CIVIL PROCEDURE (REPRESENTATIVE PROCEEDINGS) BILL 2021

Committee

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Jackie Jarvis) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary to the Attorney General) in charge of the bill.

Clause 1: Short title —

Committee was interrupted after the clause had been partly considered.

Hon NICK GOIRAN: Prior to the interruption of questions without notice, we were considering the extent to which there is any justification for maintaining the existing scheme, which is found under rule 12 of order 18 of the Supreme Court rules. In light of the information, it appears, on the best material available to the chamber at this time, that five persons would not normally be considered to be numerous in the sense of the term found in rule 12 of order 18, and therefore it is an insufficient number of persons to invoke the opportunity to commence a class action under the Supreme Court rules. In contrast, the new regime will allow seven persons to commence a class action. Can further information be provided to the chamber that might indicate why we, as a chamber, might want to support the continuation of rule 12 of order 18? Earlier, the parliamentary secretary indicated that this is ultimately a matter for the Supreme Court, which is correct. But were the Supreme Court to make an amendment to the rules, it would be possible for the house to disallow that amendment to the rules. It is therefore appropriate for us to have some understanding about what is exactly intended to occur here. The parliamentary secretary has kindly referred us back to the Law Reform Commission of Western Australia's third recommendation that it be retained, but is there any intention to have a dialogue with the Chief Justice about this? Has that dialogue already commenced? The parliamentary secretary has indicated—we will turn to this a little later when we look at the report on maintenance and champerty—that some communication will be occurring. It is intended that the government will write to the Supreme Court and, in this instance, it would be to Chief Justice Quinlan. Recognising that it is ultimately up to the Supreme Court what it wants to do, might this nevertheless form part of a conversation or a respectful dialogue with him in which the point could be made that there is no use in rule 12 of order 18 because it only causes confusion? As the parliamentary secretary has mentioned on a number of occasions, the government is trying to enhance access to justice by implementing the recommendations of the Law Reform Commission's report. That is a good thing that has the support of the opposition, but enhanced access to justice should also be seen in light of it being a simple system. It should not be an unnecessarily confusing system that has two regimes by which people can, in theory, commence a class action. That is undesirable, unless there are very good reasons why rule 12 of order 18 might be maintained. I simply ask: what is the government's intention at the moment in having any discussion with the Supreme Court on this point?

Hon MATTHEW SWINBOURN: Thank you, deputy chair, for the indulgence of some time.

I am not sure, unhelpfully, that we can take this particular point on the matter that the member has raised much further, other than to say that we have retained the dual system because it was the recommendation of the Law Reform Commission. I will add that it is my understanding that Victoria and Queensland have also retained dual structures, so we will not be alone in doing that. We do not want to unpack the reasoning for the Law Reform Commission's recommendations because it speaks for itself and I do not want to misspeak on that. I think it is fair to say that there will probably be discussions. In all likelihood, the Supreme Court and the Chief Justice will have to review rule 12 of order 18 and consider whether they want to change those sorts of things in light of what has happened here. From the government's perspective, the policy position is that we continue to support the existence of the dual system, consistent with the recommendation of the Law Reform Commission. I do not think I can take it any further than that. I note that the current Supreme Court rules-based system has not been used much in this state, and whether it continues and people utilise that will probably be a factor that, in time, determines what the Supreme Court does about that part of its rules.

Hon NICK GOIRAN: Before I move on to my next question, I will make an observation. I thank the parliamentary secretary for his indication that there will probably be some discussions with the Supreme Court on this point. I do not really understand, at this point, why the government maintains that it supports the dual system in the knowledge that one element of the system is pretty useless. It is not being used and we do not really know the minimum number of persons who are required to meet the relevant threshold. It has received some criticism over the journey. Indeed, if it was such an excellent system, we would not be doing what we are doing now. It is just not apparent why we maintain support for a useless part of the system, but I am encouraged that there seems to be some appetite for a conversation to happen. I encourage the government to report back on that discussion with the Chief Justice if it takes place. I appreciate that we are now delving into a potential landmine because we know that the government does not like to disclose its consultations with heads of jurisdictions. I simply make this point: in this instance, surely both the government and the Chief Justice are of one mind that we not only want to facilitate access to justice, but also make it simple for people to the best extent possible. Having two systems—one of which is, in my word, useless, and the other is this superior system that we are about to pass—will be unhelpful for litigants,

particularly self-litigants. I appreciate that a class action is unlikely to be launched in those circumstances. Maybe this is foreshadowing a future question on whether it will be a necessity for the representative group in a class action to be legally represented. If it does not, I imagine it would be highly unlikely that seven individuals will get together and commence a class action. Before I move on to the next theme, maybe we can round out that particular issue. Does a representative group need to be legally represented?

