The Lion's Question applied to Industry-Based Consumer Dispute Resolution Schemes

Paul O'Shea[1]

Abstract

There has been a substantial growth in the number, size, jurisdiction and complaints handling activities of industry-based consumer dispute resolution schemes in Australia particularly in financial services. The schemes have statutory recognition and, in publishing reasons for their determinations, potentially contribute to the development of the law in their relevant areas. They use a combination of mediation, conciliation and adjudication to resolve disputes. Their position in the legal and economic system is unclear and they present a unique challenge to the courts and legal academics. This challenge is no longer theoretical as disgruntled industry members are increasingly seeking judicial review of scheme decisions.

The Lion looked at Alice wearily. 'Are you animal — or vegetable — or mineral?' he said, yawning at every other word. 'It's a fabulous monster!' the Unicorn cried out before Alice could reply. — Lewis Carroll[2]

Introduction

The last ten years have seen a growth in the number and size of industry-based consumer dispute resolution schemes in Australia. This is particularly so in the areas of financial services and telecommunications. Most Australians would be familiar with the Australian Banking Industry Ombudsman (ABIO) now the Banking and Financial Services Ombudsman (BFSO), by name, although not so many would be aware that similar schemes now exist for credit unions, building societies, insurance companies, financial planners and advisers, insurance brokers, managed investments schemes and the timeshare industry.

This development is significant not only as an economic or social phenomenon but because it presents new challenges for lawyers in their understanding of the resolution of civil disputes. Alternative Dispute Resolution is usually taken to mean mediation and conciliation with some reference to commercial arbitration.

The industry-based consumer dispute resolution schemes do utilise the non-adjudicative means of resolving disputes. They are, however, fundamentally adjudicators. They are not, however, commercial arbitration in the sense commonly understood by most practitioners.

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1 Paul O'Shea BA(Hons), LLB(UQ), MSc(UO), GDLP(QUT) is a lecturer in law at TCBeirne School of Law, University of Queensland, solicitor of the Supreme Court of Queensland and the High Court of Australia. Alternate Member of the General Insurance Claims Review Panel of the Insurance Ombudsman Service. Member of the Complaints Resolution Committee of the Australian Timeshare Holiday Ownership Council, Council Member of the Financial Co-operatives Dispute Resolution Service, Member of the Queensland Surveyors Board.

2 Carroll, L, *The Complete Works of Lewis Carroll* (London, Nonesuch Press, 1939) p 212.

In determining disputes between service providers and their customers, the schemes are making decisions about substantive and complex areas of law including contracts generally, and insurance and banking and finance in particular. Many publish their reasons for determination and this may well have the effect of influencing perceptions of the law in these areas if not the development of the law itself.

A related question is that of possible rights of review of scheme decisions by dissatisfied members, or for that matter, consumers. This goes to the heart of whether the schemes are essentially private or public bodies or a hybrid of both. It is no longer just an interesting theoretical discussion, but it is already confronting the courts. This paper will focus on the financial services schemes as they raise the most curious answers to the Lion's question.

Dramatis Personae

The schemes under study are:

- The Banking and Financial Services Ombudsman Ltd (BFSO) formerly the Australian Banking Industry Ombudsman
- The Financial Industry Complaints Services Ltd (FICS)
- The Insurance Ombudsman Services (IOS) formerly Insurance Enquiries and Complaints Ltd
- The Credit Union Complaints Resolution Centre (CUDRC)
- The Financial Co-operatives Dispute Resolution Service (FCDRS)
- Insurance Brokers Disputes Ltd (IBD)
- Credit Ombudsman Service (COS) formerly the Mortgage Industry Ombudsman.

These are all the schemes which have approval from the Australian Securities and Investments Commission (ASIC) under its Policy Statement 139 to be External Dispute Resolution schemes which satisfy the dispute resolution requirements of holding an Australian Financial Services Licence. The timeshare industry, through the Australian Timeshare and Holiday Ownership Council, has proposed the establishment of its own scheme, the Australian Timeshare Industry Complaints Service, but ASIC has not approved this proposal. This decision is being challenged in the Administrative Appeals Tribunal.

This paper will not deal in detail with the Telecommunications Industry Ombudsman (TIO) or with the two large statutory utilities schemes, the Energy and Water Ombudsman New South Wales (EWON) and the Energy and Water Ombudsman Victoria (EWOV), though they would be included in any larger study of the consumer dispute resolution sector.

The Phenomenon — Size and Jurisdiction

The size and rapid growth of the schemes render them significant and interesting. The BFSO has a membership of 35 banks which represents all of the major banking institutions in Australia and 33 'non-bank' members.[3] The IOS[4] has over 90 insurer members giving it over 95% coverage of the

3 BFSO Annual Report 2003/2004.

4 Which operates the General Insurance Claims Review Scheme.

general insurance industry.[5] 2,335 life and re-insurers, managed investment funds, brokers and financial advisors were members of FICS as at June 2004.[6]

The credit union sector is served by two schemes, CUDRC which has 145 credit union members and the new FCDRS which has a membership of 45 credit unions and building societies, including Australia's largest credit union, Credit Union Australia.[7] The IBD had 743 insurance broker members and 40 other members at the end of 2004.[8] More than 3,100 finance and mortgage brokers were members of the COS by the end of the same year.

