

CIVIL PROCEDURE (REPRESENTATIVE PROCEEDINGS) BILL 2021

Committee

Resumed from 31 August. The Deputy Chair of Committees (Hon Steve Martin) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 33: Reimbursement of representative party's costs —

Progress was reported after the clause had been partly considered.

Hon MATTHEW SWINBOURN: When we left this matter yesterday, we were in the process of responding to a matter raised by Hon Nick Goiran, and hopefully I will paraphrase him correctly: is the purpose of clause 33 to enable the representative parties' costs to be covered on an indemnity basis? We have had an opportunity to consider that in more detail overnight and I make the following points.

It is important to note that the representative party plays an important role in the representative proceedings in that they are responsible for running the action on behalf of group members. In this respect, they will bear the total professional costs and disbursements payable to their legal representative during the action, unless they obtain another form of funding such as litigation funding. A representative party is also liable for costs in the proceedings as set out under clause 31 of the bill. On the other hand, during an action, group members usually play a passive role and may not even be aware that they are a group member. They will not be liable for any costs under clause 31 of the bill and ordinarily would not incur any costs in running the action. Thus, given this unique set of circumstances, when compared with individual proceedings, clause 33 provides the representative party the opportunity to ask the court to recover any reasonable costs incurred in the proceeding that exceed the costs recoverable against the respondents from the award of damages in the proceeding. In a sense, the clause provides the court a discretion to order for the benefit of the representative party a type of indemnity for their costs, but that is not against the defendant in the matter; it would be against the award of damages. This recognises the financial burden that the representative party carries on behalf of group members. However, it is important to note that the clause operates concurrently with any cost rules, including the rules on indemnity costs.

Clause put and passed.

Clauses 34 and 35 put and passed.

Clause 36: Abolition of torts of maintenance and champerty —

Hon NICK GOIRAN: We are on the penultimate clause of this 37-clause bill. This is the one clause that differs from the earlier twin bill that was presented in the fortieth Parliament. This is the clause that seeks to abolish the torts of maintenance and champerty. We spent a little bit of time discussing that in the second reading debate and at clause 1. It is noted by the government and the opposition that this matter has its history in a Law Reform Commission report. Subclause (2) seeks to clarify the intended scope of subclause (1), which is absolute abolition of those two torts, yet subclause (2) seeks to clarify precisely the scope of that absolute abolishment. Subclause (2)(a) is, in my view—I welcome any comment the parliamentary secretary might have to make on this—technically unnecessary because it merely confirms that subclause (1) is not retrospective. I submit that if subclause (2)(a) was not there, it would have no meaningful effect. I assume that, once again, this has been included on the advice of the entity regularly mentioned but never present and that out of, if you like, an abundance of caution, one might say that it puts beyond doubt that this abolition has not occurred in a retrospective fashion. I do not quibble with that; I simply make the observation that in my view it is technically unnecessary. However, subclause (2)(b) is slightly different. I understand that it received some consideration in the Law Reform Commission's report that is the genesis of this matter. Obviously, the government has decided to proceed in the same way that has been recommended by the commission, but can the parliamentary secretary take this opportunity to outline the necessity for subclause (2)(b)?

Hon MATTHEW SWINBOURN: In relation to the point that Hon Nick Goiran made about paragraph (a), we agree that it is about putting it beyond doubt, so I can confirm that his understanding is essentially correct; we concur with that. In terms of subclause (2)(b), the provision is included in the bill because in its maintenance and champerty report, the Law Reform Commission was of the view that there is merit in including such a provision for the following reasons, which we endorse. Firstly, the provision underscores the legitimacy of the court's role in scrutinising funding agreements, provides a safeguard to balance the torts' abolition and addresses concerns about control of an action by a third party funder or situations in which contracts could obstruct or pervert justice or promote litigation considered against public policy. Secondly, based on the experience of other Australian jurisdictions legislating in this fashion, it will not prevent plaintiffs from accessing litigation funding to support them. Thirdly, including such a provision will ensure that Western Australia is consistent with other Australian jurisdictions. Further to that, other states, such as New South Wales and Victoria, have included similar provisions. This provision is also similar to the United Kingdom provision that abolished the torts in that jurisdiction. As I said, it is consistent with recommendation 1 of the Law Reform Commission's maintenance and champerty report.

Hon NICK GOIRAN: Have there been any problems for litigation funders in those other jurisdictions—I think the parliamentary secretary mentioned New South Wales, Victoria and the United Kingdom—as a result of that? As I understand it, if anyone were to object to subclause (2)(b), the most likely stakeholder would be litigation funders in that somehow the inclusion of subclause (2)(b) might still call into question any possibility of them participating in or facilitating these proceedings. The last thing we want is forum shopping, as we discussed earlier. I think that concern might be put to bed if it is the case that Victoria and New South Wales have a similar provision and it has had no impact on litigation funders.

Hon MATTHEW SWINBOURN: Our understanding is that it has had no impact.

Clause put and passed.

Clause 37 put and passed.

Title put and passed.

Report

Bill reported, without amendment, and the report adopted.

Third Reading

Bill read a third time, on motion by **Hon Matthew Swinbourn (Parliamentary Secretary)**, and passed.