

CIVIL PROCEDURE (REPRESENTATIVE PROCEEDINGS) BILL 2021

Second Reading

Resumed from 28 October 2021.

HON NICK GOIRAN (South Metropolitan) [9.05 pm]: I rise as the lead speaker for the opposition, in my capacity as the shadow Attorney General, as we consider the Civil Procedure (Representative Proceedings) Bill 2021.

A short analysis of the chronology of this legislation demonstrates that it has also been a low priority reform for the McGowan Labor government. This 37-clause bill, introduced in this forty-first Parliament, has its genesis in a Law Reform Commission report from June 2015 titled *Representative Proceedings: Project 103—Final report*, and I will address that a little later. There was an almost identical twin to this bill in the fortieth Parliament; its name was the Civil Procedure (Representative Proceedings) Bill 2019. That bill was third read in the other place on 26 September 2019—almost three years ago. It was second read in this place on 15 October 2019 but not brought on again for debate in the Legislative Council at any time after 15 October 2019. Here we are, almost three years later, and during this time the government has repeatedly demonstrated two particular traits: firstly, an incompetent management of the legislative program; and, secondly, a repeated pattern of behaviour that has seen unnecessary legislation prioritised ahead of meaningful reform. Nevertheless, here we are seven years after the Law Reform Commission first recommended these access-to-justice reforms.

This simple chronology that I have outlined will perhaps be a little confusing for the Attorney General, whom the Federal Court of Australia recently found to be an unreliable historian. We need only consider his media release on 23 June 2019 wherein he boasted that he met an election commitment. To be clear, on 23 June 2019, the Attorney General boasted that he met an election commitment, yet here we are, three years later, dealing with this bill. How can the election commitment have been fulfilled three years ago when we are dealing with the bill now? In fact, I note that the so-called commitment that the Attorney General boasted of was the enactment of a class scheme at the 2017 state election. No such enactment has occurred all this time later.

Apart from the false statement made in the media release and the false boasting on 23 June 2019, in that media release the Attorney General did what he always seeks to do, which is to criticise the former Liberal government for not implementing this reform that had been recommended by the Law Reform Commission in 2015. Let us be clear that we are about to pass a reform that the Attorney General has taken more than five years to enact when he was highly critical of the former government having taken insufficient action in a period of some 18 months. Is it any wonder that the Federal Court finds him to be unreliable? With the greatest respect to the Attorney General, the one thing that he has been reliable on in recent times is his confused attempts to set out the history of matters for which he is responsible.

This bill before us introduces a legislative representative proceedings regime in the Supreme Court of Western Australia. The government has advised us that it is modelled on a regime substantially similar to part IVA of the Federal Court of Australia Act 1976. This bill will also abolish the torts of maintenance and champerty. Currently in our state, representative proceedings, or class actions as they are commonly referred to, can be commenced in one of two ways. A plaintiff can take action in the Federal Court in Western Australia, pursuant to part IVA of the Federal Court of Australia Act. Alternatively, there is a mechanism under the Western Australian Supreme Court rules—order 18 rule 12—which I will touch on in a moment. For those members who are not familiar with class actions, they are a means by which a large group or class of persons can bring a claim. They were first introduced in Australia some 30 years ago. At the time there was initially a concern that this would invoke US-style litigation that would flood our courts and might result in speculative or unmeritorious claims being driven by lawyers and that this might lead to an increase in the cost of doing business in Australia. This, of course, has not been the outcome. Rather, over the last three decades we have experienced a number of cases having been brought that might not otherwise have been pursued, a number of which have resulted in substantial settlements.

A class action can be commenced, certainly under the Federal Court scheme and under the scheme that is proposed in the bill before us, when seven or more people have claims against the same person; the claims are in respect of, or arise out of, the same, similar or related circumstances; and the claims give rise to at least one substantial common issue of law or fact. These threshold requirements have been liberally interpreted by the courts and, as a result, are generally not difficult to satisfy. Class actions are usually brought by a single class representative who becomes the applicant in the proceedings. That class representative brings the proceedings on behalf of all the class members and when there are differences between groups of class members, these can be distinguished by what is referred to as subgroups.

