciplinary Rules and now partially set out in this section of the Bill), and
- prescribing of competent sanctions.

Appointment of tribunal and committees to carry out disciplinary functions

25. (1) For the purpose of carrying out their disciplinary functions in relation to registered auditors, ~~that is to say, their functions~~ under section 5(1)(a)(i), the IRBA shall establish -

(a) a disciplinary tribunal;

(b) one or more investigatory committees; and

(c) one or more disciplinary committees, each consisting solely of registered auditors;

We believe this is a step backwards. We have had a year of disciplinary committees chaired by a legal person (as per the Myburgh Commission recommendations) and we believe it has improved the process.

The pool/panel system is essential and must be accommodated.

and section 42 applies to the membership of investigatory and disciplinary committees as it applies in relation to other committees.

Is it necessary to state this? If we are to refer to other sections, is it not more important to refer to the entrenchment section?

We believe it is more important that this section continues, to read 'and must assign to those committees its powers in terms of section 5(1)(a)(i)'.

(2) The members of the disciplinary tribunal shall be appointed as follows -

(a) the IRBA shall appoint as president of the disciplinary tribunal a person with experience as a judge or senior counsel; and the person so appointed is referred to in this Chapter as "the Tribunal President"; and,

(b) the IRBA shall appoint the other members of the disciplinary tribunal in equal numbers from among persons who are or have been registered auditors and from among other persons appearing to the IRBA to be suitably qualified having regard to the functions conferred on the tribunal under this Chapter;

and, in the event of an equality of votes among the members of the disciplinary tribunal on any issue, the Tribunal President shall have a second or casting vote.

Is there no minimum or maximum number?

Allegations of improper conduct

26. (1) The IRBA shall refer to an investigatory committee any allegation, complaint or charge of improper conduct, whether prescribed or not, ~~which it receives~~ in respect of a person who is or was a registered auditor unless it appears to the IRBA that the allegation, complaint or charge relates to conduct at a time when that person was not so registered.

What about a truly frivolous complaint, or one that is not in the correct format (or is it intended to do away with any formality).

Does the IRBA (and consequently the directorate) have no discretion at all? Is there no room for conciliation?

How does one distinguish between the matters which can be conciliated and those which cannot if there is neither a minimum requirement for a 'complaint', nor any discretion?

(2) If it appears to the IRBA that a registered auditor -

(a) is failing or has failed to perform any duties devolving upon the auditor in his or her capacity as an auditor of any entity with such degree of care and skill as in the opinion of the IRBA may reasonably be expected, or

(b) is or has been negligent in the performance of any such duties,

What is the difference between (a) and (b) – we have traditionally used the two expressions interchangeably.

What about someone who was registered at the time but no is longer – as envisaged in (1) above.

then, whether or not the auditor is liable to be or has been criminally charged or has been convicted in respect of the failure or negligence, the IRBA shall refer the matter to an investigatory committee as an allegation of improper conduct

What is the point of this last paragraph (see reference in §27(3) to the fact that proceedings are not stayed). Also does it not make the mistake of perpetuating the belief that negligent conduct is criminal conduct?

(3) If, in the course of any proceedings before any court of law, it appears to the court that there is prima facie proof of improper conduct on the part of a registered auditor the court

shall direct a copy of the record of the proceedings or such part thereof as relates to that conduct, to be sent to the IRBA.

(4) Notwithstanding the provisions of any other law, whenever it appears to an official of any body charged with the regulation or supervision of any entity that there is prima facie proof of improper conduct on the part of a registered auditor, the official must forthwith send a report of that conduct to the IRBA.

What if he doesn't? Is the word 'must' used to denote something which must be done, but there is no sanction if it is not – as distinct from 'shall' which carries a sanction? Is this perhaps the reason for the use of different words? .

(5) The IRBA shall refer to an investigatory committee any record or report received by it under subsection (3) or (4).

Investigation of allegations

27 (1) In the following provisions of this Chapter an "allegation of improper conduct" means -

(a) any such allegation, complaint or charge of improper conduct as is referred to in section 26(1)***;***

(b) any matter referred as an allegation of improper conduct under section 26(2); or

(c) any court record or report referred under section 26(5).

(2) An investigatory committee shall investigate or cause to be investigated any allegation of improper conduct which is referred to it under section 26 and, if the investigatory committee considers that there is a prima facie case to be answered, it shall refer the results of its investigation to the Tribunal President.

No. There must be provision for someone to plead guilty at this stage, or for a consent order. We cannot have every single potential guilty situation having to be heard by a disciplinary committee. This will cause enormous delays, and we are already criticised for proceedings taking too long, and will add substantially to the costs.

The section as drafted does not even make provision allow for a discharge. It confuses the concepts of

- a prima facie case being made out (the first stage), and
- the accused providing an acceptable explanation (for a variety of reasons), sufficient for the matter to be discharged (the second stage).

It also assumes that every 'prima facie' case must result in a hearing, which is wrong.

We either need to include the provisions of Disciplinary Rule 3 (discharge) here – or else leave all of this for Rules, as at present.

