CIVIL PROCEDURE (REPRESENTATIVE PROCEEDINGS) BILL 2021

Second Reading

Resumed from 30 August.

HON MATTHEW SWINBOURN (East Metropolitan — Parliamentary Secretary) [3.53 pm] — in reply: I will now give my reply to the second reading debate; the only other member who spoke on this bill was Hon Nick Goiran, and I thank the honourable member for his in-depth contribution to the second reading debate on the important Civil Procedure (Representative Proceedings) Bill 2021. This bill will increase access to justice for Western Australians and, on being passed, will fulfil a McGowan Labor government election commitment.

I also appreciate the fact that the member kindly indicated what matters he will raise during Committee of the Whole House. I have quite a lengthy reply, which will hopefully address some of the important questions that the member raised during his second reading contribution. In particular, I thank the member for taking us through the history of this reform, which was reported on by the Law Reform Commission of Western Australia's *Representative proceedings: Project 103—Final report* of 2015 and its *Maintenance and Champerty in Western Australia: Project 110: Final report* of 2020. I was not familiar with the word "champerty" until this bill came forward. I am sure most other members were not familiar with the word either. I join the member in thanking the then commissioners, Dr Cox, Mr Sefton and Dr Zimmermann, and the principal project writer, our learned friend Mr Tim Hammond, for the 2005 report, which forms the basis of the bill before us, for their hard work and their important work.

The honourable member began by speaking to the foreword of the report. In particular, he took the house through the commission's summary of the questions posed by the commission in its 2013 discussion paper, which preceded the final report. I will speak to those questions of the commission, which were raised by the member, noting that the answer to those questions formed the basis of the commission's final recommendations.

The member first asked whether the bill includes an equivalent provision to section 116(2) of part 10 of the Civil Procedure Act 2005, which is a New South Wales act, to expressly permit closed class actions. The short answer to that question is no, it does not. As the member is likely aware, the project 103 final report recommended that such a provision not be included. That is found at recommendation 6 of the final report. For the benefit of the house, I will provide some more context to that recommendation. The commission's discussion paper invited submissions on whether any legislative amendment in Western Australia should include an equivalent provision to section 116(2) of part 10 of the Civil Procedure Act of New South Wales. The commission received submissions that were fairly balanced with respect to whether an express provision similar to section 116(2) ought to be included. However, the Law Reform Commission of WA determined that this would be unnecessary because closed classes are permitted in representative proceedings under part IVA of the Federal Court of Australia Act 1976.

Hon Nick Goiran: Is it 116? I have 166.

Hon MATTHEW SWINBOURN: Sorry, it should be 166. If I said 116, I meant 166, which is alarming because 166 is written in front of me. I thank the member for picking that up.

Therefore, the 2015 report recommended that the New South Wales provision not be adopted. The full Federal Court found that part IVA of the Federal Court of Australia Act 1976 allows for representative proceedings to be run on a closed class basis as well as an open class basis; that is, the representative party can expressly bring the claim on behalf of only some of the persons who have claims against the respondent. The court found that a closed class group was permitted by the wording of section 33C(1) of the Federal Court of Australia Act 1976 in that "a proceeding may be commenced by one or more of those persons as representing some or all of them". That case was the Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd [2007] 164 FCR 275. The Law Reform Commission noted further that the New South Wales provision has only had limited judicial consideration and is relatively untested. Additionally, the Law Reform Commission noted that the principal rationale underpinning the opt-out device is to ensure that those claimants who, as a result of economic and non-economic barriers, are unable to take positive steps to be included in representative action—that is, opt in—are not deprived of access to the legal system. These are individuals who will most likely be harmed by the implementation of an automatic closed class mechanism. Despite not including an express provision the bill will, in effect, allow closed class actions as clause 6(2) also uses the wording —

> A representative proceeding is a proceeding commenced by one or more of those persons on behalf of and as representing some or all of them.

This mirrors section 33C(1) of the Federal Court of Australia Act 1976. The court will be able to scrutinise each representative proceeding, to satisfy itself that the class chosen is appropriate.

