



public interest
ADVOCACY CENTRE

**Submission to Parliamentary Joint Committee
on Corporations and Financial Services
Inquiry into Litigation Funding and the
Regulation of the Class Action Industry**

11 June 2020

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Our work addresses issues such as:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for Aboriginal and Torres Strait Islander people
- Access to affordable energy and water (the Energy and Water Consumers Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Transitional justice
- Government accountability.

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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

1. Introduction

PIAC thanks the Parliamentary Joint Committee on Corporations and Financial Services for the opportunity to make a submission to the inquiry into Litigation funding and the regulation of the class action industry.

PIAC is a not-for-profit legal centre that tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. One of the many mechanisms PIAC uses to achieve this is strategic litigation. PIAC is currently conducting or investigating potential public interest litigation in a range of areas including justice for Aboriginal and Torres Strait Islander people in areas including police accountability, child protection and racial discrimination; disability discrimination by insurers against people with mental health conditions; health rights for asylum seeker in immigration detention; ensuring the NDIS is working fairly; and ensuring government accountability and the rule of law.

Despite limitations to the law's capacity to hold decision-makers accountable and deliver meaningful change, the current litigation funding environment in Australia, and the class action system, does provide opportunities for PIAC to obtain fair and equitable outcomes for individual and groups of plaintiffs in circumstances where those outcomes may not have been available otherwise.

In this submission PIAC makes the following two observations related to the type and level of regulation that should apply to Australia's class action and litigation funding systems:

1. The availability of third party litigation funding allows PIAC and others to conduct public interest litigation on behalf of clients who would not otherwise be able to proceed because of financial risk; and
2. Current class action regimes in most Australian jurisdictions, and the litigation funding arrangements that support those class actions, can provide access to justice for individual class members.

Any proposals for reform of regulation of litigation funding or class action regimes should take account of these benefits to prospective plaintiffs and to the importance of litigation funding to public interest litigation.

2. Litigation funding and public interest litigation

2.1 Public interest litigation and adverse costs

Since its establishment in 1982, PIAC has used public interest litigation as one of a number of strategies to achieve public interest outcomes. Public interest litigation seeks to achieve systemic change for groups of people without the need for each person to bring a separate legal claim.

As the Australian Law Reform Commission reported in 1995, public interest litigation is of significant benefit to the community, providing:

- development of the law leading to greater certainty, greater equity and access to the legal system and increased public confidence in the administration of the law (which in turn should lead to fewer disputes and less expenditure on litigation);
- impetus for reform and structural change to reduce potential disputes (for example, a test case can encourage the development of rules and procedures designed to ensure greater compliance with a particular law);
- contribution to market regulation and public sector accountability by allowing greater scope for private enforcement;
- reduction of other social costs by stopping or preventing costly market or government failures.¹

Grata Fund, in its submission to the Australian Law Reform Commission 2019 Inquiry into Class Action Proceedings and Third-Party Litigation Funders (**ALRC 2019 Inquiry**), highlighted that the high risk of adverse costs orders has resulted in public interest litigation in Australia being relatively scarce in comparison to other OECD nations and other common law jurisdictions.²

The default costs rule in Australian jurisdictions is that the successful party receives costs from the unsuccessful party. Although this rule is intended to maintain fairness and equality between the parties, in reality it can prejudice potential plaintiffs who may have good legal grounds for making their claim but lack significant financial resources to absorb the risk of a costs order against them. In PIAC's experience, even where pro bono legal representation or representation on a conditional fee is secured, many meritorious cases do not proceed due to the risk of an adverse costs order. The cost risk of proceeding with litigation, even where claims have reasonable or good prospects of succeeding, is more likely to prohibit litigation where the individual bringing a claim represents a disadvantaged or marginalised community, and the proceedings are against a large corporation or entity.

Public interest litigants and legal organisations, including PIAC and our clients, currently rely on third party litigation funders to enable plaintiffs to pursue critical public interest litigation in spite of significant adverse costs risks. In the absence of other effective mechanisms to mitigate the risk of adverse costs orders, litigation funders have stepped in to indemnify plaintiffs and allow them to proceed with public interest cases. The ALRC recognised this in its 2019 report, *Integrity, Fairness and Efficiency* (**ALRC 2019 Report**), which followed the 2019 inquiry, stating:

Regardless of the quality of procedures that give citizens the right to pursue claims, such rights are of little value if those citizens are unable to afford to pursue those claims. Litigation funding is an important element in facilitating access to the legal system, particularly in jurisdictions like Australia, Canada and the United Kingdom where the losing party, in addition to having to fund its own legal fees, is responsible for the costs of the successful party (adverse costs).³

¹ Australian Law Reform Commission, *Costs shifting—who pays for litigation* (1995), [13.1]

