# The City of London origins of AFCA

For tens of thousands of bank victims who are up against the legal firepower and immense resources of the banks, the only viable option to seek redress is through Australia's financial dispute resolution body, the Australian Financial Complaints Authority (AFCA).

However, AFCA is designed to fail bank victims and thwart true justice. The fundamental structure of AFCA was created by the British banking cartel and presided over by an establishment figure of the City of London, which is a haven for financial crime and has been described as "the most corrupt place on earth" by crusading anti-Mafia Italian journalist Roberto Saviano.

London led the global wave of financial deregulation introduced from the 1980s, which enabled an unprecedented explosion in financial speculation and ultimately resulted in the 2008 Global Financial Crisis. In 1985, the British Bankers' Association established the industry-funded Banking Ombudsman to manage the inevitable tsunami of complaints from ruined bank victims. The Ombudsman was intended to stave off the threat of a statutory (government) dispute resolution authority being created—instead, financial complaints against the Ombudsman's member banks would be managed in-house.

Who was appointed inaugural Chair of this Banking Ombudsman? None other than a former Lord Mayor of the City of London, then-Dame (later Baroness) Dorothy Mary Donaldson. Not to be confused with greater London, of which Boris Johnson is a former mayor, the City of London is the square mile adjacent to the Thames River, governed by the City of London Corporation. Its voting constituency includes both the people who live in the municipality, as well as the local and global banking and other corporations located there. Its unique status, whereby the Corporation and the banks based there are exempted from many British laws, is protected by both Royal Charter and the only article of the Magna Carta still in force today—even the Queen cannot enter the City of London without being accompanied by the Lord Mayor. In other words, the Lord Mayor of the City of London is the symbolic leader of a banking enclave that is above normal laws. Donaldson was also formerly a member of the City of London Court of Common Council and Sheriff of the City of London, the first female appointee in all of these roles. This committed servant of the banks moved directly from Lord Mayor to chair the new Banking Ombudsman in 1985, and remained Chair until 1994.

In Australia, the concurrent financial deregulation of the 1980s-90s led to rising calls for an independent ombudsman for financial complaints, following industry misconduct and rising customer dissatisfaction with the banks. The Australian Bankers' Association (now Australian Banking Association) mirrored its British counterpart by swooping in and creating the industry-funded Banking and Financial Services Ombudsman (BFSO), which became operational in 1990.

The BFSO was modelled after the UK Banking Ombudsman, and the prevailing influence of British interests was evident in the appointment of its inaugural Chair, High Court Justice Sir Ninian Stephen. Stephen, a member of Queen Elizabeth's Privy Council, was appointed to the BFSO upon finishing his term as Governor-General of Australia. Although Stephen denied it at the time, he was involved in the secret "brains trust" which contrived the legal basis for the ouster of Prime Minister Gough Whitlam by Governor-General Sir John Kerr, which was coordinated with the Queen.

Similarly to its British predecessor, the BFSO was a private company (a corporation limited by guarantee), and its members were Australian banks, Australian subsidiaries of foreign banks, and foreign banks with Australian operations. The BFSO's decision-makers were accountable to its Board of Directors, composed of senior bankers and a representative of the Reserve Bank of Australia. Industry and legal expertise was provided by the BFSO's internal counsel and a revolving banking advisor who was seconded from one of the major banks. The Australian Bankers' Association ensured that any alternative dispute resolution schemes would have a jurisdictionally similar model to the BFSO, by enshrining this requirement in its 1993 Code of Banking Practice. In 2001, the BFSO was approved by the Australian Securities and Investment Commission (ASIC) as an official external dispute resolution (EDR) scheme.

In 2008, the BFSO was absorbed into the new Financial Ombudsman Service (FOS), which largely replicated the design of the BFSO. In 2018, the Australian Financial Complaints Authority (AFCA) replaced FOS, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal, establishing a "one-stop-shop" dispute resolution monopoly. This followed a similar pattern of consolidation in the UK.

