

EXPLANATORY MEMORANDUM

CIVIL PROCEDURE (REPRESENTATIVE PROCEEDINGS) BILL 2019 (WA)

Overview of the Bill

The Civil Procedure (Representative Proceedings) Bill 2019 seeks to introduce a legislative representative proceedings regime in the Supreme Court of Western Australia, which regime is substantially modelled on Part IVA of the *Federal Court of Australia Act 1976* (Cth).

Part 1 – Preliminary

This Part deals with preliminary and commencement matters.

Clause 1 Short Title

Clause 1 provides that the Bill, once enacted, will be known as the *Civil Procedure (Representative Proceedings) Act 2019*.

Clause 2 Commencement

The clause provides that Part 1 will come into operation on the day the Act receives Royal Assent. The rest of the Act will come into operation on a day fixed by proclamation.

This is to ensure that any necessary practice directions or rules of court can be put in place before the new representative proceedings regime commences operation.

Clause 3 Terms used

This clause provides for definitions of terms used within the Act. Specifically, it provides that in this Act, unless the contrary intention appears,

- ‘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 (which relates to the establishment of a sub-group of members for the determination of issues common only to members of the sub-group);
- ‘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.

The definitions of ‘representative party’ and ‘sub-group representative party’ above recognise the possibility that a representative party may change in the course of a proceeding given that the Court is empowered to order the substitution of a representative party or sub-group representative party. The definitions seek to provide certainty of the legitimacy of a substituted representative party or substituted sub-group representative party.

Clause 4 Proceedings to which Act applies

Clause 4(1) provides that this Act applies to a proceeding commenced after the commencement of this section, whether the cause of action arose before or after that commencement.

Clause 4(2) provides that this Act does not prevent the commencement or continuance of proceedings under any provision of the rules of the Court providing for proceedings by or against a person as representing others who have the same interest in proceedings.

The procedural reform sought by this Bill do not confer any new legal rights but expand on existing procedure for representative proceedings contemplated in the *Rules of the Supreme Court 1971 (WA)*.

It should be noted that Order 18 Rule 12 of the *Rules of the Supreme Court 1971 (WA)*, which relates to represented proceedings, remains unaffected by this Bill.

Clause 5 Act binds Crown

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

Part 2 – Conduct of representative proceeding

Clause 6 Commencement of representative proceeding

This clause sets out the circumstances in which representative proceedings may be commenced.

Clause 6(1) provides that a proceeding may be commenced as a representative proceeding if seven or more persons have claims against the same person; and the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and the claims of all those persons give rise to a substantial common issue of law or fact.

Clause 6(2) provides that a representative proceeding is a proceeding commenced by one or more of the persons described in clause 6(1) on behalf of and as representing some or all of them.

Clause 6(3) provides that a representative proceeding may be commenced whether or not the relief sought is or includes equitable relief; or consists of, or includes, damages; or includes claims for damages that would require individual assessment; or is the same for each person represented.

Clause 6(4) provides that a representative proceeding may be commenced whether or not the proceeding is concerned with separate contracts or transactions between the respondent in the proceeding and individual group members; or involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.

Clause 7 Standing

Clause 7(1) provides that if a proceeding can be commenced as a representative proceeding, a person who has a sufficient interest to commence the proceeding on their own behalf against another person has a sufficient interest to commence the proceeding against that other person as a representative proceeding on behalf of other group members.

Clause 7(2) provides express permission to commence representative proceedings on behalf of other persons against more than one defendant irrespective of whether or not the person and each of those other persons have a claim against every defendant in the proceeding.

In so doing, clause 7(2) avoids the effect of 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.

Clause 7(3) provides that a person who has commenced a representative proceeding retains a sufficient interest to continue the proceeding and to appeal against a decision in the proceeding even if the person ceases to have a claim against the respondent.

Clause 8 Consent to be group member

Clause 8(1) provides that the consent of a person to be a group member in a representative proceeding is not required unless consent is required under subsection (2). It is to be noted that under clause 12 below a group member may opt out of a representative proceeding.

