

## Class Action Reform Imminent in Western Australia

### IN SHORT

**The Situation:** The Parliament of Western Australia has introduced new legislation to modernise the State's class action regime (which is seen to be outdated, uncertain and silent on many important procedural aspects of representative proceedings).

**The Result:** The proposed regime is substantially modelled on Part IVA of the *Federal Court of Australia Act 1976* (Cth). If passed, it brings Western Australia more or less in line with the class action procedures that apply federally and on the east coast of Australia.

**Looking Ahead:** Western Australian class actions that attract Federal jurisdiction are likely to still be instituted in the Federal Court. However, the modernised procedure provided by these new reforms will almost certainly see an increased uptake of representative proceedings for State-based causes of action, such as contract and tort. As the Western Australian economy is characterised by its resources (iron ore, gold, liquefied natural gas), agriculture and services sectors, corporations operating in those areas may be exposed to greater class action risk.

Large-scale class actions have become a common feature of the legal landscape in Australia. The Federal Court has overwhelmingly been the forum of choice for class actions, but reforms over the last decade have seen an increase in the uptake of representative proceedings in the State courts of Victoria, New South Wales and Queensland.

Western Australia is now likely to adopt a new class actions regime, with the *Civil Procedure (Representative Proceedings) Bill 2019 (WA)* introduced before Parliament on 26 June 2019. If passed, the bill will provide for a class action system in Western Australia based heavily on the Federal Court model and will also implement the recommendations handed down by the WA Law Reform Commission in 2015.



The new reforms will modernise the class actions regime in Western Australia through the adoption of a modified version of the Federal Court model.



The key features of the proposed system include:

- **Commencing a Class Action:** Representative actions will be available where at least seven people have claims against the same person or company, and their claims arise out of the same, or similar, circumstances and give rise to a common question of fact or law. This is the same threshold requirement for commencing an action as that which applies under the current Federal regime.
- **Group Membership:** The system adopts an "opt out" model for group membership. This means that consent to be a group member is not required (except for certain State entities and public corporations), but group members must be given an opportunity to opt out of the class action before the action reaches a certain stage.

- **Multiple Defendants:** It will be open for a class action to be commenced against multiple defendants, irrespective of whether the lead plaintiff and all other group members have a claim against every defendant. Western Australia is seeking to avoid the "Philip Morris Issue"—where all represented plaintiffs must have a claim against each defendant named in the proceedings—which is how the Federal regime had been interpreted up until 2014. See Jones Day's previous *Commentary*, *Federal Court Relaxes Requirements for Australian Class Actions* (September 2014) available [here](#).
- **Discontinuing Uneconomical or Inappropriate Proceedings:** The Court will have the power to effectively disband a class action where it is satisfied that it is in the interests of justice to do so because the cost of the action is likely to make it uneconomical or inefficient, or it is an ineffective or inappropriate means of resolving the class action claims. Experience from other Australian jurisdictions suggests that this power is likely to be exercised in rare situations.
- **Substituting the Lead Plaintiff:** The Court will have the power to substitute the lead plaintiff in a class action with another group member, where the lead plaintiff is not adequately representing the interests of the group or if it is in the interest of justice to do so. This provision largely mirrors the Federal Court equivalent, but allows for greater flexibility by also permitting the Court to act in the interest of justice rather than being limited to just considering the interests of the group. However, such an order can only be made on the application of a group member.
- **Limitation Periods:** On the commencement of a representative proceeding, any applicable limitation period that applies to the claim of a group member will be suspended. This will apply unless the group member either opts out of the group, or the proceeding is discontinued without determining the group member's claim.
- **Court Approval of Settlement:** Like other class action regimes in Australia, a class action will only be able to be settled or discontinued with approval from the Court.
- **Judgment:** Class action judgments bind all group members except those that have opted out of the proceeding.

To date, the uncertainty surrounding the existing class action mechanisms in Western Australia has led such claims to be a rarity in the State's courts. That position is now likely to change. The proposed reforms will make it simpler for plaintiffs to establish and efficiently pursue representative proceedings in the Supreme Court, and as a result, we expect to see an increase in class actions arising in the west.

### THREE KEY TAKEAWAYS

1. If passed, the new reforms will modernise the class actions regime in Western Australia through the adoption of a modified version of the Federal Court model.
2. The new regime will create a pathway for more class actions to be initiated in Western Australia. State-based claims such as contract and tort, which were previously not viable to run, will now be more economical for plaintiffs to establish and pursue as a class action.
3. While the reforms will "open up" the State's courts to redress wrongs committed in Western Australia, large companies operating in the State will face increased class action risk (particularly in the current environment where we continue to see a rise in entrepreneurial class actions being initiated in Australia).



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