CIVIL PROCEDURE (REPRESENTATIVE PROCEEDINGS) BILL 2019

Second Reading

Resumed from 26 June.

MR P.A. KATSAMBANIS (Hillarys) [12.20 pm]: I rise to speak as the lead speaker of the Liberal opposition on the Civil Procedure (Representative Proceedings) Bill 2019. I indicate at the outset that the Liberal Party will support the bill.

This bill seeks to introduce a procedure into the legal system of Western Australia to allow what are termed in the bill as representative proceedings—perhaps better known in the community as class actions—to be undertaken in Western Australia in a manner that is modern and in accordance with the federal jurisdiction and jurisdictions right across Australia. The model for creating a regime that allows for representative proceedings or class actions in Australia is contained in part IVA of the Federal Court of Australia Act 1976. It came into force many years ago, in March 1992, and it has been used extensively since that time to allow people to bring class actions when it was deemed necessary to do so. Large parts of that model have been implemented in other states, including Victoria, which adopted the act back in 2000, and New South Wales and Queensland, which implemented it earlier this decade. It is now a pretty well-tested model.

The principle behind class actions is to bring together parties when a wrong has been committed that has affected many people and has given rise to meritorious claims for compensation. Class actions give people the opportunity to come together and take out representative proceedings when either the individual's loss is not sufficient to make it individually economically viable to bring an action or the matters traversed in a dispute are so broad and so large that, again, it would be difficult for one person to compete, particularly against large corporations and their well-funded legal teams. Some of these proceedings have been immortalised across the world. I think people are aware of the sort of work that people like Erin Brockovich have done, which has been immortalised in semi-fictional films and the like. I have a very good friend, Tony Merchant, who is known in Canada as being the creator and the greatest exponent of class actions. I had the opportunity not so long ago to speak to Tony about how he goes about his practice and what it means to the people he represents who, if it were not for representative proceedings, may never have been able to access justice or to afford such access, or, in some cases, although they knew they had suffered a wrong, may not have thought that they may be entitled to legal compensation. They dealt with the wrong, perhaps one that had caused them significant illness or distress, but they could not contemplate how they could seek financial redress through legal action. These cases have proven over the course of time that class actions or representative proceedings have a place in our legal system. There are not hundreds of them every year, but there are some. It is worthwhile to create a regime to enable people who have been aggrieved and have suffered loss to seek access to justice.

There is an existing mechanism in Western Australia to bring representative proceedings, which is contained in order 18 of rule 12 of the Rules of the Supreme Court 1971; however, over time, that order has not really been utilised. It does not contain a lot of detail. There are not prescriptive rules behind the order made in the Rules of the Supreme Court, and, really, it has been superseded by modern developments such as part IVA of the Federal Court of Australia Act 1976. Although the bill before the house is modelled on the part IVA regime, it makes some changes to that regime. Most of the changes are to tidy up the language to make it more contemporary and modern. As we progress from year to year and decade to decade, we have seen that the language of Western Australian acts changes, as do some of the drafting protocols. The changes have been made to improve the readability and to indicate that it is a modern 2019 act. I do not see any harm in that.

The bill proposes an expansion of the provision contained in part IVA of the Federal Court of Australia Act to allow the court to remove and substitute a representative party in particular circumstances. In Western Australia, the bill foreshadows the expansion of that provision so that the court may remove and substitute a representative party when it is in the interests of justice to do so. It places the ultimate onus on the court, with fewer restrictions and less prescribed circumstances than in the federal jurisdiction. Again, I think that is right, because we cannot foresee every circumstance. As I said at the outset and as the Attorney General said in his second reading speech, this is about facilitating access to justice for people who may otherwise not be able to seek justice for a wrong that has been caused to them, so giving the court that additional flexibility is a good thing. I have looked at the provision and compared it. I do not think the modern provision will cause any great harm. In some limited circumstances, it may advantage people who do not currently get an advantage under the Federal Court regime. I think that is a good thing.

The bill seeks to change the definition of "representative party" slightly to clarify that a substituted party is a represented party. I do not think that has ever been an issue in the federal jurisdiction or the other jurisdictions that have mirrored the federal rules, but, again, it gives clarity. If we are going to allow someone to be substituted, they should be deemed to be a representative party for all purposes under the bill. Again, I think that is a good thing. Another provision in the bill that is different from the Federal Court provisions is the direct provision that allows a representative action to be commenced against multiple defendants, regardless of whether each person to the representative action has a claim against every defendant. This issue was addressed in the Full Court of the

Federal Court in the case of Philip Morris (Australia) Ltd v Nixon [2000]. It was outlined in the Attorney General's second reading speech. The Full Court of the Federal Court found that all representative plaintiffs must have a claim against each of the named defendants in the proceedings. This clause was introduced into the bill to try to address that issue in which there are multiple defendants and claimants and there might be a mishmash of liability. It has relevance when we consider that some of the defendants to these actions may have a series of related entities or subsidiary companies and some action by some plaintiffs may lie against one of the companies and other plaintiffs may have action against a separate but related company. It would defeat the purpose to allow representative proceedings to be so narrow and prescriptive; therefore, again, I do not necessarily agree that the expansion of the provisions in the Federal Court jurisdiction is a bad thing.

There is also a review clause, and I think that is good. With legislation such as this, we need to look at it at all times to see whether it is working correctly, so introducing the review clause is good. A five-year review clause is included in this bill. I am not sure what our friends in the upper house are going to think of that part. Knowing the history of class actions in Australia, some class actions are quite large and they go for a long time, so five years is appropriate. Numerically, we will not see many. The ones that do occur may extend over a lengthy period, so having a review every two or three years might actually defeat the purpose of having a review at all if a case has started and it is going to run for three, four or five years. I think that is a good idea.

The Attorney General made it clear in his second reading speech that although this legislation will be enacted—it will be passed in this place in the near future and, then, eventually, it will be passed in the other place—it will not commence immediately. The operative parts of the bill, which is everything other than part 1, will commence on a day to be fixed by proclamation. In his second reading speech, the Attorney General outlined that a series of steps will need to be undertaken before the bill will be operational as an act. The Supreme Court will need to develop supporting practice directions and rules to back up the regime that is legislated for by Parliament. As we know, the court sets its own rules and proceedings, and that should be how it is in our jurisdiction when there is a clear separation of powers between Parliament and the judiciary. What I would seek from the Attorney General, perhaps in summing up, rather than requiring us to go into consideration in detail, is an indication of how long he thinks it might take, not a prescriptive drop-dead date—to use some colloquialisms the Attorney General sometimes likes to use—but a best-endeavours time frame of how long after the legislation receives royal assent he thinks the Supreme Court, in cooperation with the Attorney General and the Department of Justice, will be in a position to have its rules and practice directions in place so that this regime can start.

