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Slaying the dragon

Take on the Financial Industry Complaints Service, and you take on the constitution

The question “Masu who?” is being whispered across the financial services boardrooms and corridors of Australia. The reply comes in a hushed tone: Masu is the FICS slayer, the one who challenged the unchallengeable and won. And they are doing it again.

For some in this industry, FICS (the Financial Industry Complaints Service) represents Final Inquiry, Career Stuffed; for the rest of us, FICS is that tribunal thing that only affects financial advisers with dark secrets.

Masu Financial Management challenged the FICS determination against it and put Justice Jeff Shaw of the New South Wales Supreme Court to the task of examining the role of the Financial Industry Complaints Service.

Justice Shaw will now be remembered for his role in the first FICS challenge as well as for being the judge whose lost blood sample after a traffic accident sparked a Police Integrity Commission inquiry. A month after the accident Justice Shaw resigned from the judiciary, stating “my health is more serious than I had believed and ... I am now not well enough to discharge the duties of my office”. His judgement in the Masu decision came just two months earlier.

In his two separate judgements, Justice Shaw upheld the role of FICS as constitutionally valid but also found the FICS decision against Masu was open to “a reasonable apprehension of bias”, and he ordered a rehearing. This excited both the financial services profession and their legal brethren; lawyers always like a good court case, particularly if their client has principles and a deep pocket.

Some lawyers promoted the Masu case as the beginning of the challenge against FICS. Don’t be fooled by this — yes, Masu won, but at a cost perhaps 10 times what it was originally ordered to pay. We should nevertheless thank Masu for joining the line of martyrs that have advanced our knowledge of the workings of the industry.

The concept of FICS is not new. The service has been around since the early 1990s, since when it evolved and expanded its role to become the only recognised independent complaint-review service for the financial services community.

Many mistakenly think of FICS as an alternative court, but it is in fact a very special club with exclusive membership. Anybody who holds an Australian Financial Services Licence (AFSL) needs to be a member of an external dispute-resolution scheme approved by the Australian Securities and Investments Commission (ASIC), which covers all products listed on their licence. An AFSL holder can join FICS, but financial planners have no role or say in its operations. FICS supports and promotes the industry and can reprimand AFSLs on their actions and practices.

At financial planner level, the pressing issue concerning FICS is



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the lack of personal involvement in the review process. FICS is for the AFSL, not the planner, yet the actions of the planner are usually the subject of the complaint, review and determination. The structure of FICS reflects the financial services industry the Government imposed on all of us. It is not their fault; they have to work under the current system too. If planners want an active role in the management of FICS reviews, they need to resolve this with their AFSL.

The most problematic issue for AFSLs is the ease of complaint to FICS and its no-cost-to-the-consumer approach. This actively encourages a complaint to FICS, because the client has nothing to lose. Appeal-savvy clients may use this to their advantage by lodging complaints to FICS over issues that are not worthy just because they know the AFSL will make an offer of settlement to avoid the administrative and time costs of a FICS appeal.

But in Masu the complainant found a dealer with principle and deep lawyer-supporting pockets. Masu argued that FICS was a quasi-judicial body that performed the functions of a court but was not constituted as one. In effect, Masu claimed FICS was unconstitutional. The FICS decision it challenged cost it a primary order

of \$10,363. The court decision must have cost it many times that amount, particularly after the Federal Government intervened to argue in support of the constitutional validity of Fics.

The role of Fics is misunderstood. It does not rule on the law concerning a complaint; its role is to determine a complaint on its merits and to “do what, in its opinion, is fair in all the circumstances”. It is to have regard to “... a number of specified criteria, which include any applicable legal rule or judicial authority (including one concerning the legal effect of an express or implied term of the contract or other document)” and “general principles of good industry practice and any applicable code of practice”.

In this sense it is not bound by legal precedent but, as Fics itself will tell you, “we do not stray from the rule of law. Our panel seeks to apply principles that are well established in law. We then supplement these with good industry practice principles. After all, we are accountable to our members, who are the persons most affected by our determinations.”

Because Fics is not understood, many in the industry do not know how to deal with a complaint that can make its way to Fics. Legal advice is not enough, because law is just part of the determination process — an important part, but only part of the decision.

Masu’s main constitutional argument rested on the claim that an AFSL ignoring an unfair Fics decision could be expelled from Fics membership and consequently lose its licence. Justice Shaw accepted that this sequence of events may be true, but he felt it was of a disciplinary or administrative nature, one that involved Fics in consulting first with ASIC before any expulsion action could be taken. And even if this occurred, it was not necessarily automatic that ASIC would cancel the licence of an AFSL. But if it were to take such an action, that was itself reviewable before the courts.

In the view of Justice Shaw, Fics is “an administrative complaints mechanism, which is empowered to exercise functions of conciliation and arbitration arising from consumer complaints”. In other words, Fics worked, and it was constitutionally valid.

But that was not Masu’s only complaint. It also argued that Fics breached its obligation of natural justice and procedural fairness. On this point Justice Shaw was sure: “The contractual arrangement [of Fics membership] involves at least the obligation to grant procedural fairness. These contractual rights are enforceable in this court.” This conclusion allowed the court to rule upon the next issue: was the panel decision flawed?

For Justice Shaw there were some issues, particularly over the Fics review of a matter that the complainant did not raise herself. The determination ordered Masu to pay back the commission it earned, but the former client did not complain about this. “Thus there

was a legitimate expectation, in my view, on the part of Masu that the panel would only deal with the matters specified in Ms Wong’s complaint, and that an opportunity should have been given to Masu to deal with matters not in the complainant’s submissions.”

Justice Shaw clearly felt that “there was an express obligation on the panel to provide reasons for the decision”. This comment may appear obvious, but he said common law would not have required the exposure of reasons. In other words, Masu was told the reasons for the determination only because Fics rules required it.

But if reasons are required, what type of reasons? They must be “proper, adequate and intelligible”, and any gap in that requirement can, as Justice Shaw decided, render a determination void. In effect, everyone coming before Fics is entitled to know what legal wrong they have committed.

Will this open the floodgate of appeals? Fics does not believe so, and neither do I. Justice Shaw found a potential failure in the Fics determination that, due to the lack of expressed reasons, could not be examined. This is why he quashed the determination. But he did not quash the complaint, and gave an order for the primary issue be resubmitted to a differently constituted Fics panel.

Justice Shaw also broke from custom by not awarding a legal costs order in favour of Masu. Usually the court victor gets to claim its legal costs against the opposing losing side. But this order was not given. So what does it all mean?

Fics is legitimate and constitutionally valid. Its decisions are appealable, but only the process of the determination is appealable, not the content of the determination itself. If an error with the process were found to exist, a court could quash that determination, but the issue would likely be sent back to Fics for a fresh decision.

Alison Maynard, the CEO of Fics, is confident that, by the time of the Masu decision, the organisation had already embraced the lessons of the Masu Case. Reform had been adopted where it may have been needed, and Fics pressed further internal change to ensure it remains realistic and viable.

Maynard’s main worry is that the Masu case will be wrongly interpreted and that many more appeals to the courts will be lodged, thus delaying the process and resulting in more Fics member money being spent on potentially futile matters that, if successful, are only going to come back to Fics anyway.

We will hear more about Fics, particularly from lawyers willing to take on the Complaints Service; just be careful what you listen to. There is no secret weapon in the Masu case, it is simply old law applied afresh. We will also hear more about Fics from Fics itself. No doubt it has an image problem, one that will never entirely go away. Nobody likes the referee who rules against them. **Asset**