

# WA introduces class action scheme

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### At a glance

- On 1 September 2022, new class action laws were passed in Western Australia (WA). The Act will come into operation on a day to be fixed by proclamation.
- The *Civil Procedure (Representative Proceedings) Bill 2021 (WA)* introduces a legislative representative proceedings regime in the Supreme Court of Western Australia, which is substantially modelled on Part IVA of the *Federal Court of Australia Act 1976 (Cth)*.
- Victoria, New South Wales, Queensland and Tasmania also have regimes modelled on the federal scheme.
- Based on the experiences of the other states, it is likely WA will see a rise in class actions.

### The Civil Procedure (Representative Proceedings) Bill 2021 (WA)

On 1 September 2022, new class action laws were passed in Western Australia (WA). This followed a long and extensive reform process, which included the Law Reform Commission of Western Australia recommending changes back in 2015. The Law Reform Commission found WA's existing representative proceedings at the time to be "outdated, inherently uncertain and silent on many procedural aspects of representative proceedings."<sup>1</sup>

Following the lead of other states, the WA government introduced its Bill modelled on Part IVA. As WA Attorney General John Quigley said: "A similar regime has been substantially adopted in Victoria in 2000, New South Wales in 2011, Queensland in 2017, and Tasmania in 2019, and has stood the test of time."<sup>2</sup>

### Features of the WA Scheme

The proposed WA Scheme is primarily based on Part IVA of the Federal Court class action scheme, with some notable WA-specific elements.

Under the WA Scheme, to bring a group proceeding, litigants must satisfy the following threshold elements:

- there must be claims by seven or more persons against the same person
- the claims must arise out of the same, similar or related circumstances, and
- the claims of all those persons must give rise to a substantial common issue of law or fact.



<sup>1</sup> <https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/09/New-class-action-scheme-ensures-access-to-justice-for-more-people.aspx>

<sup>2</sup> Ibid.

It is worth noting the WA Bill has some differences from the federal scheme. These include:

- where a representative proceeding is commenced against more than one respondent, the representative party and each group member does not need to have a claim against every respondent
- the Court's power is limited to direct that a representative proceeding no longer continue (or be stayed) where the cost of identifying and distributing money to group members would be excessive for the respondent if judgment went against them, and
- an additional power is given to the Court, enabling it to remove a representative party where it is in the "interests of justice to do so".

The prohibition on lawyers charging a contingency fee has not been removed, unlike Victoria. However, it cannot be said what the future holds in terms of reform as the new regime will be reviewed after five years. It is anticipated that the state government will put forward the Law

Reform Commission's recommendation of providing an independent costs expert by the Supreme Court to assist in the assessment of legal costs.

### Litigation funding

The torts of maintenance and champerty (i.e. litigation funding) historically have prohibited an unrelated party from litigation funding or profiting from litigation in which they have no interest. The intention is to protect against interference in the litigation process for gain.

The WA Bill abolishes the torts of maintenance and champerty from the day it comes into operation, whilst preserving the rule of law for the cases in which a litigation funding contract is to be treated as contrary to public policy or as otherwise illegal.<sup>3</sup>

The WA Attorney General accepted that litigation funding will be prevalent in WA class actions by stating "...the fact that litigation funding is now a modern reality and has the potential to improve access to justice when the costs to initiate an action are so prohibitive."<sup>4</sup>

### Outlook for class actions in WA

The Bill will take effect on a day yet to be set by proclamation. According to the explanatory memorandum,<sup>5</sup> this is "to ensure that any necessary practice directions or rules of court can be put in place before the new representative proceeding regime commences operation."

This legislative reform aims to make it simpler for plaintiffs in WA to establish and efficiently pursue representative proceedings in the Supreme Court of WA. As WA Attorney General John Quigley said: "This regime will not only enhance access to justice by reducing the cost of court proceedings to the individual and improve the individual's ability to access legal remedies, it will enable court resources to be used more efficiently."<sup>6</sup>

While the stated aims of the WA scheme are noble, experience from other Australian jurisdictions tells us that efficiency and the cost-effectiveness of group proceedings do not necessarily go hand-in-hand.

Proceedings issued under similar regimes have (generally speaking) resulted in drawn-out litigation characterised by disproportionality in damages and costs awards to litigation funders / plaintiff law firms. It remains to be seen whether similar outcomes will follow in WA. The WA Supreme Court will play a vital role in ensuring equity for both sides of class action disputes.

Insurers can otherwise expect WA-specific group proceedings over the coming years, which are likely to arise out of industries that dominate WA's resource-driven economy (i.e. mining, oil and gas). Similarly, with the longest coastline in Australia and exposure to climate change and other emerging environmental risks (e.g. fire, rising sea levels and cyclones), insurers, brokers and their corporate clients with exposure to these risks in WA should continue to 'watch this space' as the legislation takes effect. Time will tell whether WA becomes the next class action battleground in Australia.

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<sup>3</sup> s 36(2)(b) *Civil Procedure (Representative Proceedings) Bill 2021* (WA)

<sup>4</sup> *Civil Procedure (Representative Proceedings) Bill 2021* Second Reading 18 August 2021 Mr J.R. Quigley

<sup>5</sup> [https://www.parliament.wa.gov.au/publications/tables/papers.nsf/displaypaper/4110834c436db179735d96cb4825877d000b2dbe/\\$file/tp-834.pdf](https://www.parliament.wa.gov.au/publications/tables/papers.nsf/displaypaper/4110834c436db179735d96cb4825877d000b2dbe/$file/tp-834.pdf)

<sup>6</sup> <https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/09/New-class-action-scheme-ensures-access-to-justice-for-more-people.aspx>

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