The schemes handle many thousands of consumer complaints each year. Last year, the BFSO opened 5,859 new cases[9] and the IOS had 1,734 cases referred for determination.[10] In 2003/4, FICS dealt with 9,519 enquiries which generated 1,038 written complaints with 863 finalised that year.[11] In the same year, IBD received 4, 193 telephone complaints and 124 complaints in writing.[12] For the credit union schemes, CUDRC received over 1,400 enquiries which led to 144 new cases[13] and FCDRS received 1,295,527 calls and determined 49 disputes.[14] The COS, in the same year, received over 900 telephone complaints and resolved 126 disputes.[15] With the exception of the IOS in 2003 and 2004, all the schemes have experienced continuous growth in membership and activity over the last decade.[16]

The monetary values of the disputes being handled by these schemes are by no means trivial. The BFSO can determine disputes where the amount claimed is up to $250,000[17] and the IOS for claims up to $120,000. FICS can determine disputes for life insurance complaints up to $250,000 and $100,000 for other complaints.[18] The IBD can make determinations up to a value of $50,000 and more; if the broker waives the limitation,[19] the CUDRC and FCDRS monetary limits are $100,000 per claim.[20]

All of the schemes are no longer confined to consumer complaints and include small business. Since 1998, the BFSO can resolve disputes involving a small business, which is defined as having 100 employees or less if it is in the business of manufacturing and 20 employees or less if it is any other

5 www.iecltd.com.au as at 9 May 2005.
6 FICS Annual Review 2003/2004 p 35.
7 FCDRS Council Meeting Minutes 18 February (2004).
8 IBD Annual Report 2004 p 7.
9 BFSO Annual Report 2004.
10 IEC Annual Review 2004 p 7.
11 FICS Annual Report 2003/4 p 7.
12 IBD Annual report 2004 p 13.
13 CUDRC Annual Report 2004 p 8.
14 FCDRS Annual Report 2004 p 14.
15 COS Annual Report 2004 p 12.
16 The IOS (formerly IEC) had continuous growth until 2003/2004. According to its CEO, the collapse of HIH; the drought and better industry internal dispute resolution reduced referrals. See IEC Annual Review 2004 p 5 and for a detailed discussion of the historical growth in the schemes see O'Shea, P, 'Underneath the Radar: The largely unnoticed phenomenon of industry based consumer dispute resolution schemes in Australia' (2004) 15 ADRJ 156 at p 157.
17 BFSO Terms of Reference 5.1(e).
18 FICS Rules — Rule 12.
19 IBD Terms of Reference p 3.
20 FCDRS Terms of Reference, p 4; CUDRC Terms of Reference, 4.1(d).

business.[21] The IBD uses the same definition though its jurisdiction is complicated by the exclusion of certain types of insurance products.[22] The IOS can receive complaints from small business but defines that term more narrowly to those which have five employees or less and a turnover of $400,000 per year or less.[23]

FICS Rules provide that only 'retail investors' may access the service and adopts the meaning of this term in the *Corporations Act 2001* (Cth) which is essentially that the investor is not a 'professional investor' and that the value of the product was $500,000 or less.[24] Small business customers can also access the IBD and COS.

Likewise CUDRC and the FCDRS now has a limited jurisdiction for small business.

Effectiveness

As a condition of their approval from ASIC under its PS139, all the financial services schemes must be subjected to an independent review every three years. These reviews assess the schemes against the guidelines for alternative dispute resolution contained in s 12FA of the *Australian Securities and Investment Commission Act 1989* (Cth). PS139 also expressly refers to the Benchmarks for Industry-Based Customer Dispute Resolution Schemes published by the Department of industry, Science and Tourism in August, 1997. These DIST Benchmarks encompass the following 'key principles':

- Accessibility — which means that schemes should be well promoted to consumers, easy to use and free of charge.
- Independence — so that decision-making and administration are independent from the scheme industry members.
- Fairness — which refers to procedural fairness and specific criteria.
- Accountability — published determinations, complaints handling and reporting on systemic industry problems.
- Efficiency — tracking complaints, appropriate processes and regular performance reviews.
- Effectiveness — appropriate and comprehensive terms of reference and substantial industry coverage.[25]

Some of the larger schemes have already had a review while others have not yet had their first review since receiving PS139 Approval. The BFSO review in 2004 was conducted by The Navigator Company Ltd and it concluded that the 'BFSO scheme is a very successful operation widely and strongly endorsed by its stakeholders and demonstrably meeting each of the ASIC PS139 benchmarks.'[26] Although the reviewers made 26 recommendations, they acknowledge that these are primarily of an 'incremental' nature and do not represent major structural or operational change.

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21 BFSO, n 15 at Definitions.

22 IBD, n 18, p 2.

23 IEC Terms of Reference 1.2 Definitions.

24 FICS Rule 3 Definitions and *Corporations Act 2001* (Cth) s 761G(7) and reg 7.1.11 though the methods of calculation of the value of such products are quite complicated.

25 ASIC PS139.151.

26 The Navigator Company Pty Ltd 'Independent Review of the Banking and Financial Services Ombudsman' November 2004, p 4.

The FICS review, conducted by Prof Tania Sourdin of La Trobe University and Community Solutions in 2002, was not so glowing in its findings. Whilst it said that 'FICS has the support of its members and of consumer organisations' and its 'Panel processes are generally considered to be fair' the reviewers identified several 'weaknesses' and made over 60 recommendations for change.[27] In particular, they were concerned about the "Advisory Letter" processes which they urged should be 'thoroughly reviewed.'[28] This process, in which case managers gave their view to one party as to their likely prospects of success before the Panel, was substantially criticised by stakeholders and is being changed in order to better differentiate between the mediative and determinative functions of the scheme.

FICS has taken the criticisms 'to heart' as it were and adopted a comprehensive Implementation Plan which included the vast majority of the recommendations and resolved to implement them within an 18 month timeframe.[29] It is interesting to note that FICS is the first and, so far, only scheme which has been subject to a challenge to one of its decisions by a disgruntled industry member. Apart from the *Masu* decision, which will be discussed in detail below, another application by a large FICS insurance company member is currently before the courts.