The other area I want to raise is the interoperation of the jurisdiction of the Federal Court with some of the eastern states' courts, particularly those in New South Wales and Victoria. What has emerged is simply a by-product of our federal system of government and the nature of having both federal and state courts sometimes with competing jurisdiction, sometimes with overlapping jurisdiction and at other times with jurisdiction cross-vested between the courts. What has happened in New South Wales and Victoria in particular is that law firms that undertake class actions or representative proceedings on behalf of the variety of claimants represented in the action are commencing actions against common parties and dealing with similar issues in more than one jurisdiction, and often in a federal and state jurisdiction, either at or about the same time, but they are common parties with similar or sometimes the same issues. Occasionally, it might be an either/or claim. Sometimes it may involve a claim that is partly a federal and partly a state jurisdiction, but it is happening and it is real. On the eastern seaboard, the Federal Court has tried to deal with this by putting in a series of protocols in the Supreme Courts of both New South Wales and Victoria to deal with these issues and to allow the courts to cooperatively manage these sorts of class actions that involve common parties and similar or the same issues and that are commenced at or about the same time in competing courts in more than one jurisdiction.

From a case management point of view, and also to ensure fairness for both the represented parties and the defendants, I think the introduction of those sorts of protocols is a really, really good step. The protocols are only new. The protocol between the Federal Court and the Supreme Court of New South Wales was introduced in the middle of 2018, and the protocol between the Federal Court and the Victorian Supreme Court was introduced only around the middle of this year. They are new. There is probably not a lot of experience around them, but I think they are a pointer to the sort of class action that we are likely to see in many cases in Western Australia; I would not say in all cases, but in many cases. They would be class actions that would probably have a genesis in both state and federal law, and it would be prudent for a legal practitioner, at least in the first instance, to commence action in both the state and federal jurisdictions and then, as the case goes forward, see which jurisdiction is the most applicable, or whether parts can be separated, with some heard in the state jurisdiction and some heard in the federal jurisdiction. When we think of the types of class actions there might be, there might be class actions around consumer law whereby there is an interaction between state and federal law, but usually the guidance is taken at a state level. There might be class actions against the state government or the commonwealth government, or, in some cases, both governments, that deal with all sorts of issues, such as environmental or water issues and the like, and that might require the commencement of actions in more than one court.

In his summing up, can the Attorney General indicate whether, in the period since this legislation was introduced, any thought has been given to implementing some protocols with the Federal Court from the outset so that any matters that have already been dealt with in states such as Victoria and New South Wales can be dealt with fairly, equitably and efficiently in Western Australia rather than waiting for these sorts of dual actions in competing courts to start before we take action? In commenting, the Attorney General might also want to indicate whether he thinks that these things are best dealt with through protocols enacted between the courts or whether this is something that may also need to be considered at an interjurisdictional level by Attorneys General. The acronyms for the Attorneys General national group keeps changing; I am not sure whether the Attorney General is able to help.

Mr J.R. Quigley: I do not know.

Mr P.A. KATSAMBANIS: He does not know either! The name keeps changing. I hesitate to use an acronym, but there are regular meetings with the federal and state Attorneys General. I would welcome the Attorney General's comments about what he thinks is the best way to go in the future in dealing with these cross-jurisdictional claims—that is, whether to allow the courts to deal with it through their own rules or protocols or whether it needs to be addressed at a legislative level.

I do not want to delay the passage of this bill. It was recommended for introduction into Western Australia by the Law Reform Commission of Western Australia in a report it tabled in this Parliament in October 2015 called, interestingly enough, "Representative Proceedings". The Law Reform Commission said it is a good idea; the other states thought it was a good idea. The Federal Court has been dealing with these issues for almost 30 years. There was a lot of hesitation when the federal jurisdiction was first introduced, but since then there have been a series of very significant class actions. I know other members will most likely speak about some of those class actions, so I will not go through all of them. A small number of very significant actions have benefited a large class of people who had been wronged and had suffered both physical suffering and financial loss, as well as mental health impacts. It has enabled those people to seek compensation, perhaps not the monetary compensation they were seeking but, at the very least, a sense of justice being done as well as some monetary compensation, if not the full amount. Without representative proceedings, it is doubtful that those people would have ever had either the financial wherewithal or simply the gravitas and the time to undertake what can sometimes be protracted legal battles, often dealing with matters of law in which precedent is being set rather than followed.

The federal regime has proven itself. There are still some question marks around the regimes in other states because of that nexus between federal and state laws. Often, the federal jurisdiction is preferred; sometimes it is an either/or situation. I see absolutely no harm in moving away from the very narrow rules of the Supreme Court in Western Australia, which do not have a lot of detail around them and do not seem to be used very often anyway, and moving towards this legislated regime for representative proceedings. As I said at the outset, the Liberal Party supports the introduction of this bill.

MR M. HUGHES (Kalamunda) [12.44 pm]: I would like to make a contribution to the second reading debate on the Civil Procedure (Representative Proceedings) Bill 2019. I was delighted on 26 June 2019 when this bill was introduced into this house by the Attorney General. The new legislation, thankfully, will modernise Western Australia's class action regime, which the legal profession regards as being outdated, uncertain and silent on many important procedural aspects of representative proceedings. The regime had been developed, as we heard from the member for Hillarys, by the commonwealth and a number of other states. As we also heard from the member for Hillarys, the proposed regime is modelled substantially on part IVA of the Federal Court of Australia Act 1976.

If passed, the bill will bring Western Australia more or less in line with the class action procedures that apply federally and in other states on the east coast of Australia. Western Australian class actions that attract federal jurisdiction will likely still be instituted in the Federal Court. This legislation will not replace that pathway; it will still be determined based on jurisdiction. However, the modernised procedures provided by the reforms contained in the bill will provide a clearer and more certain pathway; therefore, it is anticipated there will be an increase in the uptake of representative proceedings for state-based causes of action such as contract and tort.

As we have heard, large-scale class actions are now a common feature of the legal landscape in Australia. It was not always the case. The Federal Court has become the forum of choice for such actions. However, over the last 10 years or so there has been an increase in the number of representative proceedings in the state courts of Victoria and New South Wales, and more recently Queensland, as these jurisdictions have made legislative provisions for representative proceedings.

Murphy and Cameron, in "Access to Justice and the Evolution of Class Action Litigation in Australia", examined the origins and purposes of class action proceedings in Australia. They recognised that the policy and purposes underlying part IVA of the Federal Court of Australia Act, upon which the Western Australian act is substantially based, were identified in the second reading speech that was given in the commonwealth Parliament. I would like to quote from the second reading speech that was delivered then, to give an indication of the importance of representative proceedings. I quote —

> The Bill gives the Federal Court an efficient and effective procedure to deal with multiple claims. Such a procedure is needed for two purposes. The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action.
>
> The second purpose of the Bill is to deal efficiently —

I emphasise "efficiently" —

> with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions.

