# GRATA FUND

Inquiry into Class Action Proceedings and Third Party Litigation Funders

Australian Law Reform Commission

Submission - 31 July 2018

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

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*Preface*

Public interest litigation[1] that holds the powerful accountable to the rule of law in our democracy is relatively scarce in comparison to other OECD nations and/or common law jurisdictions including Germany, India, the Netherlands, South Africa, the United Kingdom and the United States of America, among many others. Grata Fund was established to address this disparity, motivated by a fundamental belief in the importance of the rule of law as a "basic postulate of democratic societies".[2]

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."[3]

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[1] For the purposes of this submission, we define public interest litigation as:

- proceedings brought against governments or their officials that (1) assert that the rule of law has not been complied with and (2) seek a binding ruling that it is complied with; or
- proceedings brought against another that (1) seek to clarify the operation and meaning of the law, and the obligations of those who are subject to it, and (2) have potential consequences for the public good - whether directly on a class of people, or indirectly on society and democracy at large.

While we appreciate these concepts are difficult to pin down in general terms, we believe a broad and common sense definition is more appropriate than narrow standards that may be unduly restrictive in application.

[2] The Hon. Michael Kirby AC CMG, "Deconstructing the Law's Hostility to Public Interest Litigation," *Law Quarterly Review* (2011).

[3] The Hon. Michael Kirby AC CMG, "Deconstructing the Law's Hostility to Public Interest Litigation," *Law Quarterly Review* (2011).

After extensive consultation with the nonprofit and for-profit legal community in Australia in 2014 and 2015, Grata Fund concluded that there is one critical financial hurdle that is restricting the ability of Australians to hold governments and corporations accountable to the law: the prohibitive and asymmetric burden of adverse costs risks that fall upon public interest litigants who are unable to receive commercial litigation funding due to a non-pecuniary or low value remedy being sought.

In order to help address this imbalance and enable Australians to bring public interest litigation before the courts, Grata Fund provides third party litigation funding by way of adverse costs protection and disbursement funding to plaintiffs in public interest matters.

Grata Fund typically 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 online donations via our website.

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 Interest Advocacy Centre in New South Wales and Fitzroy Legal Service in Victoria. Adverse costs protection and disbursement funding is provided by way of a deed of indemnity to plaintiffs.

Grata Fund accepts applications for funding support from the community via our website and develops strategic case briefs internally that would be unable to proceed without the prospect of adverse cost protection for plaintiffs.

Grata Fund's board makes final decisions about whether to provide support to a case according to criteria including:

- Whether support for the matter falls within our constitutional objects;
- Whether the matter falls within our policy priority areas and has the potential to drive significant impact through integrated campaign strategy;
- Whether the case has reasonable prospects of success;
- Whether there is a strong legal team involved;
- Whether there is a genuine need for support;
- Whether the matter is likely to proceed to hearing;
- The extent of adverse cost exposure.

Our application process is outlined here by hyperlink and attached to our submission.

Grata Fund's board is comprised of the following members: Dr Peter Cashman, Michael Eyers AM (Chairperson), The Hon. Marcia Neave AO, Isabelle Reinecke, Jennifer Robinson and Deanne Weir.

Grata Fund's advisory council is comprised of the following members: Jonathon Hunyor, CEO, Public Interest Advocacy Centre; Hugh de Kretser, Executive Director, Human Rights Law Centre; Prof. George Williams AO, Dean of Law, UNSW Sydney; Professor Andrea Durbach, UNSW Sydney Faculty of Law; Kim Rubenstein, ANU College of Law; Brendan Sydes, CEO, Environmental Justice Australia; David Morris, CEO, Environmental Defenders Office NSW; Katie Wood, Legal Manager, Amnesty International; Paul Oosting, National Director, GetUp!; and David Ritter, CEO, Greenpeace.

## 1. Introduction

We welcome the Australian Law Reform Commission (ALRC) Inquiry into Class Action Proceedings and Third Party Litigation Funders and thank the ALRC for the opportunity to make a submission.

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.

Our submission principally relates to third party funding of public interest litigation that has minimal or no prospect of financial return.[4] This may include shareholder class actions, for example where a declaratory remedy is sought from the court regarding a company's compliance with corporations law. However, it also extends to public interest proceedings brought under almost every body of Australian law, including discrimination, constitutional, administrative, and environmental law.