Clause 8(2) provides that none of the following persons is a group member in a representative proceeding unless the person gives written consent to being a group member:

- the Commonwealth, a State or a Territory;
- a Minister of the Commonwealth, a State or a Territory;
- a body corporate established for a public purpose by a law of the Commonwealth, a State or a Territory, other than an incorporated company or association;
- an officer of the Commonwealth, a State or a Territory, in their capacity as such an officer.

Clause 9 Person under disability

Clause 9(1) provides that 'person under disability' means a person who, under the rules of the Court, is not permitted to bring a proceeding except by the person's next friend. The rules dealing with a person under disability are under Order 70 of the *Rules of the Supreme Court 1971* (WA).

Clause 9(2) provides that it is not necessary for a person under disability to have a next friend merely in order to be a group member.

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

Clause 10 Representative proceeding not be commenced in certain circumstances

This clause provides that a representative proceeding cannot be commenced if the proceeding would be concerned only with claims in respect of which the Court has jurisdiction solely by virtue of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (WA) or a corresponding law of the Commonwealth or another State or Territory.

Clause 11 Originating process

Clause 11(1) provides that an application commencing a representative proceeding, or a document filed in support of such an application, must, in addition to any other matters required to be included:

- describe or otherwise identify the group members to whom the proceeding relates; and
- specify the nature of the claims made on behalf of the group members and the relief claimed; and
- specify the questions of law or fact common to the claims of the group members.

Clause 11(2) provides that in describing or otherwise identifying group members for the purposes of this section, it is not necessary to name, or specify the number of, the group members.

Clause 12 Right of group member to opt out

Clause 12(1) provides that the Court must fix a date before which a group member may opt out of a representative proceeding.

Clause 12(2) provides that a group member may opt out of the representative proceeding by written notice given under the rules of the Court before the date fixed under clause 12(1).

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

Clause 12(4) provides that except with the leave of the Court, the hearing of a representative proceeding must not commence earlier than the date before which a group member may opt out of the proceeding.

Clause 13 Causes of action accruing after commencement of representative proceeding

Clause 13(1) provides that the Court may at any stage of a representative proceeding, on application made by the representative party, give leave to amend the application commencing the representative proceeding so as to alter the description of the group.

Clause 13(2) provides that the description of the group may be altered to include a person:

- whose cause of action accrued after the commencement of the representative proceeding but before such date as the Court fixes when giving leave; and
- who would have been included in the group (or would have been included in the group with the consent of the person) if the cause of action had accrued before the commencement of the proceeding.

This clause enables as many potential group members as possible to be included in order to avoid, so far as possible, the need for separate proceedings.

Clause 13(3) provides that the date the Court fixes under subsection (2)(a) when giving leave may be the date on which leave is given or another date before or after that date.

Clause 13(4) provides that where the Court gives leave under this section, it may also make any other orders it thinks just, including an order relating to the giving of notice to persons who, as a result of the amendment, will be included in the group and the date before which such persons may opt out of the proceeding.

Clause 14 Situation of fewer than 7 group members

This clause provides that if, at any stage of a representative proceeding, it appears likely to the Court that there are fewer than seven group members, the Court may, on such conditions (if any) as it thinks fit, either order that the proceeding continue under this Act or order that the proceeding no longer continue under this Act.

Clause 15 Distribution costs excessive

Clause 15(1) provides that 'monetary relief' means relief by way of payment of money to group members, otherwise than in respect of costs.

Clause 15(2) provides that if the Court concludes on application by the respondent that the cost to the respondent of identifying the group members and distributing to them the amounts that would be ordered to be paid to them if judgment were to be given in favour of the representative party would be excessive having regard to the likely total of those amounts, the Court may, by order:

- direct that the proceeding no longer continue under this Act; or
- stay the proceeding so far as it relates to monetary relief.

Clause 15(3) provides that this section only applies in a representative proceeding where the relief claimed is or includes monetary relief.