## The formation of AFCA

In May 2016 the Turnbull Government announced a review into the financial system's external dispute resolution and complaints framework, called the Ramsay Review. Professor Ian Ramsay, a former member of numerous ASIC and government advisory panels, led the review with a secretariat provided by then-Treasurer Scott Morrison's Treasury department.

As documented in the Explanatory Memorandum of AFCA's governing legislation, the Ramsay Review found that Australia's current dispute resolution framework was "a product of history rather than design and that reform is needed". However, the Review's recommendations largely replicated the

organisational structure of FOS and its predecessors. Unsurprisingly, the Turnbull Government endorsed all of the findings and recommendations in the Review's 9 May 2017 final report, and in response announced the establishment of a new "one-stop-shop" to deal with financial system complaints.

On 26 July 2017, Treasury announced the appointment of a Transition Team to lead the establishment of AFCA. The Transition Team was headed by former Assistant Governor of the RBA Dr Malcolm Edey, who was appointed following a forty-year career at the RBA; and was "supported by a team located in Treasury that will draw on private sector expertise as required".

There was inconsistent messaging from Morrison's Treasury, about who was responsible for determining AFCA's operating rules (or "terms of reference"). In its 26 July 2017 announcement, Treasury asserted that the Transition Team would "advise the Government on AFCA's terms of reference, governance and funding arrangements"; however, Treasury's November 2017 AFCA consultation paper stated that "[t]he Transition Team will not develop AFCA's terms of reference, funding or governance arrangements", as these matters were to be the responsibility of AFCA's Board.

The AFCA scheme was authorised under the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018 (Cth) (the AFCA Act)*, which set out broad conditions under which AFCA would function; however AFCA's Board-designed Rules determined how the organisation would operationally meet those legislative and policy requirements.

Similarly to its predecessors, the AFCA scheme would be operated by a not-for-profit company limited by guarantee. On 23 April 2018 the Minister for Revenue and Financial Services, Kelly O'Dwyer, authorised Australian Financial Complaints Limited to operate the AFCA scheme via a notifiable instrument. O'Dwyer claimed that she had taken into account the "general considerations for an external dispute resolution scheme" as per the enabling legislation, which considerations were the accessibility, independence, fairness, accountability, efficiency and effectiveness of the scheme. However, the truth of this claim is questionable. For example, the Bill's Explanatory Memorandum states that "[w]hen considering whether the EDR [external dispute resolution] scheme is 'fair', the Minister may consider matters such as whether the complaints handling procedures of the scheme will accord with the principles of natural justice and industry best practice". However, O'Dwyer could not have genuinely assessed the fairness of AFCA's complaints handling procedures, because the company had not yet commenced public consultation on its draft Rules or developed its Operational Guidelines. Nevertheless, ASIC approved AFCA's Rules on 6 September 2018 and the organisation commenced operation the following November.

## AFCA decisions based on 'fairness' instead of laws

The operation of the City of London's Banking Ombudsman was described in a January 2012 report by the World Bank entitled "Resolving disputes between consumers and financial businesses: Fundamentals for a financial ombudsman". It stated: "The ombudsman's terms of reference set out the scope of jurisdiction. But it was for the ombudsman to decide whether or not an individual case was within jurisdiction. … In deciding a case, the ombudsman was required to do so on the basis of what was fair in all the circumstances of the case. In doing so, the ombudsman would take into account (but not be bound by): what a court would do; any relevant code of practice; and good industry practice. … There was no appeal to court. As membership was voluntary, the ombudsman scheme was not subject to judicial review by the courts."

This operational structure was replicated in the Ombudsman's Australian successors: the BFSO, FOS and now AFCA. For example, these schemes were only required to "have regard to" or "take into account" legal principles or industry codes (but were not bound by them), and were not bound by the legal rules of evidence. AFCA firmly asserts that it is not a court, nor a government department or agency, nor a financial regulator.

