GRATA FUND

Submission to the Parliamentary Joint Committee on Corporations and Financial Services' Inquiry into litigation funding and the regulation of the class action industry

19 June 2020

UNSW SYDNEY

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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

**By email: corporations.joint@aph.gov.au**

Dear Committee Secretary,

**Submission to Inquiry into litigation funding and the regulation of the class action industry**

Grata Fund welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Corporations and Financial Services' inquiry into litigation funding and the regulation of the class action industry.

Public interest litigants and legal organisations in Australia currently rely on third party litigation funders to enable plaintiffs to pursue critical public interest litigation in spite of significant adverse costs risks. Litigation funding provides a mechanism for plaintiffs with meritorious claims to pursue their cases in court, increasing access to justice and accountability through the legal system.

Grata Fund was established to address the access to justice gap caused by adverse cost rules in Australia, motivated by a fundamental belief in the importance of the rule of law as a "basic postulate of democratic societies".[1]

[1] Michael Kirby, "Deconstructing the Law's Hostility to Public Interest Litigation," (2011) 127 (October) *Law Quarterly Review* (2011) 537, 537.

As explained by The Hon. Michael Kirby AC CMG in 2011, "[a]ccording to this principle, the exercise of power in a community must ultimately be susceptible to authoritative scrutiny against the touchstone of applicable laws. All persons must ultimately have access to independent courts and tribunals which can decide their contests. Moreover, in the modern understanding of the rule of law, the governing law, when accessed, must conform to certain basic principles, including compliance with human rights and the universal standards of civilised societies."[2]

This submission focuses on the following Terms of Reference:

4. The financial and organisational relationship between litigation funders and lawyers acting for plaintiffs in funded litigation and whether these relationships have the capacity to impact on plaintiff lawyers' duties to their clients;
6. The regulation and oversight of the litigation funding industry and litigation funding agreements; and
14. Any matters related to these terms of reference.

## About Grata Fund

Grata Fund funds litigation that has a non-pecuniary outcome or for which the pecuniary outcome is a secondary issue. Regardless, unlike commercial litigation funders we do not take a financial return in exchange for our support. Instead we are motivated by social impact and funded via philanthropy, trusts and foundations and donations.

Since 2016, Grata Fund has provided adverse costs funding in a range of matters initiated in the Federal Court of Australia and the High Court of Australia against government and corporate actors by community legal groups including the Public

[2] Ibid.

Interest Advocacy Centre in New South Wales, Fitzroy Legal Service in Victoria and Australian Lawyers for Remote Aboriginal Rights in the Northern Territory.

**ToR 4: the financial and organisational relationship between litigation funders and lawyers acting for plaintiffs in funded litigation and whether these relationships have the capacity to impact on plaintiff lawyers' duties to their clients**

As the Australian Law Reform Commission (**ALRC**) noted in their *Integrity, Fairness and Efficiency - An Inquiry into Class Action Proceedings and Third-Party Litigation Funders Report* (***Integrity, Fairness and Efficiency*** **report**), litigation funders are in a unique position because they are not the client, yet they fund litigation and can give directions to a plaintiff's lawyers.[3] This relationship may give rise to situations of conflict that are not covered by formal regulatory mechanisms. The ASIC Regulatory Guide 248 (**the Guide**) was developed to address this issue. The Guide requires funders to implement robust arrangements to address potential, actual or perceived conflicts of interest.[4]

It is unclear, however, whether the Guide applies to conflicts of interest that arise where the funder is seeking a social return on its investment rather than a financial return.

Regardless, as a non-profit litigation funder, Grata Fund implements the Guide in order to navigate potential conflicts of interest.[5] In our experience it has been extremely useful and we would recommend it heartily to others considering funding such litigation. In our view, the Guide provides extensive guidance and imposes appropriately designed obligations on litigation funders.