The IOS Review is being conducted by The Allen Consulting Group Ltd and was reported on 30th June 2005. Both CUDRC and the IBD are conducting reviews this year though no discussion papers have been released. There are no plans for reviews this year of the COS or the FCDRS.

Theoretical Challenges — Problems with Contracts

If the phenomenon of the schemes is a response to a problem, what kind of problem is it? What are the disputes which the schemes attempt to resolve? These are almost always problems with contracts. The contracts in question are those between the industry members and their consumer customers. For the schemes under study, they are loan contracts, insurance contracts, contracts for investment advice and other financial services such as brokerage and the contracts between bankers and customers relating to the operation of accounts.

Disagreements about the existence, meaning and effect of contracts can create problems between the parties to those contracts. These are often not just problems for the parties themselves but for society as a whole. The parties and society can deal with these problems in a number of ways: for instance, self-help; dispute resolution; regulation and the courts.

In the self-help situation, one party takes direct action to avoid the consequences of contracts, or to enforce their perception of such consequences, without the co-operation or agreement of the other. Its level of intensity and social destruction can vary from quietly evading the law and ignoring the contract (an option which could be taken by consumers and industry alike) through to public protest (usually an option for consumers) and maybe violent action (an option chosen with varying success by both the weak and powerful). There is little legal about this. It is not concerned with rights but the exercise of power. A robust society may accommodate a limited amount of self-help problem solving,

27 Sourdin, T and Community Solutions, 'Review of the Financial Industry Complaints Service — Final Report' December 2002 p (ii).

28 Ibid p (v).

29 See the Plan at www.fics.org.au

in the non-domestic sphere, but too much of it, too publicly, will undermine the capacity of the society to provide for the most basic needs of its members for security of property and person. Even private, domestic or so-called 'family' matters which, usually, are susceptible to much greater levels of self-help problem solving, may sometimes generate socially destructive or, at least, socially significant repercussions. In the absence of the complete destruction or disabling of one of the parties, such self-help solutions are not a resolution or determination of the problem as there is neither agreement between the parties nor enforcement of the outcome by the state.

Dispute resolution or, as it is often called 'alternative dispute resolution',[30] ('ADR') involves the parties to the problematic contract, reaching a new agreement as to how to fix their problem. The process usually entails some communication between the parties who then make concessions from their own respective positions which induce the agreement of the other to a new overall position. They create a new contract. This process is also not primarily concerned with the law to the extent that the law is about rights, obligations and their enforcement by the state.

The original contractual rights of the respective parties to an ADR process do not determine the outcome of that process. Perceptions about rights may influence the positions taken by the parties and the flexibility or intractability with which they maintain those positions. Dispute resolution is about outcomes and about reaching a position which both sides "can live with" whether they think a court would determine their rights accordingly or not.

The various kinds of ADR, negotiation, mediation, conciliation and arbitration are touted by their proponents as being more efficient, less confrontational, less expensive, quicker and easier than the Courts. As the old saying goes: 'Agree for the law is costly.'[31] The most common form of non-court resolution of civil disputes is not the formal ADR processes of mediation, conciliation and arbitration which always involve the services of a third party, but negotiation between the parties, whether through their respective lawyers or not. Settlements and agreements reached as a result of dispute resolution processes are no more (or less) enforceable than the original problematic contract. Breaches of such settlement agreements constitute a new dispute which may result in the parties, who are probably by now completely estranged, going to court.

The courts determine rights. They have the mandate, both the power and the obligation, to do so. This mandate is usually found in written documents, such as constitutions which have been expressly adopted by the citizens of the society or which, as in the case of the United Kingdom, have evolved over time. Courts determine rights between the parties to civil disputes whether those parties are private citizens, corporations or the state itself.[32]

In one sense, courts are also in the business of dispute resolution. This is only to the extent, however, that the entire dispute between the parties is capable of being distilled to a simple question of competing rights (which is often the vexed subject of pleadings in civil litigation). Whether the parties

30 Sir Laurence Street has argued that 'alternative' is a misnomer and that 'additional' is more accurate (see article in (1997) 71 ALJ). The UK Financial Services Ombudsman has claimed that the courts are now the alternative. (Personal Interview with Walter Merricks, UK Financial Services Chief Ombudsman, 10 November 2004).

31 Camden W, *Remains Concerning Britain* (1623) as cited in Hyman R, *A Dictionary of Famous Quotations* (Evans, London, 1962) p 206.

32 This is, of course, quite apart from the role of the courts and the state in the criminal law.

are 'resolved' however, as a result of litigation, is another matter. Such resolution is not the primary concern of the courts despite their efforts in recent times at encouraging it even in the midst of judicial proceedings.[33]

Although the judicial adjudicative method itself can be confined to narrow forensic examinations of disputed facts and the somewhat abstracted process of finding rights, the courts do have an influence beyond the parties to particular disputes. Courts generally keep records of their decisions and the reasons for such decisions. These become precedents which will often bind and frequently influence other courts as to how to determine subsequent cases. They will also influence the conduct of parties who study these records (usually through their lawyers) to decide how they will conduct business. Such interpretations will affect the original formation of contracts, their recording in contractual documents and initial pre-litigious responses of parties when contractual problems arise.

A court will usually be a part of a system which provides for appeals or reviews based on allegations that the first court failed in its interpretation of the law or the facts. The state will enforce decisions of the courts though, in civil matters, this will not be automatic or free of charge.

Regulators respond to contractual problems in order to avoid socially destructive consequences. They are not as interested in the resolution of disputes or in the legal rights of the parties. The power of regulators is 'legal' to the extent that it is mandated by the law, usually a statute. Within the legal parameters of that power, however, its exercise is not determined (though it may be influenced) by a balancing of legal rights as interpreted from the facts, statutes or precedents. The decisions of a regulator may be based completely on its perception (whether internally developed or handed down from higher authority within government) of what is the appropriate policy for a particular industry or class of party. Few, if any, records are kept of the decisions of regulators in individual cases and they are almost never taken as binding precedents. Their decisions are, however, enforceable by the state often with the co-operation of the courts.

