

**Civil Procedure (Representative Proceedings)
Bill 2021**

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Western Australia

LEGISLATIVE ASSEMBLY

**Civil Procedure (Representative Proceedings)
Bill 2021**

A Bill for

**An Act to provide for representative proceedings in civil proceedings
in the Supreme Court.**

The Parliament of Western Australia enacts as follows:

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Part 1 — Preliminary

1. Short title

This is the *Civil Procedure (Representative Proceedings) Act 2021*.

2. Commencement

This Act comes into operation as follows —

- (a) Part 1 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation.

3. Terms used

In this Act —

Court means the Supreme Court;

group member means a member of a group of persons on whose behalf a representative proceeding has been commenced;

proceeding means a civil proceeding in the Court;

representative party means a person who commences a representative proceeding or who is substituted as a representative party under this Act;

representative proceeding means a proceeding commenced as a representative proceeding under this Act;

respondent means a person against whom relief is sought in a representative proceeding;

sub-group member means a person included in a sub-group established under section 18;

sub-group representative party means a person appointed to be the sub-group representative party for sub-group members or who is substituted as a sub-group representative party under this Act.

1 **4. Proceedings to which Act applies**

2 (1) This Act applies to a proceeding commenced on or after the day
3 on which this section comes into operation, whether the cause of
4 action accrued before, on or after that day.

5 (2) This Act does not prevent the commencement or continuance of
6 proceedings under any provision of the rules of the Court
7 providing for proceedings by or against a person as representing
8 others who have the same interest in proceedings.

9 **5. Act binds Crown**

10 This Act binds the Crown in right of Western Australia and, so
11 far as the legislative power of the Parliament permits, the Crown
12 in all its other capacities.

1 **Part 2 — Conduct of representative proceeding**

2 **6. Commencement of representative proceeding**

3 (1) A proceeding may be commenced as a representative
4 proceeding if —

5 (a) 7 or more persons have claims against the same person;
6 and

7 (b) the claims of all those persons are in respect of, or arise out
8 of, the same, similar or related circumstances; and

9 (c) the claims of all those persons give rise to a substantial
10 common issue of law or fact.

11 (2) A representative proceeding is a proceeding commenced by one or
12 more of those persons on behalf of and as representing some or all
13 of them.

14 (3) A representative proceeding may be commenced whether or not
15 the relief sought —

16 (a) is, or includes, equitable relief; or

17 (b) consists of, or includes, damages; or

18 (c) includes claims for damages that would require
19 individual assessment; or

20 (d) is the same for each person represented.

21 (4) A representative proceeding may be commenced whether or not
22 the proceeding —

23 (a) is concerned with separate contracts or transactions
24 between the respondent in the proceeding and individual
25 group members; or

26 (b) involves separate acts or omissions of the respondent
27 done or omitted to be done in relation to individual
28 group members.

1 **7. Standing**

2 (1) If a proceeding can be commenced as a representative
3 proceeding, a person who has a sufficient interest to commence
4 the proceeding on their own behalf against another person has a
5 sufficient interest to commence the proceeding against that
6 other person as a representative proceeding on behalf of other
7 persons referred to in section 6(1)(a).

8 (2) A person may commence a representative proceeding on behalf
9 of other persons against more than one respondent irrespective
10 of whether or not the person and each of those other persons
11 have a claim against every respondent in the proceeding.

12 (3) A person who has commenced a representative proceeding
13 retains a sufficient interest to continue the proceeding and to
14 appeal against a decision in the proceeding even if the person
15 ceases to have a claim against the respondent.

16 **8. Consent to be group member**

17 (1) The consent of a person to be a group member in a
18 representative proceeding is not required unless consent is
19 required under subsection (2).