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[3] Australian Law Reform Commission, *Integrity, Fairness and Efficiency - An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) ('*ALRC - Integrity, Fairness and Efficiency*')177 [6.94].

[4] Australian Securities and Investments Commission, *Regulatory Guide 248: Litigation Schemes and Proof of Debt Schemas: Managing Conflicts of Interest* (Regulatory Guide 248, April 2013), 9 [RG 248.18].

[5] For example, where a litigant receives a favourable settlement offer, but the funder is motivated to continue to a court resolution in order to set a precedent that clarifies that law, provides a public good and transcends the private interests of the litigant.

We acknowledge that it is unclear whether all litigation funders are following the Guide. To address this issue, the ALRC made the following recommendation in its *Integrity, Fairness and Efficiency* report:

> ALRC Recommendation 15 - *The Australian Securities Investments Commission Regulatory Guide 248 should be amended to require that third-party litigation funders that fund representative proceedings report annually to the regulator on their compliance with the requirement to implement adequate practices and procedures to manage conflicts of interest.*[6]

Grata Fund supports the introduction of this reporting requirement. However, in order to reduce compliance costs for non-profit litigation funders, we submit this requirement should be waived for situations where a litigation funder does not seek a financial return on their litigation funding investment.

**Recommendations**

Grata Fund recommends:

1. That the ASIC Regulatory Guide 248 be amended to introduce an annual reporting requirement;
2. That this requirement be waived in any year that a funder does not seek a financial return on their litigation funding investment; and
3. That the ASIC Regulatory Guide 248 be amended to provide greater clarity as to whether it applies to litigation funders seeking a social return, rather than a financial return on investment.

[6] *ALRC - Integrity, Fairness and Efficiency* (n 4) 10, 32 [1.46], 181.

## ToR 6: The regulation and oversight of the litigation funding industry and litigation funding agreements

*Litigation funding licences*

On 22 May 2020, the Treasurer Josh Frydenberg MP announced that litigation funders will be required to hold an Australian Financial Services Licence (**AFSL**) and to comply with the managed investment scheme (**MIS**) regime. These changes will be implemented through amendments to the *Corporations Regulations 2001* (Cth), and they will take effect from three months after the announcement.[7] The details of the regulations are still unknown.

We note that this announcement is somewhat contrary to the recommendations made by the ALRC in its *Integrity, Fairness and Efficiency* report. We agree with the ALRC's conclusion that "a licence is unlikely to improve regulatory compliance in the third-party litigation funding industry in the short to medium term".[8]

Nonetheless, as we previously submitted to the ALRC 2018 Inquiry, if a licensing regime is to be implemented, we recommend that non-profit litigation funders be exempted from the requirement to maintain a litigation funding license. Alternatively, we suggest that the cost and complexity of maintaining the licence should not be so costly or burdensome that it discourages non-profit litigation funding.[9]

We recommend that responsible officers who hold current Australian legal practicing certificates should not be required to take any further steps to meet the character and qualification requirements of litigation funding licenses.

We submit that the definition of third-party litigation funders should be sufficiently precise so as to ensure private or corporate philanthropy that provides financial

[7] Josh Frydenberg, 'Litigation funders to be regulated under the Corporations Act' (Media Release, 22 May 2020).
[8] *ALRC - Integrity, Fairness and Efficiency* (n 4) 162 [6.40].
[9] Grata Fund, Submission No 29 to Australian Law Reform Commission, *Litigation Funding Inquiry* (31 July 2018) 8.

support to public interest litigation directly or indirectly is not captured by the requirement.

Our justification for these suggestions stems from the distinction between commercial and non-profit litigation funders. While commercial litigation funders enable Australians to bring litigation to uphold their rights as investors, shareholders, employees or consumers, non-profit litigation funders such as Grata Fund enable Australians to bring public interest litigation that seeks to uphold the rule of law and serve the public good, regardless of financial outcome.