² Grata Fund, Submission to ALRC Inquiry into Class Action Proceedings and Third Party Litigation Funders, 31 July 2018, p3

³ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (2019), [1.29]

By way of example, PIAC's clients have been able to proceed with the following important public interest cases, among others, across a range of issues, directly as a result of support received from litigation funders:

- **Accessible public transport for people with disability:** PIAC acted in successful claims
 - against Railcorp on behalf of Graeme Innes, who is blind, to improve audible announcements on trains: see *Innes v Rail Corporation of NSW (No.2)* [2013] FMCA 36. Mr Innes had the benefit of an unlimited indemnity from IMF Bentham Limited (now Omni Bridgeway). His case delivered significant improvements in the frequency and quality of announcements on trains, which are critical for blind and vision-impaired customers to be able to travel independently.
 - against Murrays Coaches, in relation to wheelchair accessible coaches: see *Haraskin v Murrays Australia (No. 2)* [2013] FCA 217, supported by a \$10,000 indemnity from IMF Bentham. The Federal Court ordered Murrays to make significant modifications to their fleet to ensure sufficient wheelchair accessible coaches.
- **Police accountability:** In 2014, PIAC brought claims of false imprisonment, assault and battery against NSW Police on behalf of an Aboriginal young man, who alleged that three years earlier when he was 14 years old, two police officers abducted him from a skate park in Wellington, NSW, and took him to two separate locations where they assaulted and intimidated him. The officers were subsequently charged with a range of criminal offences in relation to the incident, but never convicted. IMF Bentham provided a \$100,000 costs indemnity to the client, and the proceedings were settled on confidential terms.
- **Accessibility and new technologies:** In 2018, PIAC represented Graeme Innes and Nadia Mattiazzo in their challenge to the accessibility of the Commonwealth Bank of Australia's touch-screen 'Albert' EFTPOS machines for people who are blind or vision impaired. The matter settled, with the CBA agreeing to introduce a range of changes to ensure better accessibility of the Albert machines and committing to accessibility in future product development. In settling the claim, the CBA acknowledged the difficulty Mr Innes, Ms Mattiazzo and other Australians who are blind or vision impaired have experienced using Albert's touchscreen technology to enter their PINs. Grata Fund indemnified both Graeme Innes and Nadia Mattiazzo. Financial support for the proceedings in the form of assistance for payment for disbursements (for example expert reports) was also provided by Blind Citizens Australia.
- **Consumer participation in electricity regulation:** In 2015, PIAC led the first-ever legal challenge on behalf of consumers to the Australian Energy Regulator's electricity network revenue decisions in NSW. PIAC sought cuts to revenue allowances on the basis of inefficiencies in network businesses' operations. The challenge was backed by a \$50,000 costs indemnity from IMF Bentham.

2.2 PIAC ACO Fund

As a means of responding to the significant barrier that is posed by the risk of an adverse cost order, in 2016 PIAC established the Adverse Costs Order Guarantee Fund (**ACO Fund**) with the support of a number of commercial litigation funders. Current project partners include Investor Claim Partner, Litigation Capital Management Limited, Litigation Lending Services and Woodsford Litigation Funding.

Under the ACO Fund, project partners agree to commit an amount annually by way of guarantee towards protecting PIAC clients from adverse cost orders in public interest cases. There is no financial return to project partners. Their involvement is a commitment each makes to supporting social justice and public interest litigation.

PIAC asks that in considering any reform to regulation of litigation funding in Australia, the Committee consider this important function of litigation funders in supporting public interest litigation. For example, as Grata submitted to the ALRC 2019 Inquiry, the requirement for litigation funders to hold a licence (which we understand has now been regulated by removing exemptions to requirements to hold an Australian Financial Services Licence), should not be so costly or burdensome that it discourages non-profit litigation funding.⁴ Likewise, PIAC submits that any further regulation of third party litigation funders should not impact on their ability to contribute to PIAC's ACO Fund or similar funds.

Notwithstanding the support provided by some litigation funders for public interest litigation, as Grata Fund highlights in its submission to the ALRC 2019 Inquiry, this support is only able to “scratch the surface of unmet need in our community for litigation funding”.⁵ Like Grata, PIAC believes reform of the adverse cost system for public interest matters is required to ensure those with legitimate claims against well-resourced corporate and government defendants are able to pursue those claims to seek broader change (and not just financial settlements).