20 (2) None of the following persons is a group member in a
21 representative proceeding unless the person gives written
22 consent to being a group member —

- 23 (a) the Commonwealth, a State or a Territory;
- 24 (b) a Minister of the Commonwealth, a State or a Territory;
- 25 (c) a body corporate established for a public purpose by a
26 law of the Commonwealth, a State or a Territory, other
27 than an incorporated company or association;
- 28 (d) an officer of the Commonwealth, a State or a Territory,
29 in the person's capacity as such an officer.

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1 **9. Person under disability**

2 (1) In this section —

3 *person under disability* means a person who, under the rules of
4 the Court, is not permitted to bring a proceeding except by the
5 person's next friend.

6 (2) It is not necessary for a person under disability to have a next
7 friend merely in order to be a group member.

8 (3) A group member who is a person under disability may only take
9 a step in the representative proceeding, or conduct part of the
10 proceeding, by the group member's next friend unless the Court
11 otherwise orders.

12 **10. Representative proceeding not to be commenced in certain**
13 **circumstances**

14 A representative proceeding cannot be commenced if the
15 proceeding would be concerned only with claims in respect of
16 which the Court has jurisdiction solely by virtue of the
17 *Jurisdiction of Courts (Cross-vesting) Act 1987* or a
18 corresponding law of the Commonwealth or another State or a
19 Territory.

20 **11. Originating process**

21 (1) An application commencing a representative proceeding, or a
22 document filed in support of such an application, must, in
23 addition to any other matters required to be included —

24 (a) describe or otherwise identify the group members to
25 whom the proceeding relates; and

26 (b) specify the nature of the claims made on behalf of the
27 group members and the relief claimed; and

28 (c) specify the questions of law or fact common to the
29 claims of the group members.

1 (2) In describing or otherwise identifying group members for the
2 purposes of this section, it is not necessary to name, or specify
3 the number of, the group members.

4 **12. Right of group member to opt out**

5 (1) The Court must fix a date before which a group member may
6 opt out of a representative proceeding.

7 (2) A group member may opt out of the representative proceeding
8 by written notice given under the rules of the Court before the
9 date so fixed.

10 (3) The Court may, on the application of a group member, the
11 representative party or the respondent in the proceeding, fix
12 another date so as to extend the period during which a group
13 member may opt out of the representative proceeding.

14 (4) Except with the leave of the Court, the hearing of a
15 representative proceeding must not commence earlier than the
16 date before which a group member may opt out of the
17 proceeding.

18 **13. Causes of action accruing after commencement of**
19 **representative proceeding**

20 (1) The Court may at any stage of a representative proceeding, on
21 application made by the representative party, give leave to
22 amend the application commencing the representative
23 proceeding so as to alter the description of the group.

24 (2) The description of the group may be altered so as to include a
25 person —

26 (a) whose cause of action accrued after the commencement
27 of the representative proceeding but before such date as
28 the Court fixes when giving leave; and

29 (b) who would have been included in the group (or would
30 have been included in the group with the consent of the

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1 person) if the cause of action had accrued before the
2 commencement of the proceeding.

3 (3) The date the Court fixes under subsection (2)(a) when giving
4 leave may be the date on which leave is given or another date
5 before or after that date.

6 (4) Where the Court gives leave under this section, it may also
7 make any other orders it thinks just, including an order relating
8 to the giving of notice to persons who, as a result of the
9 amendment, will be included in the group and the date before
10 which such persons may opt out of the proceeding.

11 **14. Situation of fewer than 7 group members**

12 If, at any stage of a representative proceeding, it appears likely
13 to the Court that there are fewer than 7 group members, the
14 Court may, on such conditions (if any) as it thinks fit —

- 15 (a) order that the proceeding continue under this Act; or
16 (b) order that the proceeding no longer continue under this
17 Act.

18 **15. Distribution costs excessive**

19 (1) In this section —

20 *monetary relief* means relief by way of payment of money to
21 group members (otherwise than in respect of costs).