Clause 16 Discontinuance of proceedings in certain circumstances

Clause 16(1) provides that the Court may, on application by the respondent or of its own motion, order that a proceeding no longer continue under this Act where it is satisfied that it is in the interests of justice to do so because:

- the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
- all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Act; or
- the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
- it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

Clause 16(2) provides that if the Court dismisses an application under this section, the Court may order that no further application under this section be made by the respondent except with the leave of the Court.

Clause 16(3) provides that leave for the purposes of subsection (2) may be granted subject to such conditions as to costs as the Court considers just.

Clause 17 Consequences of order for discontinuance of proceedings

This clause provides that where the Court makes an order under Part 2 that a proceeding no longer continue under this Act:

- the proceeding may be continued as a proceeding by the representative party on their own behalf against the respondent; and
- on the application of a person who was a group member for the purposes of the proceeding, the Court may order that the person be joined as an applicant in the proceeding.

Clause 18 Determination of issues where not all issues are common

Clause 18(1) provides that if it appears to the Court that determination of the issue or issues common to all group members will not finally determine the claims of all group members, the Court may give directions in relation to the determination of the remaining issues.

Clause 18(2) provides that in the case of issues common to the claims of some only of the group members, the directions given by the Court may include directions establishing a sub-group consisting of those group members and appointing a person to be the sub-group representative party on behalf of the sub-group members.

Clause 18(3) provides that where the Court appoints a person other than the representative party to be a sub-group representative party, that person, and not the representative party, is liable for costs associated with the determination of the issue or issues common to the sub-group members.

Clause 19 Individual issues

Clause 19(1) provides that in giving directions under section 18, the Court may permit an individual group member to appear in the proceeding for the purpose of determining an issue that relates only to the claims of that member.

Clause 19(2) provides that in a case described in clause 19(1), the individual group member, and not the representative party, is liable for costs associated with the determination of the issue.

Clause 20 Directions relating to commencement of further proceedings

This clause provides that where an issue cannot properly or conveniently be dealt with under section 18 or 19, the Court may:

- where the issue concerns only the claim of a particular member, give directions relating to the commencement and conduct of a separate proceeding by that member; or
- where the issue is common to the claims of all members of a sub-group, give directions relating to the commencement and conduct of a representative proceeding in relation to the claims of those members.

Clause 21 Substitution of representative or sub-group representative party

Clause 21(1) provides that the Court may substitute another group member as representative party or another person as sub-group representative party if it appears to the Court that:

- the representative party or sub-group representative party is not able to adequately represent the interests of the group members or sub-group members (as appropriate); or
- it is otherwise in the interests of justice to do so.

Clause 21(1) is largely modelled on section 33T of the *Federal Court of Australia Act 1976* (Cth). However, clause 21(1) differs from section 33T in that it provides that the Court may also substitute a representative or sub-group party if it appears to the Court that it is in the interests of justice to do so, rather than solely being empowered to do so because it appears to the Court that the representative party or sub-group representative party is not able to adequately represent the interests of the group members or sub-group members (as appropriate). Clause 21(1) therefore provides the Court with additional flexibility.

Clause 21(2) provides that an order for the substitution of a representative party may only be made on application by a group member and an order for the substitution of a sub-group representative party may only be made on application by a sub-group member.

Clause 21(3) provides that when the Court substitutes a representative party or sub-group representative party the Court may make such other orders as it thinks fit.

Clause 22 Stay of execution in certain circumstances

This clause provides that where a respondent in a representative proceeding commences a proceeding in the Court against a group member, the Court may order a stay of execution in respect of any relief awarded to the group member in the representative proceeding until the other proceeding is determined.

Clause 23 Settlement and discontinuance of representative proceeding

Clause 23(1) provides that a representative proceeding cannot be settled or discontinued without the approval of the Court.

Clause 23(2) provides that if the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

Clause 24 Settlement of individual claim of representative party

Clause 24(1) provides that a representative party may, with leave of the Court, settle the party's individual claim in whole or in part at any stage of the representative proceeding.

Clause 24(2) provides that a representative party who is seeking leave to settle, or who has settled, the party's individual claim may, with leave of the Court, withdraw as representative party.