The Schemes — where do they fit?

The industry-based consumer dispute resolution schemes discussed above are a new response to contractual problems which do not fit the models described above. They are not 'self-help' to the extent that they do not rely on the exercise of power, whether economic or political, to resolve or determine disputes. Scheme decision makers purport to resolve 'complaints' by reference to decision making criteria which do not include the relative power of the parties.

This is not to say that power was not a factor in their establishment and is not important in maintaining their on-going position. At least one history of a large Australian scheme notes the power of the consumer movement to attract the attention of government to put pressure on industry associations to establish an ADR scheme.[34] The power and strength and other factors of industry maturity and development of the relevant industry peak bodies forestalled or diluted any threatened direct regulatory intervention thus allowing a degree of self-regulation. Whether this self-regulation is 'coerced' or 'voluntary', it is real and distinguishes the schemes from court-based or regulatory

33 For instance see Nancy Welsh, 'The Place of Court Connected Mediation in a Democratic Justice System' (Spring 2004) 5 *Cardozo Journal of Conflict Resolution* 117.

34 Isaacs, J, *Insurance Enquiries and Complaints — The First Ten Years* (2001) IEC pp 6-8.

solutions to contractual problems. It is the result of the interaction between multiple sources of power within society.

The schemes are often described as being ADR. Although this is, in one sense, accurate to the extent that they are a non-court solution to contractual problems, it is also misleading as it lumps the schemes in with the mediation and conciliation 'industry.' Still, the schemes do use mediation and conciliation to resolve disputes prior to exercising their determinative powers. The case management statistics of all the schemes indicate that a significant number, and in most schemes, the vast majority of complaints and cases referred to them are resolved by these means prior to any final determination. The following table is a comparison of the adjudicative and non-adjudicative resolution of disputes from the latest available annual reports of the financial services schemes.

Dispute Resolution Outcomes for Industry Schemes

Scheme	Non-Adjudicative	Adjudicative
Banking and Financial Services Ombudsman	5, 273 (90.1%)	586 (9.9%)
Insurance Ombudsman Service	272 (15%)	1,538 (85%)
Financial Industry Complaints Service	628 (72%)	235 (28%)
Credit Union Dispute Centre	100 (81%)	23 (19%)
Financial Co-operatives Dispute Resolution Service	15 (30.1%)	34 (69%)
Insurance Brokers Disputes	69 (56%)	54 (45%)
Credit Ombudsman Service	118 (93%)	8 (7%)

I have compacted all the non-adjudicative resolutions into the one category for the purposes of this paper. This is partially a function of limitations of time and space but also a recognition that many of the schemes use a combination of mediation and conciliation in their non-adjudicative processes and the distinctions are not always clear. Basically, in this table, 'non-adjudicative' means 'settled without formal determination' either by a panel or ombudsman or adjudicator or referee.

The BFSO, famously, has not issued a determination in many years (since 1997) though its 'settlements' based on recommendations are so highly directed as to be de facto determinations in de jure conciliations. I have thus included any matter which went as far as 'recommendation' in the 'adjudicative' column. BFSO 'findings' which are sent to each party and are still open to be contested, do not, in this table, constitute a determination and their acceptance by the parties is still, therefore, a 'non-adjudicative' resolution. There are further confusions here between schemes which serve industries with highly developed internal dispute resolution (IDR) processes, such as insurance, and those which don't. Also, some schemes include disputes which are successfully referred back to the industry member's IDR as resolved disputes and others only count those which remain unresolved after exhausting all IDR as being disputes.

Do the schemes ultimately and effectively determine the rights of the parties? The answer is more clearly 'yes' than 'no.' Despite the use of non-determinative processes, they are not merely a third party mediator or conciliator. Their investigation role (traditional for ombudsmen) is primarily directed towards informing a decision about the dispute. Its effect of better informing the parties, and thus encouraging settlement, is secondary. In becoming a member of a scheme, the industry party agrees to be bound by scheme decisions and is thus, to some extent, at least, surrendering its legal rights to solve its consumer contractual problems in a court. Although consumers have not so agreed, and are therefore free to reject the scheme determination and take their issue up with the courts, for a variety of reasons, very few do so. Like the industry member, their rights have been effectively determined.

The schemes frequently publish the reasons for their determinations. Despite the accompanying disclaimers that these are not binding precedents, the effect of such publication on industry and on the scheme decisions makers is to develop consistent patterns of decision making which influence industry conduct. Those schemes that do not publish reasons for determinations (such as the BFSO) do produce comprehensive and detailed guidelines which are drawn from previous decisions and indicate the likely course of decisions in the future as well as selected summarised case studies.

Enforcement of scheme decisions is by a combination of regulatory and industry self-regulation mechanisms. Failure to comply with a scheme decision will lead to industry based sanctions such as expulsion from the relevant industry association and, ultimately, upon being reported to the relevant regulator, to withdrawal of the licence to conduct the relevant industry activity.

Are the schemes, therefore, private courts? They determine rights. Their mediative and concilliative roles do not disqualify them from being 'court-like' as courts themselves are delving into these alternative dispute resolution methods whilst retaining their ultimate determinative power. The schemes differ in significant ways, however, from the courts.

Firstly, whatever their relationship to the regulatory organs of the state, they are not government agencies. Their governing bodies, councils or boards are not appointed by the state (though consumer representatives for the BFSO, IOS and FICS were once the subject of ministerial appointments, this is no longer the case). Their funding comes exclusively from industry.