3. Class actions and access to justice

As the ALRC recognises, Australia's current class action system operates to a large degree as intended, to provide opportunities for many classes of consumers or groups of individuals to access justice where it may otherwise be out of their reach. Referring to Part IVA of the *Federal Court of Australia Act 1976* (Cth), the ALRC 2019 Report at [2.6] observes:

... As was intended, the regime has provided a remedy where, although many people are affected and the total amount at issue is significant, each person's claim is small, and to deal efficiently with similar individual claims that would never be large enough to justify individual actions. To date, the cases that have been brought under the regime reflect a broad range of both commercial and non-commercial causes of action, including shareholder and investor claims, anti-cartel claims, mass tort claims, consumer claims for contravention of consumer protection law, environmental claims, trade union actions, claims under the Migration Act 1958 (Cth), and human rights claims. One of the more recent examples of the Part IVA regime promoting access to justice is the formal apology and settlement award of \$30 million to 447 residents of Palm Island in their action against the Queensland Government following claims of racism and police misconduct in 2004.⁶

PIAC has observed the value of class actions first hand, through litigation it commenced in 2011, together with law firm Maurice Blackburn, on behalf of a number of young people who had been

⁴ Grata Fund, Submission to ALRC Inquiry into Class Action Proceedings and Third Party Litigation Funders, 31 July 2018, p8

⁵ As above, p17

⁶ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (2019) at [2.6]

wrongfully arrested and detained (sometimes overnight) as a result of inaccuracies in the Police computer database COPS (Computer Operational Policing System). The action settled in 2015 on terms approved by the Supreme Court of NSW and compensation of more than \$1.85 million was paid to the young people affected. Many of the young people participating in the class action would not have been prepared to bring a case in their own name. PIAC first tried a suite of other approaches to resolve the problem before commencing class action proceedings. The ability to commence a class action allowed these clients to have their rights enforced and systemic problems addressed where that may not otherwise have been possible.

Other examples include consumer claims on behalf of vulnerable consumers without the means to pursue actions individually, such as the class action commenced by Legal Aid NSW in 2016 against Cash AFX stores alleging breaches of the National Credit Code and other laws in relation to fees charged on 'payday' loans.⁷ And, in 2017, Maurice Blackburn commenced a class action on behalf of customers of Radio Rentals, claiming that between 28 March 2011 and 29 March 2017, Radio Rentals' customers in every state except South Australia paid too much for their Rent Try \$1 Buy rentals.⁸ These examples demonstrate that the availability of class actions in Australia has empowered groups of people who had legitimate grievances against government or businesses but lacked the means to enforce their rights individually. In this respect, class actions play an important role in facilitating access to justice in the current Australian legal system.

While the number of class actions may be increasing as the system matures, and appear as an increasing risk to some businesses, to the extent this represents a levelling of the playing field for individuals who previously had no access to recourse, the additional risk is reasonable. This should serve the purpose of encouraging potential defendants of class actions to assess and minimise their risk of breaching the law, and rights of individuals and consumers, at an earlier stage. Further, to the extent that class actions resolve claims more efficiently and at less cost overall than multiple individual actions, they can in some cases be seen as cost saving for businesses and the broader economy.

Third party litigation funders have played a key role in facilitating this greater access to justice by assuming the risk of adverse costs – the ALRC noted “[L]itigation funding has largely filled the lacuna created by the absence of a satisfactory mechanism to protect principal applicants from adverse costs orders.”⁹ PIAC recognises that reliance on third party litigation funding for class actions has limitations, and that the ALRC, Productivity Commission and Victorian Law Reform Commission have recommended changes to the prohibition on 'contingency fee' arrangements, to seek to improve access to justice for individuals prohibited from bringing proceedings due to the cost.¹⁰ PIAC repeats its view above that reform of the adverse cost system for public interest matters is also critical to ensuring access to justice for the most vulnerable. PIAC also supports changes to current regulation of class actions and litigation funding that would remove barriers to

⁷ Legal Aid NSW, Submission to ALRC Inquiry into Class Action Proceedings and Third-party Litigation Funders, 13 August 2018, p2

⁸ Maurice Blackburn, <https://www.mauriceblackburn.com.au/class-actions/current-class-actions/radio-rentals-class-action/>, accessed 5 June 2020

⁹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (2019) at [2.9]

¹⁰ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (2019) at [7.75]; Productivity Commission, *Access to Justice Arrangements*, 5 September 2014, Recommendation 18.1; Victorian Law Reform Commission, *Access to Justice: Litigation Funding and Group Proceedings*, 19 June 2018, [3.66]

access to class actions for potentially vulnerable individuals seeking to enforce their rights, while also providing adequate protections for those individuals negotiating the system.

Litigation funding and class actions play an important role in facilitating access to justice in the current Australian legal system. PIAC urges the Committee not to recommend any measures which would lessen the ability of consumers, and vulnerable individuals seeking to enforce their rights, to access either the class action system or litigation funding for public interest cases. We would be pleased to provide further information to the Committee if it would assist.