It is not uncommon for class actions to be funded by litigation funders. The litigation funding pool grew after the decision in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006]; 229 ALR 58; *Commonwealth Law Reports* 386. That High Court decision effectively gave licence to litigation funding, or the High Court's stamp of approval. Although the initial claims were predominantly product liability, industrial and migration actions, claims

by investors, shareholders and consumer class actions have been prominent in recent years. It is expected that future claims will involve financial products and services, disaster claims as a result of floods and bushfires, and franchisee claims, to name just a few. I note there is support for class actions by the regulators—the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission—as class actions are seen as having a positive role to play in enforcement and deterring misconduct. This bill before us will now provide the Western Australian legal system with a more defined procedure to commence class actions in our Supreme Court, with such procedures already being readily available in Victoria, New South Wales and Queensland.

I turn now to the Law Reform Commission's 103rd report, which, as I mentioned earlier, is really the genesis of the bill that is before us. It was entitled *Representative proceedings* and dated June 2015. I want to acknowledge Dr Cox, Mr Sefton and Dr Zimmermann, who were the three commissioners of the Law Reform Commission at the time of this report. I also want to acknowledge the principal project writer, my learned friend Tim Hammond, who is responsible in large part for what is now before us. I take a moment to note the foreword in this large report, which reads —

In July 2011, the then Attorney General asked the Law Reform Commission of Western Australia ... to examine and report upon whether, 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, in particular giving 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 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.

The Commission released a Discussion Paper in February 2013. In its Discussion Paper, 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* ... should be retained in its current form as a surviving alternative.

The Commission sought submissions on the above proposals, as well as on all and any aspects of the Terms of Reference. Specifically it sought comment on three key issues:

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?

I will pause there to note that that is precisely what is happening in this instance. The new regime will occur through the passage of legislation and not by amendment of the rules of the Supreme or District Courts, for reasons that we will unpack a little later.

I continue with the foreword, in which the commissioners set out the three key issues that they sought comment on —

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* ...

Again, I pause to note that that is what this bill will do —

In respect of this second issue, the Commission recognised that there were two fundamental points of difference between Part IVA of the *Federal Court of Australia Act* ... and Part 10 of the *Civil Procedure Act 2005* (NSW). The first is the extent to which the legislation should allow representative actions to automatically proceed on a 'closed class' basis, as prescribed by s 166(2) of Part 10 of the *Civil Procedure Act 2005* (NSW). While such a provision does not exist in either the federal or the Victorian legislation, the Commission is aware that closed class representative actions are relatively common in both federal and New South Wales proceedings.

The Commission therefore invited submissions on whether any legislative amendment in Western Australia should include an equivalent provision to s 166(2) of Part 10 of the *Civil Procedure Act 2005* (NSW).

I pause there to, in effect, pose my first question on notice to the parliamentary secretary on this matter, to ascertain whether in fact this bill does include that equivalent provision.

The commissioners in this foreword continue on to outline the three key issues. I move to the third one, which reads as follows —

The other key difference in the *Civil Procedure Act 2005* (NSW) 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 (‘the *Philip Morris* issue’).

In respect of this third issue, the Commission understands that in circumstances where the Philip Morris issue presents in the federal and Victorian jurisdictions, the practice routinely adopted is that multiple actions are issued and thereafter consolidated. The Commission specifically invited comment on whether a provision equivalent to s 158(2) of Part 10 of the *Civil Procedure Act 2005* (NSW) should be included in any final recommendation for legislative reform in Western Australia.

Again, I pause there to pose the same question on notice to the parliamentary secretary—that is, whether this bill includes that equivalent provision, albeit my understanding is that it is adhered to in this legislation.

