



**In the matter of the Institute of Chartered Accountants in Ireland
(Operating under the title of Chartered Accountants Ireland)**

DECISION

Of the

**Irish Auditing and Accounting Supervisory Authority
(On foot of the appointment of an Enquiry Committee under Section 23 of
the Companies (Auditing and Accounting) Act 2003)**

Complaint to the Authority relating to non-adherence by the ICAI to its Approved Investigation and Disciplinary Procedures in considering a Complaint about Toll Revenue Underpayments

Summary of Decision

The main adverse findings of the Authority's Enquiry Committee are as follows:

1. The Complaints Committee of the Institute is obliged to *"first form an opinion as to whether or not the Complaint is one that gives rise to or includes questions of public concern and/or is of complexity or importance"*. The Enquiry Committee established that there was no evidence that the Complaints Committee had formed the necessary opinion because there was no contemporaneous record, including the minutes, to this effect. Consequently the Enquiry Committee found that the Institute breached Bye-Law 72.1¹ in its consideration of the Complaint at the Complaints Committee Meeting on 15 December 2005.
2. One of the quorum requirements of a Complaints Committee meeting is that the majority of the members **attending** must be lay members (non members of the Institute). The Enquiry Committee established that at a meeting of the Complaints Committee, the Complaints Committee neglected this requirement and instead deemed two Institute members not to be part of the quorum (on the basis that they did not participate in the vote) even though they were manifestly in "attendance" at the meeting. The Enquiry Committee therefore found that the Institute breached Bye-Law 67.2² in its consideration of the Complaint at the Complaints Committee Meeting of 15 December 2005.
3. The Complaints Committee must comprise a majority of non-members of the Institute. The Enquiry Committee found that the composition of the Complaints Committee at its meeting of 10 October 2006 was not in compliance with this requirement and that the Institute was therefore in breach of Bye-Law 67.1³.

¹ *"Where a complaint has been conveyed to the Complaints Committee by the Secretary the Complaints Committee shall first form an opinion as to whether or not the Complaint is one that gives rise to or includes questions of public concern and/or is of complexity or importance."*

² *"The quorum for meetings of the Complaints Committee shall be six persons, so long as a majority of the attendance thereat consists of members of the Committee who are not members of the Institute. Any meeting of the Complaints Committee at which a quorum is present shall be competent to exercise all the functions and powers conferred upon the Complaints Committee by these Bye-Laws."*

³ *"The Complaints Committee shall consist of not more than twelve persons of whom the majority shall be persons who are not members of the Institute. The Council may appoint from time to time persons to fill any vacancy that arises in the membership of the Complaints Committee."*

4. A member of the Complaints Committee can only be appointed for two terms of five years. The Enquiry committee established that one member of the Complaints Committee was appointed for a second term but that before his term expired he was “stood down” by the Council of the Institute and ceased to be a member of the Complaints Committee. Notwithstanding the fact that his second term was terminated the Council of the Institute, some fifteen months later, purported to re-appoint the member for a further term i.e. a third term. Consequently the Enquiry Committee found that the Institute breached Bye-Law 66.1⁴ in having the member of the Institute on the Complaints Committee at its meetings on 10 October 2006 and 15 December 2006 which considered the Complaint while he was ineligible to so attend.

The Enquiry Committee concludes that the above breaches were caused by negligence and inattention to the requirements of the relevant Bye-Laws.

Having considered all the circumstances of findings 1 to 4 for the purpose of determining the level of sanction (including a number of mitigating and aggravating circumstances), it is the decision of the Enquiry Committee to:

- (a) censure the Institute for the above Bye-Law breaches;
- (b) annul the decisions of the Complaints Committee made on 15 December 2005 and later Committee meetings with respect to the Complaint;
- (c) direct a fresh investigation of the Complaint to commence within 14 days of this Decision taking effect; and
- (d) require the Institute to pay the sum of €110,000 to the Authority within 14 days of a Court order pursuant to Section 29 of the Act.

Definitions

For the purposes of this Notice, the following definitions shall apply:

“Act”, shall mean the *Companies (Auditing and Accounting) Act 2003*;

“Approved investigation and disciplinary procedures”, shall have the meaning assigned to it by Section 23 of the Act and by the Regulations. The term includes the Bye-Laws of the Institute, the Regulations of the Complaints Committee and the Rules of Professional Conduct;

⁴ The relevant extract from Bye-Law 66.1 reads: “Each person so appointed shall be appointed [to the Complaints Committee] for a term of five years. Any such appointment may be renewed for one subsequent term.”

“Authority”, shall mean the *Irish Auditing and Accounting Supervisory Authority*;

“Board”, shall mean the Board of the Authority;

“Bye-Laws”, shall mean the Bye-Laws of the Institute including (unless the context otherwise requires) the Bye-Laws which were effective from 10 October 2005 until they were amended in February 2007;

“Complaint”, shall mean the complaint made by the Complainant to the ICAI;

“Complainant”, shall mean Senator Shane Ross whose identity is a matter of public record;

“Complaints Committee”, shall mean the Complaints Committee of the Institute;

“Council”, shall mean the Council of the Institute;

“EC” and “Enquiry Committee”, shall mean the Committee of the Authority set up pursuant to Section 27 of the Act and the Regulations;

“ICAI” and “Institute”, shall mean the Institute of Chartered Accountants in Ireland trading as Chartered Accountants Ireland;

“Member”, shall mean a member, member firm, affiliate or student of the Institute;

“The Member Firm” shall mean KPMG, the firm against whom the Complainant made the Complaint, whose identity is a matter of public record;

“PEC” and “Preliminary Enquiry Committee”, shall mean the Committee of the Authority set up pursuant to Section 27 of the Act and the Regulations;

“Regulations”, shall mean the *Companies (Auditing and Accounting) Act 2003 (Procedures Governing the Conduct of Section 23 Enquiries) Regulations 2007 (S.I. 667 of 2007)*.

Background

How the ICAI must deal with Complaints under its Bye-Laws (those in force at the time of the Complaint) - a Summary

The Complaints Committee of the Institute is a committee of up to 12 persons appointed by Council. The majority of the Committee must be non-members of the Institute ("lay members").

Each member of the Complaints Committee is appointed for a maximum of two terms of up to five years each. The quorum for meetings of the Complaints Committee is six persons so long as a majority of those in attendance consists of lay members.

Complaints are sent to the Secretary to the Complaints Committee who is obliged to convey the complaint to the Complaints Committee unless the complaint is resolved.

Once the complaint comes before the Complaints Committee, the Committee must first form an opinion as to whether the complaint is one that gives rise to or includes questions of public concern and/or is of complexity or importance.

If the Complaints Committee forms such an opinion, then the Committee may refer the complaint to a Special Investigator. Following investigation, the Investigator reports back to the Committee and certifies whether or not, in his or her opinion, a *prima facie* case exists that the Member is liable to disciplinary action in accordance with the Bye-Laws. If the Special Investigator certifies that a *prima facie* case exists, the Complaints Committee must refer the complaint to the Institute's Disciplinary Committee.

If the Complaints Committee forms the opinion that the complaint should not be referred to a Special Investigator, then it must investigate the complaint to determine whether or not a *prima facie* case has been made out. Before reaching its decision, the Committee must forward the complaint to the Member who is afforded an opportunity to make written representations on it.

If the Complaints Committee determines that a *prima facie* case has been made out, various options are available to it including referral of all or part of the complaint to the Disciplinary Committee.

If the Complaints Committee determines that no *prima facie* case is made out, the Committee notifies the Member and the complainant (if any). If the complainant is not satisfied with the finding, he or she can refer the Complaints Committee's decision to an Independent Reviewer who reviews the decision and reports back to the Complaints Committee. The Complaints Committee reconsiders the issues in the light of that report and notifies all

relevant parties of what the Committee is minded to do subject to any further comment of the Independent Reviewer.

The Committee considers any reply of the Independent Reviewer and makes a final decision on whether or not a *prima facie* case is made out against the Member. If it determines that no *prima facie* case has been made out, that is the end of the matter. If the Complaints Committee determines that a *prima facie* case has been made out, the Committee may decide to refer all or part of the complaint to the Disciplinary Committee.

The Report of the Comptroller and Auditor General

In September 2005, the Comptroller and Auditor General laid his Annual Report for 2004 before Dáil Éireann. At Chapter 13 of the Report, he set out his findings with respect to the audit of the accounts of the Department of Transport. In particular, he identified an underpayment of €1,984,628 (including a rounding error of €171,000) by National Toll Roads plc ("NTR") in respect of its total liability to the State for toll revenue collected by it on the West-Link Toll Bridge for 2002 and 2003. This underpayment had not previously been detected, notwithstanding the existence of agreed legal arrangements which required *inter alia* that the auditor of the relevant NTR subsidiary, namely the Member Firm, confirm annually the accuracy of the computation of the licence fee in accordance with the agreed arrangements.