**Recommendations**

Grata Fund recommends:

4. That non-profit litigation funders be exempted from the requirement to maintain a litigation funding license;
5. That as an alternative, the cost and complexity of maintaining the licence should not be overly costly or burdensome so as to discourage non-profit litigation funding;
6. Responsible officers who hold current Australian legal practicing certificates should not be required to take any further steps to meet the character and qualification requirements of litigation funding licenses; and
7. The definition of third-party litigation funders should be sufficiently precise so as to ensure private or corporate philanthropy that provides financial support to public interest litigation directly or indirectly is not captured by the requirement.

**ToR 14:** Any matters related to these terms of reference

*The need for adverse costs reform*

A major barrier access to justice in Australia is the prohibitive adverse costs regime. The default rule in the majority of jurisdictions in Australia is that ordinarily costs follow the event i.e. the unsuccessful party must pay their own legal costs, and the costs of the successful party. While 'no cost', 'protective cost' and 'maximum cost' orders are available in various jurisdictions across Australia, the process to apply for cost capping orders is complex, and there is no standard public interest rule that applies. Often, even where a cost capping order is sought in public interest cases, courts will decline to depart from the usual rule of costs following the event.

Adverse cost risk acts as a barrier to access to justice. Many meritorious matters are not pursued in Australia due to the adverse costs risk, leaving unjust policies and laws unchallenged. For example, estimates by the Public Interest Law Clearing House (now Justice Connect) suggest that 9 out of 10 meritorious cases aren't reaching the courts, simply due to the financial barriers caused by the risk of adverse costs orders.

In its *Integrity, Fairness and Efficiency* report, the ALRC noted that "[l]itigation funding has largely filled the lacuna created by the absence of a satisfactory mechanism to protect principal applicants from adverse costs orders".[10] However, Grata Fund maintains that reform of the adverse cost system for public interest matters is necessary to ensure access to justice for the most vulnerable in our society.

Specifically, public interest litigants seeking adverse costs protection in matters that have minimal or no prospect of financial return have limited options:

- Secure capped support from the Grata Fund where it meets our funding priorities; or

[10] *ALRC - Integrity, Fairness and Efficiency* (n 4) [2.9].

- Secure capped support via ad hoc corporate social responsibility contributions from commercial litigation funders;[11] or
- In exceptionally rare cases, successfully fundraise the significant funds required and - for adverse cost risk - create a facility to return funds to donors in the event their donations aren't required.[12]

If unable to secure support, lawyers must advise their clients that - despite having a legitimate claim to bring - they run the risk of financial catastrophe if they are unsuccessful in court. Indeed, in our experience, prospective plaintiffs all too often do not proceed with legitimate and meritorious public interest claims because they are unwilling to assume the risk of a substantial adverse costs order. In effect, these people are barred from accessing the courts - one of the most fundamental components of our democracy - simply due to a lack of financial means.

Until significant reform of Australia's adverse cost system for public interest litigants takes place, funders will only be able to scratch the surface of unmet need in our community for litigation funding.

[11] For example, Public Interest Advocacy Centre (PIAC) clients are eligible for limited support from commercial litigation funders via PIAC's 'Adverse Cost Guarantee Fund'. The Fund, established in 2016, receives guarantee facilities of $10,000/year from several commercial funders annually - enough to support about one case per year. Also, IMF Bentham has from time to time supported disbursement funding and adverse cost protection in important public interest matters - most recently in 2015 in North Australian Aboriginal Justice Agency Limited v Northern Territory [2015] HCA 41 (11 November 2015). For more information please see: https://www.benthamimf.com/about-us/corporate-social-responsibility.

[12] Australians occasionally attempt to use crowdfunding platforms to raise funds for legal fees, disbursements and/or adverse costs. However, crowdfunding platforms only pay out funds if users hit their predetermined fundraising target. As the quantum required for litigation funding is typically very high and potential donors are often nervous about the legitimacy of the legal cause, these campaigns are usually unsuccessful.

