

Independence and Accountability

Session 8A

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Introduction/scope

Unelected, and not part of the legal system, where is our legitimacy? How are we governed?

- Governance: statutory, industry-led, trade associate backed or part of wider consumer redress arrangements?
- Legal structures and interfaces with the courts
- Trends and pressures in new schemes and proposals for reform in existing schemes

Ireland - Financial Services Ombudsman

The scheme started in April 2005 and forms part of the public service. Prior to this the pre-existing schemes were voluntary. Since the scheme has been made statutory, the Irish ombudsman can

- direct a firm to rectify or change a practice
- demand the production of any document or information from a firm
- summon any officer, member, agent or employee of a firm to attend the Irish Ombudsman and take evidence under oath
- enter and inspect any business premises without a search warrant and without notice.

Obstructing the Ombudsman, or failing to comply is a criminal offence punishable by a fine of €2,000 and/or three months imprisonment.

The new statutory scheme is subject to judicial review and a direct appeal to the High Court by either party against any decision. However, the court will not consider complaints about process or merits in isolation, but rather the adjudicative process as a whole. The court will also not consider new evidence except in wholly exceptional circumstances.

A judicial review is not concerned with the decision of the Ombudsman, but the decision making process. It can enquire into whether there has been

- an excess of jurisdiction
- an error of law on the face of the record

- an error in the exercise of jurisdiction
- any bias
- any evidence of *mala fides*

An industry sponsored scheme, no matter how well or independently it is run, will always suffer from the perception that it has ownership of one side of the dispute. However the existence of judicial review and an appeal to the High Court are not factors in favour of the complainant. Under the previous voluntary schemes the firm had to accept the decision from the ombudsman.

UK – Financial Ombudsman Service

The Service is a statutory scheme established by the regulator (the Financial Services Authority) under statute and incorporated eight former schemes. In terms of governance, ombudsmen are appointed by the board, who in turn are appointed by the regulator. It is industry funded by way of levies and non-outcome related case fees. A decision is binding if accepted by the complainant and enforceable in court. A decision can also be subject to a judicial review.

It is important for an ombudsman scheme to be independent and to be seen to be independent. But most schemes are set up differently

- Terms of business of the scheme –set by the ombudsman, government, regulator or industry?
- Appointment of ombudsmen – industry or independently?
- Oversight of scheme staff – ombudsman or separate body?
- Funding arrangements – ombudsman, regulator, government or industry?

Australia - Superannuation Complaints Tribunal

Established in 1993, the Tribunal is a statutory scheme funded by the government through an annual levy on superannuation funds. The chair and deputy chair are appointed by the government who are responsible for operations. The Tribunal does not have a board. The decisions are binding on both parties.

Can independence sit well with accountability?

- Accountability - in a complex, modern society it is impossible for a decision-maker to be objectively accountable for every choice made. Inevitably, there are some subjective elements for which accountability will not be either required or possible to justify. A prime example is when facts are in dispute – who should the decision-maker believe? Some facts will support and others detract from a finding. Even if all the facts point one way, there is still a possibility of there being some unknown or inaccessible fact or circumstance which could change the outcome.
- Independence – has two manifestations – the impartiality of the decision-maker and institutional (or structural) independence.

In the case of the Tribunal, appeals can be made to the courts, but are limited to questions of law. While it remains uncertain how far the courts are prepared to intervene in private dispute resolution schemes, indications are that they have formed the view that such schemes are part of the quasi-judicial landscape. The courts should take oversight to ensure natural justice and that jurisdictional issues are properly addressed by the schemes.

Belgium (Le Service Médiation Banques – Crédit – Placements)

- The ombudsman prepares the decision and the Representative of Consumer Interests approves the decision. If the decision is not approved, it goes before a panel of industry and consumer representatives to decide the case.
- A simple process with non-binding decisions.
- Statutory schemes offer no opportunity for consumer groups or trade associations to represent themselves.

Netherlands (Financial Services Complaint Institute - Kifid)

- The ombudsman is appointed by the Board of Foundation, which is made up of representatives from banks and consumer associations. The Board decides the rules of engagement and procedures. The scheme is funded by the industry.
- Decisions are non-binding. If a complainant is unhappy the complaint can be reviewed by a tribunal. There is a second tribunal for matters over €50,000.

South Africa (Ombudsman for Short-Term Insurance)

- The scheme is voluntary and funded by the industry which can create a perception of lack of independence. However, the ombudsman is answerable to a council, not the members who fund the scheme.
- Decisions are non-binding. A complainant can go to the courts to enforce a decision or the firm can be reported to the regulator.

Australia (Advisory Council to the Energy Ombudsman Queensland)

- This scheme is funded by the industry, but operates to a slightly different budgetary model—the ombudsman prepares the budget, which is reviewed and endorsed by the advisory council, then approved by the government.
- For some, this creates the perception of greater independence.
- Regardless of the funding source, assessment of a scheme's independence or otherwise will likely come down to the actions and qualities of the ombudsman.

A question was raised as to whether budgetary independence was part of the independence of a scheme. The UK Financial Ombudsman Service prepares a budget for the year ahead which is then passed to the regulator for approval. It was agreed that a scheme's source and method of funding is a critical factor in the perception of independence.