Clause 24(3) provides that where a person has sought leave to withdraw as representative party under 24(2), the Court may, on the application of a group member, make an order for the substitution of another group member as representative party and may make such other orders as it thinks fit.

Clause 24(4) provides that before granting a person leave to withdraw as a representative party the Court must be satisfied that:

- notice of the application has been given to group members in accordance with Part 3 and in sufficient time for them to apply to have another person substituted as the representative party; and
- any application for the substitution of another group member as a representative party has been determined.

Clause 24(5) provides that the Court may grant leave to a person to withdraw as representative party subject to such conditions as to costs as the Court considers just.

Part 3 – Notices

Clause 25 Notice to be given of certain matters

Clause 25(1) provides that notice must be given to group members of the following matters in relation to a representative proceeding:

- 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));
- an application by the respondent in the proceeding for the dismissal of the proceeding on the ground of want of prosecution;
- an application by a representative party seeking leave to withdraw as representative party under section 24.

Clause 25(2) provides that the Court may dispense with compliance with any or all of the requirements of 25(1) where the relief sought in a proceeding does not include any claim for damages.

Clause 25(3) provides that 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.

Clause 25(4) provides that 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.

Clause 25(5) provides that the Court may, at any stage, order that notice of any matter be given to a group member or group members.

Clause 25(6) provides that notice under section 25 must be given as soon as practicable after the happening of the event to which the notice relates.

Clause 26 Ancillary provisions for notices

Clause 26(1) provides that the form and content of a notice required under Part 3 must be approved by the Court.

Clause 26(2) provides that the Court must, by order, specify who is to give the notice and the way in which notice is to be given.

Clause 26(3) provides that the Court's order may include provision:

- directing a party to provide information relevant to the giving of the notice; and
- relating to the costs of notice; and

- requiring that notice be given by means of press advertisement, radio or television broadcast, or by any other means.

Clause 26(4) provides that the Court must not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.

Clause 26(5) provides that a notice that concerns a matter for which the Court's leave or approval is required must specify the period within which a group member or other person may apply to the Court, or take some other step, in relation to the matter.

Clause 26(6) provides that a notice that includes or concerns conditions must specify the conditions and the period, if any, for compliance.

Clause 26(7) provides that the failure of a group member to receive or respond to a notice does not affect a step taken, an order made, or a judgment given, in a proceeding.

Part 4 – Judgment

Clause 27 Determination of proceedings

Clause 27(1) provides that the Court may, in determining a matter in a representative proceeding, do any one or more of the following:

- determine an issue of law;
- determine an issue of fact;
- make a declaration of liability;
- grant any equitable relief;
- 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;
- award damages in an aggregate amount without specifying amounts awarded in respect of individual group members;
- make such other order as the Court thinks just.

Clause 27(2) provides that 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.

Clause 27(3) provides that 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.

Clause 27(4) provides that 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:

- the manner in which a group member is to establish their entitlement to share in the damages; and
- the manner in which any dispute regarding the entitlement of a group member to share in the damages is to be determined.

Clause 28 Fund for distribution of money

Clause 28(1) provides that without limiting the Court's power to make provision for the distribution of money to group members, the Court may provide for:

- the constitution and administration of a fund consisting of the money to be distributed; and
- the payment by the respondent into the fund of a fixed sum of money or of instalments on such terms as the Court directs to meet the claims of group members; and
- entitlements to interest earned on the money in the fund.

Clause 28(2) provides that the costs of administering a fund are to be borne by the fund, or by the respondent in the representative proceeding, as the Court directs.

Clause 28(3) provides that where the Court orders the constitution of a fund under section 28, the order must:

- require notice to be given to group members in such manner as is specified in the order; and
- specify the manner in which a group member is to make a claim for payment out of the fund and establish their entitlement to the payment; and
- specify the period, ending no earlier than six months after the day on which the order is made, within which group members may make a claim for payment out of the fund (which period is defined as the 'distribution period'); and
- make provision in relation to the day before which the fund is to be distributed to group members who have established an entitlement to be paid out of the fund (which day is defined as the 'final distribution day').