The Complaint

The Complainant wrote to the Institute on 30 September 2005 complaining about the Member Firm's failure in its audit of NTR to identify the serious error of nearly €2 million in the accounts of NTR. On that date, the Complainant was provided with information on the Institute's complaints process.

At the invitation of the Institute, the Member Firm responded on 3 November 2005 to the Complaint. On 25 November 2005, the Institute *inter alia* informed the Member Firm that the Complaint would be considered under the August 2004 Bye-Laws and advised it of the terms of the draft indicative complaint (see below) which would come before the Complaints Committee meeting on 15 December 2005. On 9 December 2005, the Member Firm made a number of further observations in response to the draft indicative complaint for consideration by the Complaints Committee.

On receiving an assurance of confidentiality from the Complainant, the Institute forwarded to the Complainant on 2 December 2005 a copy of the Member Firm's initial response to his Complaint. Having been advised that the Complaint would be dealt with at the Complaints Committee meeting on 15 December 2005, by letter dated 12 December 2005 the Complainant set out

his observations on the matter and asked that they be brought to the attention of the Committee.

On 29 November 2005, the members of the Complaints Committee were advised of the agenda for its 15 December 2005 meeting. The papers before the meeting with respect to the Complaint included three files comprising an extract from the Annual Report of the Comptroller and Auditor General, a number of press articles and the correspondence between the Complainant, the Institute and the Member Firm. The indicative complaint before the Committee was to the effect that the Member Firm did:

“contrary to Fundamental Principle 4 of the Ethical Guide for Members in the course of the audit of the annual financial statements of NTR and the confirmation of the annual licence fee payable to the Government by NTR;

- 1. fail to identify an error of nearly €2m, as outlined in the Annual Report for 2004 of the Comptroller and Auditor General and*
- 2. fail to pick up a rounding error in the licence fee of a further €171,000*

and is accordingly liable to disciplinary action under Chapter IX of the Institute’s Bye Laws.”

Decisions of the Complaints Committee

The Complaints Committee determined on 15 December 2005 that a *prima facie* case was not established and that:

- the error arose due to the Member Firm not identifying during their audit an amendment to the toll scheme in a supplemental agreement between the National Roads Authority on behalf of the State and a wholly owned subsidiary of NTR in 2001;
- the error was of an isolated nature and as such did not constitute evidence of inadequate audit procedures and
- the error did not in consequence amount to conduct which would bring discredit to the Member Firm within the provisions of Bye-Law 65.1 such as to render it liable to disciplinary action.

In the light of this decision, the Complainant availed of his right to have the Complaints Committee’s determination referred to an Independent Reviewer. An Independent Reviewer was subsequently appointed, and in a submission to the Independent Reviewer on 3 April 2006, the Complainant indicated that he was not pursuing the ‘rounding up’ element of his Complaint.

In his report of 25 July 2006, the Independent Reviewer found that the decision of the Complaints Committee was wrong in a certain respect. He pointed out that Bye-Law 65.1(b) distinguishes between the conduct and performance of member firms to a particular extent or on a number of occasions. He noted that the Committee had confined its decision to the isolated nature of the error but expressed the opinion that the Committee should also have considered the matter in the context of the other limb of the Bye-Law. In particular, he concluded that the Committee needed to determine if a *prima facie* case had been made out that the Member Firm had performed its professional duties or conducted its practice inefficiently or incompetently to such an extent as to render it liable to disciplinary action even if the error was an isolated one.

On 10 October 2006, the Complaints Committee reconsidered the Complaint in the light of the report of the Independent Reviewer and determined that it was not minded to change its decision. In the Committee's view, the failure of the Member Firm was due to it not identifying the impact of an amended definition in a Supplemental Agreement on the calculation of the licence fee. The amendment in the Agreement was one that the Committee considered gave rise in its strict interpretation to a counter-intuitive result. In the circumstances, the Committee considered that the failure to identify the error in the calculation of the licence fee was not in itself of a reprehensible nature, nor did this isolated incident reflect inadequate audit procedures such as to bring discredit to the Member Firm, the Institute or the profession of accountancy within the context of Bye-Law 65.1(b). The Secretary to the Committee subsequently informed the Independent Reviewer, the Member Firm and the Complainant that it was not minded to change its decision subject to it's considering any further views of the Independent Reviewer.

In a subsequent letter, the Independent Reviewer reiterated his position. He expressed concern that the Complaints Committee was placing too much reliance on the isolated nature of the alleged breach. He referred to the nature of the assignment being quite focused and specific and stated that it would be more appropriate for the Committee in its decision to focus on the extent of any alleged breach of professional standards rather than on the isolated nature of such a breach.

The Complaints Committee noted the comments of the Independent Reviewer at its meeting on 15 December 2006 and decided to confirm its original decision.

Decisions of the Authority

Having considered in particular press reportage on the Institute's consideration of the Complaint, the Board on 24 July 2007 appointed a Preliminary Enquiry Committee pursuant to the Act and the Regulations.

By letter dated 29 July 2008, as amended by letter dated 7 August 2008, the Preliminary Enquiry Committee determined that there was a *prima facie* case that the Institute had failed to comply with its approved investigation and disciplinary procedures including Bye-Laws 67.2 and 74.4 in particular.

As a consequence of the findings of the Preliminary Enquiry Committee, the Board on 16 September 2008 resolved to appoint an Enquiry Committee to conduct a full enquiry pursuant to the Act and the Regulations which said Committee was established on 23 December 2008.

Work of the Enquiry Committee

At the outset, the Enquiry Committee considered the initial complaint made to the Authority and reviewed the findings of the Preliminary Enquiry Committee.

On 11 March 2009, the Enquiry Committee issued a Notice pursuant to Regulation 5(3) of the Regulations to the Institute, the Member Firm, NTR, the Comptroller and Auditor General and the Complainant outlining *inter alia* the intended scope of the Enquiry and its powers.

By letter also dated 11 March 2009, the Enquiry Committee set out *inter alia* how it was minded to proceed with its Enquiry.

Having considered the submissions made in response, the Committee then entered upon its Enquiry and sought and received certain documents and explanations from the Institute which it considered germane to its Enquiry. Supplementary documents and explanations were obtained as necessary.

By letters dated 11 February 2010 and 15 February 2010 addressed to the Institute and the Member Firm, the Complainant and NTR respectively, the Enquiry Committee advised them of the amendment of the scope of its Enquiry. The scope of this Enquiry (as amended) is as follows:

"To investigate the Institute's consideration of a complaint made by Senator Shane Ross against KPMG with particular reference to the allegations made in an article in the Sunday Independent Newspaper of 7 January 2007 headed 'KPMG: the great Houdini's' and to the prima facie case found by the Preliminary Enquiry Committee as set out in its notification dated 29 July 2008 (as subsequently amended by their letter of 7 August 2008 addressed to the Secretary of the Institute and the Managing Partner of KPMG)."

On 5 March 2010, the Institute declined to avail of its option under the Regulations to request an oral hearing of the matters before the Enquiry, and the Enquiry Committee subsequently decided not to convene such a hearing.

The focus of the Enquiry Committee's deliberations has been on the extent to which the Institute complied with its approved investigation and disciplinary procedures in its consideration of the Complaint, including at the Complaints Committee meetings on 15 December 2005, 10 October 2006 and 15 December 2006. In accordance with Section 23 of the Act and the Regulations, the Committee's remit does not extend to examining the substance of the Complaint.

Having made initial findings and considered the Institute's submissions thereon, this Enquiry Committee finds that the Institute failed to comply with certain approved investigation and disciplinary procedures in its consideration of the Complaint as hereinafter set out.

The Enquiry Committee also considered the Institute's submissions on the Enquiry Committee's proposed considerations with respect to sanctions before determining the specific sanctions as hereinafter set out. Regulation 12(2) of the Regulations specifies that in determining the level of sanctions to apply, an Enquiry Committee will have regard to all of the circumstances of the matter which may include *inter alia* the following factors:

- whether the failure to comply with approved investigation and disciplinary procedures was deliberate, dishonest, reckless or negligent;
- the duration and/or the frequency of the failure to comply; and
- the extent to which the failure to comply deviated from the required procedure.

Findings of the Enquiry Committee

Having reviewed the information and the documentation made available to it and all submissions received from the Institute and all other relevant parties, the Enquiry Committee makes the following findings.