(3) The fact that any alleged improper conduct forms (or that the IRBA has reason to believe is likely to form) the subject of criminal or civil proceedings in a court of law, shall not of itself prevent the continuation of an investigation, prior to the finalisation of ~~before~~ any such proceedings ~~have been concluded.~~

(4) For the purpose of investigating any allegation of improper conduct an investigatory committee may -

(a) require the registered auditor to whom the allegation relates or any other person to produce to the committee any book, document or thing which is the possession or under the control of that auditor or other person and which relates to the subject-matter of the allegation, including specifically, but without limitation, any working papers of the registered auditor; and

(b) inspect and, if the investigatory committee considers it appropriate, retain any such book, document or other thing for the purposes of its investigations;

(c) make copies of and take extracts from, any such book, document or other thing;

and the provisions of this subsection apply notwithstanding that the registered auditor is of the opinion that the book, document or other thing contains confidential information about a client and any such book, document or thing may be admitted in evidence in any investigation or hearing concerning the allegation or charge of improper conduct.

(5) Nothing in this section affects the law relating to professional privilege or the right of any professional body to take disciplinary or other action against any of its members in accordance with its constitution and rules.

This seems to be in conflict with the proviso above.

Allocation of allegations to disciplinary tribunal or disciplinary committee

28. (1) Where the results of an investigation of an allegation of improper conduct are referred to the Tribunal President under section *27(2)*, the Tribunal President shall consider whether the alleged conduct is of such a nature that, if proved, it would affect public trust in the auditing profession.

(2) If the Tribunal President concludes that the alleged conduct is of the nature mentioned in subsection (1), the alleged conduct shall be referred for hearing before the disciplinary tribunal and, in any other case, the alleged conduct shall be referred for hearing before a disciplinary committee.

Notice and evidential provisions applicable to investigations and hearings

29. (1) A person whose conduct forms the subject of a hearing must be informed of the nature of the complaint made against the person and is entitled to appear personally or to be represented by some other person duly authorised in writing to produce evidence, call and examine witnesses and cross-examine other witnesses.

Should this notice be in a prescribed form?

(2) Neither evidence given ~~for the purpose of~~ pusuant to any investigation or hearing nor any decision on [is this the right word] a hearing may be used by or against a person [can we not say ‘an ‘RA’ – who else are we hearing?] whose conduct is the subject of the investigation or hearing in any subsequent civil or criminal proceedings in any court, but may be used in disciplinary proceedings before ~~any~~ a professional body.

We are concerned about the use of the word ‘subsequent’. What about concurrent proceedings?

Does ‘evidence given’ mean only oral evidence or would it cover document evidence?

We heartily support the sentiments in this section, which we presume was introduced

- to overcome the delay in disciplinary matters being heard, while other litigation is first finalised, so as not to cause prejudice, and

- to prevent complainants using a finding of a committee (obtained at little or not cost, and with a very different onus) to found an action against the respondent RA.

However, we are not certain that adequate consideration been given to the way in which the Promotion of Access to Information Act will impact this, as it (PAIA) overrides any other legislation (and thus this legislation), and the IRBA will be a public body in terms of that Act, obliged to produce information on demand.

(3) In any investigation or hearing it is sufficient, for the purpose of proving the proper execution or the terms or the content or the authenticity of a document, for a copy of the document purporting to be a copy of the original to be used in evidence, subject to the right of any person to adduce evidence that any copy so presented in evidence is not authentic.

(4) Any book, document or other thing which is retained in connection with an allegation of improper conduct as mentioned in section 27(4)(b) may be admitted in evidence in any investigation or hearing concerning the allegation.

(5) In this section "hearing" means a hearing by the disciplinary tribunal or a disciplinary committee under section 30.

Should sectional definitions not go at the beginning of the relevant section?

Disciplinary hearings

30. (1) This section applies where the matter of any alleged conduct is referred under section 28 for hearing before the disciplinary tribunal or a disciplinary committee; and in the following provisions of this section and section 31 "disciplinary body" means the disciplinary tribunal or, as the case may require, the disciplinary committee to whom the matter is referred.

(2) The disciplinary body may -

(a) summon any person who, in its opinion, may be able to give material information concerning the subject of the hearing or who is believed to be in possession or have custody or control of any book, document or thing which has any bearing on the subject of the hearing, to appear before it at a time and place specified in the summons, and to be interrogated or to produce that book, document or thing and may retain that book, document or thing for examination;

(b) call any person present who was or could have been summoned under paragraph (a) to give evidence at the hearing;

(c) administer an oath to, or accept an affirmation from any such person;

(d) interrogate any such person and require the person to produce any book, document or thing in possession or custody or under control of the person; and

(e) appoint any person to advise it at the hearing on matters pertaining to law, procedure or evidence;

This takes us back to the previous situation, where chairman was an RAA and had an advisor. We prefer the current situation where the chairman is drawn from a panel of legal people – which cuts out the need for this advisor, as well as cutting out the consequent

convolutions in the following line (if the lawyer is part of the committee, he doesn't need this dispensation).

and, if the Tribunal President or, as the case may be, the chairperson of the disciplinary committee so requests, a person appointed under paragraph (e) may interrogate any such person as is referred to in paragraph (b).