Hon MATTHEW SWINBOURN: The bill makes no provision on representations so it does not make it clear whether somebody could commence representative proceedings and self-represent and therefore represent others. The bill does not deal with that. Whether or not the Supreme Court would allow for that to happen will be a matter for the Supreme Court and its rules. I cannot give the member any more clarity than that because it is not a matter that comes within the bill. I am not suggesting the member's question is outside the scope of what we are dealing with here; it is simply that the bill has not made provision for representation in class proceedings and therefore it will be the Supreme Court and its rules that will determine who can represent and whether a self-represented—this is going to get complicated—representative in a class action can represent others. I would say it is highly unlikely, given the complexity. Even though we talked about this being a simpler process, representative proceedings—class actions—are not simple. There are requirements to commence them—advertising and procedures. Although we are trying to put forward a straightforward regime, I would not suggest that the ordinary person will be well suited to engaging with that. The Supreme Court is pretty strict about who gets to represent others. I tried it once many years ago in the Magistrates Court, as the "next best friend" kind of thing, and it did not go very well. But that is unrelated to this issue.

Hon NICK GOIRAN: Moving on to a different but related theme, I draw members' attention to the long title of the bill. It says that this is "An Act to provide for representative proceedings in civil proceedings in the Supreme Court." Was consideration given to amending the Supreme Court Act rather than creating this standalone statute?

Hon MATTHEW SWINBOURN: I am going to mention that entity that is never present. It was considered, but my advice is that Parliamentary Counsel's Office thought a standalone act would be more appropriate than an amendment to the Supreme Court Act.

Hon NICK GOIRAN: That is interesting. I think that the disadvantages of what I will describe as "fragmented legislation" are obvious. Again, the bipartisan desire here is to facilitate access to justice, and that needs to be done in the least complicated fashion rather than the most. By having a fragmented legislation approach, people will have to go to different statutes to work out how they will run a civil proceeding in the Supreme Court. That fragmented approach would be somewhat of a disadvantage. I think that is obvious. Nevertheless, a decision has been made, albeit on the basis of Parliamentary Counsel's advice it seems, that we will go with this fragmented approach rather than a consolidated approach. What are the benefits of having this fragmented approach?

Hon MATTHEW SWINBOURN: I am not sure. There is probably a broader debate about this fragmented point that the member has made. I am not sure it was ever looked at in terms of how the member has framed it in terms of the fragmentation. I think one of the benefits of having a standalone act is that everything that relates to representative proceedings is contained within this bill and the act, if and when it passes. There would be fragmentation even if we included it within the Supreme Court Act, because reference would still be had to, for example, the Supreme Court rules, which, as the member knows, are quite a tome. There are obviously complexities with that. I cannot say why an active decision was made to go for a standalone act, as opposed to incorporating the amendments in an amending bill, because we do not know the reasoning other than that is the path that PCO said to take. As I say, the point the member is making is not without merit, but it comes down to—Hansard will not pick this up because it is the same word—potato, "potahto" and tomato, "tomahto", and that sort of thing. I am sure that academics and other people could argue forever and a day about which way we should go. Presently, we have this one. I cannot take it much further than that.

Hon NICK GOIRAN: If the government had elected to proceed with this reform by way of an amendment to the Supreme Court Act, would clause 35 still be needed?

Hon MATTHEW SWINBOURN: The most certainty that I can give, because it is hypothetical and Parliamentary Counsel's Office would normally give advice on these things, is the advisers at the table say that they do not think it would it would have been necessary.

Hon NICK GOIRAN: I wonder whether this is at all indicative of a difference of opinion between the government and Chief Justice Quinlan on how this matter should be handled, and, in particular, whether the Chief Justice was of the view that this ought to be done by way of an amendment to the Supreme Court Act but that the government, through parliamentary counsel's advice, decided that it would be a standalone bill.