The member's second question was whether the bill includes an equivalent provision to section 158(2) of the Civil Procedure Act 2005, again a New South Wales act, to expressly allow a representative action against multiple defendants, irrespective of whether the persons affected have a claim against each defendant in the action. I can

advise the member that his understanding is correct; the answer to the question is yes. Again, it may assist members to explain this provision in more detail. The Law Reform Commission received submissions in response to this issue that were generally in favour of including an express provision similar to section 158(2) of the Civil Procedure Act 2005. In its 2015 final report, the Law Reform Commission recommended some deviations from the model in part IVA of the Federal Court of Australia Act. One of these recommendations was the insertion of a provision in the same terms as section 158(2) of the Civil Procedure Act. This section was included in the New South Wales legislation to overcome the decision in Philip Morris (Australia) Ltd & Ors v Nixon & Ors (2000) 170 ALR 487, in which the full court of the Federal Court concluded that all group members in a representative proceeding must have a claim against each of the named defendants in the proceeding. Accordingly, clause 7(2) of the bill has been included. This clause provides —

> A person may commence a representative proceeding on behalf of other persons against more than one respondent irrespective of whether or not the person and each of those other persons have a claim against every respondent in the proceeding.

Because of this clause, it is not necessary for every group member and the representative party to have a claim against every defendant in a proceeding. This result is consistent with the bill's emphasis on access to justice. Further, as a practical matter, allowing for representative proceedings that encompass all relevant group members and defendants encourages the efficient resolution of claims by avoiding the need for multiple separate actions arising out of the same circumstances.

I will now turn to the some of the honourable member's observations and comments. The member noted that it appears the bill has captured, firstly, the possible need for codification of the role of the representative plaintiff and requirements for removal of a representative plaintiff, and, secondly, the suspension of limitation periods and the status of class members' claims in the event a class is disbanded by order of the court. I can confirm that the bill addresses the substitution of the representative plaintiff and their removal is dealt with in clause 21 of the bill, while the suspension of limitation period is dealt with in clause 32 of the bill. However, the bill does not expressly codify the role of the representative plaintiff. As the member pointed out, the Law Reform Commission of Western Australia considered whether this provision should be significantly broadened to codify some more specific standards in relation to the role and responsibilities of the representative plaintiff. In the end, however, the commission decided that this was not necessary and recommended only that the provision be slightly broadened so as to provide the court with the ability to remove and substitute a representative when it is in the interest of justice to do so, as suggested by the then Chief Justice in his submission to the commission.

The honourable member also noted the commission's inquiry into whether there should be a more prescriptive legislative framework in relation to security for costs in representative proceedings. I understand that the member foreshadowed an intention to unpack this issue during the Committee of the Whole stage, but I will take the opportunity to address this issue as it was considered by the Law Reform Commission of WA. In its discussion paper and final report, it considered whether a Western Australian representative proceeding regime ought to include a prescriptive framework in relation to security for costs. On pages 50 and 51 of its final report on the matter, the Law Reform Commission noted —

> In its Discussion Paper, the Commission expressed the tentative view that the existing law with respect to security for costs can adequately deal with such issues to the extent they arise in representative proceedings. Submissions that the Commission received almost uniformly endorsed that view. These included submissions from the Chief Justice of Western Australia, the Western Australian Bar Association, the Law Society of Western Australia and the Law Council of Australia.
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> …
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> The Commission accordingly does not recommend that a specific legislative provision be included in relation to security for costs in the proposed Western Australian legislative regime for representative actions.

The development of this bill was guided by the Law Reform Commission's project 103 recommendations and observations. The bill does not include a provision addressing security of costs, because the Law Reform Commission recommended that such a provision not be included. It is important to note that the court will be able to use its discretion, under order 25 of the Rules of the Supreme Court 1971, as to whether the particular circumstances of the case warrant an order for security of costs. Over 30 years of jurisprudence in this area will assist the court in reaching its decisions.

The member then correctly observed that the first two recommendations of the final report are addressed in the bill, namely —

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* …

The member then foreshadowed his intention to ask questions about recommendation 3 of the commission's final report —

> 3. that Order 18 Rule 12 of the RSC be retained.