1. Pursuant to Regulation 11(1) of the Regulations, the Enquiry Committee finds that the Institute breached Bye-Law 72.1 in its consideration of the Complaint at the Complaints Committee Meeting on 15 December 2005 - 'Public Concern' Issue

Context of this Finding

Bye-Law 72.1 provides as follows:

"Where a complaint has been conveyed to the Complaints Committee by the Secretary the Complaints Committee shall first form an opinion as to whether or not the Complaint is one that gives rise to or includes questions of public concern and/or is of complexity or importance."

The documents furnished by the Institute to the Enquiry did not contain any contemporaneous evidence that the Complaints Committee formed the prerequisite opinion on the Complaint under Bye-Law 72.1 at its meeting on 15 December 2005. The documents in question included:

- the extant manuscript notes taken at the meeting of the deliberations of the Complaints Committee on the Complaint;
- the letters written subsequently to the Complainant and the Member Firm recording the decision of the 15 December 2005 meeting;
- the report made to Council of the decision taken at the 15 December 2005 meeting, and
- the approved minutes of the 15 December 2005 meeting.

The Institute's Submissions on this Finding

The Institute submitted that the requisite decision in accordance with Bye-Law 72.1 was in fact made at the Complaints Committee meeting on 15 December 2005 notwithstanding that there was no contemporaneous documentary record of that decision. The submissions indicated that the absence of a minute pointed to the Complaint not having given rise to a question of public concern and that any decision to refer the Complaint to a Special Investigator would have been minuted.

The Institute placed particular reliance on the representations originally made by it to the Preliminary Enquiry Committee on 19 March 2008. The signatory of that letter who had attended the Complaints Committee meeting on 15 December 2005 stated that:

“Whilst not reflected in the minutes, the Complaints Committee did in fact fulfil its obligations under Bye-Law 72.1 and formed the opinion that the Complaint was not one that gave rise to or included questions of public concern or was of complexity or importance. Had the Committee formed the opposite opinion, it would have referred the Complaint for investigation by a Special Investigator under the Bye-Laws. No such referral took place.”

The Enquiry Committee’s Response to the Submissions on this Finding

Having considered the Institute’s submissions, the Enquiry Committee does not accept them for the following reasons.

Firstly having regard to the mandatory nature of the opinion to be formed by the Complaints Committee on the ‘public concern’ issue under Bye-Law 72.1, it was a requirement under Regulation 4 of the Regulations of the Complaints Committee that any Committee decision under Bye-Law 72.1 be recorded in those minutes.

Secondly, the minutes of the following Complaints Committee meeting on 3 March 2006 recorded the draft minutes of its preceding meeting of 15 December 2005 as having been amended. Notwithstanding this scrutiny, no reference was included in the minutes of the 15 December meeting to a Committee decision with respect to Bye-Law 72.1 and the Complaint.

Thirdly, the approved minutes of the Complaints Committee meeting on 15 December 2005 did in fact record the making of a decision under Bye-Law 72.1 in the case of another unrelated complaint to the effect that *“the complaint was not one which gave rise to or includes questions of public concern”*. The Enquiry Committee is of the opinion that if such a decision was recorded in the case of one complaint considered at the meeting, the Committee would not have failed to record in the minutes a decision under Bye-Law 72.1 on the Complaint if such a decision had in fact been made at the meeting.

Fourthly, it is unsatisfactory that the only available document supporting the Institute’s submission is a letter of 19 March 2008 to the Preliminary Enquiry Committee which post-dates the relevant Committee meeting by more than two years.

Fifthly, with respect to the related argument in that letter of 19 March 2008 that the Complaint would have been referred to a Special Investigator if the Complaints Committee had determined that a ‘public concern’ issue arose, Bye-Law 72.2 permits the Complaints Committee to take one of three decisions *“in its absolute discretion”*:

- a complaint is not a ‘public concern’ issue;

- a complaint is a ‘public concern’ issue but not one warranting referral to a Special Investigator;
- a complaint is a ‘public concern’ issue warranting referral to a Special Investigator.

Accordingly, the Institute’s repeated submissions to the PEC and this Enquiry Committee that the Complaint would have been referred to a Special Investigator if the Complaints Committee had determined that a ‘public concern’ issue arose is not consistent with the applicable Bye-Law 72.2.

Taking account of these reasons as well as the absence of any contemporaneous documentary record, the Enquiry Committee finds that the Institute breached Bye-Law 72.1 in its consideration of the Complaint at the Complaints Committee meeting on 15 December 2005.

The Institute’s Submissions on Sanctions

The Institute made submissions on the Enquiry Committee’s proposed considerations with respect to sanctions in the circumstances of this finding of a breach of Bye-Law 72.1. Having considered these submissions, the Enquiry Committee believes that the following Institute submissions should be addressed in this Decision:

- i) There was *“no negligence or inattention on its part”* in adhering to Bye-Law 72.1 when the Complaints Committee considered the Complaint on 15 December 2005. The Institute’s failure to adequately minute the Committee’s decision on the Complaint under this Bye-Law was *“inadvertent”*, and this inadvertence *“represented, at most, inattention on its part”*. This inadvertence did not *“render the decision of the Complaints Committee on the complaint deficient”*;
- ii) a matter relating to Bye-Law 72.2 is not relevant *“as the EC cannot consider possible sanctions by reference to a Bye-Law pursuant to which no finding has been made”*. Moreover, the Institute’s representations with respect to any decision of the Complaints Committee to be made under Bye-Law 72.2 reflected its opinion that the Committee *“would have referred the matter in this case to a Special Investigator where the complaint had been one of public concern”*;
- iii) *“The EC should take into account that the Institute has amended its practice in respect of Bye-Law 72.1 in that a Complaints Committee’s consideration of Bye-Law 72.1 is now always minuted in respect of every complaint”*;
- iv) *“...it is beyond the scope of the EC’s considerations in respect of sanctions, in particular in considering the ‘duration and frequency’ element of any Bye-Law*

breach, to take into account 'suggested breaches of Bye-Law 72.1 in respect of other complaints considered at the Complaints Committee meeting on 15 December 2005'", because these "other un-established breaches of Bye-Law 72.1...were not the subject matter of the Enquiry".

The Enquiry Committee's Response to the Institute's Submissions on Sanctions

Having considered the Institute's submissions, the Enquiry Committee notes that submission i) is based on the Enquiry Committee having made a finding that the Institute acted under Bye-Law 72.1 and only failed to minute the Complaints Committee's decision under the Bye-Law. Accordingly, this submission fails to address the Enquiry Committee's actual finding of a breach of Bye-Law 72.1.

Furthermore in respect of submission ii), the Institute made no decision on the Complaint under Bye-Law 72.2, and accordingly, this Enquiry Committee has no decision under that Bye-Law to review. However, it is clear that the Institute's assertions to the PEC and this Enquiry Committee were made in the context of the review of the Institute's compliance with Bye-Law 72.1. Moreover, the Institute has failed to provide an explanation for its repeated assertions to the PEC and this Enquiry Committee that the Complaints Committee did not minute its decision under Bye-Law 72.1 notwithstanding the explicit requirement in Regulation 4 of the Regulations of the Complaints Committee that this be done. The Enquiry Committee is satisfied that in determining the level of sanctions, it can take account of these matters, because they form part of the circumstances relating to the matter, namely this Enquiry Committee's finding of a breach of Bye-Law 72.1.

In respect of submissions iii) and iv), the Enquiry Committee believes that the Institute's submissions are contradictory. On the one hand, the Institute is urging the Enquiry Committee to disregard in its sanctions decision other complaints which were considered at the Complaints Committee meeting of 15 December 2005 on the grounds that these lie beyond the scope of the Enquiry. At the same time, it is urging the Enquiry Committee to take into account the fact that Bye-Law 72.1 is now being complied with in respect of complaints considered after 15 December 2005 notwithstanding that these also lie beyond the scope of the Enquiry.

Having considered the matter, the Enquiry Committee has decided to have regard to both sets of complaints in its decision on sanctions on the basis that they are relevant to all the circumstances of the matter (namely the breach of Bye Law 72.1) but to treat each of them differently. On the one hand, it accepts the Institute's assurance that the Institute is now complying with Bye-Law 72.1 in its complaints decision-making, and the

Enquiry Committee will reflect that in its determination of the level of sanction. In contrast, the Enquiry Committee has decided to merely note the circumstances suggesting further breaches of the Bye-Law and not to regard them as an aggravating factor in its determination of the level of sanction for this Complaint.