Hon MATTHEW SWINBOURN: I think the member is trying to get to what might have progressed between the Chief Justice and his views about these things and the consultation with government. I cannot disclose that, as the member knows. I think that if the Chief Justice has a view he wants to express, he can do that in a form that he wants to. It sounds really terrible, but I can neither confirm nor deny whether there was any difference of opinion

about how this should be drafted and proceeded with. If the member has other information, maybe, but I cannot take it any further than that.

Hon NICK GOIRAN: To be clear, I have no information. This is mere speculation on my part. The problem for the opposition, members of Parliament and the house of review is that we are being asked to enter the arena of the Supreme Court on how civil litigation is to unfold, but we are to do so in a blindfolded fashion. Only members of government are privy to what the judiciary and heads of jurisdiction might have to say about these things. The rest of us are expected to do so in a blindfolded fashion, as demonstrated by the point that was just made.

Hon Matthew Swinbourn: But do you accept that that is the choice of the Chief Justice rather than the government?

Hon NICK GOIRAN: I would if it was confirmed that that was the choice. I previously asked whether the government would go to the heads of jurisdiction and seek their consent to release the consultation they have given. The response that came back from government—I appreciate, as per usual, that the parliamentary secretary is the messenger in this situation—has been no, the government is not even prepared to ask that question. Once again, I am not sure whether it was the Chief Justice, but if it were, if we were given some kind of statement—I do not see why that could not be done—that would probably solve this matter once and for all. If the heads of jurisdiction came out with some kind of statement or memo and said to all and sundry, "Look, lawmakers, at the end of the day, we would like our consultations with executive government to always be kept confidential and not be released to the Parliament under any circumstances", that would put this debate to bed once and for all. But as far as I know, we have never seen that. Nevertheless, we do not know whether there is a difference of opinion on this structure. All that we know is that the entity that is often mentioned but never present has guided this particular process, and we now have this standalone bill that is before us.

That takes me to the issue of consultation. Once this bill passes, will litigants retain the right to commence representative proceedings in the District Court under that Supreme Court order?

Hon MATTHEW SWINBOURN: Yes, member.

Hon NICK GOIRAN: But the representative proceedings under this bill will not be able to be undertaken in a District Court, will they?

Hon MATTHEW SWINBOURN: No.

Hon NICK GOIRAN: Was Chief Judge Wager consulted on this bill?

Hon MATTHEW SWINBOURN: I do not think that Chief Judge Wager was the Chief Judge at the time of the development of the bill. The bill was introduced last year. However, I can confirm that consultation did not occur with the then Chief Judge of the District Court, whose name escapes me.

Hon Nick Goiran: It was Chief Judge Sleight, I think.

Hon MATTHEW SWINBOURN: Yes. However, the then head of jurisdiction did not make a submission to the Law Reform Commission of Western Australia report in 2015, so they expressed no view over the course. They have not been consulted, but they did not express a view back in 2015 either.

Hon NICK GOIRAN: We know that as a result of the passage of this bill, a dual system will exist. Persons will be able to choose to commence a class action in either the Supreme Court or the District Court under order 18, rule 12; alternatively, they will be able to undertake these representative proceedings only in the Supreme Court by virtue of the Civil Procedure (Representative Proceedings) Act 2022, as it will be. Have any proceedings ever been brought in the District Court under the relevant order?

Hon MATTHEW SWINBOURN: We do not know whether they ever have been brought.

Hon NICK GOIRAN: Again, this is an observation, not a question, we will move to the next theme, but I simply observe again the need for consultation. I think this enhances or elevates the need for that consultation, discussion and dialogue to happen with the Chief Justice. Why are we keeping order 18, rule 12, when no-one even knows whether it has been used in the District Court? We know it has been used a few times in the Supreme Court, but we are not really sure how many times. There have been issues. We are not sure how many litigants would be considered to be numerous in order to satisfy the threshold to have a right to proceed under order 18, rule 12. Frankly, it feels like a mess. I think that the best thing the courts could do is clear up this mess by dispensing with it completely and saying that they are satisfied with the Civil Procedure (Representative Proceedings) Bill 2021. If not, and if it is the case that order 18, rule 12 will continue to exist in abeyance in perpetuity beyond the passage of this bill, in my view, that will demonstrate that there is a disagreement at the moment between the judiciary and the executive. The judiciary has a view—we do not know what that is; that is being kept secret—and, as a result, it is maintaining that it wants to continue with order 18, rule 12. It is not apparent to me what those reasons are.

