

**FAIR AND REASONABLE: THE ESSENTIAL ELEMENTS
OF DISPUTE RESOLUTION**

**A paper presented by Jan Taylor FCDRS Ombudsman
to the 2007 EDR Conference**

Fair and Reasonable: the Essential Element of Dispute Resolution

Thank you for the opportunity to participate in this EDR forum, and to represent the small group of FCDRS staff who spend each working moment endeavoring to advance the interests of consumers in the financial sector.

The scheme of which I am the ombudsman, the Financial Co-operative Dispute Resolution Service (FCDRS), is recognised by ASIC under its Policy Statement 139 as an external dispute resolution (EDR) scheme satisfying the requirements of the *Corporations Act*.

The FCDRS is an incorporated association with 45 members; 29 credit unions and 16 building societies. Its council, which serves a similar function to the boards of other PS139 schemes, has two consumer representatives, two from industry, and an independent chairman. The Council is responsible for the overall conduct and management of the scheme and out sources the FCDRS Ombudsman's office to conduct its dispute resolution, education and awareness, and other functions.

The broad issue I want to raise today goes to the relationship between the FCDRS, and indeed all EDR schemes, and the law as it applies to dispute resolution.

At the outset, I want to place up front my strongly held view that consumer disputes by their very nature are quite distinct to other transactions in the marketplace. The difference is predicated in large part on the unequal bargaining power that consumers have in most of their transactions.

In external dispute resolution this translates into an intention to balance that inequality with common sense, inexpensive, accessible, and fair and reasonable redress that is comprehensible and acceptable to the great majority of consumers.

It is for these reasons that I believe the concept of fairness trumps or outranks the law in the resolution of consumer disputes. And no one with any type of legal background ever makes such a statement without at least one or two shivers sliding up the spine.

I say it, however, having worked in dispute resolution in the financial sector for twelve years. And before that I was active in consumer protection for over fifteen years, including five as Queensland's Commissioner for Consumer Affairs and Director of Fair Trading.

From my practical experience as an advocate, commissioner, mediator and ombudsman, and from my own reading and research, I am prepared to say unequivocally that consumer law is quite different to the law of contract, but still an integral part of the law of contract.

I say this as matter of general principle and also as a matter of contract between the FCDRS and its members. That particular contract is contained in the FCDRS constitution and Terms of Reference.

The latter states that I am obliged to *have regard to applicable and binding industry codes of practice or guidelines, good industry practice, the participant's constitution, any applicable rule of law or relevant judicial authority, and what is fair and reasonable in all the circumstances to both the participant and the disputant.*

My interpretation of this obligation is that what is *fair and reasonable* has to be viewed as the final, and ultimate, consideration. The applicable rules of law and judicial authority are but one set of matters to which I am required to have regard in reaching a decision. In practice, *fairness* ultimately becomes the paramount criteria. Does this mean that the FCDRS or any other EDR scheme is above the law? Are they lawless or can completely ignore the law? The answer of course is no.

To explain my view on the relationship between consumer law, contract law and the rule of law generally, I need to say something about consumer law.

The strict precepts of the black letter law of contract set up a framework within which consumer law can operate. However, at the level of consumer transactions and resolution of consumer disputes, a lot of other factors start to come into play, none of which are new to any of you. The factors include inequality of bargaining power; inequality of information; special and general disadvantages to one party to the transaction; and the inflexibility of standard form contracts with no capacity to negotiate.

Within the general law of contract consumer law occupies a very different place to the law that occupies most commercial lawyers dealing with large corporate entities – and even larger sums of money - across crowded courts or conference rooms.

Last year in an article in the *Sydney Law Review* Charles Rickett and Paul O'Shea described consumer law as an *enclave* within the general law of contract - in which outcomes are influenced but not totally determined by the precepts of contract law.

They go further than anything I have said publicly before and arguably express it much better. EDR schemes are not concerned with determining rights or making

rules but resolving disputes and, therefore, courts should largely leave EDR schemes alone.

Interestingly, the inference by the above authors is that EDR schemes are some wonderful new invention to assist consumers. That's not true, of course, as small claims courts, by whatever name, operate in most states and territories and predate the EDR sector by a decade or more.

At the risk of dating myself, Queensland was first cab off the rank with its Small Claims Tribunal and I had the pleasure of working in that organisation for a period. Like its successors, it had neither an interest in, nor capacity for, making precedents and was not subject to appeal or review for error of law or fact.

The decisions of such courts can only be overturned for error of jurisdiction or breach of natural justice.

Those courts of course had many deficiencies, not least of which was their very restrictive jurisdiction and inability to cope with the complexity, and monetary value, of issues facing consumers in the purchase of financial services, telecommunications and utilities; all the subject of EDR schemes today.