Firstly, I will speak to the general issue. The Law Reform Commission noted that the level of complexity required in the comprehensive representative proceedings regime is such as to require legislation rather than amendment of the existing rule-based scheme. The Law Reform Commission also concluded that a legislative approach would provide certainty and clarity. Introducing the bill in its current form is therefore more prudent than simply requesting that the Supreme Court amend its rules. I might also add that the Parliament, rather than the court, will decide the content of the scheme, which I think is a more appropriate mechanism. I think every other member of the house would probably agree with that sentiment, as well, including Hon Nick Goiran, but I will not speak on his behalf, of course.

The bill will provide for a comprehensive representative proceedings regime based on the federal scheme. The bill will provide considerably more certainty for litigants and the court than the existing order 18 rule 12. For instance, order 18 rule 12 simply provides that when numerous people have the same interest in any proceeding, they may bring representative proceedings. However, the bill will provide the specific and clear requirements that the group must comprise seven or more persons, which is clause 6(1)(a), and that the claims of all group members must be in respect of, or arise out of, the same, similar or related circumstances and give rise to a common issue of law or fact, which is clauses 6(1)(b) and (c). Unlike order 18 rule 12, the bill will also make specific provision for matters such as notice to group members, limitation periods, appeals and costs.

Another example of the benefits of the scheme in the bill over the existing rule-based scheme is limitation periods. As I have already noted, the bill will address the suspension of limitation periods, in clause 32, which removes any need for a group member to commence an individual proceeding to protect himself or herself from expiry of the relevant limitation period in the event that the representative action is dismissed on a procedural basis, without judgement being given on the merits. However, in its 2015 report, the Law Reform Commission indicated —

> While Order 18 Rule 12 of the RSC lacks detail and clarity, it nonetheless is likely to have utility for some representative proceedings even if a legislative model for representative actions is introduced.

Further, the commission noted that South Australia has two separate procedures. Whether a group of litigants will choose the rule-based regime or the statutory regime in the bill will depend on the particular circumstances of their case. The types of circumstances in which individuals would prefer the rule-based regime may involve cases of little complexity that in the first instance do not meet the threshold requirement to commence an action under the statutory regime.

As the member rightly observed, whether the rules are retained, amended or repealed is a matter entirely for the Supreme Court. The member then spoke to recommendations 4 through to 7 of the final report and observed or sought confirmation that those recommendations are being addressed in the Civil Procedure (Representative Proceedings) Bill 2021 or otherwise adhered to. I can confirm that is the case in respect of recommendations 4, 5, 6 and 7, noting that I have spoken in detail already about sections 158(2) and 166(2) of the Civil Procedure Act 2005 (NSW).

Hon Nick Goiran then turned to consider the recommendations of the Law Reform Commission of Western Australia's *Maintenance and champerty in Western Australia: Project 110: Final report*. In particular, the honourable member correctly noted that the bill will implement recommendation 1 of that report —

> 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.

This is dealt with in clause 36 of the bill. The honourable member also queried the government's position on recommendations 2 and 3 of the maintenance and champerty report. I note that recommendation 2 states that if the Civil Procedure (Representative Proceedings) Bill 2019 is passed, that the government write to the Supreme Court recommending that it 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 …

Following the passage of this bill, the government will write to the Supreme Court recommending that the court consider those recommendations. Similarly, in relation to recommendation 3, following passage of the bill, the government will write to the heads of all Western Australian court jurisdictions requesting 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. As the member will be aware, the courts are independent of government and are responsible for the case management of matters before them. It is ultimately a matter for the courts to decide whether they will adopt these recommendations. As I have indicated, the government will write to those heads of jurisdiction and to the Supreme Court.

Finally, as I understand it, the member sought an update to the answer to question without notice asked on 2 September 2021. I can confirm that there is no update for that answer. Insofar as the member's question relates to recommendations 2 and 3, I have already advised that the government intends to write to court jurisdictions in accordance with recommendations 2 and 3 of project 110 once the bill is passed.