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

- Secure capped support via ad hoc corporate social responsibility contributions from commercial litigation funders;[5] or

[4] Commercial litigation funders readily provide funding for legal fees, disbursements and adverse costs in proceedings that may secure a financial return for the funder. These groups are better placed to address the aspects of the ALRC's Discussion Paper that relate to litigation funding provided in exchange for a potential financial return on investment.

[5] 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

- 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.[6]

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. Understandably, most individuals are unable or unwilling to take such an enormous risk. 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.

This submission focuses on three chapters in the ALRC's Discussion Paper: 'Regulating Litigation Funders', 'Conflicts of Interest', and 'Commission Rates and Legal Fees'.

funding and adverse cost protection in important public interest matters - most recently in 2015 in *NAAJA v NT [2015] HCA 41* . For more information please see: https://www.benthamimf.com/about-us/corporate-social-responsibility.

[6] 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 its relatively small market.

2. Regulating Litigation Funders

We consider **Proposal 3–1**, **Proposal 3–2**, **Question 3–1**, and **Question 3–2** in turn below.

**Proposal 3–1** The *Corporations Act (2001)* (Cth) should be amended to require third-party litigation funders to obtain and maintain a 'litigation funding licence' to operate in Australia.

**Proposal 3–2** A litigation funding licence should require third-party litigation funders to:
· do all things necessary to ensure that their services are provided efficiently, honestly and fairly;
· ensure all communications with class members and potential class members are clear, honest and accurate;
· have adequate arrangements for managing conflicts of interest;
· have sufficient resources (including financial, technological and human resources);
· have adequate risk management systems;
· have a compliant dispute resolution system; and
· be audited annually.

We recommend that nonprofit litigation funders be exempted from the requirement to maintain a litigation funding license.

Alternatively, the cost and complexity of maintaining a litigation funding licence should not be so significant that it discourages non-profit litigation funding.

For example, we consider that:

- compliance with the current Australian Investments and Securities Commission (ASIC) Regulation 248 is sufficient to meet the

proposed requirement for adequate management of conflicts of interest; and

- annual auditing ought only be necessary for nonprofits that have an annual revenue of $1 million or more (i.e. "large" as defined by the Australian Charities and Not-for-profits Commission (ACNC)).[7]

We also advise that the definition of third party litigation funders is 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.

**Question 3–1** What should be the minimum requirements for obtaining a litigation funding licence, in terms of the character and qualifications of responsible officers?

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.

**Question 3–2** What ongoing financial standards should apply to third party litigation funders? For example, standards could be set in relation to capital adequacy and adequate buffers for cash flow.

We recommend the ALRC consider the impact of capital adequacy and cash flow buffer requirements on the ability of nonprofit litigation funders to support public interest litigation before making a final recommendation.

[7] 205-25, Subdivision 205-B, *Australian Charities and Not-for-profits Commission Act 2012* (Cth).

The AFSL financial requirement for actual contingent liabilities outlined in by the ALRC - "to provision (that is, hold in reserve) approximately 5.5% of their liabilities as a buffer"[8] - is an appropriate standard for nonprofit litigation funders and unlikely to impact their ability to operate.

3. Conflicts of Interest

*General remarks*

The ASIC Regulatory Guide 248 clearly applies where the litigation funder has a financial interest in proceedings.

It is less clear 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, the Grata Fund implements the Guide in order to navigate potential conflicts of interest.[9] In our experience it has been extremely useful and we would recommend it heartily to others considering funding such litigation.

However, clarity regarding whether the Guide captures funders seeking a social return on investment would be useful, especially in light of the increased compliance burden proposed under Proposal 4–1.

We now consider **Proposal 4–1**.

[8] ALRC, "Inquiry into Class Action Proceedings and Third Party-Litigation Funders: Discussion Paper" (2018) at paragraph 3.53-3.54.

[9] 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.

**Proposal 4–1** If the licensing regime proposed by Proposal 3–1 is not adopted, third-party litigation funders operating in Australia should remain subject to the requirements of Australian Securities Investments Commission Regulatory Guide 248 and should be required to report annually to the regulator on their compliance with the requirement to implement adequate practices and procedures to manage conflicts of interest.

