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26th February 2008

Ms Anna Colban,
Secretary to the Board,
AADB,
Aldwych House,
71-91 Aldwych,
London WC2B 4HN.

27 FEB 2008

Dear Ms Colban,

AADB Accountancy Scheme Review

Thank you for your letter of 28th January on behalf of the Board, inviting my comments on the proposals. I enclose my comments as requested.

Yours sincerely
Robert Rhodes.

COMMENTS ON AADB'S CONSULTATION PAPER OF JANUARY 2008.

1. The Paper has been carefully and thoughtfully drafted. Generally speaking, I am in favour of most of the proposals in the Paper. The bulk of my comments are relatively trivial.
 2. **“Relevant Conduct”**
 - 2.1 Given that the underlying principles (see page 10) are fairness and proportionality, I would suggest that the definition of Relevant Conduct be slightly altered so as to insert the word “significantly” or “substantially” at the beginning of sub-paragraphs iii-v in paragraph 6.6
 - 2.2 As the definition stands, members would be at risk of disciplinary action for what could be relatively trivial breaches of standards.
 3. **Question 2:** I agree with the proposal, which strikes me as eminently sensible.
 4. **Question 3:** I agree with the proposal of independent review, and with the proposed composition and the three main functions of the DDC.
 5. **Question 4 a):** I agree with the proposal for the Board to be able to reduce the scope of an investigation on request by Executive Counsel. Again, it is plainly a sensible proposal.
 6. **Question 5:** I agree with both proposed tests. As for Desirability Criteria, I would have thought that criteria similar to those of the Crown Prosecution Service (adapted as necessary) would be appropriate.
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7. **Question 6:** I agree that an independent Convener should appoint Tribunals. This seems to me to be an important aspect of transparency.

8. **Question 7: Costs.**

8.1 I regret to say that this is where I have a profound disagreement with the proposals in the Consultation Paper.

8.2 I agree with the observations made in paragraphs 6.32-6.34 (p.17). I also sympathise with the comments in the first sentence of paragraph 6.37 (p.18), but stress the phrase “properly brought”. I welcome the comment in the second sentence of that paragraph that “the Board is concerned not to compromise fairness to respondents”.

8.3 The summary in the third sentence of the present rule as to payment of costs on behalf of a respondent does not strike me as altogether accurate.

8.3.1 Regulation 15 (i) (p.50) includes the criterion before such an order is made that it be “not reasonable to expect a Member to conduct his defence...without legal representation because for example of the complexities of the issues involved”.

8.3.2 I also stress that, as pointed out in the Paper, it is in any event a matter for the Tribunal’s discretion, because of the use of the word “may” in the expression “may after application require...”

8.3.3 In any event, the discretion to order payment of legal costs in advance is subject to the restriction “only if, in all the circumstances, the absence of legal representation would be contrary to the rules of natural justice”.

8.4 A person may be able to **afford** to pay for legal representation, but the **effect** of doing so might be virtually to beggar him, particularly in a heavy case such as Mayflower. He might have to remortgage his house or draw against his pension. I regard this as “compromising fairness to respondents” if the Tribunal takes the view of the proceedings that the members of the Mayflower Tribunal took as regards the cases of PricewaterhouseCoopers (“PwC”) and Mr Donnelly.

8.5 In the Mayflower case, the Tribunal considered the law and facts with great care. I refer in particular to pages 12-23 of the Costs Report relating

to PwC and Mr Donnelly. Because of the importance of appreciating the balancing exercise actually carried out by the Tribunal, I take the liberty of quoting the following passages from that Costs Report:

36.5 *There is considerable force in Mr Lawrence QC's submission that, in the absence of bad faith, regulators should not be deterred by the fear of punitive costs penalties from bringing proceedings which they reasonably consider to be in the public interest but which ultimately fail.*

36.6 *As against that, the Tribunal considers that regulators have a continuing duty to review a complaint once it has been brought, against the available evidence, and to consider whether it is reasonable to maintain the complaint at a hearing. In respect of the MIDFES complaint¹, the Tribunal finds that Executive Counsel should not have maintained it against PwC after the latter had served its substantial evidence in May 2006. A majority² of the Tribunal makes a similar finding in respect of the "going concern" complaint. Had Executive Counsel then abandoned those complaints, there would have been a considerable saving in legal costs.*

....

41.5 *...The Tribunal ...appreciates the importance of protecting regulators who take important decisions in the public interest and who act in good faith. Nevertheless, the Tribunal does not consider that the AIDB acted reasonably in bringing either complaint against Mr Donnelly in the first place.*

8.6 Had the proposed criterion of "misfeasance" been in place, the Tribunal would have been unlikely to have been able to make the costs orders that it did. In my view, that simply would not have been fair, given the Tribunal's findings about the inappropriateness of the proceedings against PwC and Mr Donnelly.

¹ That complaint was abandoned on the second day of the hearing.

² Four out of the five members.

8.7 In paragraph 7.28 (p.24) of the Paper, it is stated that “In the normal course of events, a successful respondent will not be able to recover their [sic] costs under the Accountancy Scheme”. I would point out that the decision as regards costs relating to PwC and Mr Donnelly in the Mayflower case was not “in the normal course of events”, and that was not the yardstick that the Tribunal applied.

8.8 Moreover, I would point out that the Tribunal refused a costs application against the AIDB made on behalf of Mr Shelton, whom the Tribunal absolved of the allegation of dishonesty made against him by the AIDB.

8.9 The only circumstance in which I could see that it would be reasonable to restrict the grounds on which to award costs against the AADB to “misfeasance” as proposed is if it were a professional requirement for members to be insured in respect of their legal costs for disciplinary proceedings. I do not know what the likely cost of such insurance would be.

9. **Question 8: What should happen on equality of votes.** I agree with both proposals, which strike me as fair. It is, however, unlikely that a casting vote would be required in practice, given that Tribunals comprise odd numbers of members. It would only be if one member had to withdraw in the course of a hearing that this problem would arise.

10. The only other comments I would make as regards the proposed revised Accountancy Scheme are as follows:

10.1 On p.26 at paragraph 7(3)(ii) line 4: “they” should read “he”.

10.2 On p.47 at paragraph 14(1) in the line that reads “shall for the purposes of this Scheme be conclusive evidence of Relevant Conduct”, the phrase “prima facie” be substituted for “conclusive” if the conviction were outside the United Kingdom. cf paragraph 14(4) last two lines at p.49. I question whether it would maintain public confidence in the integrity and fairness of the disciplinary process of the AADB for a conviction before certain overseas courts to be regarded as conclusive evidence of Relevant Conduct.

11. If the Board would like me to attend upon them to discuss further any points arising from these Comments, I should be happy to do so.



Robert Rhodes QC

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