Relevant Circumstances in determining the Level of Sanction

Having considered all the circumstances of the matter for the purpose of determining the level of sanction to apply under Regulation 12(2), the Enquiry Committee has formed the opinion that the breach of Bye-Law 72.1 with respect to the Complaint at the Complaints Committee meeting on 15 December 2005 was caused by negligence and inattention to the requirements of the relevant Bye-Law. In forming this opinion, the Enquiry Committee is mindful that this breach occurred notwithstanding that a copy of the Bye-Laws formed part of the papers for the Complaints Committee meeting.

The Enquiry Committee is also of opinion that in failing to abide by Bye-Law 72.1, the purported decision of the Complaints Committee on the Complaint on 15 December 2005 was deficient. Moreover, the purpose of this Bye-Law was to consider if the Complaint was a matter of public interest, and the Enquiry Committee is of the opinion that the failure to comply was therefore serious.

In addition, the Enquiry Committee is concerned by the content of the repeated representations made by the Institute to the PEC and this Enquiry Committee to the effect that no breach of Bye-Law 72.1 occurred and that the only failure was a failure to minute the Complaints Committee's decision under the Bye-Law. These representations are inconsistent with the requirements of other approved investigation and disciplinary procedures of the Institute, specifically Bye-Law 72.2 and Regulation 4 of the Regulations of the Complaints Committee.

2. Pursuant to Regulation 11(1) of the Regulations, the Enquiry Committee finds that the Institute breached Bye-Law 67.2 in its consideration of the Complaint at the Complaints Committee Meeting of 15 December 2005 – Quorum Issue

Context of this Finding

Bye-Law 67.2 states:

*“The quorum for meetings of the Complaints Committee shall be six persons, so long as **a majority of the attendance thereat** consists of members of the Committee who are not members of the Institute. Any meeting of the Complaints Committee at which a quorum is present shall be competent to exercise all the functions and powers conferred upon the Complaints Committee by these Bye-Laws.”* (Emphasis added).

The minutes of the Complaints Committee meeting on 15 December 2005 disclose that there were nine Committee members in attendance throughout the meeting together with five other persons including staff of the Institute. Of the nine Committee members present, five were members of the Institute and four were lay members.

It is also evident that the Committee was aware of the quorum issue having regard to the following extract from the minutes of the meeting:

“The Committee noted that two Institute members of the Committee would have to abstain from voting in each case in order to achieve the correct quorum. The members are named at the start of each case.”

The Institute’s Submissions on this Finding

The Institute submitted that the Complaints Committee meeting on 15 December 2005 was quorate because two Committee members took no part in the consideration and determination of the Complaint. It enclosed a Memorandum signed on 26 February 2007 by all but one of the relevant Committee members which indicated *inter alia* that despite their attendance, specified members took no part in the Committee’s deliberations on each complaint in order to help satisfy the provisions of Bye-Law 67.2.

The Institute also submitted legal advice in support of its view that the meeting was quorate.

The Enquiry Committee’s Response to the Submissions on this Finding

Having considered the Institute’s submissions, the Enquiry Committee does not accept that in considering the Complaint, the Complaints Committee meeting on 15 December 2005 was quorate.

While the Enquiry Committee accepts the Institute's submission that the two indicated members of the Institute did not contribute at the Complaints Committee meeting to the consideration and determination of the Complaint, the Enquiry Committee takes the view that the mere presence of one or more persons at a meeting from which they should be excluded can influence a meeting's consideration and determination of an issue.

A major purpose of Bye-Law 67.2 is to ensure that complaints against members of the Institute are independently determined by a majority of persons who are not associated with the Institute and its members. This is intended to provide public confidence in the independence and quality of the investigative process.

While the Enquiry Committee has noted that the Institute's legal advice expressed the view that the meeting was quorate, nevertheless the Enquiry Committee believes, having taken its own legal advice, that the Bye-Law is very clear in specifying that a majority of the attendees at the meeting ("*a majority of the attendance thereat*") must be lay members before the Complaints Committee can discharge its functions.

In the circumstances, the Enquiry Committee finds that the Institute breached Bye-Law 67.2 in its consideration of the Complaint at the Complaints Committee meeting on 15 December 2005. It follows that any inquorate meeting is not competent to make decisions on any matters before it.

The Institute's Submissions on Sanctions

The Institute made submissions on the Enquiry Committee's proposed considerations with respect to sanctions in the circumstances of this finding of a breach of Bye-Law 67.2. Having considered these submissions, the Enquiry Committee believes that the following Institute submissions should be addressed in this Decision:

- i) there was "*no negligence or inattention on its part*" in adhering to Bye-Law 67.2 when the Complaints Committee considered the Complaint on 15 December 2005;
- ii) "*The fact [that] the Institute was acting in good faith pursuant to legal advice is a factor for consideration in relation to any possible sanction*";
- iii) "*...the Institute rejects the EC's assertion [that the Complaints Committee's decision on 15 December 2005 was invalid by reason of the quorum issue]*";

- iv) *"The EC should take into account that the Institute has since amended its Bye-Laws [to require] a quorum of five persons instead of six persons. However even in advance of the Bye-Laws being amended (in December 2007) the Institute had amended its practice in that for the purposes of its consideration of cases before it, the Complaints Committee ensured that the required number of members absented themselves from the meeting so that the meeting was quorate";*
- v) *"...it is beyond the scope of the EC's considerations in respect of sanctions, in particular in considering the 'duration and frequency' element of any Bye-Law breach, to take into account 'suggested breaches of Bye-Law 67.2. in respect of other complaints considered at the Complaints Committee meeting (sic) on 12 October and 15 December 2005'", because these "other un-established breaches of Bye-Law 67.2...were not the subject matter of the Enquiry".*

The Enquiry Committee's Response to the Institute's Submissions on Sanctions

Having considered the Institute's submissions, the Enquiry Committee does not accept the validity of submission i), because this breach would not have occurred if the explicit requirements of Bye-Law 67.2 had received proper attention.

The Enquiry Committee notes submission ii). However, the legal advice in question was only received in early 2007, and accordingly, it cannot be the case that the Institute was acting *"in good faith"* pursuant to this legal advice on the occasion of the Complaints Committee meeting of 15 December 2005.

With respect to submission iii), the Enquiry Committee has already made clear in the finding above that it does not accept this submission.

In response to submission iv), the Enquiry Committee takes the view that as the quorum size of six persons was not directly responsible for this breach of the Bye-Law, the subsequent reduction in the quorum requirement to five does not in itself safeguard future compliance with this Bye-Law.

The Enquiry Committee also believes that submissions iv) and v) are contradictory. On the one hand, the Institute is urging the Enquiry Committee to disregard in its sanctions decision other complaints which were considered at the Complaints Committee meetings of 12 October 2005 and 15 December 2005 on the grounds that these lie beyond the scope of the Enquiry. At the same time, it is urging the Enquiry Committee to take into account the fact that Bye-Law 67.2 is now being complied with in respect of complaints considered after 15 December 2005 notwithstanding that these also lie beyond the scope of the Enquiry.

Having considered the matter, the Enquiry Committee has decided to have regard to both sets of complaints in its decision on sanctions on the basis they are relevant to all the circumstances of the matter (namely the breach of Bye-Law 67.2) but to treat each of them differently. On the one hand, it accepts the Institute's assurance that the Institute is now complying with Bye-Law 67.2 in its complaints decision-making, and the Enquiry Committee will reflect that in its determination of the level of sanction. In contrast, the Enquiry Committee has decided to merely note the circumstances suggesting further breaches of the Bye-Law and not to regard them as an aggravating factor in its determination of the level of sanction for this Complaint.

Relevant Circumstances in determining the Level of Sanction

Having considered all the circumstances of the matter for the purpose of determining the level of sanction to apply under Regulation 12(2), the Enquiry Committee has formed the opinion that the breach of Bye-Law 67.2 with respect to the Complaint at the Complaints Committee meeting on 15 December 2005 was caused by negligence and inattention to the requirements of the relevant Bye-Law. In forming this opinion, the Enquiry Committee is mindful that this breach occurred notwithstanding that a copy of the Bye-Laws formed part of the papers for the Complaints Committee meeting.

It is a consequence of the Enquiry Committee's finding of a breach of Bye-Law 67.2 that the purported decision of the Complaints Committee on the Complaint on 15 December 2005 was invalid. To that extent, the failure by the Institute to comply with its own Bye-Law was significant.

3. Pursuant to Regulation 11(1), the Enquiry Committee finds that the composition of the Complaints Committee at its meeting of 10 October 2006 was in breach of Bye-Law 67.1.

Context of this Finding

Bye-Law 67.1 provides as follows:

"The Complaints Committee shall consist of not more than twelve persons of whom the majority shall be persons who are not members of the Institute. The Council may appoint from time to time persons to fill any vacancy that arises in the membership of the Complaints Committee."