The part of the second reading speech that I just read underscores that facilitating access to justice is a central aim of the class action regime. It was established with the intention of providing a mechanism for individual citizens to seek redress through the courts for civil wrongs essentially committed by the "big" and "powerful" in our society—governments, corporations and other defendants that are more powerful than any individual claimant. Clear access to such a mechanism is of fundamental importance in a globalised economy in which civil wrongs are often committed on a mass scale by large and powerful entities and those nearer to home, of course, that emulate them. Such entities, the large corporations and the like, have all the advantages that are accrued to those in litigation and dispute resolution that sheer size and wealth commands. This legislation, in common with the legislation both at the federal level and in other state jurisdictions, rebalances this power differential. It is a clear aim of the class action legislation. It provides the means by which the solitary individual with a grievance shared in common with another can combine in a way that would be non-existent if claims were pursued individually. It provides a mechanism by which a greater number of those claims can and will be litigated.

Compared with measures that we have recently considered in this place, this is a relatively small piece of legislation, but it is long overdue and an important step forward to bringing fairness into our judicial system for ordinary folk seeking redress before the courts in Western Australia. It is another indication of the hard work of the Attorney General and the McGowan Labor government in tackling and delivering on justice issues that were known to the previous government, but rather than acted on were either consigned to the too-hard basket or suffered from the characteristic all too lazy indifference of the previous Attorney General.

The bill has had a long gestation. It was introduced in response to the recommendation of the "Representative Proceedings: Project 103: Final Report" tabled by the Law Reform Commission of Western Australia on 21 October 2015. On the face of it, the previous government would seem to have had ample time to draft a bill and bring it into law; but that it did not is an all too familiar tale. Commenting on the recommendations of the commission, Herbert Smith Freehills in one of its legal briefings on 21 March 2016 remarked —

> Uncertainty surrounding the class actions or 'representative proceedings' … in Western Australia make such claims a rarity but a new report by the state's Law Reform Commission could see this change.

It certainly was not done speedily. It was expected that the commission's recommendations that the Western Australian government should seek to introduce class action legislation based on the federal regime reform would likely result in a measure of uniformity with Australian jurisdictions and would have a significant effect on the litigation landscape for defendants who are faced by a large class of plaintiffs in Western Australia. It was hoped that the introduction of such legislation would be imminent and thus would finally bring greater fairness into play, but, as I said, predictably, nothing happened, apart from rampant inertia. Let us look at the report that gave rise to the recommendations for reform. This goes back as far as July 2011. The then Attorney General, Christian Porter, directed the state Law Reform Commission to investigate and report on representative proceedings within Western Australia. As stated in its report, the commission was tasked to give close consideration to the following —

i. the need for a detailed guiding framework for the manner in which representative proceedings are to be conducted or concluded;

ii. the need to reduce the uncertainty and lack of clarity in the area;

iii. the adoption of an appropriate and effective model, either through amendment to the Supreme Court Rules or statutory reform, taking into account recent developments regarding representative proceedings in other jurisdictions both nationally and internationally;

iv. the need to ensure that representative proceedings are conducted in a fair manner which gives those who will be bound by orders made in the proceedings a reasonable opportunity to decide whether or not to participate in the proceedings and to be heard in relation to issues affecting their rights; and

v. any related matter.

As we heard, the commission released a substantial discussion paper of 150 pages in February 2013. In it, the commission made the following proposals —

(a) that Western Australia should adopt legislation to create a scheme allowing representative actions in substantially similar terms to Part IVA of the *Federal Court of Australia Act 1976* … and

(b) Order 18 Rule 12 of the Rules of the *Supreme Court 1971* (WA) should be retained in its current form as a surviving alternative.

To the terms of reference, the commission sought specific comments on three issues. The report states —

(1) If a new regime is appropriate, should such amendment be effected by amendment of the rules of the Supreme and/or District Courts only, or by the passage of legislation?

(2) Should Western Australia adopt a legislative representative proceedings regime substantively similar to that existing in Part IVA of the *Federal Court of Australia Act 1976* …

The report went on to comment —

> The other key difference in the *Civil Procedure Act 2005* (NSW) —

From the Federal Court legislation —

> is the extent to which there is an express permission to issue a representative action against multiple defendants, irrespective of whether or not the persons affected have a claim against every defendant in the action …

This was as we heard in the so-called Philip Morris issue. The issues addressed by the commission were well known to the first term Barnett Liberal–National government. A representative proceedings in the Supreme Court of Western Australia, as we have heard, is defined in order 18, "Causes of action, counterclaims and parties", rule 12(1) of the Rules of the Supreme Court 1971, and it says —

> Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, —

That is, it pertains to representation of interested persons who cannot be ascertained —

> the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

I am a layperson and I find that very difficult to follow, but no doubt the lawyers amongst us are used to that language. However, the commission's final report found that order 18, rule 12 of the rules, was inadequate to facilitate large representative actions in Western Australia and lacked clarity for those who wished to bring class action to the court. The commission recommended that a new legislative scheme be introduced in order to allow more efficiency in the realm of representative actions. The aim of the scheme would be to assist in reducing interlocutory disputes and lower costs and to alleviate procedural barriers. The commission recommended that the legislative scheme should be based on part IVA of the commonwealth Federal Court of Australia Act 1976, and to include various provisions from the Civil Procedure Act 2005, New South Wales.

As we have heard from the member for Hillarys, since 1992, part IVA of the Federal Court of Australia Act has provided for a legislative regime under which representative proceedings could be commenced in the Federal Court. It sets out the requirements and tests in which a class action is to be brought before the Federal Court. Since its implementation, similar schemes have been adopted in Victoria, New South Wales and more recently Queensland. As I understand it, the starting point for consideration of the benefits of a representative proceedings regime is the comment made by Hon Justice McHugh in Carnie v Esanda Finance Corporation Ltd. In that judgement, Justice McHugh said —

> *The cost of litigation often makes it economically irrational for an individual to attempt to enforce legal rights arising out of a consumer contract. Consumers should not be denied the opportunity to have legal rights determined when it can be done efficiently and effectively on their behalf by one person with the same community of interest as other consumers.*

As far back as June 2013, the Law Council of Australia took the opportunity to comment on the Law Reform Commission of Western Australia's discussion paper that I mentioned. The Law Council of Australia observed that —

> … it is likely that these actions benefit the wider community by making wrongdoers accountable and thereby improving compliance with corporate standards and consumer safety … whereas absent a facilitated class action procedure, very few claims have been made for compensation by groups of claimants.

Therefore, the central importance of class actions, or representative proceedings, to access justice by John Citizen is very much recognised by eminent lawyers. As a layperson and a mere citizen, I am very thankful for the opportunity that this legislation will bring to the citizens of Western Australia. It continued —

> Successful Australian class actions have compensated people suffering injuries from defective products and those misled into poor investments …
>
> …
>
> Class actions have also successfully sought compensation for a range of other reasons and a number of actions for victims of mass torts have been concluded,

Another eminent person who certainly has more standing in this area than I would ever lay claim to, Justice Bernard Murphy, in a keynote address titled "Class Actions Current issues after 25 years of Part IVA", which was delivered to a seminar titled "Access to Justice Under Part IVA Regime" held at the University of NSW on 23 March 2016, commented —

> It is important to remember that, before the class action regime —

That is part IVA of the Federal Court Act —

> was introduced, it was either impossible, or at least exceedingly rare, for consumers, cartel victims, shareholders, investors and the victims of catastrophe to recover compensation, even where the misconduct was plain.