22 (2) If the Court concludes, on application by the respondent, that
23 the cost to the respondent of identifying the group members and
24 distributing to them the amounts that would be ordered to be
25 paid to them if judgment were to be given in favour of the
26 representative party would be excessive having regard to the
27 likely total of those amounts, the Court may, by order —

- 28 (a) direct that the proceeding no longer continue under this
29 Act; or
30 (b) stay the proceeding so far as it relates to monetary relief.

1 (3) This section applies only in a representative proceeding where
2 the relief claimed is or includes monetary relief.

3 **16. Discontinuance of proceedings in certain circumstances**

4 (1) The Court may, on application by the respondent or of its own
5 motion, order that a proceeding no longer continue under this
6 Act where it is satisfied that it is in the interests of justice to do
7 so because —

- 8 (a) the costs that would be incurred if the proceeding were
9 to continue as a representative proceeding are likely to
10 exceed the costs that would be incurred if each group
11 member conducted a separate proceeding; or
12 (b) all the relief sought can be obtained by means of a
13 proceeding other than a representative proceeding under
14 this Act; or
15 (c) the representative proceeding will not provide an
16 efficient and effective means of dealing with the claims
17 of group members; or
18 (d) it is otherwise inappropriate that the claims be pursued
19 by means of a representative proceeding.

20 (2) If the Court dismisses an application under this section, the
21 Court may order that no further application under this section be
22 made by the respondent except with the leave of the Court.

23 (3) Leave for the purposes of subsection (2) may be granted subject
24 to such conditions as to costs as the Court considers just.

25 **17. Consequences of order for discontinuance of proceedings**

26 Where the Court makes an order under this Part that a
27 proceeding no longer continue under this Act —

- 28 (a) the proceeding may be continued as a proceeding by the
29 representative party on their own behalf against the
30 respondent; and

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- 1 (b) on the application of a person who was a group member
2 for the purposes of the proceeding, the Court may order
3 that the person be joined as an applicant in the
4 proceeding.

5 **18. Determination of issues where not all issues are common**

- 6 (1) If it appears to the Court that determination of the issue or
7 issues common to all group members will not finally determine
8 the claims of all group members, the Court may give directions
9 in relation to the determination of the remaining issues.
- 10 (2) In the case of issues common to the claims of some only of the
11 group members, the directions given by the Court may include
12 directions establishing a sub-group consisting of those group
13 members and appointing a person to be the sub-group
14 representative party on behalf of the sub-group members.
- 15 (3) Where the Court appoints a person other than the representative
16 party to be a sub-group representative party, that person, and not
17 the representative party, is liable for costs associated with the
18 determination of the issue or issues common to the sub-group
19 members.

20 **19. Individual issues**

- 21 (1) In giving directions under section 18, the Court may permit an
22 individual group member to appear in the proceeding for the
23 purpose of determining an issue that relates only to the claims of
24 that member.
- 25 (2) In such a case, the individual group member, and not the
26 representative party, is liable for costs associated with the
27 determination of the issue.

1 **20. Directions relating to commencement of further proceedings**

2 Where an issue cannot properly or conveniently be dealt with
3 under section 18 or 19, the Court may —

- 4 (a) if the issue concerns only the claim of a particular
5 member — give directions relating to the
6 commencement and conduct of a separate proceeding by
7 that member; or
- 8 (b) if the issue is common to the claims of all members of a
9 sub-group — give directions relating to the
10 commencement and conduct of a representative
11 proceeding in relation to the claims of those members.

12 **21. Substitution of representative party or sub-group**
13 **representative party**

- 14 (1) The Court may substitute another group member as
15 representative party or another person as sub-group
16 representative party if it appears to the Court that —
- 17 (a) the representative party or sub-group representative
18 party is not able to adequately represent the interests of
19 the group members or sub-group members (as
20 appropriate); or
- 21 (b) it is otherwise in the interests of justice to do so.
- 22 (2) An order for the substitution of a representative party may only
23 be made on application by a group member and an order for the
24 substitution of a sub-group representative party may only be
25 made on application by a sub-group member.
- 26 (3) When the Court substitutes a representative party or sub-group
27 representative party the Court may make such other orders as it
28 thinks fit.