(3) A summons for the attendance before the disciplinary body of any person or for the production of any book, document or thing must -

(a) be in the form prescribed by the IRBA,

(b) be signed by the Tribunal President or the chairperson of the IRBA or a person authorised by the IRBA for the purpose; and

(c) be served in the same manner as it would have been served if it had been a subpoena in a civil matter in a magistrate's court.

There should be provision for this to be waived, for example where it is a subpoena for the accused.

(4) In a hearing before a disciplinary body, the provisions of the law relating to privilege, as applicable to a witness subpoenaed to give evidence or to produce any book, document or thing before a court of law, applies.

(5) A hearing before a disciplinary body is open to the public except where, in the opinion of the Tribunal President or, as the case may require, the chairperson of a disciplinary committee, any part of the hearing should be held in camera.

(6) On a hearing before a disciplinary body of an allegation which was referred to an investigatory committee under section 26, section 27(4) applies in relation to the disciplinary body as it applies in relation to an investigatory committee.

(7) If the disciplinary body makes a finding of guilt against the person whose alleged conduct is the subject matter of the hearing, the disciplinary body may impose any prescribed punishment in respect of that finding.

This is not well conceptualised. There is no provision to prescribe punishment. See comment under §5(1)(a) and at the beginning of this chapter. In addition, 'prescribed' means by rule, and 'rule' is defined as a rule made in terms of §50 – which we believe is a mistake – as §50 specifically requires this rule in turn to be published in the Gazette. We are moving away from the Gazette as a publishing vehicle, although §50 has a reason to insist on it, in so far as it anticipates the provisions of the Administrative Justice Act..

Costs, publicity and recovery of monetary penalties and costs

31. (1) A disciplinary body which makes a finding of guilt as mentioned in subsection (7) of section 30 shall order any person upon whom any punishment is imposed under that subsection to pay such reasonable costs as have been incurred by an investigatory committee and the disciplinary body in connection with the investigation and hearing in question, or such part thereof as the disciplinary body considers just.

'Shall' in this case should be 'may'. It is too prescriptive. What if the committee decides for good reason that it is not appropriate to recover any costs at all.

(2) In any case where -

(a) a person whose conduct has been the subject of a hearing under section 30 has not been found guilty of improper conduct, or

(b) on a hearing no punishment has been imposed on the person whose conduct was the subject of the hearing,

What is the envisaged difference between (a) and (b)? Is it intended to cover a finding of guilty but with no punishment? This seems odd, if they are obliged to recover costs – but not obliged to impose a punishment. We suspect that this might have to do with the concept of 'caution and discharge'. At the moment a caution is viewed as a punishment.

the disciplinary body by which the hearing was conducted may nevertheless order that person to pay any costs unnecessarily incurred by the disciplinary body or an investigating committee as a result of the conduct of that person.

(3) In any case where -

(a) any punishment has been imposed on a person by the disciplinary tribunal, or

(b) any punishment has been imposed on a person by a disciplinary committee and the Tribunal President so directs on the grounds that in the circumstances of the case it is appropriate to do so,

the IRBA shall cause to be made known in any journal or other publication such as is referred to in section 5(1)(o) and in at least one national newspaper and such other newspapers (if any) as the IRBA considers appropriate, -

We believe this is too prescriptive. It does not envisage, for example, web publication. We believe this should be left to the discretion of the IRBA to publish in whatever manner it deems fit.

(i) the name of the person concerned and, where that person is an individual who at any relevant time was associated as auditor with a firm, the name of that firm;

This seems a little convoluted. If as we suspect 'person' is intended to include a jurisdic person, such as a firm (or else why has it been used instead of individual), then why is it necessary to make separate reference to the firm, here. Also, we would like to be able to publish the name of the firm without the name of the individual if appropriate.

(ii) the details of the punishment so imposed; and

(iii) ~~concise~~ appropriate details of the finding pursuant to which the punishment was imposed.

What exactly will be permitted in publication, particularly as there is an increasing desire for fairly detailed (quite the opposite of concise) reasons why the particular sanction was imposed, to be published. In our experience, the lighter the punishment, the more detail as to why it was imposed is required. The cost of publishing in a national newspaper is prohibitive and so one would need to be concise. Not necessarily so with other forms of publication which are frequently more appropriate, in any event.

(4) Whenever –

(a) any punishment imposed under section 30(7) consists of, or includes, a monetary penalty, or

(b) an order as to costs has been made under subsection (1) or subsection (2),

the amount thereof shall be recoverable by the IRBA from the person concerned, and any amount so recovered shall be paid into the funds of the IRBA.

CHAPTER VI

OFFENCES

False statements in connection with audits

32. (1) A registered auditor who, for the purposes of, or in connection with, the audit of any financial statement, knowingly or recklessly expresses any opinion or makes any report or other statement which is false in a material particular shall be guilty of an offence.

