

Representative Proceedings

Law Reform Commission of Western Australia Project 103 Discussion Paper February 2013

To

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Table of Contents

Proposals

- 1 Introduce Representative Proceedings Scheme
- 2 Retain Order 18 rule 12 of the Rules of the Supreme Court

Issues

- 1 Should a new regime be effected by amendment to Rules or by legislation?
- 2 Should Western Australia adopt an automatic closed class basis for commencing actions as in New South Wales?
- 3 Actions against multiple defendants – follow New South Wales or the Federal Court?
- A The possible need for codification of the role of the representative plaintiff and requirements for removal of a representative plaintiff.
- B The suspension of limitation periods and the status of class members' claims in the event a class is disbanded by order of the court.
- C Whether there should be a more prescriptive legislative framework in relation to security for costs in representative proceedings.
- D Whether the impact of proportionate liability legislation as enshrined in the Civil Liability Act (WA) could produce anomalous results in relation to the issue of whether every group member must have a claim against each named respondent.
- E In relation to notification to claimants giving them the ability to opt out of a representative proceeding, are more prescriptive provisions required in order to ensure class members are aware of their right to opt out of a representative proceeding?
- F Section 33V in its current form contains no statutory guidance or criteria that a court should take into account when considering whether to approve the settlement or discontinuance of an action. Should the provision in its present form be amended to include formal criteria a court should take into account when deciding to approve the finalisation of a representative proceeding?
- G Other Issues:
Relationship between representative proceedings and litigation funding.

The Law Society of Western Australia comments on the Proposal/Issues in the Law Reform Commission of Western Australia (LRCWA) Discussion Paper, *Representative Proceedings*, Project 103, dated February 2013.

Proposals

1 Introduce Representative Proceeding Scheme

Western Australia should adopt legislation to create a scheme allowing representative actions in substantially similar terms to Part IVA of the Federal Court of Australia Act 1976 (Cth).

The Society supports this proposal.

2 Retain Order 18 rule 12 of the Rules of the Supreme Court

Order 18 Rule 12 should be retained in its current form as a surviving alternative.

The Society supports this proposal.

Issues

1 *If a new regime facilitating actions in which a class of plaintiffs (or defendants) is appropriate the Commission invites submissions as to whether such amendment can or should be effected by amendment of the rules of the Supreme and or District Courts only, or by the passage of legislation?*

The Society supports a position that legislation is adopted to create a scheme allowing representative actions in substantially similar terms to Part IVA of the *Federal Court of Australia Act 1976 (Cth)* (**Federal Scheme**).

In the Society's view the adoption of representative action processes in substantially similar terms to that in Part IVA of the *Federal Court Act 1976* provides the following advantages:

- increased capacity for and certainty in bringing such proceedings in the jurisdiction of the Supreme Court of Western Australia;
- consistency with an existing structure and body of authority for interpreting such procedures;
- the removal of uncertainty that may result from the adoption of such procedures as Rules only, in particular in respect of issues arising from merger of actions, applications to close classes and effect on limitation periods; and
- avoidance of inefficiencies and distortions associated with forum shopping between the Federal Court and the WA Supreme Court if different regimes were in place.

Further, as the introduction of such procedures may be regarded as a significant departure from the existing jurisdiction or procedures of the Court at present, it is appropriate that such changes be implemented by the legislature.

2 *Should Western Australia adopt a legislative representative proceedings regime substantively similar to that existing in Part IVA of the Federal Court of Australia Act 1976 (Cth)? The Commission recognises that there are two fundamental points of difference between Part IVA and Part 10 of the recently introduced New South Wales legislation.*

The first is the extent to which the legislation should allow representative actions to automatically proceed on a 'closed class' basis, as prescribed by s 166(2) of Part 10. While such a provision does not exist in either the federal or the Victorian legislation, the Commission is aware that closed class representative actions are relatively common in both federal and New South Wales proceedings. The Commission therefore invites submissions on whether any legislative amendment in Western Australia should include an equivalent provision to s 166(2) of Part 10.

The Society does not support an automatic 'closed class' basis for commencing actions as is the case in New South Wales. Whether a class should remain open or be closed should be subject to the sole discretion and determination by the Judge considering the representative proceedings.