29 **22. Stay of execution in certain circumstances**

30 Where a respondent in a representative proceeding commences
31 a proceeding in the Court against a group member, the Court

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1 may order a stay of execution in respect of any relief awarded to
2 the group member in the representative proceeding until the
3 other proceeding is determined.

4 **23. Settlement and discontinuance of representative proceeding**

5 (1) A representative proceeding cannot be settled or discontinued
6 without the approval of the Court.

7 (2) If the Court gives such an approval, it may make such orders as
8 are just with respect to the distribution of any money paid under
9 a settlement or paid into the Court.

10 **24. Settlement of individual claim of representative party**

11 (1) A representative party may, with leave of the Court, settle the
12 party's individual claim in whole or in part at any stage of the
13 representative proceeding.

14 (2) A representative party who is seeking leave to settle, or who has
15 settled, the party's individual claim may, with leave of the
16 Court, withdraw as representative party.

17 (3) Where a person has sought leave to withdraw as representative
18 party under subsection (2), the Court may, on the application of
19 a group member, make an order for the substitution of another
20 group member as representative party and may make such other
21 orders as it thinks fit.

22 (4) Before granting a person leave to withdraw as a representative
23 party the Court must be satisfied that —

24 (a) notice of the application has been given to group
25 members in accordance with Part 3 and in sufficient
26 time for them to apply to have another person
27 substituted as the representative party; and

28 (b) any application for the substitution of another group
29 member as a representative party has been determined.

- 1 (5) The Court may grant leave to a person to withdraw as
2 representative party subject to such conditions as to costs as the
3 Court considers just.

Part 3 — Notices

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25. Notice to be given of certain matters

- (1) Notice must be given to group members of the following matters in relation to a representative proceeding —
 - (a) the commencement of the proceeding and the right of the group members to opt out of the proceeding before a specified date (being the date fixed under section 12(1));
 - (b) an application by the respondent in the proceeding for the dismissal of the proceeding on the ground of want of prosecution;
 - (c) an application by a representative party seeking leave to withdraw under section 24 as representative party.
- (2) The Court may dispense with compliance with any or all of the requirements of subsection (1) where the relief sought in a proceeding does not include any claim for damages.
- (3) If the Court so orders, notice must be given to group members of the bringing into Court of money in answer to a cause of action on which a claim in the representative proceeding is founded.
- (4) Unless the Court is satisfied that it is just to do so, an application for the Court’s approval of a settlement of a representative proceeding must not be determined unless notice has been given to group members.
- (5) The Court may, at any stage, order that notice of any matter be given to a group member or group members.
- (6) Notice under this section must be given as soon as practicable after the happening of the event to which the notice relates.

26. Ancillary provisions for notices

- (1) The form and content of a notice required under this Part must be as approved by the Court.

- 1 (2) The Court must, by order, specify —
- 2 (a) who is to give the notice; and
- 3 (b) the way in which the notice is to be given.
- 4 (3) The Court’s order may include provision —
- 5 (a) directing a party to provide information relevant to the
- 6 giving of the notice; and
- 7 (b) relating to the costs of notice; and
- 8 (c) requiring that notice be given by means of press
- 9 advertisement, radio or television broadcast, or by any
- 10 other means.
- 11 (4) The Court must not order that notice be given personally to each
- 12 group member unless it is satisfied that it is reasonably
- 13 practicable, and not unduly expensive, to do so.
- 14 (5) A notice that concerns a matter for which the Court’s leave or
- 15 approval is required must specify the period within which a
- 16 group member or other person may apply to the Court, or take
- 17 some other step, in relation to the matter.
- 18 (6) A notice that includes or concerns conditions must specify the
- 19 conditions and the period, if any, for compliance.
- 20 (7) The failure of a group member to receive or respond to a notice
- 21 does not affect a step taken, an order made, or a judgment given,
- 22 in a proceeding.