(2) Where the auditor conducting an audit is a firm, subsection (1) applies to the member of the firm conducting the audit; but nothing in this subsection prevents the taking of disciplinary action under Chapter V ~~in respect of~~ against the firm concerned, in addition to or instead of the individual auditor conducting the audit.

(3) A person convicted of an offence under this section is liable to a fine or to imprisonment for a term not exceeding ten years or both.

Offences relating to disciplinary hearings

33. (1) Subject to section 30(4), a person is guilty of an offence if -

(a) having been duly summoned under section 30, the person fails, without sufficient cause, to attend at the time and place specified in the summons, or to remain in attendance until excused from further attendance by the Tribunal President or, as the case may be, the chairperson of the disciplinary committee; or

(b) having been called under section 30(2)(b), the person refuses to be sworn or to affirm as a witness or fails without sufficient cause to answer fully and satisfactorily to the best of the person's knowledge and belief all questions lawfully put concerning the subject of the hearing; or

(c) having been called under section 30(2)(b) and having possession, custody or control of, any book, document or thing refuses to produce it when required to do so.

(2) A witness before the disciplinary tribunal or a disciplinary committee who, having been duly sworn or having made an affirmation, gives a false answer to any question lawfully put to the witness or makes a false statement on any matter, knowing the answer or statement to be false, is guilty of an offence.

(3) Any person who wilfully hinders any person acting in the capacity of a member of the disciplinary tribunal or of a disciplinary committee in the exercise of any power conferred upon that person by or under section 30, is guilty of an offence.

(4) A person convicted of an offence under this section is liable to a fine to be prescribed by the Minister by regulation from time to time.

This is the first reference to ‘regulation’ – we are not certain to what regulations this refers.

Offences relating to practice by auditors

It appears from §12, relating to firms, that MDPs are not envisaged either at the large firm level (for example lawyer or IT partners) or the small firm level (for example bookkeeper or

CFA partners) – should thus fee-sharing with non-registered people not be an offence, as at present.

34. (1) Except with the consent of the IRBA, a registered auditor may not knowingly employ in connection with the practice of the auditor -

(a) any person who is for the time being suspended from practice under any provision of this Act; or

We are not certain the Bill in fact makes provision for this. The current Act specifically provides for suspension both as a competent punishment (see our comment under §5(1)), and in a separate section dealing with subsequent mental disability.

(b) any person who is no longer registered as an auditor as a result of the name of the person having been removed from the register or being disqualified from registration by virtue of a finding of misconduct and punishment imposed on the person under section 30(7)***;*** or

(c) any person who applied for registration under this Act, but whose application was declined by the IRBA under section 9(3) or (4).

(2) A registered auditor may not -

(a) practise under a firm name or title unless on every letterhead bearing the firm name or title there appears -

(i) the auditor's present first names, or initials, and surname; or

(ii) in the case of a partnership, at least the present first names, or initials, and surnames of the managing partners or, if there are no managing partners, of the active partners or, where such a letterhead is used only by a branch office of the partnership, at least the present first names, or initials, and surnames of the managing partners at that branch office or, if there are no such resident partners, of the partners assigned to that branch office; or

(iii) in the case of a company, the names of the directors as required by section 171 of the Companies Act 1973 (Act No.61 of 1973);

(b) sign any account, statement, report or other document which purports to represent work performed by the auditor, unless the work was performed by the auditor, or under the personal supervision or direction of the auditor, or by or under the personal supervision or directions of one or more of the partners, co-directors or co-members why reference to member of the auditor, as the case may be;

(c) perform professional work in connection with any matter which is the subject of a dispute or litigation on condition that payment for the work may be made only if the dispute or litigation ends favourably for the party for whom the work is performed;

(d) engage in practice during any period in respect of which the auditor has been suspended from practice; or

(e) engage in practice without carrying such professional indemnity or fidelity insurance as ~~is~~ might have been determined by the IRBA.

But the empowering section does not give it this power

(3) The provisions of subsection (2)(b) do not apply in respect of work -

(a) performed on behalf of a registered auditor by another registered auditor; or

(b) performed by another registered auditor ("the previous auditor") in a partially completed assignment which the previous auditor was unable to complete as a result of death, disability or other fortuitous cause not under the control of the previous auditor, and which assignment the successor auditor is engaged to complete; or

(c) performed outside the Republic by a member of a professional body of auditors outside the Republic whose status, in the opinion of the IRBA, is at least equal to that demanded by the IRBA for the profession in the Republic.

(4) Nothing in subsection (2)(b) prevents any registered auditor from signing the firm name or title what's this under which the auditor practises.

(5) For the purposes of section 171 of the Companies Act, 1973 (names of directors to be stated on trade catalogues, trade circulars and business letters ~~etc~~), in relation to such a company as is described in section 12(1), it shall be regarded as sufficient if a catalogue, circular or letter to which the said section 171 applies and which emanates from a branch office of any company contains the required particulars in respect of directors attached to that branch office.