[Member's time extended.]

Mr M. HUGHES: He continued —

> Since 1992 —

An important figure is coming up —

> the regime has permitted claimants to recover more than $3.5 billion in compensation for civil wrongs they have suffered.

I will turn to the bill for a moment or two. The Civil Procedure (Representative Proceedings) Bill 2019 will provide for a new Western Australian representative proceedings scheme that implements a clearer set of processes to govern the commencement and conduct of class actions in Western Australia to ensure fairness and efficiency in the system. To achieve that, the bill provides for the minimum threshold requirements in the commencement of representative proceedings; the right to opt out or formally discontinue from the proceedings; settlement of individual claims; discontinuance of proceedings; and the distribution of payments.

I turn now to commencing a class action. Representative actions will be available when at least seven people have claims against the same person or entity if the claims arise out of the same or similar set of circumstances and give rise to a common question of fact or law. This same threshold applies under the federal regime. I refer to group membership. The system proposed for Western Australia adopts an "opt out" model for group membership of a class action. This means that consent to be a group member is not required, except, as the member for Hillarys referred to in his contribution, for specified state entities and public corporations. However, members of the action must be given an opportunity to opt out of a class action before the action reaches a certain stage. The bill provides that it will be open for a class action to be commenced against multiple defendants irrespective of whether the lead plaintiff and all other group members have a claim against every defendant. I understand that in this way Western Australia is seeking to avoid the Philip Morris issue, which has been previously referred to, in which all representative plaintiffs must have a claim against each defendant named in the proceedings. I believe that is how the federal regime had been interpreted until 2014. Under the provisions of the bill, the Western Australia Supreme Court will have the power to disband a class action if it is satisfied that it is in the interests of justice to do so because the cost of the action is likely to make it uneconomical or inefficient, or it is an ineffective or inappropriate means of resolving the class action claims. The bill will give the court power to substitute the lead plaintiff in a class action with another group member if the plaintiff is not adequately representing the interests of the group or if it is in the interest of justice to do so—a provision that largely mirrors the Federal Court equivalent. The Western Australian provision will allow for greater flexibility by also permitting the court to act in the interest of justice rather being limited to just considering the interests of the group. That covers the main points I wanted to raise about the legislation.

As we heard from the Attorney General in his second reading speech, there are some notable differences from the commonwealth legislation. I will recap those. First, the courts will have additional powers to remove and substitute a representative party if it is in the interests of justice to do so. Secondly, the definition of representative party is expanded from covering only an individual who commences representative proceedings to include an individual who has been substituted as a representative party. The expansion of this definition will reduce the risk of possible

challenges to the legitimacy of a substituted party. Finally, the bill will allow for representative action to be taken against multiple defendants, regardless of whether each individual in the action has a claim against every defendant.

In his media release about the bill, referring to class actions, the Attorney General stated —

> … at its heart, is an access to justice issue …
>
> …
>
> … there are situations where a legal wrong has been committed which affects many people, but each person's individual loss is not such as to make it economically viable to bring an individual action. Without a strong and sustainable mechanism for bringing class actions, countless individuals will not see justice and their losses will go uncompensated.

Until the present time, the uncertainty surrounding the class action mechanism in Western Australia has led to such claims being a rarity in our courts. With this bill, that position is expected to change. At long last, the provisions of the bill will make it simpler for plaintiffs to establish and efficiently pursue representative proceedings in the Supreme Court of Western Australia. The McGowan Labor government and our hardworking and reforming Attorney General are to be congratulated on the energy directed in the fortieth Parliament to improve access to justice for the people of Western Australia.

MR S.A. MILLMAN (Mount Lawley) [1.07 pm]: It gives me great pleasure to follow the member for Kalamunda and make a contribution to the second reading debate on the Civil Procedure (Representative Proceedings) Bill 2019. As usual, he made a clear, informed and erudite contribution to this debate and summarised the relevant history and a lot of philosophical and policy considerations. It also gives me great pleasure to once again speak about another piece of legislation this activist and reforming Attorney General has brought before the Legislative Assembly. It is another feather in his cap. This Attorney General has introduced a succession of bills that modernise and reform the Western Australian legal system, which is to his great credit. Before I go any further, I am grateful to the member for Hillarys for spelling out in clear and unambiguous terms that the opposition will be supporting this legislation, as it ought to, which will be understood once members hear my contribution.

I commence my contribution by reiterating two recurring themes I have raised on a number of occasions—namely, equity and access to justice. At the moment, there are class action provisions in the laws of Queensland, New South Wales, Victoria, South Australia and the federal jurisdiction of the Federal Court. On the basis of equity of access, Western Australia should catch up with the rest of the nation. I will return to that point a little later. The greater good achieved by this legislation is the facilitation of class actions in the Western Australian jurisdictions. As everyone knows, the public policy purpose of the law is to right wrongs and discourage bad behaviour. In that regard, when a plaintiff who has been wronged and desires access to justice has an impediment removed thus facilitating that access to justice, it is a good thing, because the wrong can be exposed and remedied. What sort of wrongs are we talking about? The first place to turn and the best place to start is John Fleming's *The Law of Torts*. I cite page 1 from the introduction of that text —

> Broadly speaking, the entire field of liability may be divided according to its purposes into criminal, tortious, contractual … Each of these is distinguishable by the nature of the conduct or its consequences and the purpose for which legal remedies are given.
>
> The laws of tort and crime, despite their common origin in revenge and deterrence, long ago parted company and assumed distinctly separate functions. A crime is an offence against the State, as representative of the public, which will vindicate its interests by punishing the offender. A criminal prosecution is not concerned with repairing an injury that may have been done to an individual, but with exacting a penalty in order to protect society as a whole. Tort liability, on the other hand, exists primarily to compensate the victim by compelling the wrongdoer to pay for the damage he has done.

Further, on page 3 it states —

> The law of torts, then, is concerned with the allocation of losses incident to … activities in modern society. "Arising out of the various and ever-increasing clashes of the activities of persons living in a common society, carrying on business in competition with fellow members of that society, owning property which may in any of a thousand ways affect the person or property of others—in short, doing all the things that constitute modern living. There must of necessity be losses, or injuries of many kinds sustained as a result of the activities of others. The purpose of the law of torts is to adjust these losses and afford compensation for injuries sustained by one person as the result of the conduct of another."

The history of the law of torts is hinged on the tension between two basic interests of individuals. We know that in this debate it is important to put an emphasis on civil liberty and individual rights—the interests of security on the one hand and the interests of freedom of action on the other. The first, the interest of security, requires that one who has been hurt should be compensated by the injurer regardless of the latter's motivation and purpose; that is when the interests of security are being protected. The second, the protection of the interest of freedom of action,

requires that the injurer should, at best, be held responsible only when his activity was intentionally wrongful or indicated an undue lack of consideration for others. The former is content with imposing liability for faultless causation; the latter insists on fault and culpability. The purpose served by the law of torts is to make sure that people who do the wrong thing and by that conduct injure others do not get away with it. The purpose of class action is to aggregate those claims when, as the member for Hillarys and Kalamunda have already said, they might for other reasons otherwise be uneconomic. The reason I make those points is that up until now the most common form of class actions have been in respect of the law of torts, but later on in my contribution, as the member for Hillarys asked, I will outline some of the more common types of class actions that have been taking place more recently.