We support the introduction of reporting requirements as proposed. However, we suggest that the requirement be waived in any year that a funder does not seek a financial return on their litigation funding investment.

4. Commission Rates and Legal Fees

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| **Question 5–4** What other funding options are there for meritorious claims that are unable to attract third-party litigation funding? For example, would a 'class action reinvestment fund' be a viable option? |

*Self-funded models currently operating: Grata Fund - funding model*

Grata Fund is funded through a combination of philanthropy, trusts and foundations and donations online through our website.

The failure of successive governments to establish a fund for adverse cost protection to enable access to justice as proposed previously by the ALRC in 1988 and 1995 and the Victorian Law Reform Commission (VLRC) in 2008 informed Grata Fund's decision to fund itself completely independently from government.[10]

Critically, our independence from government funding ensures that the Grata Fund is able to fund litigation against government respondents or corporate donors to political parties, free from the fear that this will impact future funding.

As Grata Fund does not typically fund litigation that seeks a significant financial outcome, we do not recover contingent fees. We do, however, invite legal teams to make a voluntary tax-deductible contributions at the end of proceedings where costs have been awarded in their favour to support further public interest litigation.

[10] Australian Law Reform Commission, 'Grouped Proceedings in the Federal Court, Report 46' (1988), rec 3.09; Australian Law Reform Commission, 'Costs Shifting - Who Pays for Litigation, Report 75' ( 1995), rec 60; Victorian Law Reform Commission, 'Civil Justice Review: Report' (2008), Chapter 10.

*The role of commercial litigation funders*

Commercial litigation funders provide an essential access to justice service in Australia. Without them, investors, shareholders, employees, consumers and other affected citizens would be unable to afford to hold major corporations accountable for corporate misconduct.

However, there is room for commercial litigation funders to do more to contribute to access to justice in public interest matters. Unlike most large financial services and legal organisations in Australia, which have well developed corporate social responsibility programs embedded in their organisations, to our knowledge no commercial litigation funders in Australia currently operate a *consistent* corporate social responsibility program to support public interest litigation. Such a program could include:

- Providing adverse cost indemnities/other funding (as a percentage of profits or contingent fees recovered) directly to litigants - managing case assessment, funding agreements and case management in house;

- Providing adverse costs indemnities/other funding (as a percentage of profits or contingent fees recovered) via another party, such as the Grata Fund or a newly established governmental body that is able to assess cases and manage funding agreements and funded cases - effectively outsourcing the principle overheads involved in litigation funding; and/or

- Providing a percentage of profits or contingent fees recovered to existing disbursement funds, such as Grata Fund or the Commonwealth Attorney General's 'Disbursement support scheme'.

*Establishment of a class action reinvestment fund vs adverse cost reform*

In principle, Grata Fund is supportive of a 'class action reinvestment fund'. Our model is similar to that outlined in the ALRC Discussion Paper at paragraph 5.80. Indeed, we would likely seek funding via such a body to support plaintiffs in litigation that meets our funding criteria if the fund is established.

The model considered by the ALRC focuses on the needs of "small or mid-sized meritorious class action claims". While we understand that there may be unmet need for class action litigation funding due to the significant minimum claim thresholds of commercial litigation funders, in our experience there is more urgent and significant unmet need in our community for litigation funding for public interest matters that do not necessarily seek a financial remedy for a class.

For example, litigation brought by people with disabilities to enforce their rights under Australia's anti-discrimination law where the complainant's dispute has not resolved through Australian Human Rights Commission conciliation process; or litigation brought by environmental groups to uphold the rule of law in regards to development proposals.

Regardless, 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[11], WA Law Reform Commission[12], and VLRC[13] reports,

[11] Australian Law Reform Commission, 'Cost Shifting – Who Pays for Litigation, Report 75' (1995).

[12] Law Reform Commission of Western Australia, 'Review of the Criminal and Civil Justice System, Report No 92' (1999).