(6) Any person who -

(a) contravenes or fails to comply with any provision of this section, or

(b) contravenes subsection (1) or subsection (4) of section 11,

is guilty of an offence and on conviction liable to a fine or in default of payment, to imprisonment not exceeding five years, or to both such fine and such imprisonment.

(7) Any person who -

(a) contravenes any provision of subsections (3) and (5) of section 24; or

(b) obstructs or hinders any person in the performance of functions under that section,

is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding one year.

If MDPs are not to be permitted, then it must be an offence to share professional fees (or some such term, which must be defined) with non RAs.

These punishments do appear to be a little excessive.

CHAPTER VII

PROCEDURAL AND FINANCIAL MATTERS, AND REPORTING

Appointment of members of Boards

35. (1) Any appointment by the Minister to the IRBA or by the IRBA to the SBE or the SBA must indicate the date on which it takes effect, as well as its duration, but no such appointment may be for a period of more than three years (without prejudice [is this the right word] to the possibility of re-appointment for a further period or periods).

(2) Any office-holder entitled to nominate a person to the SBA does so according to the rules and procedures applicable to the office-holder
Does this mean or add anything – how else could they nominate.

(3) When the need for an appointment to the SBA arises and the appointment depends on a nomination, the SBA must provide the IRBA with the name of the nominated person, the name of any nominated alternate and any further relevant information, whereupon the IRBA must in writing appoint the nominated persons within three months of receipt of the nominations.

(4) Where any person's appointment to the SBA is dependent on a nomination, the IRBA may make the duration of the appointment terminable on notice given by the nominating office-holder to the IRBA withdrawing the nomination.

(5) Immediately upon receipt from the Minister of a notice of an appointment, the IRBA must publish a notice in the *Gazette*, containing the name of the appointed person and the person's alternate, the date from which the appointment takes effect and the duration of the appointment.

(6) Immediately upon receipt from the IRBA of a notice of an appointment, the SBE or the SBA, as the case may be, must publish a notice in the *Gazette*, containing the name of the appointed person and the person's alternate, the date from which the appointment takes effect and the duration of the appointment.

(7) A member of a Board whose term has expired continues to serve until a successor has been appointed.

Alternate members

It should be made clear at the outset that it is not compulsory to appoint alternates to each committee or board member. In fact, in most cases it is not practical at all. The only situation where alternates might have a real role to play is in the IRBA where, presumably, the Minister will appoint members from various constituencies – but even here in §3(3) it is optional for the Minister to appoint alternates. (Again the absence of the peremptory auxiliary in §36(1) compounds the uncertainty).

36. (1) The procedure for the appointment to a Board of an alternate member is the same as that for the appointment of the relevant principal member.

(2) Subject to subsection (3), an alternate member may attend a meeting of a Board only where the principal member is absent, and is at any such meeting entitled to participate in all the proceedings and to vote in such proceedings.

(3) The Chairperson of a Board may, at no possessive pronoun at all discretion, allow an alternate member to attend a meeting of the Board even though the principal member is present at the meeting but, in such a case, the alternate may not vote in any of the proceedings.

Disqualification from membership

37. No person may serve as a member or alternate member of a Board if ~~the~~ that person [or simply 'they']-

(a) is an unrehabilitated insolvent;

(b) has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, corruption, money-laundering, forgery (including uttering a forged document) perjury, or any other offence of which ~~involves~~ dishonesty is an element; or

(c) is for the time being declared by a competent court to be of unsound mind or unable to manage the person's [their] own affairs.

Vacancies

38 (1) A member of a Board vacates membership -

(a) by resigning in writing to the Board;

(b) by becoming subject to any of the disqualifications referred to in section 37;

(c) when the member is replaced by the office-holder by whom the member was nominated; or

(d) when the member has ~~without leave~~ been absent without leave from two consecutive meetings of the Board.

(2) A vacancy is filled by the Minister or, as the case may be, the IRBA in accordance with the procedure set out in section 35.

Chairperson and deputy chairperson

39. (1) At the first meeting of the SBE or, as the case may be, the SBA after it is appointed, the members of the Board must elect a chairperson and a deputy chairperson from their own ranks.

(2) If neither the chairperson nor the deputy-chairperson is available at a properly constituted meeting of a Board, the members present must elect from their own ranks a chairperson for the meeting concerned.

Meetings

40. (1) A Board meets as often as circumstances require, but at least twice every year, and at such time and place as ~~the Board~~ it may from time to time determine.

(2) The chairperson of a Board may at any time convene a special meeting at a time and place determined by the chairperson.

(3) Upon a written request signed by not less than three members of a Board, the chairperson concerned must convene a special meeting to be held within three weeks after the receipt of the request, and the meeting shall take place at a time and place determined by the chairperson.

(4) A Board must determine rules of procedure for the conduct of its meetings and the meetings of its committees, including rules on the taking of decisions in written form when the relevant members are not gathered at a meeting.

(5) At any meeting of a Board a majority of the members of the Board constitutes a quorum.