The government obviously has a different view and it has decided to go down this path. This can all be easily clarified by way of some form of a statement. It would hardly interfere with the independence of the judiciary if

its members came forward to make their view of the dual system clear to Western Australians. If it is about access to justice, should an ordinary Western Australian not have a clear understanding of the preferable path? At the moment, it is confusing and it could be easily clarified by the Chief Justice and the Chief Judge saying, "Don't bring these under order 18, rule 12. In fact, we're going to repeal that particular law; proceed under the Civil Procedure (Representative Proceedings) Act 2022."

Having made that comment, which I hope will eventually filter through to the heads of jurisdiction when the relevant dialogue commences, I turn to the deviations from the Federal Court model. The parliamentary secretary previously explained in the chamber, certainly in his second reading speech, that this new regime is based on the Federal Court model—part IVA of the Federal Court of Australia Act 1976 to be specific. Indeed, I note that the explanatory memorandum that accompanies the bill asserts that the bill will introduce a regime that is "substantially modelled" on part IVA of the Federal Court act. To what extent will the proposed regime deviate from that model?

Hon MATTHEW SWINBOURN: I think I mentioned this in my second reading reply, but I will be more precise. As the member has indicated, it will be substantially the same. I am advised that the key difference from a policy point of view is in clause 7(2), which relates to the Philip Morris issue about dealing with people with different —

Hon Nick Goiran: I was intending for us to unpack that at clause 7.

Hon MATTHEW SWINBOURN: Yes. I am just indicating to the member that that is not provided for in part IV of the federal regime. I am also advised that clause 21(1)(b), which deals with the replacement of the representative in the representative proceedings in the interests of justice, also does not form part of the federal regime.

Hon Nick Goiran: That is the Law Reform Commission's recommendation.

Hon MATTHEW SWINBOURN: Yes. There are obviously other differences, because we are dealing with the Western Australian jurisdiction, and those differences have been described as either jurisdictional or stylistic in nature. Those are the primary ones.

Hon NICK GOIRAN: Thank you, parliamentary secretary. I think that satisfactorily explains the extent to which there will be any substantial deviations from the Federal Court model, and we can quickly pick up those matters at clauses 7 and 21. My last question on clause 1 is about communication and cooperation protocols. New South Wales and the Federal Court have had a protocol for class actions since November 2018, and Victoria and the Federal Court have had a protocol for class actions since June 2019. Do Western Australia and the Federal Court have such a protocol?

Hon MATTHEW SWINBOURN: The advisers are doing some more follow-up, but the simple answer is that there currently is no protocol. The advisers had thought there might have been something in the maintenance and champerty report recommending that such a thing happen, but they are now saying there is not. There is currently no protocol in existence. I can only speculate why that is the case; I suspect the reason is we just do not have many class actions happening under order 18, rule 12.

Hon Nick Goiran: You'll know them by heart by the end of this bill!

Hon MATTHEW SWINBOURN: I know! Whereas in Victoria and New South Wales there is a much more significant number of them, including ones that might have more appropriately been commenced in Western Australia but were not, owing to the lack of a suitable regime for those matters to proceed.

Hon NICK GOIRAN: Will a protocol be sought once this bill is passed?

Hon MATTHEW SWINBOURN: It is a court-to-court protocol, so it is a matter for the Supreme Court to take up, in conjunction with the Federal Court. I know the member has previously made an observation about that information, but at this stage it is not a matter about which we can say the protocol will be entered into; it is a matter for the court. My understanding is that those protocols were entered into in other states following inquiries or reviews in their own jurisdictions about the benefits of them, so it would not be unreasonable to think that our Supreme Court could enter into such arrangements with the Federal Court. However, I cannot confirm that, because we do not have that information.

Clause put and passed.

Clause 2: Commencement —

Hon NICK GOIRAN: To assist the passage of the bill, I have questions at clauses 2, 7 and 9, to start with. With regard to clause 2, the explanatory memorandum justifies the delay of the commencement of clause 2(b) by proclamation to enable practice directions or rules of court to be put in place. Will there be any?