There is documentary evidence available to the Enquiry Committee to indicate that:

- there were five lay members, five ICAI members and two vacancies on the Complaints Committee immediately after the Council meeting held on 16 June 2006;
- there were five lay members, four ICAI members and three vacancies on the Complaints Committee at the Committee's meeting held on 21 July 2006. (It appears that the fortuitous resignation of an ICAI member from the Committee in advance of the meeting brought it into compliance with Bye-Law 67.1.);
- there were four lay members, four ICAI members and four vacancies on the Complaints Committee on 31 July 2006 when the Institute informed the Complainant of the identities of the members of the Committee at that time;
- there were four lay members, four ICAI members and four vacancies on the Complaints Committee immediately prior to the Council meeting on 15 September 2006 when:
 - o the Institute e-mailed the Complainant on 11 September 2006 and informed him that: *"At present we have 5 non accountant members of the Complaints Committee - we currently have two vacancies which will shortly be filled by Council."* The information was incorrect insofar as there were then only three non-accountant members on the Committee;
 - o the Institute sent a letter dated 12 September 2006 to the Complainant indicating *inter alia* that the membership of the Committee comprised six named lay members and five named ICAI members. The letter was inaccurate in representing that a

named lay person remained a member of the Committee (notwithstanding that Council had not reappointed him at its meeting on 16 June 2006) and that a second named lay person and a named ICAI member were then on the Committee (notwithstanding that they would only be appointed at the following Council meeting on 15 September 2006);

- there were five lay members, five ICAI members and two vacancies on the Complaints Committee immediately after the Council meeting on 15 September 2006 and
- there were five lay members, five ICAI members and two vacancies on the Complaints Committee on 10 October 2006 when it considered the report of the Independent Reviewer on the Complaint.

The Institute's Submissions on this Finding

The Institute has accepted that there was a technical breach of Bye-Law 67.1 in respect of the Complaints Committee meeting on 10 October 2006. However, it represented that the Committee was cognisant of the composition of the meeting, and in considering each of the cases, it ensured that one member of the Institute absented himself or herself so that the meeting was quorate.

The Institute has also submitted that the Enquiry Committee can only make a finding in relation to the composition of the Committee which considered the Complaint. It contended that the Enquiry Committee was not permitted to find that Council breached Bye-Law 67.1 by failing to appoint a majority of lay members on 16 June 2006 and 15 September 2006.

In respect of the incorrect information communicated by the Institute to the Complainant in the e-mail of 11 September 2006, the Institute submitted that this occurred as a result of human error, that it reflected the composition of the Complaints Committee in or around June 2006, that there was no malfeasance or attempt to mislead the Complainant in the provision of the outdated information and that there was no consequential breach of Bye-Laws or professional standards.

In respect of the incorrect information communicated by the Institute to the Complainant in the letter of 12 September 2006, the Institute made very similar submissions to those outlined in the preceding paragraph.

The Enquiry Committee's Response to the Submissions on this Finding

Having considered the Institute's submissions, the Enquiry Committee does not accept that the Complaints Committee was properly constituted on 10 October 2006 when it considered the report of the Independent Reviewer on the Complaint. As it was not constituted in accordance with

the requirements of Bye-Law 67.1 on that date, the Institute's purported decision with respect to the Complaint was therefore invalid.

The Enquiry Committee also notes that:

- the composition of the Complaints Committee on 10 October 2006 was a product of previous Council decisions, in particular those made at the Council meetings on 16 June 2006 and 15 September 2006 and
- the decisions to appoint/re-appoint an equal number of ICAI and lay members to the Complaints Committee at both Council meetings in contravention of the requirements of Bye-Law 67.1 were avoidable in that Council had the option to refrain from appointing an ICAI member to the Committee on both dates.

In respect of the incorrect information forwarded to the Complainant on 11 and 12 September 2006, the Enquiry Committee is of opinion that the Institute was in a position to know the true composition of the Complaints Committee at all times.

With regard to the e-mail of 11 September 2006 and the inclusion in the letter of 12 September 2006 of the named lay person who was no longer a member of the Committee, the Enquiry Committee accepts that the communication of the inaccurate and misleading information may well have been inadvertent.

Insofar as the letter of 12 September 2006 communicated the names of the two other persons who would only be appointed at the following Council meeting on 15 September 2006, the Enquiry Committee does not accept the Institute's submissions, because:

- the schedule of members of the Complaints Committee containing the names of both persons was not representative of the Complaints Committee in or around June 2006 as neither were members of the Committee at that time;
- the names of both persons could only have been included on the schedule of members of the Complaints Committee because of the Institute's awareness that they were being proposed to Council for approval at its meeting three days later.

Other Circumstances of the Matter

It is a matter of concern to the Enquiry Committee that this is not the only occasion on which the Institute made incorrect representations to the Complainant. In addressing his request for a copy of the Member Firm's

response to his Complaint, the Institute wrote to the Complainant on 11 November 2005 indicating as follows:

"Having fully considered the matter the [Complaints] Committee (including its lay members, whose function is, of course, to protect the public interest) wishes to ensure an open process and provide the complainant with the opportunity to contribute to the process by commenting on the responses made by the firm whilst fully recognising the concerns discussed above. The Committee therefore considers that a proper balance between the interests of the complainant, the member firm and its client would be struck by disclosing to you the firm's whole response subject to your assurance that you will not disclose it or any part of it, or cause it or any part of it to be disclosed to any third party and will not be made available by you for publication, broadcast, etc (other than your own legal adviser who will naturally be bound by their own Rules of Professional Conduct in relation to confidentiality and by the undertaking that you have given personally), until such time as the process as laid out in the Institute's Disciplinary Bye-laws has finally concluded."

Notwithstanding the claim in the letter that the Complaints Committee had *"fully considered the matter"*, that it wished to *"ensure an open process"* and that it considered the striking of *"a proper balance"*, it is clear this information was incorrect and misleading for the reason that at the time the letter was conceived, written and sent, no aspect of the Complaint had been put before the Complaints Committee, a fact that was known to the Institute at the time of issue of the letter. The Institute's assertion to this Enquiry Committee that the Chairman and Vice-Chairman of the Committee were consulted in advance of the issue of the letter on the possible provision to the Complainant of a copy of the Member Firm's response is not, in the view of the Enquiry Committee, an adequate explanation of the communicated misinformation.

The Enquiry Committee notes that the Member Firm may also have received incorrect information on one occasion. The Institute informed this Enquiry that the Complaints Committee considered the Complaint under the October 2005 Bye-Laws at all times. However in inviting the Member Firm to make further submissions on 25 November 2005, the Institute informed it that the Complaint would be considered under the August 2004 Bye-Laws. Four days later on 29 November 2005, the Complaints Committee was apparently forwarded a copy of the October 2005 Bye-Laws under which the Complaint was considered. No record has been made available to this Enquiry Committee to indicate that the Member Firm was subsequently informed that the Complaint was in fact being considered under the October 2005 Bye-Laws.

The Institute's Submissions on Sanctions

The Institute made submissions on the Enquiry Committee's proposed considerations with respect to sanctions in the circumstances of this finding of a breach of Bye-Law 67.1. Having considered these submissions, the Enquiry Committee believes that the following Institute submissions should be addressed in this Decision:

- i) there was "*no negligence or inattention on its part*" in adhering to Bye-Law 67.1 when the Complaints Committee considered the Complaint on 10 October 2006;
- ii) "*The Institute further submits that the decision of the Complaints Committee on 10 October 2006 on the report of the Independent Review (sic) was not invalid, as asserted by the EC*";
- iii) "*The Institute absolutely rejects that the Correspondence [on 11 and 12 September 2006 and 11 and 25 November 2005] should be considered in relation to possible sanctions for a number of reasons as follows:*
 - *The Finding relates to the compliance with Bye-Law 67.1 in relation to the composition of the Complaints Committee meeting of 10 October 2006. Alleged miscommunication of information in the correspondence [on 11 and 12 September 2006] in relation to the composition of the Complaints Committee in itself is not a Bye-Law breach. Therefore, as the sanction can only address the specific Bye-Law breach, it should not form part of the EC's considerations on sanctions; and*
 - *The correspondence [on 11 and 25 November 2005] is unrelated to the Finding. The Institute submits that it is beyond the scope of the EC's considerations, and as a matter of fair procedures, to take into account alleged miscommunication in unrelated correspondence, which again is not a Bye-Law breach, in relation to the imposition of possible sanctions. Furthermore, the correspondence [on 25 November 2005] has not to date even formed part of the exchange of correspondence with the Institute in relation to the Enquiry. As a matter of fair procedures the EC (sic) ought to have been afforded the opportunity to make submissions on this correspondence in advance of the issuance of the Finding in circumstances where the EC took the view it would be considered in relation to possible sanctions*";
- iv) "*...the EC's assertion that the alleged miscommunication in the correspondence [on 11 and 12 September 2006 and 11 November 2005] was 'inadvertent' does not correlate to its assertion of 'recklessness' and/or 'negligence' in respect of such correspondence. At most, any alleged miscommunication in such correspondence was 'inadvertent' and the Institute submits any alleged miscommunication was neither reckless nor negligent*";