(6) Every member of a Board, including the chairperson, has one vote.

(7) In the event of an equality of votes, the chairperson of the meeting has a second or casting vote.

Decisions

41. (1) A decision of a Board requires the support of a majority of the members of the Board at a meeting where a quorum for the meeting is present but, where a meeting is not held, subject to any rules made under section 40(4)

(2) No decision taken by or act authorised by a Board is invalid by reason only of –

(a) a casual vacancy; or

(b) the fact that any person not entitled to sit or act as a member of the Board participated in the meeting or the act at the time the decision was taken or the act was authorised, if the members of the Board who were present and acted at the time followed the required procedure for decisions.

(3) The IRBA may not amend, withdraw or interfere with decisions taken by the SBE or the SBA on issues of standards of professional competence and ethics.

Other entrenched sections appear at §5(5). Should they not all be together

Committees

42. (1) A Board may establish one or more committees to assist it in the performance of its functions and duties, and it may at any time dissolve or reconstitute any such committee.

(2) A committee consists of as many persons as the Board considers necessary.

(3) The members of a committee may be appointed from outside the ranks of the Board and the auditing profession.

(4) A Board may assign to a committee such of its powers as it may deem fit, excluding the power to make rules but, subject to section 5(5), is not divested of any power so assigned, and may amend or withdraw any such power.

(5) The provisions of sections 36, 37, 39, 40, 41, and 45 relating to alternate members, disqualification from membership, chairperson and deputy chairperson, meetings, decisions and reimbursement for expenses, respectively, shall with the necessary changes apply in respect of any committee.

(6) Unless clearly inappropriate, any reference in this Act to a Board in relation to the exercise of a power assigned to a committee, shall be construed as including a reference to that committee

Funds and accounting

43. (1) The funds of the IRBA consist of fees and monies payable and received under this Act.

(2) All monies received by the IRBA must be paid into one or more accounts kept at one or more registered financial institutions.

(3) The IRBA must ensure that full and correct account is kept of all amounts received and expended.

(4) The IRBA must ensure that annual financial statements are prepared in accordance with Statements of Generally Accepted Accounting Practice issued by the Accounting Practices Board or its successor body as at the last day of every calendar year.

Statements of GAAP have been superseded by International Financial Reporting Standards (IFRSs)

(5) After any such annual financial statements have been audited by a registered auditor appointed by the IRBA, copies of the audited statements must be made available to all members of the IRBA, all accredited professional bodies, and to any other person on request.

§43(5) implies that it is not necessary to send the IRBA's annual financial statements (effectively its Annual Report) to RAs, except on request; they should be entitled to receive copies of the audited AFS that they are funding.

Funding of committees and ~~related~~ Boards

44. The IRBA must provide funding to its committees and the other ~~its related~~ Boards, in such a way that the committees and ~~related~~ Boards can perform their functions effectively.

Remuneration and re-imbursement for expenses

45. (1) To such extent as may be determined by the Minister, a member and an alternate member of a Board may be reimbursed for expenses reasonably incurred by them.

This we support, but are not certain that it requires Ministerial determination.

(2) A member of a Board who is not in full-time employment of the State shall be paid such remuneration as may be determined by the Minister (in addition to any reimbursement due to the member under subsection (1)).

We have grave reservations about this. It has severe cost implications. The only exception which might be permitted is for the firm or company of a Board member to be briefed to perform certain professional work on behalf of the Board, which should be permissible.(but not necessarily in the Bill). Perhaps the intention is to pay Board members (IRBA, SBE & SBA) who are not State employees fees for attending meetings, since they are now to be drawn (in the majority) from outside the profession. However, this creates an expensive and undesirable precedent which should certainly not extend to members of other committees. It becomes even more cloudy when one tries to understand what remuneration is intended for the Disciplinary Tribunal (and especially the President) - is this a committee? The only

person who is paid under the current dispensation is the chairman of the Disciplinary Committee (a senior lawyer).

(3) Any remuneration or reimbursement payable under this section shall be paid out of funds provided by the IRBA.

This should not need ministerial approval. The Board might well wish to remunerate someone their time, in an extraordinary situation, and do it quickly. Ministerial consent can take a very long time. Similarly, re-imbursement should be allowed as matter of course or people are simply not going to serve, if they are obliged pay their own travel.

There does not appear to be an empowering clause for this - is one needed?

CHAPTER VIII

OVERSIGHT AND REPORTING

Oversight by Government through Treasury

46. (1) The Government of South Africa, acting through the National Treasury, shall have a general oversight of the carrying out by the IRBA of its powers and duties under this Act.

(2) The Minister may appoint persons to investigate on behalf of the Treasury any matter ~~with respect to~~ regarding the functioning of the IRBA; and the persons so appointed may, if the Minister thinks it appropriate, include ~~persons who are~~ qualified [what exactly does this mean] ~~as~~ auditors; but all persons who are so appointed shall be persons who are independent of any Board or committee established by or under this Act.