The Society supports the position stated in the ALRC Class Action Report,¹ where it concluded:

"An effective grouping procedure is needed as a way of reducing the cost of enforcing legal remedies in cases of multiple wrongdoing. Such a procedure could enable people who suffer loss or damage in common with others as a result of a wrongful act or omission by the same respondent to enforce their legal rights in the courts in a cost effective manner. It could overcome the cost and other barriers which impede people from pursuing a legal remedy. People who may be ignorant of their rights or fearful of embarking on proceedings could be assisted to a remedy if one member of a group, all similarly affected, could commence proceedings on behalf of all members. The grouping of claims could also promote efficiency in the use of resources by enabling common issues to be dealt, with together. Appropriate grouping procedures are an essential part of the legal system's response to multiple wrongdoing in an increasingly complex world."

For these reasons and also to ensure a consistency of approach in the procedures adopted in Western Australia, the Society endorses the adoption of legislation in substantially similar terms to those in Federal Scheme and not the alternative presented in Part 10 of the New South Wales legislation.

¹ Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) at [67].

- 3 *The other key difference in the New South Wales legislation is the extent to which there is an express permission to issue a representative action against multiple defendants, irrespective of whether or not the persons affected have a claim against every defendant in the action ('the Phillip Morris issue').*

While the Society supports a position that legislation is adopted to create a scheme allowing representative actions in substantially similar terms to the Federal Scheme, there, of course, may be demonstrated deficiencies in the Federal Court approach which warrant Western Australia modifying the regime to address that deficiency. A Western Australian regime should not be beholden to identified flaws in the regime adopted in other jurisdictions.

One such deficiency may be whether there needs to be an express provision which permits a representative proceeding to be commenced against multiple defendants, where not all group members have a claim against all defendants. Such a provision would be warranted if:

- the Federal Court regime does not permit it;
- it was thought preferable on policy grounds to permit it; and
- the case management tools available to the Court are not adequate to accommodate such claims.

These questions are considered separately below.

Federal Scheme

There are conflicting authorities² as to whether the requirement that “7 or more persons have claims against the same person” requires all class members to have individual claims against all defendants. The prevalent view under the Federal Scheme is that it technically requires all group members to have the same claim against each named respondent. This is particularly so in light of the decision in *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 (**Phillip Morris**). The decision has become known as the *Phillip Morris* rule, and requires that all applicants must have a claim against each respondent. More recent authority, such as *Bray v Hoffmann La-Roche* (2003) 130 FCR 317 have disagreed with the *Phillip Morris* rule. The question will no doubt ultimately be resolved by an appellate Court, but there is presently judicial and academic debate on the question.

² Compare *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487, with *Bray v Hoffmann La-Roche* (2003) 130 FCR 317.

In this context of uncertainty, New South Wales legislation resolves the issue by section 158(2) of the *Civil Procedure Act* (2005), which expressly provides that a person may commence representative proceeding on behalf of other persons “against more than one defendant irrespective of whether or not the person and each of those persons have a claim against every defendant in the proceedings”. Following commencement, the onus falls on the defendant to make an application for an order that the action no longer continue as a representative proceeding.

On this basis, while it cannot be said definitively at this stage that the Federal Scheme does not allow for representative proceedings where group members have claims against all defendants, neither can it be said definitively that it does allow.

Policy considerations

The policy arguments in favour of expressly permitting group members to advance claims against different defendants are finely balanced. Plaintiff interest groups and litigation funders tend to support liberalisation of the requirement to permit such representative proceedings, as it provides greater flexibility in the framing of the claim, and the number of group members who can participate.³

The arguments against inserting such a provision tend to focus on the impact upon defendants who may only be included in respect of relatively discrete claims from a relatively small group. Such defendants are then exposed to the cost and complexity of participating in a much broader claim. This tends to generate additional interlocutory applications and an increase in complexity and duration of trials to resolve more disparate issues of fact and law. There are also concerns as to the greater complexity in resolving representative actions where multiple defendants who do not face claims from all group members are involved.

Case management

The final question is the adequacy of the case management tools available to the Court to ensure that proceedings are conducted efficiently, and that the policy concerns articulated above do not result in unfairness for any of the parties or inefficiency for the Court system.

³ See for example the Victorian Law Reform Commission – Civil Justice Review: Report 2008, 2.2.1, p 530.