Dr D.J. Honey: Do we get CPD credits for this one?

Mr S.A. MILLMAN: We sure do! Back when I was at Slater and Gordon, we were registered for the provision of continuing professional development. We were a quality assurance provider, but unfortunately I do not think that carries today!

There have been a number of papers written about this. The member for Kalamunda has already alluded to some of the research papers written by Herbert Smith Freehills, which is a renowned commercial firm with a long and established reputation for acting for defendants in class action matters. Another firm with a similar characterisation is Ashurst. The paper I will refer to is dated 9 March 2017 and is produced by Ashurst. It is called "Class Actions in Australia". The paper starts with a relatively simple proposition. It states —

> Class actions are firmly established as a means by which a large group or class of persons can bring a claim in Australia. Over the last 25 years, there have been numerous significant class actions brought and a number have resulted in substantial settlements.

Opponents, or perhaps I should say sceptics, of class actions note, as stated in the paper, that their introduction has resulted in a number of cases being brought that may otherwise not have been pursued. If members refer to the point I just made about the public policy imperative of these cases being brought so wrongdoers can be held to account, they will appreciate that that is not a good thing. If people who have suffered an injustice have a valid claim and are unable to bring it, it is something we should fix. The member for Hillarys has already alluded to this, but these reforms that this reforming Attorney General has brought forward mean that people who are not otherwise accessing justice now have the opportunity. The Ashurst report goes on to say —

- Class action lawyers are accessing reports and documents obtained by regulators such as ASIC and the ACCC to support their clients' claims.

I would say that that is entirely appropriate —

> These same regulators have publically given their support to class actions as having a positive role to play in enforcement and in deterring misconduct.

This is the legal system operating entirely as it ought to, with the plaintiffs seeking assistance and representation to bring their claims and aggregating their claims so they derive the utility, the benefit, of collective action. The federal government and the courts continue to support the role of third parties in facilitating class actions, subject to, obviously, ensuring that the interests of class members are protected.

In his contribution, the member for Hillarys asked: what types of claims have been the subject of class actions and what types of claims are likely to be in the future? I should pause to acknowledge Professor Vince Morabito, who was quoted at length in the Ashurst paper and also in the WA Law Reform Commission report that the member for Kalamunda has already referred to. Professor Morabito did an outstanding study of 25 year history of class actions from 1992 and he found that the first 12 years of the federal class action regime were dominated by product liability actions, industrial claims and migration actions, but over the next 12 years—that is, the more recent 12 years—prominent federal class actions included claims by investors, shareholders and consumer protection class actions. Shortly, I will come to a list of some of the most substantial class action settlements. What types of claims are likely to occur in the future? The reason this is a relevant consideration is that at the moment citizens of Western Australia have access to class action jurisdiction when the matter falls within the purview of the jurisdiction of the Federal Court, when it is a commonwealth matter, when it is a federal law matter, but not when it is a matter pertaining to state law because of the access of the class action regime in the WA jurisdiction. Class actions of the future, according to professor Morabito, will include claims by residents and businesses following disasters such as bushfires and floods—members need only recall the Parkerville bushfire claim—claims by creditors against directors and advisers of failed companies, claims by investors in managed investment funds and cartel claims. There are claims that will necessarily fall within the jurisdiction of the Western Australian Supreme Court for which the Western Australian Parliament has in my view an obligation to legislate. The shareholder class actions have delivered significant settlement amounts, and that is why class actions are closely followed by the legal profession. In Kirby v Centro Properties Ltd and Vlachos v Centro Properties Ltd there was a settlement of more than $200 million; in Dorajay Pty Ltd v Aristocrat Leisure it was $144 million; in Pathway Investments Pty Ltd v National Australia Bank it was $115 million;

in King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd) it was $112 million; in P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited it was $110 million; and in Modtech Engineering Pty Limited v GPT Management Holdings Limited it was $75 million. We can see that these sums are significant. In every one of these cases one of two firms was representing the plaintiffs. It was either Maurice Blackburn, which is a renowned plaintiff firm, or Slater and Gordon, which, as everyone knows, is the firm I used to work at. We can see that the work that has been done in other Australian jurisdictions—Victoria, New South Wales, Queensland and the federal jurisdiction—has delivered justice for all of these people in all of these different circumstances. We can go back and look at some of the work done by Slater and Gordon in the early years of class actions in the 1980s in Victoria and in the 1990s in the federal jurisdiction. Perhaps because the lawyers at Slater and Gordon had a great appreciation of the power of aggregating individual claims and a great appreciation of the utility of collective action, being a significant union firm, we can see the similarities in the philosophical approach that was adopted. In *That disreputable firm… the inside story of Slater & Gordon*, published in 1998, author Michael Cannon says at page 101 —

> The exploding complexity of high-technology societies like America and Australia often makes it difficult to achieve true justice for individual citizens.

That is the Joe, John or, may I say, Jane Citizen in the example presented by the member for Kalamunda. It continues —

> Once upon a time it seemed sufficient to use common law precedents based on a multiplicity of cases, or to codify them into statute law after parliamentary debate.

There is a long history of Parliament taking an interest in what the courts are doing. A lot of cases have evolved over time. The best example of that is when courts adjudicate on a number of workplace injury cases and Parliament recognises it has a role to play so it passes workers' compensation legislation. This is a more nuanced response, in that we are assisting the courts with their case management and the way in which plaintiffs can access justice. We are not adjudicating on the fundamentals of each case; we are just facilitating the courts to have that role. This is statute law that is being developed after parliamentary debate. The book continues —

> But with thousands of new products and techniques being marketed each year to millions of consumers, the law has been struggling to find effective ways of dealing with what are called 'mass torts' —

That is, mass wrongs —

> — that is, harm done to many individuals by faulty mining or manufacturing procedures. A good example is the silicone breast implant made in the USA by Dow Corning, which has caused agony to many women throughout the world.

The rhetorical question posed in Cannon's book is —

> … how could the average Australian woman without ample funds hope to sue a large American corporation?