The commissioners go on to say in the foreword —

In addition, the Commission invited interested parties to comment on the following questions:

- the possible need for codification of the role of the representative plaintiff and requirements for removal of a representative plaintiff;
- the suspension of limitation periods and the status of class members’ claims in the event a class is disbanded by order of the court;

Again, I note that it appears to me that those first two matters are both captured in the bill before us. The third matter is —

- whether there should be a more prescriptive legislative framework in relation to security for costs in representative proceedings;

I note that there is reference to security for costs in this bill. Whether it could be described as a more prescriptive legislative framework remains to be seen, but we can unpack that when we get to that clause in the Committee of the Whole House.

The foreword continues —

- whether the impact of proportionate liability legislation as enshrined in the *Civil Liability Act 2002* (WA) could produce anomalous results in relation to the issue of whether every group member must have a claim against each named respondent;
- whether more prescriptive notification provisions are required in order to ensure that class members are aware of their right to opt out of a representative proceeding; and
- In its current form, s 33V of the *Federal Court of Australia Act 1976* (Cth) contains no statutory guidance or criteria that a court should take into account when considering whether to approve the settlement or discontinuance of an action. The Commission invited submissions on the question of whether formal criteria are required.

The Commission also noted that interested parties were encouraged to make submissions on any other issues relating to the current composition of Part IVA proceedings.

The Commission received seven submissions from stakeholders including the Law Society of Western Australia, the Law Council of Australia, the Western Australian Bar Association and the Justices of the Supreme Court of Western Australia. The submissions were of great assistance in completing the reference, and the Commission appreciates the time and effort that went into their preparation.

Following analysis of the submissions and its own research, the Commission has formed the view that Order 18 Rule 12 of the *Rules of the Supreme Court 1971* (WA) is inadequate to facilitate large representative actions with sufficient connection to Western Australia being litigated on their merits in our state courts. The Commission considers that the introduction of a legislative scheme allowing representative actions would assist in reducing interlocutory disputes, lowering costs and alleviating procedural barriers. Accordingly, the Commission makes the following recommendations in this Report:

1. that Western Australia enact legislation to create a scheme in relation to the conduct of representative actions.
2. that the legislative scheme be based on Part IVA of the *Federal Court of Australia Act 1976* (Cth).

Again, I pause to note that in my view, the first two recommendations are being implemented by virtue of the Civil Procedure (Representative Proceedings) Bill 2021. The third recommendation reads —

that Order 18 Rule 12 of the Rules of the Supreme Court 1971 (WA) be retained.

I foreshadow that I will ask questions about that matter, albeit I appreciate that those are matters for the courts. Recommendation 4 states —

that the legislative scheme include a provision based on s 33T of Part IVA of the *Federal Court of Australia Act 1976* (Cth) but that it be expanded so that a court may remove and substitute a representative party where it is in the interests of justice to do so.

Again, I pause to note that it is my assessment that that will be done by this bill. Recommendation 5 states —

that a provision equivalent to s 158(2) of the *Civil Procedure Act 2005* (NSW) be included in the legislative scheme.

I ask the parliamentary secretary whether that is being done; in other words, is recommendation 5 of this Law Reform Commission final report 103 being implemented by this bill; and, if so, by means of which clause? Recommendation 6 reads —

that a provision equivalent to s 166(2) of the *Civil Procedure Act 2005* (NSW) not be included in the legislative scheme.

Again, I seek confirmation that that recommendation has been adhered to and that we are not including such a provision; and, of course, if any of these things have been included, an explanation ought to be provided. Recommendation 7 reads —

that, in conjunction with any implementation of the above recommendations, consideration be given by government to whether the torts of maintenance and champerty should be abolished or whether the law in relation to their operation should be otherwise modified in Western Australia.

I note that, indeed, this bill will abolish those two torts.

As I said earlier, I thank the three commissioners and the principal project writer for their substantial work in this matter in 2015 and their 61-page report, the recommendations of which, it appears on the surface, will be implemented by virtue of the bill that is presently before us.