Secondly, they play an active role in the investigation of the facts of a particular dispute but this role is hampered, somewhat, by not having the state sanctioned power to order discovery or subpoena witnesses or documents. In common law court systems, the investigation of the facts and presentation of evidence is a matter for the parties and the court is more like a passive receptor and processor of information produced by others. European civil systems, however, give more of this role to the court itself which determines 'the issues that will be explored, the discovery that will be conducted, the witnesses who will be called and the questions that the witnesses will answer.'[35]

Thirdly, as discussed above, enforcement of their decisions is not directly sanctioned by the state, as is the case for the decisions of courts. No bailiff will execute a warrant issued by an industry-based dispute resolution scheme. Indeed, unlike decisions of the Small Claims Tribunals (in various states), scheme decisions cannot be registered as judgments and enforced in the same way.

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35 Welsh, Note 32 at FN 8 and, generally, Langbein, J, 'The German Advantage in Civil Procedure' (1985) 52 *University of Chicago Law Review* 823.

There is the vexed question of how a consumer could enforce a scheme decision against a recalcitrant industry scheme member. As the consumer was not a party to the 'agreement' pursuant to which the industry member joined the scheme, they cannot enforce its term to be bound by scheme decisions. It could be argued, however, that there is an implied term in the original contract between the consumer and the industry scheme member that, as the industry member is part of an industry based consumer dispute resolution scheme, it will comply with scheme decisions.

A scheme itself may have the means of enforcing its own decisions in a court but regulatory enforcement of scheme decisions is likely to supersede any court-based options. As discussed above, there is now some regulatory licence-based sanction for expulsion from an industry-based consumer dispute resolution scheme. For financial services providers, scheme membership is a requirement of their Australian Financial Services licence and the appropriate schemes are those with approval from ASIC under its Policy PS139.

Are the schemes, therefore, so intertwined with the government as to be just another regulatory agency? The answer is no. Though their membership may be the result of regulation, they themselves are not regulators.

Firstly, the schemes themselves are not constituted by statute. Their constitutions, jurisdictions and membership are substantially influenced by statutes such as the *Corporations Act* for financial services, the *Telecommunications Acts* for the TIO and the various Acts which privatised water and electricity supply for the EWOV and EWON. None of these statutes, however, provides for the establishment of the relevant scheme, merely that the industry members must join one which conforms to certain requirements. The constituent form of the schemes can vary from companies limited by guarantee to incorporated associations. There is no theoretical reason why a particular scheme need rely on an incorporation statute at all, though, practically, it would be impossible to satisfy the statutory and regulatory obligations of their members if they did not. Despite this, the schemes themselves are not creatures of statute any more than any other public or private company, club or association.

Secondly, they are not funded by government. In the case of the financial services schemes, no funding or even facilitation was provided by government. The only role played by government, through ASIC, is to process applications by schemes for approval under PS139 as appropriate bodies to satisfy the dispute resolution requirements of Australian Financial Services licence holders. Although some establishment costs were borne by government for the TIO and the utilities schemes, all ongoing operational costs are paid for by industry.

Thirdly, and to some extent consequentially, the staff of the schemes are not government employees. The scheme boards or councils are no longer government appointees and in some cases, they never were. None of the customer contact and case-management staff work for the government. The scheme decision-makers are not accountable directly to government for any scheme decision.

Fourthly, in resolving individual disputes and making the decisions which are their prime function, the schemes do not rely on government policies as decision-making criteria. These criteria usually refer to the law, the relevant industry code and what is fair and reasonable in the circumstances. The schemes are concerned with and, effectively, determine the rights of the parties and, therefore, will examine the facts, law and circumstances to find those rights.

Fifthly, although they have a role in detecting and reporting systemic issues that is their only 'society-wide' concern. They are primarily involved in determining the outcome of a particular dispute between two particular parties, the consumer and the industry member. A regulator is concerned with how particular conduct or disputes impact on society as a whole. For the regulator, particular outcomes are secondary to general implications.

There are two useful theoretical conclusions to draw from this discussion. The first, and most obvious, is that the industry-based consumer dispute resolution schemes do not fit into the categories of self-help, courts, dispute resolution or regulation which generally encompass the most common ways society deals with problems with contracts. The second conclusion is that the schemes display some features of all of these categories and they interact, in a variety of ways, with systems and institutions defined by them.

This 'inside out' aspect presents the most interesting challenges for a theory to both explain and understand the schemes as well as assess them and consider their future.[36]

The Challenge for the Courts — *Masu Financial Services Ltd v FICS and Julie Wong*[37]

The first Australian judicial review of an industry-based consumer dispute resolution scheme decision raised the issue of whether those schemes are exercising the judicial power of the Commonwealth in breach of Chapter III of the Australian Constitution. Julie Wong retained Masu Financial Management Pty Ltd ('Masu') which recommended investment in a negatively geared property which Ms Wong bought in 1999. After a rental guarantee period expired, the property started losing more money than Ms Wong could afford. When she tried to sell it, the real estate agents indicated that it would yield a $50,000 loss.

Ms Wong complained to the Financial Industry Complaints Service ('FICS'). The FICS panel determined that Masu pay back its consultancy fee of $9,863.00 plus some out of pocket expenses and interest. Masu made application to the Supreme Court of NSW for declarations that:

- FICS represented an unconstitutional exercise of the Commonwealth judicial power;
- FICS is a public body and amenable to judicial review and, in this instance, is in breach of its public duties; or alternatively
- FICS is contractually bound to Masu in a way which gives rise to similar duties which have been breached.