Reports to Minister

47. (1) The IRBA must, within three months after the close of its financial year, submit to the Minister a report on its affairs and functions during that financial year, which report must include the following:

(a) a copy of its audited annual financial statements;

(b) an overview of the activities of the IRBA, of its committees and its related Boards, and

(c) an account of the extent to which the objectives set by this Act had been achieved in that financial year by the IRBA, its committees and related Boards.

§47(1)(c) imposes perhaps a more onerous obligation than was intended. The various objectives are quite broad; laudable but difficult to articulate concepts, in a few instances. They are a vision, to some extent, rather than a blue print. We are not sure how one reports on an annual basis on these issues.

This section refers to performance information, similar to the requirements in the PFMA. It is really the setting of specific targets and reporting on the achievement thereof. For example, in the public sector, such performance information would include the Department of housing's targets in respect of number of houses to be built in a particular financial year. In our case, it might be more difficult as we cannot predict the number of cases which will be heard, standards issued or students who will pass. It is therefore an onerous requirement.

(2) The Minister must table the report in Parliament as soon as possible after its receipt.

(3) In addition to the financial year end report ~~with respect to a financial year~~ required by subsection (1), the IRBA must, at the end of the third, sixth and ninth month of each of its financial years, submit to the Minister a report giving such information concerning its finances and operations, disciplinary proceedings and other matters as the Minister may determine.

See comment above

CHAPTER IX

MISCELLANEOUS MATTERS

Temporary control of firm by IRBA

48. (1) Where a firm [this usually happens with sole practitioners, who are currently excluded from the definition of firm] which is a registered auditor is for any reason whatsoever unable to carry out its professional duties, and -

(a) reasonable attempts have failed to make arrangements with another registered auditor to come to the assistance of the firm, or

(b) where it will not be in the public interest to expect any such arrangements to be made,

the IRBA may take temporary control, or appoint a registered auditor to take temporary control of the firm concerned, and must by notice in the *Gazette* give notice thereof.

(2) The IRBA must determine conditions and set guidelines for the temporary control of a firm under this section and may prescribe any matter relating to that temporary control which it deems necessary or appropriate.

(3) Temporary control of a firm must be terminated as soon as is reasonably ~~practicable~~ practical, and the IRBA must by notice in the *Gazette* give notice of the termination.

(4) This section applies in relation to a registered auditor who is in practice as an individual practitioner as it applies in relation to a firm and references to a firm shall be construed accordingly.

We do not believe it is necessary to provide so much detail on this concept. We believe the single line in §13(1)(o) of the existing Act is more than adequate. It reads as follows: "The Board may take control or appoint a person to take control of the practice of any accountant and auditor in circumstances which the board deems to be in the public interest" It has only been necessary twice in the last 17 years to gain access to the premises, or take into custody the files, of an RA (one who had absconded and one who was in jail) and it proved not to be a major issue, but certainly we had to act really quickly. Devoting an entire section to this situation and having to publish in the Gazette and set guidelines is overstating the case somewhat, and will act as a deterrent to intervention. We suggest that this section is deleted in its entirety and replaced by a simple empowering clause in §5.

Indemnity

49. Neither a Board or any member or employee thereof, nor a committee of a Board or any member thereof, nor the Public Accountants' and Auditors' Board or any member thereof, incurs any liability in respect of any act or omission performed [how do you perform an omission] in good faith under or by virtue of a provision in this Act, unless that performance was grossly negligent.

Rules and administrative matters

50. (1) With the appropriate consent, the IRBA, the SBE and SBA, may each make rules –

(a) on any matter which is under this Act required or permitted to be prescribed by the relevant Board; and

(b) on any matter which the relevant Board deems necessary or expedient to be prescribed for the better achieving of the objects of the Board and of this Act;

and a Board may make different rules ~~as regards~~ regarding different persons, firms or bodies, or different matters relevant to the functions of the Board under this Act, provided that no such differentiation ~~may amount~~ amounts to unfair discrimination.

(2) The appropriate consent referred to in subsection (1) is –

(a) in the case of the IRBA, the consent of the Minister; and

(b) in the case of the SBE and the SBA, the consent of the IRBA

(3) Rules made under this section must be published in the *Gazette*.

(4) Subject to the provisions of this Act, where a Board takes any decision or any other step of an administrative nature under this Act which affects the rights and duties of any other person, Board or body, the Board concerned must –

(a) publish or otherwise make known the nature and effect thereof in a written, printed or electronic manner to any affected persons, Boards and bodies in a manner designed to ensure that they acquire full knowledge thereof; and

(b) comply with any applicable requirement of just administrative action, including the furnishing of reasons for discretionary decisions imposed by, under or by virtue of any law.

This is presumably in response to the Administrative Justice Act – but we are not quite sure what types of rights are envisaged here. This needs to be clarified. This section on publication media is better worded than the one in §31(3). We suggest that subsection (4) be deleted as unnecessary.

Repeal of laws

51. (1) The laws mentioned in the Schedule are hereby, subject to section 52, repealed to the extent set out in the third column of that Schedule.