- v) *“The EC should take into account that the Institute has since amended its Bye-Laws [to require] that the Complaints Committee consists of nine persons, rather than twelve, the majority of whom shall be persons who are not members of the Institute...Furthermore, the Bye-Law was also amended to permit the Complaints Committee to act notwithstanding any vacancy in its body...This has remedied any potential concern the EC might have in relation to a Complaints Committee’s adherence to Bye-Law 67.1”;*
- vi) *“...it is beyond the scope of the EC’s considerations in respect of sanctions, in particular in considering the ‘duration and frequency’ element of any Bye-Law breach, to take into account ‘circumstances suggesting breaches of Bye-Law 67.1 in respect of other complaints considered at the Complaints Committee meeting on 10 October 2006’”, because these “other un-established breaches of Bye-Law 67.1...were not the subject matter of the Enquiry...”.*

The Enquiry Committee’s Response to the Institute’s Submissions on Sanctions

Having considered the Institute’s submissions, the Enquiry Committee does not accept the validity of submission i), because this breach would not have occurred if the explicit requirements of Bye-Law 67.1 had received proper attention.

With respect to submission ii), the Enquiry Committee has already made clear in the finding above that it does not accept this submission.

In relation to submission iii), the Enquiry Committee acknowledges that the Institute’s communication of misinformation in the correspondence on 11 and 12 September 2006 and 11 and 25 November 2005 is not in itself a breach of the approved investigation and disciplinary procedures under the Act and the Regulations. Insofar as the Enquiry Committee can establish, the Institute as a body is not bound by its own Rules of Professional Conduct even though these form part of those approved investigation and disciplinary procedures. As these Rules comprise the standards that the Institute demands of its members and as non-compliance with these Rules renders the members liable to disciplinary action, the Enquiry Committee would expect that the Institute itself would be assiduous in complying with its own Rules.

The Enquiry Committee observes however that there are circumstances suggesting that in communicating the misinformation in the above correspondence, the Institute may have failed to comply with one or more of the following fundamental principles which are part of its approved Rules of Professional Conduct:

- Integrity: Be straightforward and honest in all professional and business relationships;

- Due Care: Act diligently and in accordance with approved technical and professional standards;
- Professional Behaviour: Comply with relevant laws and regulations and avoid any action that discredits the profession.

The Enquiry Committee is satisfied having taken legal advice that the content of the communicated misinformation in the Institute's correspondence on 11 and 12 September 2006 is directly related to the composition of the Complaints Committee and the requirements of Bye-Law 67.1. As the Enquiry Committee has found that the Institute has breached this Bye-Law in respect of the Complaint and as the misinformation in question was given to the Complainant, the Enquiry Committee is fully satisfied that this is a 'circumstance of the matter' which Regulation 12(2) requires the Enquiry Committee to take into account in determining the level of sanction for the breach.

The Institute's correspondence of 11 and 25 November 2005 is related to the Complaint, the Complainant and the Member Firm who is the subject of the Complaint. While it is not directly related to a particular Bye-Law breach as it pre-dates the holding of any Complaints Committee meeting, it is relevant to 'all of the circumstances of the matter' and the Enquiry Committee's consideration of sanctions under Regulation 12(2) that the Institute communicated misinformation on other occasions during the period of consideration of this Complaint. As such, it is an aggravating factor which the Enquiry Committee is satisfied having taken legal advice can be taken into account in determining the level of sanction to apply.

In relation to the submission about an alleged lack of engagement by the Enquiry Committee with the Institute on the letter of 25 November 2005, the Enquiry Committee is firmly of the view that it has properly afforded the Institute an opportunity to make a submission on the matter prior to the Enquiry Committee making a decision on sanctions.

Insofar as submission iv) is concerned, the Enquiry Committee does not accept that its proposed considerations on sanctions were inconsistent but will outline clearly in this Decision its conclusions on the gravity of the relevant circumstances. It also notes, but does not accept, the related submission that the communication of the misinformation was merely inadvertent at all times. For instance, it cannot be merely inadvertent to describe certain matters as having received Complaints Committee consideration when the Institute was aware that no deliberations of the Committee had taken place.

With respect to submission v), the Enquiry Committee takes the view that as the Complaints Committee membership provision of up to twelve persons was not responsible for this breach of the Bye-Law, the subsequent reduction in that membership requirement to nine persons will not in itself safeguard future compliance with this Bye-Law.

The Enquiry Committee also believes that submissions v) and vi) are contradictory. On the one hand, the Institute is urging the Enquiry Committee to disregard in its sanctions decision other complaints which were considered at the Complaints Committee meeting of 10 October 2006 on the grounds that these lie beyond the scope of the Enquiry. At the same time, it is urging the Enquiry Committee to take into account the fact that Bye-Law 67.1 is now being complied with in respect of complaints considered after 10 October 2006 notwithstanding that these also lie beyond the scope of the Enquiry.

Having considered the matter, the Enquiry Committee has decided to have regard to both sets of complaints in its decision on sanctions on the basis they are relevant to all the circumstances of the matter (namely the breach of Bye-Law 67.1) but to treat each of them differently. On the one hand, it accepts the Institute's assurance that the Institute is now complying with Bye-Law 67.1 in its complaints decision-making, and the Enquiry Committee will reflect that in its determination of the level of sanction. In contrast, the Enquiry Committee has decided to merely note the circumstances suggesting further breaches of the Bye-Law and not to regard them as an aggravating factor in its determination of the level of sanction for this Complaint.

Relevant Circumstances in determining the Level of Sanction

Having considered all the circumstances of the matter for the purpose of determining the level of sanction to apply under Regulation 12(2), the Enquiry Committee has formed the opinion that the breach of Bye-Law 67.1 with respect to the Complaint at the Complaints Committee meeting on 10 October 2006 was caused by negligence and inattention to the requirements of the relevant Bye-Law. In forming this opinion, the Enquiry Committee is mindful that this breach occurred notwithstanding that a copy of the Bye-Laws formed part of the papers for the Complaints Committee meeting.

It is a consequence of the Enquiry Committee's finding that the Complaints Committee was not properly constituted pursuant to Bye-Law 67.1 at its meeting on 10 October 2006 and that the purported decision of the Complaints Committee on the report of the Independent Reviewer on that date was therefore invalid. To that extent, the failure to comply was significant.

The Enquiry Committee notes that the decision to appoint/re-appoint the ICAI member to the Complaints Committee in contravention of Bye-Law 67.1 was avoidable in that Council had the option to refrain from appointing him to the Committee on that date.

The Enquiry Committee has also concluded that although the communication of inaccurate and misleading information to the Complainant on 11 September 2006 and in respect of the former Complaints Committee member on 12 September 2006 may have been inadvertent, the Institute's failure to communicate accurate information was caused by negligence because the Institute was in a position to know the true composition of the Complaints Committee at all times.

The Enquiry Committee is not in a position to say that the Institute deliberately communicated to the Complainant on 12 September 2006 the names of the two other persons who would only be appointed at the following Council meeting on 15 September 2006. Similarly, the Enquiry Committee finds it difficult to conclude that the Institute deliberately communicated inaccurate and misleading information to the Complainant on 11 November 2005 on the purported Complaints Committee deliberations. However, the Institute was responsible for providing inaccurate and misleading information to the Complainant on the dates in question, and the Enquiry Committee is satisfied that the Institute was reckless in communicating clearly incorrect information to him on both dates without regard to its invalidity.

In relation to the inaccurate Bye-Law information which was communicated to the Member Firm and which was not apparently corrected, the Enquiry Committee found it necessary to examine if the Firm was prejudiced as a result. The Enquiry Committee is satisfied that the specific Bye-Laws under which the Complaint was considered did not materially change between August 2004 and October 2005. The Enquiry Committee has concluded that although the communication of inaccurate information to the Member Firm on 25 November 2005 may have been inadvertent, the Institute's failure was caused by negligence because it would have known at all times the version of the Bye-Laws under which the Complaint was to be considered.

4. Pursuant to Regulation 11(1), the Enquiry Committee finds that the Institute breached Bye-Law 66.1 in having a named member of the Institute ("the ICAI member") on the Complaints Committee at its meetings on 10 October 2006 and 15 December 2006 which considered the Complaint while he was ineligible to so attend.