[13] VLRC, "Victorian Law Reform Commission - Civil Justice Review: Report" (2007).

community legal organisations,[14] and eminent members of the Australian legal community for over 20 years.[15]

Most recently former Shadow Minister for Small Business and Financial Services, Katy Gallagher introduced the *Competition and Consumer Legislation Amendment (Small Business Access to Justice) Bill 2017* (Cth) into the Australian Parliament. The Bill sought to allow judges in the Federal Court to waive liability for adverse costs to small business private litigants in cases related to the misuse of market power. In her Second Reading Speech, Former Senator Gallagher noted that "access to justice is being compromised by the same asymmetries the law is supposed to address." As Ms Gallagher explained,

> "*The problem is that when private parties litigate breaches of the competition law, the risk of significant adverse cost orders and the time taken to finalise action in the courts have an excessively inhibiting effect on small businesses.*
>
> *These disincentives within the legal system allow the well-resourced legal teams of our larger corporations to stare down potentially legitimate claims from small businesses and suppliers who can't sustain a long legal case and can't risk testing their claim where there is a prospect of adverse costs.*
>
> *The mechanisms, as they stand, can act as an unintended filter keeping legitimate cases out of the courts. Almost by definition, cases in which the misuse of market power may be at play reflect*

[14] 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).

[15] The Hon. Michael Kirby AC CMG, "Deconstructing the Law's Hostility to Public Interest Litigation," *Law Quarterly Review* (2011).

*an asymmetry in the resources and the organisational capacities of the businesses involved.*

*Too many smaller businesses are having to make a decision about calling out bad conduct based on the resources they can invest in the pursuit of a court ruling, rather than on the merits of their case."*

This statement also accurately captures the dilemma faced by almost all Australians with legitimate and meritorious public interest claims against large corporations and governments.

Therefore, we recommend that the ALRC prioritise urgent reform of Australia's adverse cost system in public interest matters to bring it into line with similar democracies around the world where adverse costs are either non-existent or significantly reduced in public interest matters.[16]

Doing so will address access to justice issues in a more cost effective, systematic and lasting way.

Grata Fund is currently leading collaboration with several members of the Australian community legal sector on development of a briefing paper that will provide:

- a summary of existing jurisprudence in Australia,
- a summary of international adverse cost models that Australia may be able to replicate, and
- specific recommendations for reform.

We will be glad to provide this paper to the ALRC in due course.

[16] JusticeConnect (formerly PILCH) produced a summary of protective cost systems abroad in 2011 called 'Protective Costs Orders in Public Interest Litigation: Jurisprudence Review".

Isabelle Reinecke subsequently outlined cost regimes in jurisdictions including Germany and the United States in 'Global approaches to litigating for change: Winston Churchill Memorial Trust Fellowship Report' (2017).

5. Concluding remarks

Third party litigation funders regularly enable access to justice in Australia by providing a critical financial service.

- Commercial litigation funders enable Australians to bring litigation that seeks a financial remedy and has the power to uphold the rights of investors, shareholders, employees, consumers and other affected citizens.

- Grata Fund, a nonprofit organisation, enables Australians to bring public interest litigation that seeks to uphold the rule of law and serve the public good, regardless of financial outcome.

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.

We encourage the ALRC to address the issue of adverse cost reform in public interest matters as a priority in its timely consideration of class actions and third party litigation funding.

Sincerely,

Isabelle Reinecke
Executive Director
Grata Fund

# GRATA FUND APPLICATION PROCESS

## 1. INITIAL SCOPE

We discuss your case with you to see whether it is a strategic fit with our mission to develop, fund cost protection for and build alliances around significant public interest litigation on human rights, democratic freedoms and climate change.

## 2. FORMAL APPLICATION

Sign mutual confidentiality agreement to protect legal privilege.

Submit your case application form.

Submit draft statement of claim & prospects advice.

## 3. CASE REVIEW

Grata obtains independent prospects advice based on the materials provided.

Executive Director reviews all materials & makes a recommendation to the Grata board.

Grata board considers & may ask for further information from you before making a final decision about whether to support the litigation.

## 4. AGREE TO COLLABORATE

We notify you once the Grata board has made a decision about whether to support the litigation.

We enter into a Memorandum of Understanding with the legal team & any campaign partners governing our collaboration.

We enter into a funding agreement with the plaintiffs.