I thank the member for his contribution—my notes say "all" members, but only one member contributed to the second reading debate. I am sure that other members, by their presence, are contributing in their own way. I thank the members for their contribution to this debate and for their support for the bill, which will increase access to justice for all Western Australians and fulfil a McGowan Labor government election commitment. I would also like to take the opportunity to thank Vince Morabito, a professor of law at Monash University and pre-eminent expert in class actions in Australia, for the invaluable assistance that he has provided to the Department of Justice during drafting of the reform and for his contributions to the representative proceedings reports of the Law Reform Commission of Western Australia. We are very grateful for his generosity and expertise in assisting the advisers and government in this complex area of law.

I commend the bill to the house.

Question put and passed.

Bill read a second time.

Committee

The Deputy Chair of Committees (Hon Dr Sally Talbot) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 1: Short title —

Hon NICK GOIRAN: As we start our consideration of clause 1, I indicate that this is a 37-clause bill and we will most definitely need to provide some scrutiny of the 37 clauses. However, as I discussed previously, during debate of a bill when we were last sitting, that is not necessary on occasion. Occasions when that might not be necessary are occasions when the government has consulted with experts outside of government. That has not happened in this instance, but the government can in part explain or defend that insofar as this matter has had, at its heart, two Law Reform Commission reports. It is not wildly unreasonable for the government to defend itself in this instance by saying that the Law Reform Commission has effectively done the consultation process for it. Nevertheless, I think a small number of matters are worthy of further examination.

I thank the parliamentary secretary for his comprehensive response in reply to the second reading debate. I think this demonstrates some benefit in governments, of whatever persuasion, pausing prior to delivering a reply to the second reading debates. Conveniently, time allowed for that yesterday and today, but that is a rare occurrence, generally speaking. Often, a minister or parliamentary secretary is expected to reply to a substantial second reading debate on the fly, and that is suboptimal. What we have had today demonstrates a far superior course of action, so I thank the parliamentary secretary and the advisers for the comprehensive response to the issues raised in the second reading debate.

A few matters arise from that, and it seems that now, under clause 1, might be the best time to have a brief general discussion about order 18, rule 12, of the Rules of the Supreme Court. This matter was noted by the Law Reform Commission in its third recommendation. The third recommendation in *Representative proceedings: Project 103—Final report* from June 2015 was that order 18, rule 12, of the Rules of the Supreme Court be retained, and the parliamentary secretary has indicated that that is the intention. Evidently, there is a difference between the rules-based scheme and the regime that we are about to pass. If there were not, there would be no need for the regime to be passed.

In the parliamentary secretary's reply, he mentioned that one of the thresholds to meet the requirements of order 18, rule 12, is that there must be numerous litigants, as I understand it. The word "litigants" may not be correct; it may be "plaintiffs", but according to my notes I certainly recall the parliamentary secretary mentioning the word "numerous". How has the term "numerous" been interpreted by the courts, particularly when we consider that the regime before us intends the threshold to be seven litigants?

Hon MATTHEW SWINBOURN: Before I get to the answer on this one, I would like to reinforce my appreciation for the advisers and for the overnight opportunity that allows me to provide a comprehensive reply. I would like

to think that was all my own work, but that would be misleading the chamber! It is helpful when we are able to do that.

In relation to the member's question about "numerous", I preface my answer by indicating that very few class actions have been commenced under order 18 rule 12 of the Rules of the Supreme Court 1971. The idea is that numerous persons must have the same interest to meet the threshold of numerous persons. The only guidance we have been able to find on that is from the case Re Braybrook; Braybrook v Wright [1916] WN 74, which states that five persons would not normally be regarded as numerous. We have not been able to establish any guidance beyond that. There may be some out there, but when the advisers were looking at this issue, they were not able to go any further than that. According to that decision, five was not considered numerous and we have set the bar at seven. Maybe six would be numerous, but that would be just speculation.

Hon NICK GOIRAN: Is it that—I am happy to take the answer by interjection if it assists—in that case it was determined that five is inadequate? The response was that five would not normally be considered to be numerous, almost indicating that they were saying, "Nevertheless, in this instance, we will let it go through the gate." Or was it the case that there were five, and they said, "Look, that wouldn't be considered to be numerous and therefore we are not allowing you to have a class action"?