Since the mid-1980s, Slater and Gordon has been at the forefront of developing answers for such clients. There are two ways it can be done. The member for Hillarys touched on one of them, which is test cases—when lawyers bring forward one case and run that case to trial, get an adjudication and then use that as the basis for proceeding on behalf of the other plaintiffs. The other is class actions, which are a mass procedure in which many similar individual complaints against the one defendant—I will come back to this point later—are boxed into a single action and taken to court by nominal plaintiffs. Decisions are binding on the whole group of plaintiffs, and awards and costs are shared equally. The changes in the law in Victoria in the 1980s that facilitated this really were at the cutting edge. It meant that plaintiffs who had not previously contemplated the opportunity to pursue a remedy for the damage that they had suffered had that opportunity before them. What has transpired since is that this philosophical underpinning has started to influence more and more how Parliaments and courts respond to provide people with access to justice. What we are doing today is the latest iteration of that process, whereby Western Australia is catching up with all the developments that have taken place in other parts of the Federation. As Cannon says in his book, had it not been for such widespread advertising, the victims would probably never have known that they could recover damages. Straightaway we can see that the legal process has evolved to a point at which plaintiffs now see that they have an avenue through which they can access justice. That is by way of the policy or philosophical background of the bill.

I come now to the chronology of the bill, which the member for Kalamunda has already outlined. It bears repeating, because it shows that this will not be a controversial law; this is an appropriate response to legal, political and economic imperatives that exist in Western Australia.

[Member's time extended.]

Mr S.A. MILLMAN: In July 2011, the then Attorney General for Western Australia asked the Law Reform Commission of Western Australia to examine and report on representative proceedings. I refer now to the foreword of the report, which states —

> … and if so in what manner, the principles, practices and procedures pertaining to representative proceedings being commenced in the courts of Western Australia require reform …

The Law Reform Commission was asked to give close consideration to —

i. the need for a detailed guiding framework for the manner in which representative proceedings are to be conducted or concluded;

ii. the need to reduce the uncertainty and lack of clarity in the area;

iii. the adoption of an appropriate and effective model, either through amendment to the Supreme Court Rules —

That is option 1 —

or statutory reform, —

That is what we are doing now, which is option 2 —

taking into account recent developments regarding representative proceedings in other jurisdictions …

iv. the need to ensure that representative proceedings are conducted in a fair manner which gives those who will be bound by orders made in the proceedings a reasonable opportunity to decide whether or not to participate in the proceedings and to be heard in relation to issues affecting their rights;

That is a fundamental principle of justice. Quite appropriately, the Law Reform Commission selected a person of unimpeachable credentials to author the report—Mr Tim Hammond, who is a friend of mine and an eminent barrister. The Law Reform Commission released a discussion paper in February 2013 and sought submissions from the legal community. I will just pause to thank the eminent organisations that took the time and made the effort to make submissions to the Law Reform Commission's inquiry—the Mental Health Law Centre of Western Australia; the Law Society of Western Australia; Clayton Utz; Maurice Blackburn Lawyers, which I referred to earlier in my contribution; the Western Australian Bar Association; the Law Council of Australia; and the Chief Justice of Western Australia on behalf of the Supreme Court. In June 2015, the Law Reform Commission released its final report, and that is where it stayed; unfortunately, no further action was taken by the former government for the rest of 2015 or in 2016. In March 2017, the McGowan government was elected and the member for Butler became the Attorney General, and we have had a succession of reforming initiatives on his part. Today, the legislation has been drafted, it has passed through cabinet, it has been introduced into Parliament and it is being debated. Happily, the bill is supported by the opposition.

As with every piece of legislation, it is important that we pose three questions. I have asked these three questions when I have made contributions to the debate on other bills. The three questions are: Is it needed? Will it achieve its purpose? Does it deliver on an election commitment? The answer to the third question is easy: yes, this legislation does deliver on an election commitment. Is it needed and will it achieve its purpose? The answer to those questions is contained in the Law Reform Commission report. As to the question of whether it is needed, hopefully through my contribution, members will appreciate that any mechanism that enhances, facilitates or improves access to justice for individual plaintiffs is a worthwhile endeavour. That is the first thing. Secondly, by doing this, the Parliament can assist the legal system in holding wrongdoers to account. Thirdly, it can help to deliver remedies for those who have been wronged by the actions of others. All of those are good public policy reasons to try to encourage people to bring their claims before the courts.

I take members to chapter 4 of the Law Reform Commission of Western Australia's report. In the course of its deliberations, the Law Reform Commission contemplated whether amending the Rules of the Supreme Court or specific legislation would be the most effective mechanism. The trouble is that although the Rules of the Supreme Court currently provide for group proceedings—I do not need to touch on that, because the member for Kalamunda has already covered it appropriately in his contribution—they are not widely accessed in Western Australia. The Law Reform Commission concluded that the current rule relating to representative proceedings was unsatisfactory—presumably for other reasons, but also because very few people were accessing it—and that it required amendment. This conclusion was supported by the submissions that were provided to the commission. In circumstances in which the need for reform was accepted, the commission's focus in its final report was to identify the most effective framework for reform. The report states at chapter 4.3 —

The options for reform that are available have previously been tested in the current federal, Victorian, New South Wales and South Australian regimes. Each of these have been created by way of substantial amendments being made to either:

(a) the court rules; or

(b) the legislation from which the court rules derive their power.

The Law Reform Commission also considered whether the court rules were an appropriate vehicle for reform and concluded that they were not. It concluded at chapter 4.15 that legislative reform would be a more prudent approach. It states —

> While there may be debate as to whether it is strictly necessary to introduce representative actions through legislation rather than rules of the court, the legislative approach that was followed in Victoria is considered to be the prudent one.

Again, the Attorney General is both reforming and activist, but he is also sensible, prudent, and proceeding on the basis of the evidence and the material that has been collated. We need to bear in mind, of course, that when the submissions were made to the Law Reform Commission, there was Clayton Utz on one hand, a renowned defender of class action proceedings, and Maurice Blackburn on the other hand, a noted prosecutor of class action proceedings, both making submissions to the Law Reform Commission. Clearly, both sides of the argument were presented, in addition to all the submissions made by eminent organisations such as the Western Australian Bar Association, the Law Society of Western Australia and the Chief Justice of the Supreme Court. All submissions received from interested parties, including from the Chief Justice of Western Australia on behalf of the Supreme Court of Western Australia, supported the contention that a regime facilitating representative actions should be implemented by the passage of legislation. The report states at chapter 4.22 —

> The Western Australian Bar Association observed that legislative reform would 'increase certainty and access to justice for those affected by multiple wrongdoing by':
>
> (a) providing clarity of process and procedure;
>
> (b) increasing the capacity for the commencement of and participation in representative proceedings in Western Australia;
>
> (c) providing a more cost- and resource-efficient means of recovery; and
>
> (d) addressing issues such as suspension of limitation periods for group members.

We can see the thorough and detailed analysis that has been undertaken by the Law Reform Commission to arrive at the conclusion that a statutory response is the appropriate response. Armed with that, the Attorney General has brought the current legislation to this chamber. It picks up all the recommendations contained in the Law Reform Commission report and gives effect to them.

The answer to the question, "Does this bill meet the policy imperatives that drive it?" is yes. Will it achieve its purpose? Absolutely, it will. Is it needed? The answer to that question is really a philosophical consideration. If one believes that access to justice is important, that righting wrongs is important, and that people should have the opportunity to commence, prosecute and conclude proceedings fairly and appropriately without overly burdensome legal costs and so on, then clearly the answer is yes, it is needed. Does it provide Western Australians with equitable access to justice on a par with that in South Australia, Queensland, New South Wales and Victoria? Yes, it does. Clearly, this is both excellent reforming legislation and an inevitable consequence of a hardworking Attorney General turning his mind to what should be done to make sure that our Western Australian legal system is functioning effectively and efficiently to the benefit of the citizens in this state.

