CIVIL PROCEDURE (REPRESENTATIVE PROCEEDINGS) BILL 2021

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Matthew Swinbourn (Parliamentary Secretary)**, read a first time.

Second Reading

HON MATTHEW SWINBOURN (East Metropolitan — Parliamentary Secretary) [5.56 pm]: I move —

That the bill be now read a second time.

The Civil Procedure (Representative Proceedings) Bill 2021 will introduce a legislative representative proceedings regime in the Supreme Court of Western Australia. This legislation meets a McGowan Labor government election commitment and, in so doing, will enhance access to justice in Western Australia.

This bill was introduced in a very similar form in the previous Parliament as the Civil Procedure (Representative Proceedings) Bill 2019. The 2019 bill passed the other place in September 2019 and was introduced in this place in October 2019, where it remained until Parliament was prorogued last December. The bill I am reading in today differs in only two respects from its predecessor: firstly, it includes minor editorial drafting changes; and, secondly, it seeks to abolish the torts of maintenance and champerty. I will discuss the abolishment provision shortly.

In a 2017 speech, Justice Bernard Murphy of the Federal Court of Australia observed that the regime in part IVA of the Federal Court of Australia Act 1976 "has proved flexible and adaptable" and that it "provides real, practical and broad based access to justice and it is a regime of which we should be proud". This bill seeks to implement a representative proceedings scheme modelled on that successful federal scheme. This regime was substantially adopted in Victoria in 2000, New South Wales in 2011 and Queensland in 2017, and has stood the test of time.

The bill provides for a range of matters relevant to representative proceedings. The first is a requirement that, in order for representative proceedings to be commenced, seven or more people must have a claim against the same person or corporation, and that those claims are in respect of, or arising out of, the same, similar or related circumstances. Those claims must also give rise to a substantial common issue of law or fact. The second is the right of a group member of representative proceedings to opt out and formally discontinue as a member of those representative proceedings. The third is provisions relating to the settlement of individual claims, the discontinuance of proceedings in certain circumstances, and the distribution of payments to group members.

Although the bill is modelled on the regime contained in part IVA of the Federal Court Act, it does not simply mirror the text of that regime. This bill differs from part IVA of the Federal Court Act in the following respects. First, the bill incorporates contemporary plain English drafting principles to enhance its readability. Second, the bill includes a provision that is based on section 33T of part IVA of the Federal Court Act—a provision that allows the court to remove and substitute a representative party in particular circumstances—but expands it so that the court may remove and substitute a representative party when it is in the interests of justice to do so. This provision provides the court with additional flexibility. Third, the bill's definition of "representative party" is not limited to a person who commences a representative proceeding—as in part IVA of the Federal Court Act—but also includes a person who is substituted as a representative party. It is considered that the bill's definition is more comprehensive and reduces the risk of possible challenges to the legitimacy of a substituted representative party. Fourth, the bill contains an express provision allowing 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 is to address the issue created by the decision in Philip Morris (Australia) Ltd v Nixon (2000) 170 ALR 487, in which the full court of the Federal Court concluded that all represented plaintiffs must have a claim against each of the named defendants in the proceeding. Fifth, the bill contains a review clause to ensure that the operation and effectiveness of the new legislative regime is examined following its fifth anniversary.

The current mechanism for bringing representative proceedings in Western Australia is found in rule 12 of order 18 of the Rules of the Supreme Court 1971. However, rule 12 of order 18 has been found to contain little detail. The bill will implement a clear set of processes to govern the commencement and conduct of representative proceedings in Western Australia to ensure that these actions are undertaken in the fairest and most efficient manner possible. Procedural matters relating to the conduct of representative proceedings will be discussed with the Supreme Court during the course of the development of its supporting practice directions and rules. Owing to the need to develop these instruments, the bill will not commence immediately following passage through Parliament.

As members will be aware, the Attorney General recently tabled the Law Reform Commission's final report titled *Maintenance and champerty in Western Australia: Project 110: Final report*. The Law Reform Commission made three recommendations and provided four options for the government on litigation funding. This bill will implement the Law Reform Commission's first recommendation by abolishing the torts of maintenance and champerty, whilst

preserving the rule of law as to the circumstances in which a contract is to be treated as contrary to public policy or as otherwise illegal. The torts are considered to be a barrier to justice in that they can be used by defendants to stymie class actions when litigation funders assist plaintiffs on the basis that they interfere, without justification, in another's action—known as maintenance—and for a share in the proceeds, known as champerty. The majority of stakeholders supported the abolishment of the torts during the commission's review, and the torts have long since been abolished by most Australian jurisdictions, as they are widely considered to be out of date. Tasmania also recently abolished the torts in recognition of the fact that litigation funding is now a modern reality and has the potential to improve access to justice when the costs to initiate an action are prohibitive. The Law Reform Commission's remaining two recommendations are non-legislative and are matters for the Supreme Court to consider.

Members may be aware that the Joint Committee on Corporations and Financial Services of the commonwealth Parliament recently finalised its inquiry into litigation funding and the regulation of the class action industry with its final report, tabled in the commonwealth Parliament on 21 December 2020. Government has carefully considered that report and determined that it is appropriate to reintroduce this bill in substantially the same form as its predecessor, save for the addition of the abolishment of the torts, to fulfil its election commitment to the people of Western Australia to increase access to justice. Representative proceedings serve an important role in providing access to justice; they fill a gap by allowing people who have suffered damage due to a mass civil wrong to seek compensation. Absent such regimes, many people within the community would go uncompensated.

Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party; nor does this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

I commend the bill to the house and I table the explanatory memorandum.

[See paper 834.]

Debate adjourned, pursuant to standing orders.

House adjourned at 6.03 pm