Hon MATTHEW SWINBOURN: We do not know the outcome of that case in 1916. The advisers are not sure what the ultimate outcome was. It is just that when they were looking at that decision, that is the authority they found for what "numerous" might mean. It obviously illustrates the problem with the current regime—that is, the lack of clarity on "numerous" and those sorts of things. I think the member in his contribution to the second reading debate mentioned jurisdiction shopping—to try to get that. My guess is that the Western Australian jurisdiction has been avoided because of the uncertainty around that particular order 18 rule 12.

Hon NICK GOIRAN: Is that the case in other jurisdictions? We are going to create this threshold of seven persons. I know that that is the case with the federal scheme, but do each of the other jurisdictions also maintain that as the gateway number?

Hon MATTHEW SWINBOURN: Yes.

Hon NICK GOIRAN: Other than to say that the model is the federal system, which allows for seven, why is it considered that seven is a significant number as opposed to, as the parliamentary secretary said earlier, six, five or eight? What is special about seven?

Hon MATTHEW SWINBOURN: I am not sure we would be able to say exactly why it was seven, but we can say how we have come to it being seven. The requirement that there be seven or more persons in order to commence a representative proceeding in section 33C of the Federal Court of Australia Act that clause 6 is modelled on stems from the recommendation in the Australian Law Reform Commission report 46 from 1988, titled *Grouped proceedings in the Federal Court*.

Stakeholders during the 1988 review raised concerns with the Australian Law Reform Commission that if no minimum number was specified, the procedure might be used for cases that were inappropriate to be dealt with by the Federal Court. The Australian Law Reform Commission acknowledged that although efficiencies will increase as the potential number in the group increases, grouping is also advantageous even if only small numbers are involved. Therefore, the Australian Law Reform Commission found that establishing a minimum number, which ended up being seven, would promote the efficiency of the procedure and ensure that cases are not grouped when a joinder or consolidation is more appropriate. Although the choice of the figure in section 33C is arbitrary—I am making that point—the Australian Law Reform Commission considered that the grouping procedure should be available so long as there are at least seven group members. Therefore, the minimum number requirement brings clarity to the issue when compared to the procedurally unclear requirements of numerous persons in order 18.

Hon NICK GOIRAN: This really brings me to the decision to retain rule 12 of order 18. If this new regime that we will pass allows for the threshold to be seven persons, and if the existing rules-based scheme seemingly does not allow for class actions to be commenced with, let us say, five persons—the decision was that five was not ordinarily considered to be numerous—it makes it hard to think that suddenly six would magically jump over that threshold. It is not evident from the information that there is any utility in retaining rule 12 of order 18. I could understand it if the history of cases were such that three plaintiffs would be considered sufficient to invoke rule 12 of order 18, the parliamentary secretary might be able to argue the case, "Let us retain the order 18 provision because a small number of plaintiffs can at least still put together a class action should they wish to do so; a larger group should obviously use this new legislative regime", but if it is the case that no-one is able to access rule 12 of order 18 with fewer than seven plaintiffs, what is the purpose of maintaining it?

Hon MATTHEW SWINBOURN: From the government's point of view, we have relied on the Law Reform Commission's recommendation, which was to retain it. However, I will make the qualification that I do not think Parliament has the power to strike it out anyway because it is part of the Supreme Court's original jurisdiction.

Whether or not that regime survives is ultimately a matter for the Supreme Court to decide. It will determine that particular matter. It obviously comes back to the set-up of the Supreme Court when the colony was first settled all those years ago. I am trying to think of the word—I cannot think of it—but it is the original jurisdiction and the power of the Parliament to remove that original jurisdiction.

Hon Nick Goiran: Inherent?

Hon MATTHEW SWINBOURN: Yes, maybe that is the word. I am thinking of another one, but I cannot quite recall it off the top of my head, unfortunately. But I think the member catches the gist of what I am trying to say. If we tried, I suspect we would find that perhaps we do not have the power to do so.

The DEPUTY CHAIR (Hon Dr Sally Talbot): Parliamentary secretary, I draw your attention to the time.

Hon MATTHEW SWINBOURN: I have finished the answer, so I will sit down.

Committee interrupted, pursuant to standing orders.

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