Although my reference to small claims courts may not appear to be on point it does show that the notion that *consumer law is different* is not a new idea and that it has long been recognised the resolution of consumer disputes requires a more flexible, less legalistic approach.

Clearly EDR schemes are not above the law. With regard to all external relationships, corporate governance, financial accountability, accountability to ASIC, employee relationships and of course interface with financial service providers (FSPs), EDR schemes must comply with the law in its black letter form.

FSPs, however, have contracted to comply with the internal processes of EDR schemes and, ultimately, with determinations made in accordance with the specific scheme's Terms of Reference. These Terms of Reference or rules provide schemes like the FCDRS with a mandate to give primacy to what is *fair and reasonable in all the circumstances* in the resolution of disputes.

Statements of principle are one thing, practical examples another. Some examples follow

Every financial counsellor and consumer lawyer knows that social security payments are protected from debt collection by that wonderful piece of legislation the *Social Security Administration (SSA) Act*.

A magistrates court in Queensland made a redirection of payment order (the old garnishee) to an FCDRS member in favour of a third party creditor. This left almost nothing for the consumer disputant, a Centrelink recipient, to live on.

The consumer, a father of four dependent children and sole carer of a terminally ill wife, realised the payment order would make it impossible to provide the most basic of sustenance to his family and made several attempts to persuade the FSP to adjust the payment order.

The FSP refused on the basis that it had a court order which must be obeyed. The consumer and his family lived hand to mouth for several months relying on the generosity of a number of charities. The FSP was well aware of the consumer's dire situation but would not budge.

It is probably appropriate to add here that the consumer had not fallen into debt because of profligate or addictive habits but because he had purchased a cheap vehicle to try to earn additional money for his family; the business venture failed and the court placed a residual value of \$5 000 owing to a third party on the vehicle.

The consumer went to Legal Aid Qld which assisted him to make a complaint to the FCDRS.

My final determination on this matter was that the FSP had to refund all the Centrelink payments removed from his account, plus \$3 647 for the funds (and interest) he had borrowed from an extortionate moneylender in order to keep a roof over his head, plus \$3 000 compensation for hardship including an appalling Christmas experienced by the family.

I also wrote to the Chief Magistrate of Queensland expressing my concern at the apparent lack of knowledge of the SSA Act.

He was very responsive and subsequently wrote to all magistrates directing that payment (or garnishee) orders be expressed as subject to any protection afforded by the SSA Act.

In that particular dispute, two laws or legal instruments apparently conflicted. The dispute had to be resolved, as was fair and reasonable, in favour of the consumer and there was certainly no need to explore the constitutional niceties of state court orders versus federal laws.

Fairness clearly had primacy and other considerations were incidental at best.

On another matter, an enquiry was recently received from an aged pensioner who had authorised a regular direct debit from his account to repay a debt to the

same FSP. Unfortunately, he miscalculated the direct debit date in relation to his pension deposit date.

So, each fortnight for eleven months - on 22 separate occasions, a failed direct debit fee of \$39.50 was imposed by the FSP.

The FCDRS Case Manager negotiated for the reversal of these fees, some \$800, and for a meeting between a representative of the FSP and the consumer to co-ordinate future direct debits to avoid the problem. This is fairness in action on the most pragmatic of bases.

It is also timely in this context to mention that I am currently reviewing as a matter of general policy the FCDRS position on penalty fees. Although work is still proceeding on this, FCDRS member FSPs have been advised the matter is under renewed consideration.

My concern is where a fee or charge is imposed (whether properly disclosed or not) for breach of a term of contract with an FSP. If that fee or charge is substantially more than the actual cost of the breach then it is arguably a penalty at law and therefore unenforceable.

Reminder letters, letters of demand, and telephone calls may involve some administrative cost and the FSP is entitled to recoup that cost. But if all the FSP does in response to the breach (usually late payment) is to initiate a computer generated extra line in a regular monthly statement, the cost is probably a few cents not \$20, \$30 or even \$50.

Even if the fee is not a "penalty" at law, nor unconscionable under the Consumer Credit Code (because the contract is not consumer credit), the FCDRS will still consider complaints about fees or charges imposed on the account which appear to bear no relationship to the actual cost. This would not include a regular feature of account administration such as account keeping fees.

In circumstances where the fees or charges appear to have no cost basis they are arguably neither fair nor reasonable. I would have thought that FSP profits should emanate from interest rate differentials not from ad hoc and unfair penalty fees.

My team at the FCDRS gets very few opportunities to trumpet its own successes so let me take advantage of this forum to do just that...as it relates to fair and reasonable but arguably stretching that concept.

A complaint was received from a consumer who had been served with an eviction notice. At the time the complaint came in, the mortgagee was already in possession and only two days were remaining prior to settlement with the new owners.