(2) With effect from the date on which this subsection come into force, and in respect of damages suffered by any person as a result of an act or omission of a registered auditor committed on or after that date, the reference in section 1 of the Apportionment of Damages Act, 1956 (Act No 34 of 1956), to "damage" shall be construed as a reference also to damage caused by a breach, by the auditor, of a term of a contract concluded with the auditor.

This is most welcome.

Transitional provisions

52. (1) For the purposes of constituting the first SBE and SBA, the Minister and the Public Accountants' and Auditors' Board are hereby empowered to perform all administrative functions.

(2) Any unfinished business of the Public Accountants' and Auditors' Board on the date of promulgation of this Act, including new business to be dealt with after that date, which is dealt with by that Board under a provision of the Public Accountants' and Auditors' Act, 1991, and

for which no corresponding provision appears in this Act, must be completed by that Board during the period between that date and the commencement date:

Provided –

(a) that proceedings in connection with an application for registration as accountant and auditor still pending on the commencement date shall, with effect from that date, be deemed to be proceedings for registration as an auditor contemplated in this Act and shall further be administered, considered and completed by the IRBA; and

(b) that in the case of any such proceedings, and in the case of any new applications for registration as an auditor received by the IRBA, the requirements for registration set out in section 15(2) and (4) of the Public Accountants' and Auditors' Act, 1991, shall notwithstanding the repeal of that Act and any inconsistency with a provision of this Act, be deemed to be still applicable until a date notified by the Minister by notice in the *Gazette*.

(3) Any person who immediately prior to the commencement date was registered as an accountant and auditor under the Public Accountants' and Auditors' Act, 1991, is deemed to be registered as an auditor under this Act.

How does this impact a person who was eligible for registration under the old dispensation (that is, the PAAB's QE and Articles) but was not actually registered at the time of the coming into effect of the new Act. Presumably he does not require any sort of 'certification' from an institute as envisaged in §9(2)(a)? We believe that the 'grandfather' situation needs to be addressed specifically.

(4) The following provisions shall apply for the purpose of securing continuity -

(a) The Examination Regulations as contained in the *Manual of Information: Guidelines for Registered Accountants and Auditors*, issued by the Public Accountants' and Auditors' Board as at the commencement date, shall be deemed to have been prescribed by the IRBA in respect of registered auditors.

Note that the Examination Regulations are published in the *Candidates guide to the Public Practice Examination* and not the Manual of Information as stated above.

(b) The Disciplinary Regulations as contained in the said *Manual* (excluding paragraphs 2.1 to 2.1.21, inclusive, thereof) shall be deemed to have been prescribed by the IRBA.

(c) The Code of Professional Conduct as contained in the said *Manual* (including paragraphs 1 to 2.1.21, inclusive, of the Disciplinary Regulations) shall be deemed to have been prescribed by the ISBE.

(d) The Circulars as contained in the said *Manual* shall be deemed to have been issued by the IRBA.

(e) The Recognition Model as contained in the said Manual, shall be deemed to have been prescribed by the IRBA.

(5) The Education and Training Committee of the Public Accountants' and Auditors' Board, as it exists immediately prior to the commencement date, is deemed to be a committee established by the IRBA under section 5(4) to determine the requirements for the development and achievement of professional competence.

(6) Any committee performing, immediately prior to the commencement date, an investigating or disciplinary function under the Public Accountants' and Auditors' Act, 1991, remains validly constituted and must complete its functions after that date as if this Act has not been passed.

(7) The auditing pronouncements issued by the Public Accountants' and Auditors' Board are, with effect from the commencement date, deemed to have been issued by the SBA.

(8) Subject to the provisions of this Act, on and after the commencement date, anything which was done under a provision of a law repealed by section 51 and which could be done under a corresponding provision of this Act, is deemed to have been done under that corresponding provision.

(9) A reference in any of the preceding subsections to the commencement date is a reference to the date that subsection comes into force.

Short title and commencement

53. (1) This Act is called the Auditing Profession Act, 2004.

(2) This Act shall come into force on a date to be determined by the President by notice in the *Gazette*; and different dates may be ~~so~~ determined in relation to different provisions and for different purposes.

SCHEDULE

LAWS REPEALED

(Section 52)

No and year of Act	Short title	Extent of repeal
Act 80 of 1991	Public Accountants' and Auditors; Act, 1991	The repeal of the whole.
Act 70 of 1993	Public Accountants' and Auditors' Amendment Act. 1993	The repeal of the whole.
Act 23 of 1995	Public Accountants' and Auditors' Amendment Act, 1995	The repeal of the whole.
Act 88 of 1996	Abolition of Restrictions on the Jurisdiction of Courts Act, 1996	The repeal of section 107.
Act 5 of 1997	Public Accountants' and Auditors' Amendment Act, 1997	The repeal of the whole.
Act 47 of 1997	Public Service Laws Amendment Act, 1997	The repeal of section 35 to the extent to which it refers to the Public Accountants' and Auditors' Act, 1991.

Should the relevant section of the Apportionment of Damages Act not be referred to?