While several legal-specific crowdfunding platforms have been developed both locally and globally, most have struggled to take off due to a range of factors including the complexity of and resources required to drive successful crowdfunding campaigns, and the low margins relied on by platforms to maintain operations (typically 5% of completed fundraising campaigns).

CrowdJustice, based in the UK and US, is currently the most sophisticated crowdfunding platform available for legal causes. However, it is currently unavailable in Australia and the organisation has indicated that it is unlikely to expand into Australia any time soon due to its relatively small market.

*The Justice Fund*

In 2008, the Victorian Law Reform Commission (**VLRC**) recommended the establishment of a new funding body, 'the Justice Fund', to provide:

- financial assistance to parties with meritorious civil claims;
- indemnity for adverse costs orders; and
- indemnity for any order for security of costs.[13]

It was proposed that the Justice Fund be initially funded by government, and eventually become self-funding through a statutory entitlement to a percentage share of the proceeds of litigation, recovery of costs from parties against whom the funded party obtains an order of courts, and through entering into joint venture arrangements with commercial litigation funders.[14]

Grata Fund supports the establishment of a Justice Fund in principle, in order to increase access to justice. We submit that if established, the Justice Fund eligibility criteria for funding should prioritise funding for public interest matters. However, we note that given the vast extent of unmet need for adverse cost protection and litigation funding, any fund has the potential to become an endless sinkhole unless Australia's adverse cost system is adequately reformed for public interest matters. Such reform has been advocated by successive ALRC[15], WA Law Reform Commission[16],

[13] Victorian Law Reform Commission, *Civil Justice Review* (Report 14, 1 January 2008) ('*VLRC - Civil Justice Review*') 44 [133] - [140].
[14] Ibid.
[15] Australian Law Reform Commission, 'Cost Shifting – Who Pays for Litigation, Report 75' (1995).
[16] Law Reform Commission of Western Australia, 'Review of the Criminal and Civil Justice System, Report No 92' (1999).

and VLRC[17] reports, community legal organisations,[18] and eminent members of the Australian legal community for over 20 years.[19]

We encourage the Committee to address the issue of adverse cost reform in public interest matters as a priority in this Inquiry.

**Recommendations**

Grata Fund recommends:

8. To increase access to justice, the adverse cost system for public interest matters should be reformed. This reform should provide for no cost rules to be applied in public interest matters, or alternatively, for significantly reduced costs in public interest matters; and
9. The Commonwealth government consider establishing a Justice Fund as recommended by the Victorian Law Reform Commission in its 2008 Civil Justice Review report.

## Conclusion

Third party litigation funders regularly enable access to justice in Australia by providing a critical financial service to enable meritorious cases to reach court. However, until significant reform of Australia's adverse cost system for public interest litigants takes place, funders will only be able to scratch the surface of unmet need in our community for litigation funding.

[17] *VLRC - Civil Justice Review* (n 14)..

[18] For example, the Australian Pro Bono Centre (formerly National Pro Bono Resource Centre), JusticeConnect (formerly PILCH), Victoria Legal Aid as reported by Dr Peter Cashman, Commissioner, VLRC, 'The Cost of Access to Courts Paper' presented at 'Confidence in the Courts' conference, National Museum of Australia, Canberra (February 2007).
Also see the report by Environmental Justice Australia (formerly Environmental Defenders Office Victoria) on the need for public interest costs protection in public interest litigation: 'Costing the Earth? The case for public interest costs protection in environmental litigation' (2014).

[19] Kirby (n 2).

To ensure Australia's commitment to the rule of law and access to justice, Grata Fund urges the Committee not to recommend measures that would limit the ability of Australians to access litigation funding for public interest cases.

Please don't hesitate to contact us at isabelle@gratafund.org.au and maria@gratafund.org.au should you wish to discuss our submission.

Sincerely,
Grata Fund


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