

# **Enforceability of financial services industry codes – Taking action on recommendation 1.15 of the Banking, Superannuation and Financial Services Royal Commission**

Submission to Financial Services Reform Taskforce,  
The Treasury

**12 April 2019**



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## Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

The ALA office is located on the land of the Gadigal of the Eora Nation.

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).

## Introduction

1. The ALA welcomes the opportunity to have input in relation to the enforceability of financial services industry codes.
2. The financial services industry is currently suffering from a significant trust deficit with consumers. One way of improving trust in financial services is to ensure the consumer knows that when they deal with financial services entities they will be treated fairly and in accordance with understood norms of behavioural conduct.
3. Given the findings of the recent Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, this is an important opportunity to ensure that there are relevant codes of practice that provide clear standards of behaviour for financial services entities. Importantly, those codes must include external, independent oversight as well as consequences for those entities who fail to meet the agreed standards.
4. The ALA has had the benefit of reviewing the submission provided by Maurice Blackburn Lawyers in relation to this consultation. The ALA agrees with the submission made by Maurice Blackburn Lawyers and provides the commentary below as a supplement to that submission.

## The need to review industry codes of practice

5. It must be recognised that codes of practice provide a method of self-regulation of an industry which is constantly evolving and changing. Accordingly, industry codes of practice should not be “set-and-forget”. It is important that financial services industry codes are consistently reviewed to ensure that they remain fit for purpose.
6. There are many matters in relation to financial services (such as crypto-currency, for example) which could significantly change the landscape and may also change the ultimate protections which consumers need. Accordingly, the ALA believes that industry codes should be reviewed at least every 4 years to ensure they remain fit for purpose.

## **Circumstances in which the result of an external dispute resolution process precludes further court proceedings**

7. The ALA is very concerned by this question. If it were the case that a consumer had to relinquish their right to pursue your matter before the courts in order to participate in a cost-effective and less formal dispute resolution process, that would almost certainly lead to less consumers participating in EDR, and would lead to more consumers pursuing their rights through the courts.
8. To be clear, it would be a shockingly regressive step to require a consumer to give up legal rights (through the courts) in order to participate in an EDR process and the ALA strongly objects to any proposal in support of this measure. The ALA adopts the submission of Maurice Blackburn Lawyers in relation to question 15 of the consultation paper.

## **The need to strengthen consumer protections**

9. The ALA reiterates that the recent Royal Commission has demonstrated that despite there being significant regulation of the financial services industry, consumers have still suffered significant detriment at the hands of financial services providers who have failed to act in accordance with expected community standards and in the interests of their customers. Accordingly, we believe that to the extent that any further legislative or other amendments are made, such amendments should only strengthen, and not weaken, the existing consumer protections.
10. A significant criticism of the existing voluntary superannuation code of practice is that it does not have external oversight and the power to sanction. It is the view of the ALA that all codes of practice in financial services should have external oversight from a committee or code administrator who has the power of audit and to undertake spot-checks on financial services providers. There must also be consequences for financial services providers failing to meet their obligations under the code.
11. There have been many victims, particularly in relation to negligent financial advice, who have lost significant sums of money and often their retirement savings, and who then have to deal with the professional indemnity insurer of a financial services entity. The professional indemnity insurer is not a signatory to any code of practice and in our experience conduct themselves in a manner designed only to minimise claims. This is contra to the whole purpose

of professional indemnity insurance. That is, when a financial services provider makes a mistake that causes a consumer to suffer loss, the professional indemnity insurer is supposed to exist so as to ensure that the consumer is put right. In our experience that is rarely the case, and professional indemnity insurers, who aren't subject to the relevant code of practice, act as hard-nosed defendants.

12. The ALA submits that it should either be a requirement that professional indemnity insurers of financial services entities be signatories to the code, or alternatively, a mechanism should be created which binds professional indemnity insurers to act in accordance with the obligations of their insured financial services provider under the relevant code. The same can be said in relation to re-insurers who often sit behind an insurer in a claims process with little interaction, if any, with the claimant yet whose conduct may substantially affect the overall conduct of the claim and possibly the outcome of the claim.
13. It has been recognised in the findings of the Royal Commission that one significant issue in the past has been the fact of carve-outs and exemptions to regulation. The ALA is of the view that all financial services providers and their agents need to be covered by the relevant codes of practice to ensure consistency of behavioural standards in the overall provision of financial services.

## Conclusion

14. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide a submission in relation to the enforceability of financial services industry codes. The ALA would also welcome the opportunity to engage further with you in relation to these matters should the need arise



**Paul Watson**

**On behalf of the Australian Lawyers Alliance**

**Superannuation and Insurance Special Interest group**