Justice Shaw considered the constitutional issue separately.[38] He referred to cases dealing with telecommunications[39] and superannuation[40] and said that these supported the validity of schemes

36 For a more detailed discussion of some possible theoretical approaches to industry-based consumer dispute resolution schemes see O'Shea. P at Note 15 above. The earlier experience of such schemes in Britain has generated substantially more analysis eg James, R *Private Ombudsmen and Public Law* (Ashgate, 1997); James R and Morris P, 'The new Financial Ombudsman Service in the United Kingdom: has the second generation got it right' in Rickett C and Telfer T *International Perspectives on Consumers' Access to Justice* (Cambridge University Press, 2003).

37 [2004] NSWSC 826.

38 Note 36 Judgment No 1.

39 *Australian Telecommunications Authority v Viper Communications Pty Ltd* (2001) 183 ALR 735

40 *Attorney General (Cth) v Breckler* (1999) 197 CLR 83

comparable to FICS. Masu argued that FICS can enforce its own decisions. The FICS rules allow it to expel members who do not comply with its decisions leading ASIC to withdraw the member's Australian Financial Services licence. This was the kind of self-enforcement, according to Masu, which led to the High Court striking down decisions of the Human Rights and Equal Opportunity Commission.[41]

Shaw J rejected this argument and pointed out that loss of the licence would be 'a result only *indirectly* of the termination of membership by FICS and it would be a result more directly of ASIC making an administrative decision which could itself be a subject of some legal challenge.'[42] He ruled that FICS was not, of itself, exercising the judicial power of the Commonwealth saying:

> *Determinations of a panel of FICS create new rights and obligations designed to achieve fairness, in a broad sense, between the parties rather than amounting to the performance of the traditional task of a court, namely the ascertainment and enforcement of existing legal rights.*[43]

Masu No 1 gives comfort to industry-based consumer dispute resolution schemes as to their constitutionality. *Masu No 2* may give greater pause as to their susceptibility to judicial review. In this second judgment, Shaw J proceeded to consider the substantive question of whether FICS, in reaching its decision on Ms Wong's complaint against Masu, was in breach of its duties either as a judicially reviewable public body or otherwise in contract.

The determination of the FICS Panel was, in summary, that Masu must repay Ms Wong the entirety of its consultancy fee which was $9,863.000 plus some out of pocket expenses and interest. Ms Wong had also sought compensation for an expected capital loss on the sale of the investment property she had bought on Masu's advice. The FICS Panel determined that:

> *If the complainant sells the apartment before 31 December 2002 and satisfies the Panel that:*
> *(a) the sale was on the open market and at arm's length; and*
> *(b) she has made a loss after taking into account interest payments and income from and expenditure on or in connection with the apartment*
> *the panel will give a further direction to the member to compensate her for that loss. Otherwise, it will not direct the member to pay her any more compensation than is provided for in this decision.*

Masu argued that there were several errors which, somewhat confusingly, Shaw J described as both 'substantive' and, elsewhere, as 'procedural.' In summary, they were as follows:

- *Firstly, there was insufficient notice given to Masu that the FICS panel was going to consider an important question, namely disclosure of commission;*
- *Secondly, the FICS Panel gave insufficient reasons for its determination;*

41 See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

42 Note 36, No 1 p 5.

43 Note 36 p 6.

- *Thirdly, the decision of the FICS Panel was so unreasonable as not to have been available or open to it;*
- *Fourthly, the Panel should not have proceeded to deal with the matter at all unless and until it had determined the monetary value of the claim so as to ensure that it was within its Rules as to jurisdiction.*

It is interesting that none of these grounds amount to an error of law within jurisdiction. They are, therefore, available as grounds for review regardless of whether FICS is characterised as a public or a private body. Justice Shaw's finding that 'FICS was exercising powers of a public nature, and this (sic) is susceptible to judicial review' was not necessary to determine the outcome of the case. It is, therefore, merely *obiter*. His Honour is himself keenly aware of the limitations of this finding as he says:

> *Lest I be wrong about the capacity of the court to judicially review decisions of FICS, I think that the cautious approach is to couch any remedies which this court might grant in the contractual context of the enforcement of the constitution and rules of FICS.*[44]

This caution is, with respect, justified. Firstly, it is not clear that the weight of authority supports his Honour's conclusion as to the law; and secondly, several of the 'observations' his honour makes about FICS, to support his conclusion, were either erroneous at the time of hearing of the case or are certainly so now.

The line of authority on which his honour relied included the English decision *R v Panel on Takeovers & Mergers; Ex Parte Datafin Plc*[45] and those Australian cases which refer to *Datafin*. He said he was following the observations of Spigelman CJ in *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 where the Chief Justice says, amongst other things:

> *In my opinion, the common law basis for the duty to accord procedural fairness is reflected in the cases which extend the duty to exercise of prerogative powers... It also the basis for the extension of the principles of judicial review to private bodies which make decisions of a public character.(See,* Forbes v New South Wales Trotting Club Ltd *(1979) 143 CLR 242;* R v Panel on Take-overs and Mergers; Ex parte Datafin Plc *[1987] QB 815)*[46]

It should be noted here that Spigelman CJ is only referring to procedural fairness, not to mere error of law.

In *Masu No 2*, Shaw J said that:

> *In my view, the preponderance of Australian authority indiates that the English case of* R v Panel on Takeovers and Mergers; Ex parte Datafin Plc *[1987] 1 All ER 564 is applicable in this country, that is to say that companies administering external*

44 Above n 36 [11].

45 [1987] QB 815.