Part 4 — Judgment

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27. Determination of proceedings

- (1) The Court may, in determining a matter in a representative proceeding, do any one or more of the following —
- (a) determine an issue of law;
 - (b) determine an issue of fact;
 - (c) make a declaration of liability;
 - (d) grant any equitable relief;
 - (e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies;
 - (f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members;
 - (g) make such other order as the Court thinks just.
- (2) In making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled.
- (3) Except when approving a settlement, the Court is not to make an award of damages in an aggregate amount without specifying amounts awarded in respect of individual group members unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.
- (4) Where the Court has made an order for the award of damages, the Court may give such directions (if any) as it thinks just in relation to —
- (a) the manner in which a group member is to establish their entitlement to share in the damages; and

- 1 (b) the manner in which any dispute regarding the
2 entitlement of a group member to share in the damages
3 is to be determined.

4 **28. Fund for distribution of money**

- 5 (1) Without limiting the Court's power to make provision for the
6 payment or distribution of money to group members, the Court
7 may provide for —
- 8 (a) the constitution and administration of a fund consisting
9 of the money to be distributed; and
- 10 (b) the payment by the respondent into the fund of a fixed
11 sum of money or of instalments on such terms as the
12 Court directs to meet the claims of group members; and
- 13 (c) entitlements to interest earned on the money in the fund.
- 14 (2) The costs of administering a fund are to be borne by the fund, or
15 by the respondent in the representative proceeding, as the Court
16 directs.
- 17 (3) Where the Court orders the constitution of a fund under this
18 section, the order must —
- 19 (a) require notice to be given to group members in such
20 manner as is specified in the order; and
- 21 (b) specify the manner in which a group member is to make
22 a claim for payment out of the fund and establish their
23 entitlement to the payment; and
- 24 (c) specify the period (the *distribution period*), ending no
25 earlier than 6 months after the day on which the order is
26 made, within which group members may make a claim
27 for payment out of the fund; and
- 28 (d) make provision in relation to the day (the *final*
29 *distribution day*) before which the fund is to be
30 distributed to group members who have established an
31 entitlement to be paid out of the fund.

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1 (4) If the fund has not been fully distributed before the end of the
2 distribution period, the Court may allow a group member to
3 make a claim after the end of the distribution period if it is just
4 to do so.

5 (5) On application by the respondent in the representative
6 proceeding after the final distribution day, the Court may make
7 such orders as are just for the payment from the fund to the
8 respondent of any money remaining in the fund.

9 **29. Effect of judgment**

10 A judgment given in a representative proceeding —

- 11 (a) must describe or otherwise identify the group members
12 who will be affected by it; and
13 (b) binds all such persons other than any person who has
14 opted out of the proceeding in accordance with this Act.

1 **Part 5 — Appeals**

2 **30. Bringing of appeal as representative proceeding**

3 (1) An appeal from a judgment of the Court in a representative
4 proceeding may itself be brought as a representative proceeding.

5 (2) The parties to an appeal brought as a representative proceeding
6 are as follows —

7 (a) in the case of an appeal by the representative party on
8 behalf of group members and in respect of the judgment
9 to the extent that it relates to issues common to the
10 claims of group members, the parties are the
11 representative party, as the representative of the group
12 members, and the respondent;

13 (b) in the case of an appeal by a sub-group representative
14 party on behalf of sub-group members in respect of the
15 judgment to the extent that it relates to issues common
16 to the claims of sub-group members, the parties to the
17 appeal are the sub-group representative party, as the
18 representative of the sub-group members, and the
19 respondent;

20 (c) in the case of an appeal by the respondent in respect of
21 the judgment generally, the parties are the respondent
22 and the representative party as the representative of the
23 group members;

24 (d) in the case of an appeal by the respondent in respect of
25 the judgment to the extent that it relates to issues
26 common to the claims of sub-group members, the
27 parties are the respondent and the sub-group
28 representative party as the representative of the
29 sub-group members;

30 (e) in the case of an appeal in respect of the determination
31 of an issue that relates only to a claim of an individual
32 group member, the parties to the appeal are that group
33 member and the respondent.