I also want to make some observations about the ancillary reform, which is the abolishing of the torts of maintenance and champerty. As I indicated earlier, this bill in the forty-first Parliament had an identical twin in the fortieth Parliament, but if we compare this bill with the 2019 bill, there are two changes in the bill before us. The first range of changes are mere minor editorial changes, but, secondly, and more importantly, this bill contains a provision at clause 36 to abolish the torts of maintenance and champerty. This recommendation arises from another Law Reform Commission report—project 110 and its report in February 2020. The tort of maintenance refers to an unrelated third party assisting to maintain litigation by providing, for example, financial assistance, whereas the tort of champerty is a form of maintenance whereby a third party pays some or all of the litigation costs in return for a share of the proceeds. These torts are seen as a potential deterrent to litigation funders because contracts giving effect to arrangements for maintenance and champerty may be found to be void and/or illegal. I note that the torts of maintenance and champerty have been abolished in the Australian Capital Territory, New South Wales, South Australia, Victoria and, indeed, the United Kingdom. Although the recommendation for clause 36 is found in the Law Reform Commission's *Project 110: Final report*—that is the report from February 2020 that I mentioned moments ago—its genesis is in *Representative Proceedings: Project 103—Final report*, and I quoted extensively from the foreword a little earlier in my second reading contribution. I return to that particular report from June 2015. It is a relatively brief analysis but an important starting point for this particular reform. At page 58 of that report, the commissioners say —

A further issue that was raised by a number of interested stakeholders in the submissions received by the Commission following the publication of the Discussion Paper related to the torts of maintenance and champerty.

The Law Council of Australia observed that whilst the torts of maintenance and champerty had been abolished in the Australian Capital Territory, New South Wales, South Australian, Victoria and in the United Kingdom, the status of these torts was not clear-cut in Western Australia.

The Law Society of Western Australia was of the view that it would be appropriate to expressly abolish the torts of maintenance and champerty in this State in order to address the possibility of forum-shopping. It observed that:

It then quotes from the Law Society's submission from 27 May 2013 —

[o]ne of the Society's members has advised of firsthand experience of a litigation funder opting to commence representative proceedings in NSW, rather than Western Australia (to which a closer nexus lay), due to the uncertainty that results from maintenance and champerty continuing to be a tort in Western Australia.

The Law Reform commissioners go on to say —

The scope of the torts of champerty and maintenance now appears to be of relatively limited potential application, particularly following the reasons of the High Court in *Campbells Cash & Carry v Fostif*.

The Commission's view is that legislative abolition of the torts of champerty and maintenance or, at least, modification of the law in relation to their operation, may have merit. This is arguably consistent with the objectives of enhancing access to justice and ensuring that Western Australia is utilised as an appropriate forum for proceedings.

The Commission is conscious that this issue was not generally canvassed in its Discussion Paper or the submissions it received, and that a number of potentially competing policy considerations and views should be considered before a final decision is made. Therefore, the Commission has not formed a final view about this issue.

The Commission recommends that in conjunction with any legislative reform by way of the introduction of a legislative regime for representative actions, consideration be given to whether the torts of champerty and maintenance should be abolished, or the law in relation to their operation modified.

This led to the Attorney General referring this matter to the Law Reform Commission on 16 July 2018. In February 2020, the newly constituted Law Reform Commission made three recommendations about this point. Those recommendations are found in its *Maintenance and champerty in Western Australia: Project 110: Final report*. I will quote briefly from the three recommendations made by the Law Reform Commission at that time. Recommendation 1 states —

That Western Australia legislate to abolish the torts of maintenance and champerty and to preserve any rule of law under which a contract is to be treated as contrary to public policy or as otherwise illegal.

I pause there to note that that is indeed what the bill before us will do. I now turn to recommendations 2 and 3 and would ask the parliamentary secretary to give consideration to providing an indication of the government's position on recommendations 2 and 3 when he delivers his reply or otherwise on clause 1 when we go into Committee of the Whole House.