Hon MATTHEW SWINBOURN: We are advised that the Supreme Court needs six months to make a determination on whether it needs practice directions and rules. In the event that it does, that is the time frame within which it will develop them.

Hon NICK GOIRAN: I have no further questions at this point, but I will make a quick observation. I find that odd. It is a peculiar aspect of our lawmaking system that individuals—in this case, the judiciary—know full well

about the existence of this bill. In fact, I think we discussed in the second reading debate that this bill, if I am not mistaken, had an almost identical twin in the previous Parliament. This has been around for a long time. The Supreme Court is saying, "Well, look, when you pass the bill, we'll let you know if we intend to do any practice directions or court rules, and by the way, we'll need about six months to make that determination." Why could it have not made that determination during the seven years since the Law Reform Commission made its recommendations? I pose that question rhetorically; it is not for the government to speak for the Supreme Court, but again, this goes back to one of my pet topics: to see greater interaction between the judiciary and the Parliament, absolutely respecting each entities' independence. I think greater interaction would facilitate better quality lawmaking. In this instance, there really is no reason why we should not know whether the Supreme Court intends to make practice directions or court rules. If it does not intend to do that, the regime, which is a helpful access-to-justice regime, could commence immediately rather than being unnecessarily delayed by six months. That said, we support the passage of clause 2.

Clause put and passed.

Clauses 3 to 6 put and passed.

Clause 7: Standing —

Hon NICK GOIRAN: Were any concerns raised by stakeholders about the application of clause 7(2)?

Hon MATTHEW SWINBOURN: I think concerns were raised about clause 7(2) by Professor Michael Legg of the University of New South Wales faculty of law, and also by the Law Society of Western Australia. I understand that Professor Legg raised a general concern about clause 7. I will read what I have before me, which will make it clearer for the member. These stakeholders expressed a concern that the words "the person and" in clause 7(2) and in section 158(2) of the New South Wales legislation go further than necessary to overcome the Philip Morris issue with respect to making it clear that not all group members must have a claim against each defendant. In their view, this is inconsistent with the wording in clause 7(1), which provides for a representative party to have standing where they have a sufficient interest to commence the proceeding against the defendant or the defendants. They view this as generally being understood to mean that a representative party should have a claim against each defendant. In our view, subclause (2) does not require amendment. The bill has not been amended as the wording of clause 7(1) of the bill, together with the requirements set out in clause 6, do not contradict the approach taken in clause 7(2). When these clauses are read together, the representative party and at least six group members must all have a claim against one common defendant.

The requirements for bringing a representative proceeding are set out in clauses 6 and 7 of the bill. Firstly, at least seven persons, including the representative party, must have a claim against the one common person—defendant A. This requirement is set out in clause 6(1)(a). Secondly, if the requirements in clause 6 are met, the representative party can commence proceedings against defendant A on behalf of the other group members. This is authorised by clause 7(1). Thirdly, by virtue of clauses 7(1) and (2), the representative party can also commence proceedings against other defendants in addition to defendant A, provided that at least one group member of the representative party has a claim against those other defendants that meets the requirements in clauses 6(1)(b) and (c).

Therefore, the government's position is that the bill does not require that all group members have a claim against defendant A. Only a minimum of seven members need to have a claim against defendant A. The bill also does not require that the representative party has a claim against all other defendants. It is only necessary for the representative party, together with at least six group members, to have a claim against defendant A.

Clause put and passed.

Clause 8 put and passed.

Clause 9: Person under disability —

Hon NICK GOIRAN: We are now looking at a person under disability. Consider the scenario when there is a group of persons. We know that there must be at least seven of them. One of the seven is a person under disability. In those circumstances, will the person under disability still be able to receive damages for the provision of fund management fees?

Hon MATTHEW SWINBOURN: The advice is yes; they should be able to receive that.

Clause put and passed.

Clauses 10 to 13 put and passed.

Clause 14: Situation of fewer than 7 group members —

Hon NICK GOIRAN: Clause 4 deals with proceedings that have already commenced. As we know and have discussed previously, in order for proceedings to commence there must be at least seven members of the group. In this scenario, for whatever reason, at some stage it appears likely to the court that there will be fewer than seven group members. Who knows? That might be because somebody is deceased or, for any particular reason; someone

might have decided they did not want to participate in the matter anymore. Clause 14(a) will allow for the matter to continue, subject to the order of the court. That speaks for itself. I am more interested in the scenario under clause 14(b). What will happen to the rights of the group members in that scenario?