As the Law Reform Commission report identifies at paragraph 3.40, the question of claims against multiple defendants under the Federal Scheme, where not all group members have claims against each of those defendants, is generally resolved in practice through case management mechanisms of the Court. Naturally, the court must be satisfied that a case for consolidation is made out, but in the Society's experience, the case management mechanisms to avoid the Phillip Morris rule is available and effective. Thus it can be said that under the Federal Scheme, the onus is on the applicant to satisfy the court that two or more representative proceedings warrant being case managed together.

In summary, if Western Australia were to adopt the Federal Scheme, or at least take the position that all group members must have an action against all defendants, separate proceedings could be commenced and application made to the Court to consolidate. The Court then has a discretion to permit consolidation, on whatever conditions may be thought appropriate.

Conversely, if a Western Australian regime expressly permits the commencement of such claims though not all group members have an action against all defendants, application may be made to the Court to exercise its discretion not to permit some or all of those actions to proceed as part of the class action proceeding, or alternatively to be determined separately within the proceeding.

In short, litigants and the Courts have proven well able to accommodate that uncertainty by sensible case management mechanisms. The Society considers that the issue ultimately reduces to a policy question of whether the plaintiff group or an impacted defendant should bear the onus of persuading a court to exercise its discretion to ensure the proceeding advances in the most efficient manner possible.

It is the view of the Law Society that it is in the interests of justice that such representative proceedings be commenced in the most flexible of ways, and therefore provisions similar to that in NSW that provide express permission to issue a representative action against multiple defendants, irrespective of whether or not the persons affected have a claim against every defendant in the action, should be adopted in Western Australia.

A *The possible need for codification of the role of the representative plaintiff and requirements for removal of a representative plaintiff.*

The Society does believe there is a need for the codification of the role of the representative plaintiff and requirements for removal of a representative plaintiff. In the view of the Society, it is desirable that the Court and the parties are afforded as much flexibility as possible to allow for the various and in many ways unpredictable nature of such proceedings.

In the Society's view, any constraints or directions on the representative plaintiff's role is a matter for the Court to determine in the interests of justice in each proceeding, and likewise for the removal of any representative plaintiff.

B *The suspension of limitation periods and the status of class members' claims in the event a class is disbanded by order of the court.*

The Society supports the inclusion of a legislative provision in relation to the effect of representative proceedings on limitations, to ensure that plaintiff's are not disadvantaged in terms of limitation periods by reason of the representative proceeding process.

However, it is also the Society's view that the present Federal Scheme does not currently deal completely with the issue and in particular has left open the way in which limitation periods are to be treated for parties that are subsequently excluded or removed from a class or in situations where a class is disbanded. It is the Society's view that specific legislative provision should be included to make it clear, and beyond doubt, that in such circumstances, the relevant limitation periods will cease to be suspended and continue to run. Such a provision will provide clarity to potential plaintiffs and defendants.

C *Whether there should be a more prescriptive legislative framework in relation to security for costs in representative proceedings.*

Whilst there could be a more prescriptive legislative framework in relation to security for costs, the Society agrees that the Federal Court position under section 43(1A) that group members are immune from an adverse costs order with the exception of costs ordered under sections 33Q or 33R of the *Federal Court of Australia Act* is currently adequate to deal with security for costs applications in such proceedings. In the Western Australian Supreme Court there is also an overriding protection for defendants in that the Court will ensure that the case is managed under Order 1 rule

4A of the *Rules of the Supreme Court* such that the overriding objective of case flow management will be to ensure that the procedure, and the costs of the procedure, to the parties and the State are proportionate to the value, importance and complexity of the subject matter of the dispute.

- D** *Whether the impact of proportionate liability legislation as enshrined in the Civil Liability Act (WA) could produce anomalous results in relation to the issue of whether every group member must have a claim against each named respondent.*

The Society is not aware of any practical anomalies that may arise from the enshrining of proportionate liability principles in the *Civil Liability Act*. In this regard, the Society notes the recent guidance from the High Court with respect to the interpretation of the term "concurrent wrongdoers" in the *Civil Liability Act: Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10.