Recommendation 2 reads —

In the event that the Civil Procedure (Representative Proceedings) Bill 2019 is passed, —

I pause there to note that in this context, it would now mean the 2021 bill. The recommendation continues — that the Western Australian Government recommend that the Supreme Court consider:

- implementing a requirement that litigation funding agreements be disclosed to the Supreme Court and other parties to representative proceedings in similar terms to paragraph [6] of the Federal Court of Australia's Class Actions Practice Note;
- implementing notification requirements for representative proceedings in similar terms to paragraphs 5.3–5.5 of the Federal Court of Australia's Class Actions Practice Note; and
- providing guidance for the appointment of an independent costs expert by the Supreme Court to assist in the assessment of legal costs and litigation funding fees in representative proceedings.

I would be interested know whether the government intends to recommend that to the Supreme Court; perhaps it has already made such a recommendation or has had advanced discussions on that matter. Noting that it is a recommendation of the Law Reform Commission, it would seem appropriate for the government to provide some form of update on that.

Recommendation 3 states —

That the Western Australian Government recommend to the heads of all Western Australian court jurisdictions that they consider amendments to court rules to require a plaintiff's lawyers to provide a court with a copy of the litigation funding agreement whenever a litigation funder is involved in a proceeding where a number of disputants are represented by an intermediary.

Again, I ask for an indication as to what the government has done or intends to do with regard to recommendation 3.

I return to consideration in the Civil Procedure (Representative Proceedings) Bill 2021 of the abolishment of the torts of maintenance and champerty. Specifically, it is clear that the bill will give effect to the first of those recommendations, but it is unclear as to what the government's present intentions are with regard to recommendations 2 and 3. On 2 September last year I asked the hardworking and reliable parliamentary secretary representing the Attorney General the following question —

I refer to the torts of maintenance and champerty.

- (1) Is the Attorney General aware of the Law Reform Commission's latest report on this issue?
- (2) Will he table the report in this house?
- (3) Are there any of the report's recommendations that the government does not intend to implement?
- (4) If yes to (3), which ones?
- (5) Will he table the most recent briefing note or any similar document that he has received relating to this report?

The answer provided was —

- (1)–(2) The Attorney General tabled the Law Reform Commission of Western Australia's final report, *Project 110 final report: maintenance and champerty in Western Australia* in the Legislative Assembly on 11 August 2021. Due to an oversight, this report has not been tabled in the Legislative Council. I apologise for this oversight and I table the report now.

[See paper 509.]

- (3)–(4) The honourable member may be aware that recommendation 1 of the project 110 final report will be implemented through the Civil Procedure (Representative Proceedings) Bill 2021, which was introduced in the other place on 18 August 2021. Recommendations 2 and 3 are under consideration by government and these considerations will be influenced by whether the Civil Procedure (Representative Proceedings) Bill is passed by Parliament.

I pause there to note that that is a rather peculiar situation, given the state of the numbers in both houses of the forty-first Parliament. Nevertheless, the answer continues —

- (5) The Attorney General has not received a recent briefing note or similar document relating to this report.

One wonders whether now, some 12 months later, the Attorney General has been briefed. Perhaps the parliamentary secretary could indicate whether that is the case; in other words, could he provide an update to that question without notice that was asked on 2 September last year?

In conclusion, this bill, which originates from a referral made to the Law Reform Commission in July 2011, seeks to introduce a legislative regime to facilitate representative proceedings in WA that will operate concurrently with the existing regime found in order 18, rule 12, of the Rules of the Supreme Court 1971. It also seeks to include a special provision based on section 33T of part IVA of the Federal Court of Australia Act 1976, which allows the court to remove and substitute a representative party if it is in the interests of justice to do so. It will also expand the definition of "representative party" to include a person who is substituted as a representative, providing a more comprehensive definition to reduce the risk of possible challenges to the legitimacy of a substituted representative party. It will also allow representative action to be commenced against multiple defendants, regardless of whether each person to the representative action has a claim against every defendant to address the issues in *Philip Morris (Australia) Ltd v Nixon* [2000] 170 ALR 487 and review the operation of the new legislative regime following its fifth anniversary to ensure its effectiveness and abolish the torts of maintenance and champerty.

I conclude by indicating that the opposition will support the bill.

Debate adjourned, on motion by **Hon Pierre Yang**.