The consumer and her husband had divorced; he was a joint party to the mortgage and had allowed her to live in the property while he continued to make the mortgage payments as part of spousal maintenance. Their teenage son committed suicide (on the property) and the mortgage payments went unpaid for four months. The FSP chased the father for the arrears and he said he was happy for the house to be sold. No contact was made with the wife, the joint mortgagor, until the arrears were over \$5 000.

The consumer was traumatised by the recent loss of her son and did not worry about the loan until she was reminded that it was in arrears by four months, a total of \$5 400.

At no time during her discussions with FSP staff did they suggest or advise there were choices other than surrendering the property e.g. coming to some arrangement to pay.

The consumer only had limited funds available and was advised by FSP staff it was not enough to stop proceedings. She then chose to use the funds to move her belongings rather than pay off the arrears.

The FSP proceeded with the legalities and listed the property for sale; a contract of sale was completed within one day of it being listed. Only then did the consumer contact the FCDRS.

Technically, the legal processes were complete so outside the FCDRS jurisdiction. However, it was decided to accept the dispute as the forced sale, including the unconditional nature of the purchase in an inordinately short time frame, gave the case manager concern as to the integrity of the process. Other factors were at play including the woman's personal circumstances and the lack of adequate discussion with her.

Needless to say all of this happened a few days before Christmas...the usual case of Murphy's Law! All stops were pulled, including persuading the FSP to pay for independent legal advice for the woman. It was made clear to the CEO of the FSP that there were serious concerns re the process and action taken by its credit department and the inordinate haste with which the real estate agent managed to find a buyer.

The telephone lines ran hot right up until close of business on Christmas Eve, lots of tears were shed by the consumer and my staff ...and probably the CEO, but for very different reasons. The new buyers were compensated, expensively, for the sale not proceeding, the consumer was given sufficient money to move back onto the property, to receive grief counselling (also paid for by the FSP), and restore the changes made by the new owners...and arrangements were made to give the consumer a six month period of grace for repayments.

There were obviously numerous other intricacies involved but that's the potted version...and we all had a happy Christmas.

There is one final matter that I want to address. A view is held in some quarters that the FCDRS is not in a position to accept applications for variations in payments due to hardship under section 66 of the *Consumer Credit Code*. The FCDRS team finds these arguments unconvincing and believes the FCDRS does have jurisdiction to consider them under the scheme's Terms of Reference.

Some EDR schemes and financial service providers argue that because section 68 of the Code refers to *the Court* this gives an exclusive jurisdiction to the court to consider section 66 cases. I feel this flies in the face of fairness, reasonableness and common sense.

The FCDRS, like other EDR schemes, is a social, political and legal alternative to the courts. It is constituted to provide an alternative to legal proceedings.

No one suggests that consumers cannot bring a claim for an unjust contract or a gross undervalue in a mortgagee sale to the FCDRS yet these are described as applications to *the Court* in sections 71 and 98 respectively of the *Consumer Credit Code*.

Others argue that the decision to grant or refuse a section 66 application is a commercial judgment and therefore outside the Terms of Reference of most EDR schemes. All decisions by FSPs are, in one sense, commercial judgments, even if they are in breach of contract, in breach of the *Consumer Credit Code* or some industry code, or just plain unfair.

I believe the FCDRS can consider hardship applications.

The commercial decision was made when the FSP chose to enter the contract with the consumer. Once this was done, the FSP moved into that wonderful arena within the law of contract called *consumer law*. Different rules apply with one of them being section 66; the FCDRS is quite entitled to review a decision to refuse to vary because of hardship. However, this reasoning does not help with small businesses or with home loans in excess of the \$322 000 plus limit for section 66.

With this in mind, the FCDRS will be adopting the view that *good industry practice*, one of the express criteria combined with the *fair and reasonable* test, will require us to consider any reasonable hardship application for variation of any loan repayments which are otherwise within the Terms of Reference.

I also believe it is imperative, and will become increasingly so as debt levels rise, that FSPs give thought to different staff dealing with hardship cases as opposed to standard credit control officers.

This could be a better service for consumers who might then view their FSP contact as having more expertise (and dare I say empathy?) in the specific area of hardship, as opposed to credit control itself.

Some of the hardship problems that reach FCDRS staff arrive too late to enable the consumers to be assisted. Advice is being sought from FSPs how best to handle such cases; there has to be some middle ground... and this does not include FSPs sending every consumer in financial difficulty to an EDR scheme.

The future for some mortgagors is looking increasingly bleak and none of us can ignore that.

I hope the disputes I referred to earlier in this speech provide practical examples of what can be achieved by a small scheme, light on its feet, close to its members, and with an approach that puts fairness before bureaucratic legalism.

These are good outcomes for consumers. They are also fair and reasonable by any definition.