Hon MATTHEW SWINBOURN: I think the member's question was: what will happen to their rights? The answer is that their rights will not be extinguished by the effect of this. What it will do is give rise to options under clause 17. Clause 17 will provide consequences of order for the discontinuance of proceedings. For example, if the representative party is continuing with its cause of action, it can join that action. I do not want to regurgitate clause 17, but it makes provision for that.

I also bring to the member's attention the provisions under clause 32, which will suspend the limitation periods. If an action were to be discontinued by the court because of what occurred under clause 14(b)—it could be that the limitation period had expired—my advice is that, because clause 32 will suspend limitation periods, the cause of action would not be extinguished forever and a day.

Clause put and passed.

Clauses 15 to 20 put and passed.

Clause 21: Substitution of representative party or sub-group representative party —

Hon NICK GOIRAN: To what extent does clause 21 deviate from its model under section 33T of the Federal Court of Australia Act?

Hon MATTHEW SWINBOURN: Clause 21(1) is largely modelled on section 33T of the Federal Court of Australia Act. However, clause 21(1) differs from section 33T in that it will provide that the court may also substitute a representative or subgroup 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 subgroup representative party is not able to adequately represent the interests of the group members or subgroup members, as appropriate. Clause 21(1) will therefore provide the court with additional flexibility.

Clause put and passed.

Clauses 22 to 29 put and passed.

Clause 30: Bringing of appeal as representative proceeding —

Hon NICK GOIRAN: We move to the clause that deals with appeals. The parliamentary secretary has discussed a couple of times already that in order to launch one of these class actions or representative proceedings, there need to be seven persons in the group. How many persons are required for an appeal to be launched?

Hon MATTHEW SWINBOURN: Member, my advice is that so long—it is a qualified answer.

Hon Nick Goiran: It was obviously not straightforward.

Hon MATTHEW SWINBOURN: The member will find that it is relatively straightforward when I explain it to him. The initial proceedings is for a class of seven or more persons. Therefore, if there is an appeal by that group, it would require seven or more persons. However, the court, under clause 14, which we just dealt with, and the Court of Appeal also, has the discretion to deal with a smaller group of persons if it sees fit. If that group became fewer than seven persons, it could still continue with the appeal so long as the court allowed that to occur.

Hon Nick Goiran: So clause 14 still has application for appeals?

Hon MATTHEW SWINBOURN: Yes.

Clause put and passed.

Clause 31: Costs —

Hon NICK GOIRAN: We move now to the area of costs. This is an area that would be exercising the mind of the Premier at the moment and his confused Attorney General as they work out and try to unpick the cost of the federal court matter. Apparently, according to the—no, I will not digress any further. It is incredibly tempting. We will leave it for another day because we would like to see this bill passed this evening. With respect to clause 31, is there any intention by the government to legislate for contingency fees such as those Victoria introduced in June 2020?

Hon MATTHEW SWINBOURN: At the moment, there is no decision to make those provisions. As the member may be aware, the Australian Law Reform Commission made a recommendation with the view of having a nationally consistent approach; Victoria went out on its own. The state of Western Australia is waiting to see what the Albanese government is going to do in response to those recommendations. That is where we are at; we are aware of it and we are, of course, taking it under consideration, but we are also waiting to see what the commonwealth does.

Clause put and passed.

Clause 32 put and passed.

Clause 33: Reimbursement of representative party's costs —

Hon NICK GOIRAN: Is the purpose of clause 33 to enable the representative party's costs to be covered on an indemnity basis?

Hon MATTHEW SWINBOURN: It does not prevent the award of indemnity costs. I am not quite sure whether that directly answers the member's question, but it would not provide a bar. Clause 33(1) states —

> 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.

It does not make any specific mention of or provision for indemnity costs, and I do not think it will necessarily prohibit that because the court will obviously retain its usual powers to make an order on costs, depending on the conduct of the parties and things of that kind.

Hon NICK GOIRAN: Mr Deputy Chair, I think, noting the time, out of session I might take this up with the parliamentary secretary so that we will deal with this fairly rapidly tomorrow.

Progress reported and leave granted to sit again, pursuant to standing orders.