46 At [7] as cited in *Masu No 2* at [4].

complaints schemes concerning participants in the finance industry are judicially reviewable.[47]

He also referred to cases on the Advertising Standards Council[48] and concluded that 'Thus, it seems to me clear that the *Datafin* principle applies in New South Wales, that FICS was exercising powers of a public nature, and this is susceptible to judicial review.'[49] His Honour did not refer to cases where Australian courts have considered *Datafin* and found that there was not sufficient "public interest" or 'legislative intertwining' in the relevant organisations to justify judicial review.[50]

His Honour's reasoning ignores the decision in *Aegon Life v Insurance Ombudsman Ltd*[51] which is, probably, most analogous to the case in point. The UK Insurance Ombudsman Bureau was an incorporated body which dealt with members of the public in their consumer disputes with insurance companies who were statutorily obliged to be a member of *a* dispute resolution scheme, though not necessarily the Insurance Ombudsman. This is a close analogy to FICS. FICS is not a statutory authority unlike the UK Financial Services Ombudsman which subsequently replaced the Insurance Ombudsman Bureau. It is a company limited by guarantee whose members hold Australian Financial Services Licenses. AFS licence holders are required by the *Corporations Act* to be members of *an* ASIC approved dispute resolution scheme not *necessarily* FICS.[52]

In *Aegon Life*, the Court specifically endorsed the approach in *Datafin*, but found that it did not apply to the Insurance Ombudsman scheme. In Australia, these two cases have been considered by Ken Adams in the *Insurance Law Journal*. He applied their reasoning to the former General Insurance Claims Review Panel (now the IOS) and concluded that the Australian scheme would not be subject to judicial review as a public body.[53]

Secondly, in *Masu No 2*, Shaw J identified a number of 'indicia' which he said prompted him to the view that FICS was susceptible to judicial review. These include, amongst others, that:

- the federal government was responsible for appointing a substantial proportion of the members of the board of FICS;
- the federal government was involved in the appointment of two-thirds of any panel appointed by FICS to hear a complaint.[54]

Taking the first point, it is conceded that the federal Minister for Consumer Affairs did select the appointees for the Consumer Director positions on the FICS board until May of 2002 but this was not as of right but by way of an invitation by the FICS Board. The federal government has no proprietary

47 *Masu No 2* at [5].

48 *Typing Centre of New South Wales v Toose* (unreported, SC (NSW, Mathers J, 15 December 1998); *Dorff Industries Pty Ltd & Box Emery & Partners (a firm) v The Honourable PB Toose CBE QC* (1994) 54 FCR 350; *McClelland v Burning Palms Surf Life Saving Club* (2002) 191 ALR 759,

49 *Masu No 2* at [6].

50 *Norths Ltd v McCaughan Dyson Caple Cure Ltd* (1998) 12 ACLR 739 per Young J at p 745; *Adamson v New South Wales Rugby League Ltd* (1991) 103 ALR 319 per Gummmow J at p 347.

51 [1995] LRLR 101.

52 See O'Shea, P, 'Underneath the Radar: The Largely unnoticed phenomenon of industry based consumer dispute resolution schemes in Australia' (224) 15 ADRJ 156 at p 159.

53 Adams, K, 'Judicial Review of Claims Review Panel Decisions' (1997) 8 ILJ 105 at 114.

54 *Masu No 2* at [7].

interest in FICS. Even so, this accounted for only four out of the nine members of the board at the time of the *Masu* determination. At the May 2002 Annual General Meeting of FICS, the constitution was amended so that Consumer Directors would be appointed by the board itself after consultation with relevant consumer organisations.[55] Less than three months after the Masu FICS determination, and two years before the New South Wales Supreme Court judgment, the first two Consumer Directors who had not been selected by the Minister were appointed. The current position, therefore, is that the federal government is no longer involved at all in appointments to the FICS Board.

On the second point, panel members are employees and appointees of the FICS Board. The federal government, through the Minister for Consumer Affairs until May 2002, was involved in their appointment by way of consultation only. Since then, the federal government has not been involved at all in such appointments.

The claim for judicial review could be upheld regardless of whether FICS is a public body or not. As Shaw J says: '...I accept that it (Masu) was entitled to procedural fairness as a matter of contract between Masu and FICS' and that 'These contractual rights are enforceable in this court.'[56]

On the first substantive ground, Shaw J accepted the submission that Ms Wong had added her complaint about a non-disclosed commission paid to Masu after her original written complaint. Masu, on the other hand, had only been given an opportunity to reply to the original complaint. The FICS panel determination did include reference to the question of commission. His Honour concluded: 'It is a reasonable submission for the plaintiff to make that Masu was then thereafter faced with a determination on the basis of a case that it did not know it was required to meet.'[57]

On the ground of insufficient reasons, Shaw J thought 'there is substance in the plaintiff's submission when it says that it does not know (from the reasons) 'what legal wrong it has committed'.' He did regard as 'hyperbolic' some of Masu's submissions to the effect that the FICS panel's reasons were 'incoherent' and indicated 'grave prejudice.' He notes that the reasons given fail to explain all the relevant considerations that have been taken into account.[58]

Having already concluded that the decision was flawed, his Honour's observations about the other grounds became *obiter* but he did not 'think there is great strength' in the plaintiff's argument that the FICS panel's determination was so 'unreasonable so as to not have been available or open' on a *Wednesbury* basis.[59] Further, he did not think that there was:

> *Much substance in the criticism that the (FICS) tribunal was prohibited by (its own rules) from proceeding to deal with the matter at all unless and until it had determined the monetary value of the claim so as to ensure that the claim was within the relevant limitation.*[60]

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55 FICS Annual Review 2001, p 4.

56 *Masu No 2* [10] and [11].

57 *Masu No 2* [16].

58 *Masu No 2* [18] and [20].

59 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223; *Masu No 2* [21].

60 *Masu No. 2* [21].

Indeed, the flexibility demonstrated by the FICS panel in this 'two stage' determination, is a good example of one of the advantages that industry-based consumer dispute resolution schemes have over the more limited options available in court orders.

Justice Shaw, however, did exercise judicial imagination in making his order. He rejected Masu's submission that the decisions should simply be quashed without any order for redetermination. He was minded to repair the breaches of procedural fairness by allowing FICS to redetermine the case, albeit giving proper notice and better reasons.