I note in concluding that it is a shame that it has taken such a long time since the Law Reform Commission concluded its report to introduce this legislation. This is such unarguable legislation that it could easily have been brought before this Parliament many, many years ago. It is a testament to this government's assiduous and diligent efforts to make sure that the Western Australian justice system is fit for purpose, and it is a testament to this Attorney General that the legislation has now been brought before this chamber. As I said at the outset, I am grateful to hear that the opposition is supporting it. Once again, it is in line with this Attorney General's legislative reform agenda, and it is great to see. I commend this legislation to the house.

MS J.M. FREEMAN (Mirrabooka) [1.35 pm]: I, too, rise to speak on the Civil Procedure (Representative Proceedings) Bill 2019. I thank the previous speakers for their contributions, but mostly I thank the Attorney General for bringing forward this piece of legislation. As we heard earlier, the delays in bringing on this legislation have been to the detriment of Western Australian citizens. Other jurisdictions already have access to these sorts of class actions in law.

I agree with the member for Mount Lawley that this legislation deals with issues around access to justice, particularly with regard to the notions of common interest, shared interest and equity. Indeed, access to justice is one of the founding principles of many of the organisations I have been involved with, including community legal centres. I recently attended the Community Legal Centres Association conference to launch its new brand. I would like to congratulate the community legal centres for the good work that they do in Western Australia to ensure that people have access to information and the capacity to pursue their rights within the law. Many people would not otherwise be able to pursue actions in law and in tort. I am not a lawyer, so I am always very concerned about using terminology like that. I understand that torts all came about from some woman drinking out of a lemonade bottle and catching something in her throat. Is that the case, member for Mount Lawley?

Mr S.A. Millman: The snail in the bottle!

Ms J.M. FREEMAN: The snail in the bottle case. Does the member for Dawesville not know it? I have a very limited understanding of it, but I understand that the history of torts, which is the law of damages —

Mr S.A. Millman: Wrongs.

Ms J.M. FREEMAN: The law of wrongs. I am not a lawyer; I should have asked the member for Mount Lawley! Someone bought a drink back in ye olde England, and while drinking it, ended up with a snail caught in their throat. Please interject, member for Mount Lawley!

Mr S.A. Millman: What happened was that she and her friend were travelling to a fair—it was in Glasgow, I think—and her friend bought her a ginger beer and an ice cream; it was like a ginger beer float. She poured some of the ginger beer onto the ice cream and then she looked at the bottle and she could see a decomposing snail in the bottle. This was in the 1930s, I think.

Ms J.M. FREEMAN: Not so ye olde England!

Mr S.A. Millman: Ye olde England was perfect! As a result of seeing the decomposing snail in the bottle, she suffered a stress reaction and was unfit, so she brought proceedings against the bottler of the ginger beer.

Ms J.M. FREEMAN: If we think about it, it is a bit like the class action against Volkswagen for selling dodgy diesel cars that did not have the emissions standards it said they had. Volkswagen was wrongful in its actions and that led to a class action. I will try to get back on track here.

Mr Z.R.F. Kirkup: Thank you for enlightening me.

Mr D.A. Templeman: This is turning into a fireside chat.

Several members interjected.

Ms J.M. FREEMAN: I should just say that I did not study law at university. As I understand it, the history of class actions starts with Duke of Bedford v Ellis. Ellis was the plaintiff in that case. All the tenants on the Duke of Bedford's landholdings came together to argue that his rent increase was unjustified, given that they paid fixed rent. At that time, the court said that the tenants acted as a shared interest and had a group proceeding. Since that time, there have been many different legal cases, but I understand that it has become less and less easy to run cases as group proceedings and that is why we now have a federal system of class actions. That system has been put in place in Victoria, New South Wales and other jurisdictions, but we do not have that uniformity. I assume that leads to people shopping around for the appropriate jurisdiction to launch a class action, and that means that Western Australian citizens do not have the same capacity because they cannot take or be a plaintiff in a class action in Western Australia.

Speaking of uniformity, and at the risk of digressing once again, I want to raise that uniformity of legal rights and access with those in the rest of Australia is absolutely important to all our citizens, including women— actually, not just women, but mostly women— in de facto relationships who, under the current system of the federal Family Law Act, are in a situation whereby when de facto partners in Western Australia separate, they cannot split their superannuation. We are the only jurisdiction where people walk away after a relationship breakdown with their individual superannuation.

Ms S.F. McGurk: The federal Attorney-General has indicated that he is prepared to change that, finally, but like the snail; he's moved on that pretty slowly!

Ms J.M. FREEMAN: Yes. He is the snail in the bottle and he is causing the injury in this case. Last year, he announced that he would introduce changes to the legislation. He announced about a year ago that the government had agreed to amend the act. An article in *The West Australian* of Thursday, 25 October 2018 states —

> "If a woman has got $100,000 in super and there is $100,000 equity in a house, and the man has got $500,000 super, then the woman always comes out worse off than she would under any other situation in Australia—and that's just not fair:' Mr Porter told The West Australian.

It is just not fair that Mr Porter has not got on and fixed that inequity that he identified, spoke to *The West Australian* about in 2018 and announced he would change. We are still waiting and we feel that change is necessary.

I want to talk about the risks and cost burdens in class actions. I think we have the idea that class actions are without risk. We have all seen the Hollywood movies in which people come together to defeat the protagonists— the big corporations and bad governments—in cases about various problems in the community or damage to people's health or finances. Because the cases are always successful, it portrays the idea that these things are without risk. In bringing in this legislation, we need to make people firmly aware of the risks. It would be good if the Attorney General could talk about that. In March 2018, the Victorian Law Reform Commission released

the report "Access to Justice: Litigation Funding and Group Proceedings". One of the chapters refers to the risk and cost burdens in class actions. The report is worth looking at; it raises issues around whether the representative of the plaintiff should take on that financial risk. I take into account that, in many cases, financial risk is dealt with by law firms entering into class actions on a no win, no fee basis. The Australian Law Reform Commission found —

> … that for all finalized shareholder claims —

I gather that is claims and class actions —

> between 2013–2018, the median percentage of the settlement used to pay legal fees was 26%, and litigation funding fees was 23%. As a result, the median percentage of a settlement that was paid to group members was 51%.