Clause 28(4) provides that if the fund has not been fully distributed before the end of the distribution period, the Court may allow a group member to make a claim after the end of the distribution period if it is just to do so.

Clause 28(5) provides that on application by the respondent in the representative proceeding after the final distribution day, the Court may make such orders as are just for the payment from the fund to the respondent of any money remaining in the fund.

Clause 29 Effect of judgment

Clause 29 provides that a judgment given in a representative proceeding must describe or otherwise identify the group members who will be affected by it and that such a judgment binds all such persons other than any person who has opted out of the proceeding in accordance with this Act.

Part 5 – Appeals

Clause 30 Bringing of appeal as representative proceeding

Clause 30(1) provides that an appeal from a judgment of the Court in a representative proceeding may itself be brought as a representative proceeding.

Clause 30(2) provides that the parties to an appeal brought as a representative proceeding are as follows:

- in the case of an appeal by the representative party on behalf of group members and in respect of the judgment to the extent that it relates to issues common to the claims of group members, the parties are the representative party, as the representative of the group members, and the respondent;
- in the case of an appeal by a sub-group representative party on behalf of sub-group members in respect of the judgment to the extent that it relates to issues common to the claims of sub-group members, the parties to the appeal are the sub-group representative party, as the representative of the sub-group members, and the respondent;
- in the case of an appeal by the respondent in respect of the judgment generally, the parties are the respondent and the representative party as the representative of the group members;
- in the case of an appeal by the respondent in respect of the judgment to the extent that it relates to issues common to the claims of sub-group members, the parties are the respondent and the sub-group representative party as the representative of the sub-group members;
- in the case of an appeal in respect of the determination of an issue that relates only to a claim of an individual group member, the parties to the appeal are that group member and the respondent.

Clause 30(3) provides that if the representative party or sub-group representative party does not bring an appeal within the time provided for instituting appeals, another member of the group or sub-group may, within a further 21 days, bring an appeal as representing the group members or sub-group members, as the case may be.

Clause 30(4) provides that a group member or sub-group member cannot opt out of a representative proceeding that is an appeal proceeding.

Clause 30(5) provides that the Court may direct that notice of an appeal brought from a judgment of the Court in a representative proceeding be given to such person or persons, and in such manner, as the Court thinks appropriate.

Clause 30(6) provides that the notice instituting an appeal in relation to issues that are common to the claims of group members or sub-group members must describe or otherwise identify the group members or sub-group members, as the case may be, but need not specify the names or number of those members.

Part 6 – Miscellaneous

Clause 31 Costs

Clause 31 provides that in a representative proceeding the Court must not award costs against a group member or sub-group member other than an award against:

- a representative party; or
- a sub-group representative party for costs associated with the determination of the issue or issues common to the sub-group members; or
- 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.

Clause 32 Suspension of limitation periods

Clause 32(1) provides that 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.

Clause 32(2) provides that 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.

Clause 33 Reimbursement of representative party's costs

Clause 33(1) provides that 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 of the excess be paid to the person out of damages awarded in the proceeding.

Clause 33(2) provides that an order cannot be made under section 33 unless the Court has made an award of damages in the proceeding.

Clause 33(3) provides that on an application for an order under section 33 the Court may also make any other order it thinks just.

Clause 34 General power of Court to make orders

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

Clause 35 Power of Court to make rules

Clause 35 provides that the power to make rules of court under the *Supreme Court Act 1935* (WA) extends to the making of rules for regulating the practice and procedure in relation to proceedings under this Act.

This clause was included to remove any doubt as to whether the existing rule making powers of the Supreme Court under the *Supreme Court Act 1935* (WA) are adequate for rules that may be required for representative proceedings.

Clause 36 Review of Act

Clause 36(1) provides that the Minister must review the operation and effectiveness of this Act, and prepare a report based on the review, as soon as practicable after the 5th anniversary of the day on which this section comes into operation.

Clause 36(2) provides that the Minister must cause the report to be laid before each House of Parliament as soon as practicable after it is prepared, but not later than 12 months after the 5th anniversary.