He did not apprehend any *actual* bias on the part of FICS or the panel, 'Rather, what is said is that there could be a reasonable apprehension of bias' should the same panel redetermine the complaint. This defect, he found, 'could be accommodated by an order directing that the matter be remitted to a differently constituted panel which can then apply an independent collective mind to the complaints Ms Wong has made.'[61] There was no order as to costs.

Most disturbingly, if the *obiter* of Justice Shaw that FICS (and by extension other similar schemes) are all public bodies susceptible to full judicial review is adopted as law by another court, then this opens the possibility of review being for mere error of law within jurisdiction. This may well be a serious undermining of the autonomy of the schemes, their flexibility, their accessibility and their usefulness to both consumers and industry as a low-cost informal means of resolving disputes.

The Challenges for Industry-Based Consumer Dispute Resolution Schemes and their Stakeholders

There have been several key developments since the decision in *Masu* last year.

Firstly, the insurer for FICS has informed its board that it will no longer cover legal challenges to its determinations by members as it sees these as a certainty and not a risk.

Secondly, the High Court of Australia in *Griffith University v Tang*[62] took a narrow view on what decisions of a university were capable of review under a piece of state judicial review legislation.

Thirdly, another member of FICS, a large insurer, has commenced an action seeking a review of another FICS decision. I am informed that the grounds for review, amended after the decision in *Tang* was published, rely chiefly on the contractual basis of scheme membership and do not seek judicial review of the FICS decision as if it were a public body.

Given the probability that other insurers will respond similarly to the *Masu* decision, industry-based dispute resolution schemes must consider how to answer this challenge as the risk of substantial costs, both for themselves and by court orders of other parties, may be more than their budgets can bear.

The prospect of frequent and expensive judicial review presents a challenge to the internal decision making culture of the schemes. A new 'legalism' may creep into scheme processes and decision-making as they 'look over their shoulders' at the courts.[63] The UK Financial Services Ombudsman was 'sanguine' about this prospect in 2001.[64] In *Norwich & Peterborough Building Society v Financial Services Ombudsman*,[65] however, one of his decisions was effectively overturned. He was

61 *Masu No 2* [25] – [27].

62 [2005] HCA 7.

63 This is a fear expressed by James and Morris Note 35 at p 191 in relation to the UK Financial Services Ombudsman.

64 As reported by James and Morris see Note 62.

65 [2003] 1 All ER 6

'less sanguine' in November of 2004 but said that '...but if we merely said we've taken account of the way the law runs in this area without trying to specify the view exactly where the law stands ...then... I think in many cases we can avoid getting into serious trouble with the courts'[66]

The UK Financial Services Ombudsman is, of course, as a statutory authority, more vulnerable to full judicial review than the financial services schemes in Australia. Nevertheless, the schemes must consider their response to the *Masu* decision, the litigation it has inspired and the likely reaction of the companies providing professional indemnity insurance to schemes, their management and staff.

Some of the responses to consider are:

- Schemes must adjust their rules and operating procedures so that that no ground of complaint can be considered for a scheme determination unless all parties have had an opportunity to consider that ground and make submissions on it. Whether this is by a "summary of the arguments" or a 'finding' or an 'exposure draft determination' may vary from scheme to scheme.
- All relevant considerations should be included in panel determinations where the rules of the scheme stipulate that reasons are to be given. This does not mean panel determinations should become prolix legal treatises. Shaw J said that:

> *It would be excessive and pedantic to require an administrative tribunal of this kind to refer expressly to a particular case in the High Court decided in 1940, but nonetheless it is reasonable to require that the general concept should be adverted to as at least relevant to the adjudication of the matter.*[67]

- If a breach of natural justice or procedural fairness is alleged by a party to a panel determination, then the rules of the scheme could provide for redetermination by a differently constituted panel within the same scheme or, if the decision is by an ombudsman, referee or adjudicator, then to another such decision-maker or to an *ad hoc* review panel. This follows directly from the terms of the order in *Masu*.
- Schemes could also seek approval from their members to amend their constitutions to provide for an indemnity for costs from any member who seeks judicial review of scheme decisions. This could offset the costs of such actions which, particularly for smaller schemes, are prohibitive. Whether such an indemnity is interpreted by the court as an effective 'ouster' and, therefore, invalid, remains to be seen.
- If all else fails, there is the option of a legislative solution via an amendment to the financial services reform provisions of the *Corporations Act*. Such legislation could exclude or limit judicial review of scheme decisions so that they were more clearly confined to matters of natural justice and procedure. This already occurs for several statutory tribunals and for the various small claims tribunals in each state.[68]

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66 Personal Interview with Walter Merricks, Melbourne, November 2004.

67 Note 36 No 2 [26].

68 For instance, in Queensland the *Small Claims Tribunal Act* 1973 sections 18 and 19

Conclusion — "A fabulous monster"?

Lewis Carroll's unicorn was using the word 'fabulous' in its original meaning, namely something that was barely believable and more likely to be found in a fable than in reality. Modern usage tends to give the word meaning something marvellous and wonderful.

The industry-based consumer dispute resolution schemes do represent a marvellous and wonderful improvement in access to justice for consumers of financial services in Australia. They are largely cheap to run for industry, free to access by consumers and produce resolutions quickly and far more flexibly and usually more fairly than the courts. They are a creation of a myriad of forces — industry, the consumer movement and government — and they do not quite fit any one of the existing models of dispute resolution. Yet, they are no monster.

The challenge for scheme management, their stakeholders and for government regulators is how to maximise the benefits of the independence of the schemes while preserving the rights of the members to procedural justice. It is the problem of achieving accountable autonomy.

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