CIVIL PROCEDURE (REPRESENTATIVE PROCEEDINGS) BILL 2019

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Sue Ellery (Leader of the House)**, read a first time.

Second Reading

HON SUE ELLERY (South Metropolitan — Leader of the House) [10.21 pm]: I move —

That the bill be now read a second time.

The Civil Procedure (Representative Proceedings) Bill 2019 will introduce a legislative representative proceedings regime in the Supreme Court of Western Australia. This legislation meets a McGowan Labor government election commitment, and, in so doing, enhances access to justice in Western Australia.

The Law Reform Commission of Western Australia's "Representative Proceedings: Project 103—Final Report" was tabled in Parliament on 21 October 2015. In general terms, the Law Reform Commission recommended the introduction of a model similar to that contained in part IVA of the Federal Court of Australia Act 1976.

There are many in our community with meritorious claims for compensation, but they are unable to access the courts because they cannot afford to bring an action. In particular, there are situations in which a legal wrong has been committed that affects many people, but each person's individual loss is not such as to make it economically viable to bring an individual action. A strong and sustainable mechanism for bringing representative proceedings enhances access to justice.

When first introduced, the regime in part IVA of the Federal Court of Australia Act 1976 was met with some concern. Some critics feared that such regimes would throw open the floodgates for litigation. However, 27 years on, it is clear that this eventuality has not occurred. Rather, the regime in part IVA of the Federal Court of Australia Act 1976 has allowed those who have been wronged to gain access to justice and be awarded compensation for the wrongs they have suffered.

In a 2017 speech, Justice Bernard Murphy of the Federal Court of Australia observed that the regime in part IVA of the Federal Court of Australia Act 1976 "has proved flexible and adaptable". His Honour concluded that the regime "provides real, practical and broad based access to justice and it is a regime of which we should be proud".

The bill seeks to implement a representative proceedings scheme modelled on the successful federal scheme. This regime was substantially adopted in Victoria in 2000, New South Wales in 2011, and Queensland in 2017, and has stood the test of time.

The bill provides for a range of matters relevant to representative proceedings. The first is a requirement that, in order for representative proceedings to be commenced, seven or more people must have a claim against the same person or corporation, and that those claims are in respect of, or arising out of, the same, similar or related circumstances. Those claims must also give rise to a substantial common issue of law or fact. The second is the right of a group member to representative proceedings to "opt out" and formally discontinue as a member of those representative proceedings. The third is provisions relating to the settlement of individual claims, the discontinuance of proceedings in certain circumstances, and the distribution of payments to group members.

The bill, although modelled on the regime contained in part IVA of the Federal Court of Australia Act 1976, does not simply mirror the text of that regime. This bill differs from part IVA of the Federal Court of Australia Act 1976 in the following respects. First, the bill incorporates contemporary plain English drafting principles to enhance its readability. Second, the bill includes a provision that is based on section 33T of part IVA of the Federal Court of Australia Act 1976—a provision that allows the court to remove and substitute a representative party in particular circumstances—but expands it so that the court may remove and substitute a representative party "where it is in the interests of justice to do so". This provision provides the court with additional flexibility. Third, the bill's definition of "representative party" is not limited to a person who commences a representative proceeding—as in part IVA of the Federal Court of Australia Act 1976—but also includes a person who is substituted as a representative party. It is considered that the bill's definition is more comprehensive and reduces the risk of possible challenges to the legitimacy of a substituted representative party. Fourth, the bill contains an express provision allowing a representative action to be commenced against multiple defendants, regardless of whether each person to the representative action has a claim against every defendant. This is to address the issue created by 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. Fifth, the bill contains a review clause to ensure that the operation and effectiveness of the new legislative regime is monitored.

The current mechanism for bringing representative proceedings in Western Australia is found in order 18, rule 12 of the WA Rules of the Supreme Court 1971. However, order 18, rule 12, has been found to contain little detail. The bill will implement a clear set of processes to govern the commencement and conduct of representative proceedings in Western Australia, to ensure that these actions are undertaken in the fairest and most efficient

manner possible. Procedural matters relating to the conduct of representative proceedings will be discussed with the Supreme Court during the course of the development of their supporting practice directions and rules. Owing to the need to develop these instruments, the bill will not be able to commence immediately should it pass Parliament.

Representative proceedings serve an important role in providing access to justice—they fill a gap by allowing people who have suffered damage due to a mass civil wrong to seek compensation. Absent such regimes, many people within the community would go uncompensated.

Pursuant to standing order 126(1), I advise that this is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party; nor does this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

I commend the bill to the house and I table the explanatory memorandum.

[See paper 3268.]

Debate adjourned, pursuant to standing orders.