



GRATA FUND

Submission to the Treasury on the Exposure Draft of the Treasury Laws Amendment
(Measures for Consultation) Bill 2021: Litigation funders

6 October 2021



Grata Fund is a partner of the University of New South Wales Sydney Law School.



6 October 2021

Manager
Market Conduct Division
Treasury
Langton Crescent
Parkes ACT 2600

By email: MCDLitigationFunding@treasury.gov.au

Dear Manager,

Submission to the Treasury on the Exposure Draft of the Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation funders

Grata Fund welcomes the opportunity to make a submission to the Treasury's consultation on the Exposure Draft of the Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation funders. We note that due to the short timeframe in which to make a submission, we have provided a short submission below, but are happy to provide further information should that be useful.

About Grata Fund

Grata Fund provides support for public interest litigation that has a non-pecuniary outcome or for which the pecuniary outcome is a minor and secondary issue. This litigation is not typically supported by commercial litigation funders as it does not provide any financial return.

Grata Fund provides two types of grants: (a) adverse cost protection and (b) limited disbursements. We do not fund legal fees for lawyers or barristers, who act for their clients on a pro bono basis. Unlike commercial litigation funders, we do not take any financial return in exchange for our support. Instead we are exclusively motivated by providing benevolent relief to those suffering poverty, sickness, distress, misfortune, disability, destitution, or helplessness. We are exclusively funded via philanthropy, trusts, foundations and donations from the community in response to general fundraising appeals.



Since 2016, Grata Fund has provided capped adverse costs protection and/or limited disbursements in a range of matters initiated in various courts, including the Federal Court of Australia and the High Court of Australia, and for clients represented by community legal services, including the Public Interest Advocacy Centre in New South Wales, Fitzroy Legal Service in Victoria and Australian Lawyers for Remote Aboriginal Rights in the Northern Territory.

Grata Fund is a charity based at the University of New South Wales Law School and is registered with the Australian Charity and Non-Profit Commission.

Why litigation funding for public interest litigation is needed

A major barrier to 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 time-consuming, 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.¹

Public interest litigants and legal organisations in Australia currently rely on third party litigation funders to enable plaintiffs to pursue critical public interest litigation

¹ Senate Legal and Constitutional References Committee, Parliament of Australia, *Access to Justice* (Report, December 2009) 70-1 [4.30]-[4.31].



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.

Definition of a ‘class action litigation funding scheme’

Cl 9AAA of the exposure draft bill provides a broad definition of a ‘class action litigation funding scheme’, providing:

A scheme that has all of the following features is a class action litigation funding scheme:

- (a) the dominant purpose of the scheme is to seek remedies to which one or more persons (the claimants) may be legally entitled arising out of:
 - (i) the same, similar or related transactions or circumstances that give rise to a common issue of law or fact; or
 - (ii) different transactions or circumstances but the claims of the claimants can be appropriately dealt with together;
- (b) the possible entitlement of each of the claimants to remedies relates to transactions or circumstances that occurred before or after the first funding agreement (dealing with any issue of interests in the scheme) is finalised;
- (c) the steps taken to seek remedies for each of the claimants include one or more lawyers providing services in relation to:
 - (i) making a demand for payment in relation to a claim; or
 - (ii) lodging a proof of debt; or
 - (iii) commencing or undertaking legal proceedings; or
 - (iv) investigating a potential or actual claim; or
 - (v) negotiating a settlement of a claim; or
 - (vi) administering a deed of settlement or scheme of settlement relating to a claim;
- (d) a person (the funder) provides funds or indemnities, or both, under an agreement (the funding agreement) (including an agreement under which no fee is payable to the funder or lawyers if the scheme is not successful in seeking remedies) to enable the claimants to seek remedies;
- (e) the funder is not a lawyer or legal practice that provides a service for which some or all of the legal fees or disbursements, or both, are payable only on success.

The explanatory memorandum to the exposure draft bill provides:

1.34 A **class action litigation funding scheme** is a scheme in which a litigation **funder** seeks to fund a class action proceeding for the benefit of the scheme’s general members.



1.35 The funded proceedings may seek a remedy for a class of claimants (that includes the scheme's general members) in a class action proceeding that some or all of the claimants in the proceeding may be legally entitled to.

Our understanding is that the policy rationale for the Bill is to target commercial litigation funders who make a significant profit from claiming a percentage of awards in successful litigation that they fund, by regulating distribution of class action proceeds in proceedings involving third party litigation funders.

Given Grata Fund does not draw any financial return or profits from our support of litigation, but rather improves justice outcomes by providing support for public interest litigation, it appears that the draft Bill does not intend to capture Grata Fund's operations.

However, we believe that the drafting of cl 9AAA could be made clearer to ensure there is no doubt that litigation that is not a class action/representative proceeding under the provisions of Pt IVA the *Federal Court Act 1976* (Cth) and Divisions 9.2 and 9.3 of the *Federal Court Rules 2011* (Cth) is not captured by cl 9AAA.

For example, it could be made clearer that cl 9AAA is not intended to capture actions brought by a single plaintiff seeking a remedy where they have signed a funding agreement with a third party litigation funder; or multiple individual actions filed separately arising out of the same or similar circumstances, where one or more individual plaintiffs have signed a funding agreement with a third party litigation funder, which are then joined by a court to improve efficiency in the administration of justice.

If such actions were to fall within the definition of 'class action funding scheme' under cl 9AAA of the Bill, this could have the effect of prohibiting charitable entities, including Grata Fund from engaging in our work of providing limited indemnities and disbursements to public interest litigants, and could have the effect of limiting access to justice.



As is evidently the intention of the Bill, it could also be made clearer that non-profit and/or charitable litigation funders are explicitly exempted from the operation of the Bill to ensure that the regulatory burden does not adversely affect the ability of the public to access non-profit and/or charitable funding support in public interest matters.

Recommendations

Grata Fund recommends:

1. The definition of 'class action litigation funding scheme' in cl 9AAA of the Bill should be amended to explicitly exclude single plaintiff actions and multiple plaintiff actions that do not fall within the definition of 'class action' under Pt IVA the *Federal Court Act 1976* (Cth) and Divisions 9.2 and 9.3 of the *Federal Court Rules 2011* (Cth).
2. That non-profit and/or charitable litigation funders be explicitly exempted from the operation of the Bill.

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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Executive Director

Maria Nawaz
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