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- 1 (3) If the representative party or sub-group representative party
2 does not bring an appeal within the time provided for instituting
3 appeals, another member of the group or sub-group may, within
4 a further 21 days, bring an appeal as representing the group
5 members or sub-group members, as the case may be.
- 6 (4) A group member or sub-group member cannot opt out of a
7 representative proceeding that is an appeal proceeding.
- 8 (5) The Court may direct that notice of an appeal brought from a
9 judgment of the Court in a representative proceeding be given to
10 such person or persons, and in such manner, as the Court thinks
11 appropriate.
- 12 (6) The notice instituting an appeal in relation to issues that are
13 common to the claims of group members or sub-group members
14 must describe or otherwise identify the group members or
15 sub-group members, as the case may be, but need not specify
16 the names or number of those members.

Part 6 — Miscellaneous

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31. Costs

In a representative proceeding the Court must not award costs against a group member or sub-group member other than an award against —

- (a) a representative party; or
- (b) a sub-group representative party for costs associated with the determination of the issue or issues common to the sub-group members; or
- (c) an individual group member for costs associated with the determination of an issue that relates only to the claims of that member when the member has been permitted to appear in the proceeding for the purpose of determining that issue.

32. Suspension of limitation periods

- (1) On the commencement of a representative proceeding, the running of any limitation period that applies to the claim of a group member to which the proceeding relates is suspended.
- (2) The limitation period does not begin to run again unless either the member opts out of the proceeding in accordance with this Act or the proceeding, and any appeals arising from the proceeding, are determined without finally disposing of the group member’s claim.

33. Reimbursement of representative party’s costs

- (1) If the Court is satisfied, on application by a person who is or has been the representative party or a sub-group representative party for a representative proceeding, that the costs reasonably incurred by the person in relation to the proceeding 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

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1 of the excess be paid to the person out of damages awarded in
2 the proceeding.

3 (2) An order cannot be made under this section unless the Court has
4 made an award of damages in the proceeding.

5 (3) On an application for an order under this section the Court may
6 also make any other order it thinks just.

7 **34. General power of Court to make orders**

8 In any proceeding (including an appeal) conducted under this
9 Act, the Court may, of its own motion or on application by a
10 party or a group member, make any order the Court thinks
11 appropriate or necessary to ensure that justice is done in the
12 proceeding.

13 **35. Power of Court to make rules**

14 The power to make rules of court under the *Supreme Court*
15 *Act 1935* extends to the making of rules for regulating the
16 practice and procedure in relation to proceedings under this Act.

17 **36. Abolition of torts of maintenance and champerty**

18 (1) The torts of maintenance and champerty are abolished.

19 (2) This section does not affect any of the following —

20 (a) a cause of action in tort for maintenance or champerty
21 that accrued before the day on which this section comes
22 into operation;

23 (b) a rule of law as to the cases in which a contract is to be
24 treated as contrary to public policy or as otherwise
25 illegal.

26 **37. Review of Act**

27 (1) The Minister must review the operation and effectiveness of this
28 Act, and prepare a report based on the review, as soon as

1 practicable after the 5th anniversary of the day on which this
2 section comes into operation.

3 (2) The Minister must cause the report to be laid before each House
4 of Parliament as soon as practicable after it is prepared, but not
5 later than 12 months after the 5th anniversary.

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Defined terms

[This is a list of terms defined and the provisions where they are defined.

The list is not part of the law.]

Defined term	Provision(s)
Court	3
distribution period	28(3)
final distribution day	28(3)
group member	3
monetary relief	15(1)
person under disability	9(1)
proceeding	3
representative party	3
representative proceeding	3
respondent	3
sub-group member	3
sub-group representative party	3