Context of this Finding

Bye-Law 66.1 governs the appointment of various disciplinary tribunals including the Complaints Committee. It provides *inter alia*:

"Each person so appointed shall be appointed for a term of five years. Any such appointment may be renewed for one subsequent term."

From the documents made available by the Institute, it is evident that Council appointed the ICAI member to the Complaints Committee on 18 June 1999. Having served the maximum five year term, he was reappointed to the Committee in June 2004. However, he ceased to act on the Complaints Committee by the decision of Council made on 17 June 2005. On 15 September 2006, Council again appointed him to the Complaints Committee.

The Institute's Submissions on this Finding

The Institute submitted that there was no breach of Bye-Law 66.1 with respect to the service of the ICAI member on the Complaints Committee. He had served one full term and one year of a second term by 17 June 2005, and he resumed service of his second term on the Committee on 15 September 2006 following an interruption of some 15 months.

The Enquiry Committee's Response to the Submissions on this Finding

Having considered the Institute's submissions, the Enquiry Committee does not accept them. It is clear that the purported appointment of the ICAI member to the Complaints Committee on 15 September 2006 was for a third term.

In a letter to the ICAI member following the Council decision of 17 June 2005, the then President of the Institute made it clear to him that the decision of Council to terminate his appointment on the Complaints Committee was final. This letter of 25 July 2005 included the following statements:

"This is the time of year when we appoint committees to serve for the new Presidential Year. You will remember that new bye-laws became effective in August 2004. In relation to the period each committee member may serve, bye-law 66.1 states:

'Each person so appointed shall be appointed for a term of five years. Any such appointment may be renewed for one subsequent term.'

I have noted that you have served on the Complaints Committee since 1999 and I think it is fair to say that you have done your bit for the Institute. We will now be standing you down from the Committee. I would like to say how much your voluntary input has been appreciated – many thanks for your support over the years."

The terms of this letter do not accord with the submissions of the Institute that Council's decision of 17 July 2005 was a mere suspension of the ICAI member's service on the Committee which offered some prospect of a future resumption. Moreover, the interpretation placed on Bye-Law 66.1 by the then President is consistent with that of the Enquiry Committee.

Accordingly, the Enquiry Committee finds that the Institute breached Bye-Law 66.1 in having the ICAI member on the Complaints Committee at its meetings on 10 October 2006 and 15 December 2006 which considered the Complaint while he was ineligible to so attend.

The Institute's Submissions on Sanctions

The Institute made submissions on the Enquiry Committee's proposed considerations with respect to sanctions in the circumstances of this finding of a breach of Bye-Law 66.1. Having considered these submissions, the Enquiry Committee believes that the following Institute submissions should be addressed in this Decision:

- i) there was "*no negligence or inattention on its part*" in adhering to Bye-Law 66.1 when the Complaints Committee considered the Complaint on 10 October 2006 and 15 December 2006;
- ii) "*...the validity of [the ICAI member's] appointment to the Complaints Committee from September 2006 does not affect the Complaints Committee decision on 10 October 2006 and 15 December 2006 in respect of the complaint. Therefore, this should be taken into account in relation to possible sanctions*";
- iii) "*...it is beyond the scope of the EC's considerations in respect of sanctions, in particular in considering the 'duration and frequency' element of any Bye-Law breach, to take into account 'circumstances suggesting breaches of Bye-Law 66.1 by the Institute in respect of other complaints considered at the Complaints Committee meetings on 10 October 2006, 15 December 2006 and at later dates', because these "other un-established breaches of Bye-Law 66.1...were not the subject matter of the Enquiry..."*

The Enquiry Committee's Response to the Institute's Submissions on Sanctions

Having considered the Institute's submissions, the Enquiry Committee does not accept the validity of submission i), because this breach would not have occurred if the explicit requirements of Bye-Law 66.1 had received proper attention.

With respect to submission ii), the Enquiry Committee accepts while the ICAI failed to abide by the Bye-Law, the purported decisions of the Complaints Committee on the Complaint on 10 October 2006 and 15 December 2006 were not affected by this breach, because the ICAI member fortuitously withdrew from the Committee's consideration of the Complaint at both meetings due to a perceived conflict of interest. Accordingly in the absence of any other factor, the failure to comply with this Bye-Law had no effect on the validity of any deliberations of the Committee on both dates with respect to the Complaint.

In relation to submission iii), the Enquiry Committee has decided that while it will note the other complaints considered at the Complaints Committee meetings on 10 October 2006 and 15 December 2006, it will not consider the circumstances suggesting further breaches of Bye-Law 66.1 as an aggravating factor for the purposes of its sanctions with respect to its finding of a breach of Bye-Law 66.1 in respect of this Complaint.

Relevant Circumstances in determining the Level of Sanction

Having considered all the circumstances of the matter for the purpose of determining the level of sanction to apply under Regulation 12(2), the Enquiry Committee has formed the opinion that the breach of Bye-Law 66.1 with respect to the Complaint at the Complaints Committee meetings on 10 October 2006 and 15 December 2006 was caused by negligence and inattention to the requirements of the relevant Bye-Law. In forming this opinion, the Enquiry Committee is mindful that these breaches occurred notwithstanding that a copy of the Bye-Laws formed part of the papers for the Complaints Committee meetings.

The Enquiry Committee notes that the decision to appoint/re-appoint the ICAI member to the Complaints Committee in contravention of Bye-Law 66.1 was avoidable in that Council had the option to refrain from appointing him to the Committee on that date.

The Enquiry Committee has formed the opinion that while the ICAI failed to abide by the Bye-Law, the purported decisions of the Complaints Committee on the Complaint on 10 October 2006 and 15 December 2006 were not affected by these breaches, because the ICAI member withdrew from the Committee's consideration of the Complaint at both meetings due to a perceived conflict of interest. Accordingly, the failures to comply

with this Bye-Law had no effect on any validity of the deliberations of the Committee on both dates with respect to the Complaint. The Enquiry Committee has taken these fortuitous outcomes into account in its determination of sanctions, even though the Institute played no direct role in preserving the integrity of the Committee's decision-making on both dates. This conclusion is without prejudice to the effect of the Enquiry Committee's Finding 3 above which has determined that the Committee's decision in respect of the Complaint at the meeting of 10 October 2006 was otherwise invalid.

5. Pursuant to Regulation 11(1), the Enquiry Committee finds that the Institute did not breach Bye-Law 74.2.

Context of this Finding

Bye-Law 74.2 requires the Complaints Committee to "*investigate the Complaint in order to decide whether or not a prima facie case has been made out that [the Member] is liable to disciplinary action*". On being advised of the Complaint, the Professional Standards Partner of the Member Firm responded at length to the Institute on 3 November 2005 and 9 December 2005. The letter of 3 November 2005 includes the following statements in response to the licence fee and rounding errors respectively which were contained in the Complaint:

"I, in my capacity as Professional Standards Partner, have carried out an independent review of the NTR audit work papers for both 2002 and 2003 and have satisfied myself a) as to the appropriateness of [the Member Firm's] audit work in respect of all amounts forming part of the calculation and b) that this work was carried out to the standard required by Fundamental Principle 4. The difference occurred solely in relation to a misinterpretation of the amended definition of the term 'Gross Toll Revenue' which was not identified by [the Member Firm] during our testing procedures." and

"Again, I have carried out an independent review of the relevant work papers and am satisfied that our work was carried out in accordance with the provisions of Fundamental Principle 4 in all respects."

The Enquiry Committee's Consideration of the Matter

The Enquiry Committee has noted that the Institute did not seek access to the working papers of the Member Firm in its investigation of the Complaint. Instead, the Complaints Committee appears to have relied on the Member Firm's response to the Complaint.

The Enquiry Committee has also noted that the approved ICAI Ethical Guide identifies a number of threats to objectivity for Members including:

- the self-interest threat which may stem from a financial or other conflict;
- the self-review threat where any judgment of the Member needs to be challenged or re-evaluated subsequently;
- the advocacy threat where the Member may become an advocate for or against the position taken by clients or colleagues in any adversarial situation;
- the familiarity or trust threat where the Member may be unduly influenced by knowledge of the issue, or by the closeness of a relationship with, or judgement of the quality of, clients or colleagues.

The Enquiry Committee considers that all of these threats potentially arose in the Member Firm's review of the quality of its own audit work as part of its response to the Complaint. Having regard also to the fact that the Complaint arose from critical findings of the Comptroller and Auditor General and that he had acknowledged the seriousness of the error to remit to the State the full amount of toll revenue due, the Enquiry Committee is surprised that no internal Institute document discussed the potential threat to objectivity which might arise with the Member Firm's response and the merits or otherwise of the Complaints Committee going beyond that response in its consideration of the Complaint.