A March 2019 research paper published in the *University of New South Wales Law Journal*, titled "Legitimacy In Australia's Financial System External Dispute Resolution Framework: New And Improved Or Simply New?", examined legitimacy gaps in the design of AFCA and its predecessor schemes. The author, Herbert Smith Freehills solicitor Camilla Pondel, observed that dispute resolution schemes such as FOS and AFCA "were private companies and lacked the traditional elements of a public state-sanctioned tribunal"; however, "[s]tatutory underpinning and public purpose" prevented these schemes "from being described as wholly private … This discrepancy makes them novel legal creatures, a status which raises questions about legitimacy". Pondel observed that prior to the Ramsay Review, research on external dispute resolution schemes had been scant, and the Ramsay Review did not specifically address issues around legitimacy.

Pondel documented "legitimacy gaps" in the "informal justice model" implemented by AFCA's predecessors, including the use of "fairness" as a decision-making criteria, and a lack of internal and external review of determinations. However, as Pondel observed, these "legitimacy-challenging features" were replicated in AFCA's design, largely on recommendation of the Ramsay Review.

Pondel described AFCA's predecessor, FOS', inconsistent approach to legal interpretation, and documented examples of cases where FOS had cherry-picked laws in making its determinations, ignoring some laws while applying others.

Similarly to the UK Banking Ombudsman, rather than a strict interpretation of the law, BFSO and FOS applied a "fairness test" in their decision-making processes, which the Ramsay Review recommended should be replicated in the new proposed dispute resolution scheme, AFCA. Pondel raised questions over the "appropriateness of fairness as a decisionmaking basis, as opposed to judicial consistency", but observed that the criteria of fairness was inherent to the industry ombudsman model. This created an impasse "between AFCA's fairness-based, individualistic dispute resolution approach and the desire for legitimacy-constructing rule of law and consistency ideals", which would "exist as long as that model is retained". Industry ombudsman schemes increased sharply in Australia from the 1990s across many sectors, a product of the "self regulation" mantra of deregulation policies.

## AFCA is designed for secrecy and lack of accountability

Pondel observed that it was curious that internal and external review processes were not more closely discussed in the Ramsay Review, because the lack of these raised questions about the legitimacy of AFCA and its predecessor schemes.

Treasury's 2017 AFCA Fact Sheet claimed that AFCA would be held to account through independent reviews. However, although AFCA has commissioned two such reviews, it has declined to make them public; moreover, as a private company, AFCA is not subject to Freedom of Information laws. Similarly, Pondel documents that while FOS was required to undergo a private audit, only one such audit was ever undertaken and FOS did not publish the results.

In its submission to Treasury's 2021 AFCA Review, AFCA strongly opposed the imposition of any additional review mechanisms, insisting that its internal review processes, such as routine "peer review" of AFCA decisions, were sufficient. AFCA's view was supported by Treasury, which recommended that AFCA should continue to not be subject to further merits review, and cautioned against other administrative processes which could re-open decisions. AFCA's Rules dictate that it is not possible for complainants to appeal its determinations.

AFCA's governing legislation gives ASIC oversight of the scheme, but ASIC has no role in complaints handling and will not intervene in AFCA's decision-making. AFCA is not subject to additional parliamentary oversight, as it does not have to appear before Senate Estimates for routine questioning from parliamentarians. AFCA is only required to report any changes in fees to the responsible Minister once per year.

Similarly to its British and Australian predecessors, the determinations of AFCA are not subject to judicial review.

AFCA's fundamental structure was designed by the banking mafia of the City of London, the centre of global financial corruption, to thwart statutory interference in financial complaints. Australia's tens of thousands of bank victims have no prospect of true justice or genuine redress, because AFCA's industry ombudsman model is a product of the same deregulation policies which have enabled decades of financial predation.

*By Melissa Harrison, Australian Alert Service, 23 February 2022*

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