- E** *In relation to notification to claimants giving them the ability to opt out of a representative proceeding, are more prescriptive provisions required in order to ensure class members are aware of their right to opt out of a representative proceeding?*

The Society does not consider that more prescriptive provisions are required in order to ensure class members are aware of their right to opt out of a representative proceeding. The Court can determine the appropriate form of notification at the time of making such orders, as is appropriate in the particular case to hand.

It is noted by the Society, however, that factors to be considered by the Court maybe appropriately included in practice directions in relation to such proceedings.

- F** *Section 33V in its current form contains no statutory guidance or criteria that a court should take into account when considering whether to approve the settlement or discontinuance of an action. Should the provision in its present form be amended to include formal criteria a court should take into account when deciding to approve the finalisation of a representative proceeding?*

The Society does not consider that statutory guidance or criteria are required with respect to approval of settlement or discontinuance of an action. Judicial officers who have approved settlements of class actions have not expressed in their judgments that the absence of such guidance or criteria are a cause of difficulty. It is to be noted that there are various other types of proceedings in which the Court is required to approve settlements and does so without specific guidance. In the Society's view, this is a regular function of the Court and therefore not requiring specific guidance in this instance.

In any event, the framing of any such criteria would be most difficult to craft because each representative proceeding will be unique in terms of the plaintiffs, defendants, causes of action and proposed settlement terms. Consequently the Society considers that no specific amendment of the Federal Scheme in this regard is required.

G *Other Issues - Relationship between representative proceedings and litigation funding.*

The Society has identified one further issue for consideration by the Commission, namely litigation funding.

While the Commission has expressed a view in its discussion paper that it would not be pertinent to deal with this issue as part of the current reference ([4.65]-[4.71]), the Society notes that the terms of reference to the Commission include consideration of any related matters. It is the Society's view that given the unique relationship between representative proceedings and litigation funding, that despite litigation funding having a broader ambit than representative proceedings, it is necessary for the Commission to give the issues arising from litigation funding at least some attention.

Even with an effective representative proceedings regime aimed at improving access to justice, the cost of litigation continues to make it very difficult for the persons intended to enjoy the benefit of the regime to practically do so. This is particularly so when considering that typically, only the representative applicant is liable to pay security for costs and exposed to adverse costs orders. To counter this problem, litigation funders play a significant and important role in ensuring that claimants can actually utilise the legislative regime aimed at giving them greater access to justice. Accordingly, any attempt to improve Western Australia's perception as a representative proceedings "friendly" jurisdiction should occur with an eye on improving the environment in which litigation funders are expected to operate.

The status of the laws of maintenance and champerty in Western Australia is of particular relevance to the Commission's objective to improve the attractiveness of Western Australia as a jurisdiction in which to commence representative proceedings.

The Society, understand that the current state of the law in Western Australia is that there remains a tort of maintenance and champerty: see *Chandler v Water Corporation* [2004] WASC 95; *Freeman v Kellerberrin Farmers Co-Operative Company Ltd* [2008] WASC 182 at [32]. It being noted that in *Campbells Cash & Carry v Fostif* (2006) 229 CLR 386 at 85, the High Court expressly stated that it was unnecessary to decide the issues surrounding maintenance and champerty in respect to jurisdictions where maintenance and champerty remained a tort.

In NSW, Victoria, South Australia and the ACT, where the crimes and torts of maintenance and champerty have been abolished by legislation, litigation funders can comfortably finance representative proceedings without uncertainty and without exposure to a risk that the proceeding will be stayed for an abuse of process.

In the Society's view, the possibility of forum shopping being driven by a litigation funder will continue to exist while maintenance and champerty remain a tort in Western Australia but not in other jurisdictions. One of the Society's members has advised of firsthand experience of a litigation funder opting to commence representative proceedings in NSW, rather than Western Australia (to which a closer nexus lay), due to the uncertainty that results from maintenance and champerty continuing to be a tort in Western Australia (and the opposing clarity of the position in NSW).

The Society considers that the Parliament at the same time as passing legislation to introduce a representative proceedings regime based on the Federal Scheme, that it also expressly abolishes the tort of maintenance and champerty to ensure that Western Australia is on an equal footing with the other States.

If the Commission is not minded to give consideration to or to deal with these issues as part of the present reference, the Society suggests that the Commission consider requesting a further reference from the Attorney-General in relation to this issue.



Craig Slater
President

24 May 2013