In making this observation, the Enquiry Committee does not question the professional competence of the review undertaken by the Member Firm. However, the Enquiry Committee does suggest that the Institute's examination of the Firm's working papers would have helped to provide assurance that the Institute's process of investigation involved independence and rigour.

The Enquiry Committee acknowledges that the process of investigation mandated by Bye-Law 74.2 does not specifically require the Institute or its Complaints Committee to examine the underlying working papers even in a case such as this which was independently acknowledged to be a serious error. This is a matter which warrants the attention of the Institute and the Authority in order to safeguard public assurance of the process of investigating complaints in similar cases in the future.

In the indicated circumstances, the Enquiry Committee finds that there was no breach of Bye-Law 74.2 with regard to the Complaint.

6. Pursuant to Regulation 11(1), the Enquiry Committee finds that the Institute did not breach Bye-Law 74.4.

Context of this Finding

Bye-Law 74.4 requires the Complaints Committee to notify the Member Firm and the Complainant of the reasons for its decision where it forms the opinion that a *prima facie* case has not been made out.

The Preliminary Enquiry Committee had determined that there was a *prima facie* case that the Institute had failed to comply with Bye-Law 74.4. Its basis for doing so was that no document had been made available to it to indicate that the function of the Secretary to the Complaints Committee had been delegated to the person who had signed the letters of 21 December 2005 to the Member Firm and the Complainant.

The Enquiry Committee's Consideration of the Matter

Having enquired into the matter and examined relevant Institute documentation, the Enquiry Committee finds that there was no breach of Bye-Law 74.4 with regard to the Complaint.

7. Pursuant to Regulation 11(1), the Enquiry Committee finds that the Institute did not breach Regulation 7 of the Regulations of the Complaints Committee.

Context of this Finding

Regulation 7 of the Regulations of the Complaints Committee states:

"Any member of the Committee who has had a previous or current significant professional or personal relationship with the member or the complainant should exclude themselves from the part of the meeting of the Committee at which that case is to be considered. Likewise, any Committee member who feels that there may be an actual or perceived conflict in relation to their participation in the consideration of any case should exclude himself or herself from it at the earliest opportunity."

The Enquiry Committee's Consideration of the Matter

In the light of the allegations contained in the press reportage associated with the Complaint, the Enquiry Committee examined the minutes of Complaint Committee meetings made available to it in connection with its Enquiry. The Enquiry Committee noted that there were a number of occasions when members of the Committee excused themselves from Committee deliberations when it was due to consider a matter with which they felt closely associated. The Enquiry Committee is therefore satisfied that individual Committee members were sensitive to the requirements of the Regulation. Accordingly, the Enquiry Committee finds that it has no

evidence to suggest that the Institute breached this Regulation in its consideration of the Complaint.

Conclusion and Decision with respect to Sanctions

The Enquiry Committee finds that in the Institute's consideration of the Complaint, five breaches of four Institute Bye-Laws occurred as follows:

- the Complaints Committee meeting of 15 December 2005 failed to consider if the Complaint was a matter of 'public concern' (breach of Bye-Law 72.1), and the Committee meeting was inquorate (breach of Bye-Law 67.2);
- the Complaints Committee was incorrectly constituted at its meeting on 10 October 2006 (breach of Bye-Law 67.1), and one of its appointed members was ineligible to be a Committee member (breach of Bye-Law 66.1);
- one of the appointed members of the Complaints Committee was also acting as a Committee member at its meeting on 15 December 2006 despite being ineligible to do so (breach of Bye-Law 66.1).

In light of the foregoing findings, the Enquiry Committee finds the purported decisions of the Complaints Committee on the Complaint on 15 December 2005 and 10 October 2006 were invalid and/or deficient. While the decision of the Complaints Committee on the Complaint on 15 December 2006 was unaffected by the breach of Bye-Law 66.1 because of the fortuitous withdrawal of the ineligible member from the Committee's deliberations, this decision cannot survive the invalidity of the earlier Committee decisions.

Having considered all the circumstances of the matter, the Enquiry Committee has concluded that the breaches of Bye-Laws 66.1, 67.1, 67.2 and 72.1 were caused by negligence and inattention to the requirements of the relevant Bye-Laws.

It is a matter of concern to the Enquiry Committee that in considering the Complaint, the Institute communicated inaccurate and misleading information on three occasions to the Complainant. The Enquiry Committee has concluded that on two of those occasions (11 November 2005 and, in respect of certain information, 12 October 2006); the Institute recklessly communicated the misinformation without regard to its invalidity. The Enquiry Committee has also concluded that on the other occasions (11 October 2006 and, in respect of certain information, 12 October 2006), the Institute negligently communicated the misinformation to the Complainant.

It is also of concern to the Enquiry Committee that the Institute communicated inaccurate information on 25 November 2005 to the Member Firm although the Enquiry Committee has satisfied itself that the

misinformation in question did not prejudice the Member Firm in responding to the Complaint.

Moreover, the Enquiry Committee is concerned by the nature of the repeated representations made by the Institute to the PEC and this Enquiry Committee in making its case that no breach of Bye-Law 72.1 occurred, because the content of these representations was inconsistent with the requirements of other approved investigation and disciplinary procedures of the Institute.

The Enquiry Committee also believes that the following general matters are relevant in considering the level of sanction in the case of each Bye-Law breach:

- any sanction should be proportionate to the adverse findings but should be of dissuasive effect;
- the required standard is that the Institute should consider all complaints in accordance with its approved investigation and disciplinary procedures. Having regard to this reasonable expectation, the Enquiry Committee considers it extraordinary that the Institute breached four of its Bye-Laws in considering this one Complaint;
- the cost of the Enquiry is a product in part of the number of adverse findings made against the Institute. The Enquiry Committee believes that it is entirely appropriate that it should seek to recoup from the Institute a substantial part of the Enquiry costs (estimated at €110,000) borne by the Authority in the light of the findings of five breaches of the Institute's approved investigation and disciplinary procedures;
- the Enquiry Committee acknowledges that this was the first full Enquiry under the Regulations and that the Enquiry Committee necessarily incurred additional cost in considering the legal provisions involved *ab initio*. The Enquiry Committee also acknowledges that one of the *prima facie* findings made by the PEC was not sustained by the Enquiry Committee;
- allowing for the fact that it was also a new experience for the Institute to be subject to a full Enquiry, it is the Enquiry Committee's view that this Enquiry was protracted due to the nature of the Institute's engagements with the EC. Insofar as, for example, the 'public concern' issue was concerned, the Institute failed either to comply with Bye-Law 72.1 by not making the required 'public concern' determination or by failing to minute the determination (if it was made) contrary to Regulation 4 of the Regulations of the Complaints Committee. A straightforward and open acknowledgement of one or other error at the outset of this Section 23 Enquiry would have better served the Institute and been appreciated by

the Authority. It would also have saved much unnecessary time and expense in the examination of this one element by both the Preliminary Enquiry and this full Enquiry;

- the Enquiry Committee received irrelevant documents (e.g., eight sets of Bye-Laws when only two were pertinent to the Enquiry) and in one case a document which could not have existed at the time of the Institute's consideration of the Complaint (namely CARB's Guide to Complaints Procedures). These and the Institute's other engagements with this Enquiry caused necessary, but excessive, requests for clarifications which militated against a speedy conclusion of the Enquiry.

Having regard to the above general matters which it also considers relevant in determining the level of sanction, the Enquiry Committee has decided that a monetary sanction should be imposed. Having made due allowances for the matters in question, the Enquiry Committee has determined that a contribution of about €80,000 is warranted to cover the costs and expenses of the Enquiry.

As a consequence of findings 1 to 4 above and having considered all of the circumstances of the matters in question, the Enquiry Committee has decided under Regulation 12(1) of the Regulations to:

- (a) censure the Institute for breaches of Bye-Laws 66.1, 67.1, 67.2 and 72.1 in its consideration of the Complaint;
- (b) annul the decisions of the Complaints Committee on 15 December 2005 and later Committee meetings with respect to the Complaint;
- (c) direct a fresh investigation of the Complaint to commence within 14 days of this Decision taking effect; and
- (d) require the Institute to pay the sum of €110,000 (which includes a contribution of €80,000 to the costs and expenses of the Enquiry) to the Authority within 14 days of a Court order pursuant to Section 29 of the Act.

These sanctions must receive the confirmation of the High Court before they take effect.

Helene Coffey
Chairperson
8 July 2010