Often, even on a no win, no fee basis, plaintiffs in a class action can feel like the funds they have been compensated with have been misappropriated, because they had the idea that they would gain such largesse, but find that much of the largesse that may come from a successful claim will go into costs. How do we ensure that those costs are reasonable and borne equally? Another issue is that the plaintiff and the group that has agreed to come along with the plaintiff take the risk, but if the class action is successful, the compensation may go to a broader group than those who took the risk and, frankly, paid the costs associated with the class action. I understand that there are litigation funders that charge a funding fee. I accept all these things, but I would like to raise in this debate how we look at ensuring that access to justice means equity and whether there is capacity to debate and discuss public funds for class actions through community legal centres. When I was a committee member of the Welfare Rights and Advocacy Service, one of our major responsibilities was to take important cases to the Australian Administrative Tribunal, as it was at that time, or further. We had capacity to do that because we had free legal assistance from good lawyers around town at that time. Those cases shifted the interpretation of the laws around Centrelink so that people were treated fairly and reasonably under the legislation. The cases got good interpretations of the law and we got good outcomes for people in need. Class actions often do that. If we look at some of the class actions that have occurred over the last couple of years, we see there is currently a class action on foot with the Department of Defence about the firefighting foam used in Katherine, in the Northern Territory. It is really important that we ensure that people have their safety and health taken into account. The Takata airbag class action will continue. Combustible cladding is important also. These things are not just for the plaintiffs and the litigants; they are for broader general public safety and public good.

Mr S.A. Millman: Don't forget the Robodebt class action that has just been commenced by Peter Gordon of Gordon Legal. That is another example of the public policy imperative being met by those actions being brought, which holds governments to account.

Ms J.M. FREEMAN: Yes, and I think that is really important. The banking royal commission held major corporations to account. Slater and Gordon commenced a class action around getting people's superannuation back and Maurice Blackburn Lawyers commenced a class action against AMP. Those actions are important for those issues; however, they are not without significant cost and time, and class actions take a lot of time. Partially because people go to a no win, no fee lawyer, often a bird in the hand is better than two in the bush and they may settle because it is better to settle and get an outcome for the plaintiffs than to set up the public good aspect of the case. I note that Ontario has a class proceedings fund. It was a topic of debate for many years. The Australian Law Reform Commission's 1988 report argues that without public funding, the purpose of the class action regime in providing access to justice would be undermined by the operation of the cost-shifting rule and the burden that places on the representative plaintiff. Public funding was seen as an appropriate acknowledgement of the public purpose of many class actions, the burden of which should not rest with the representative plaintiff. The Victorian Law Reform Commission report points to its law aid fund, and that may be a good facility to pursue public funds for class actions. I am not sure whether similar funds in Western Australia could do that. The report states —

> … the Ontario Class Proceedings Fund provides financial support to approved class actions, to cover adverse costs awards as well as disbursements. Cases are selected on the basis of the merits of the claim and the public interest involved.

I raise that as an important aspect that we consider now that we are giving our community access to class actions.

MR J.R. QUIGLEY (Butler — Attorney General) [1.52 pm] — in reply: I rise to thank members for their contributions and, in particular, to thank the opposition for its indication that it will support the Civil Procedure (Representative Proceedings) Bill 2019. The member for Hillarys asked how long it would take for the procedures to get going once the bill was proclaimed—that is, once the act is in place and the rules are amended. Between the passage and the commencement of the new representative proceedings, there will need to be developed new practice directions and also amendments to the Rules of the Supreme Court. That process is likely to take around six months. The necessary tasks include the following. The Rules of the Supreme Court 1971 of Western Australia

will need to be amended in that period, given that clause 12(2) of the bill requires opting out to be by written notice given under the rules of the court. Also, clause 26 in this bill requires that other notices be in a form as approved by the court. The court will need to determine whether this will be by way of Rules of the Supreme Court or practice directions. The court will also need to review rule 12 of order 18 of the Rules of the Supreme Court 1971, which presently provides for the bringing of representative proceedings as a whole when proposed legislation is introduced, requiring consultation with the profession in the District Court, as order 18 currently applies in the District Court by virtue of rule 6 of the District Court Rules 2005. The Department of Justice has undertaken to keep the Supreme Court updated on the progress of this bill so that it can progress the rules and practice directions as soon as possible after the commencement of the legislation.

I note further that the member for Hillarys sought information on the protocols between the jurisdictions. I agree that such protocols are beneficial and I am of the view that this issue can be appropriately dealt with by the Chief Justice and his court in their regular collaborations through the Council of Chief Justices of Australia. I am confident that the Chief Justice will apply his mind and energies to this issue within the six-month period set aside for the development of the practice directions to support the new representative proceedings regime.

The member for Kalamunda made supportive remarks on this bill and I thank him for that. He correctly highlighted both the access to justice and the court efficiency purposes of the legislation. The member made mention also of the lack of action of the previous government in bringing forward this legislation subsequent to the Law Reform Commission of Western Australia's 2015 report. I thank the member for Kalamunda for taking us through the main features of this bill.

My learned colleague at law the member for Mount Lawley was as eloquent as ever and laid out the philosophical underpinnings of this bill and its role in fulfilling the legal public policy. I thank the member for his erudite discussions of tort law and the importance of holding wrongdoers to account. The member also acknowledged the pioneering work of Professor Vince Morabito in the area of class actions. Relevantly, I wish to thank Professor Morabito for his assistance in providing to the Department of Justice statistical and other relevant information relating to representative proceedings. I am grateful also to the professor for sharing his expertise so generously. The member noted accurately that the bill before us will not be controversial and will allow Western Australia to catch up with developments elsewhere in our Federation.

The member for Mirrabooka emphasised enhancing access to justice and I acknowledge the member's comments about the importance of community legal centres. I thank the member for her discussion of the history of class actions and of the risks and cost burden involved. The member asked what are the risks. The representative party takes on a significant risk by so acting. In particular, as with equivalent legislative representative proceedings regimes elsewhere in Australia, it is the representative party that will bear the costs of an unsuccessful action. If the representative proceeding proceeds, the group members will share the costs of bringing the proceedings. Clause 31 of the bill provides that members are immune from adverse costs orders, with the exception of costs authorised under clauses 18 and 19. Successful defendants must seek costs from a representative party. When the proceeding has been brought with the assistance of a litigation funder, the funding agreement will ordinarily provide that the funder pays the adverse action costs orders. Lawyers acting for a representative party must inform their clients of the risks they are assuming.

Relevantly, section 260(1)(f) of the Legal Profession Act 2008, which deals with disclosure of costs to clients, provides that if a matter is litigious, a law practice must disclose to a client an estimate of the range of costs that may be recovered if the client is successful and the range of costs that the client may be ordered to pay if they are unsuccessful. In the event that an action is successful, clause 33 of the bill provides for some security for representative parties to ensure that they are not left out of pocket. This clause provides that when the representative party satisfies the court that the costs reasonably incurred by the representative party are likely to exceed the costs recoverable by the person from the respondent, the court may order that an amount equal to the whole or a part of the excess be paid to the person out of damages awarded in the proceedings.

I am very, very proud to be bringing this legislation for class actions and representative proceedings before the Parliament of Western Australia and note that its passage through this Parliament will mark the delivery of yet another McGowan Labor government election promise, made in 2017, that we would increase access to justice for all Western Australians. It has been shown in other jurisdictions that class actions and representative proceedings do just that.

Debate adjourned, pursuant to standing orders.