

TASMANIA

**SUPREME COURT CIVIL PROCEDURE
AMENDMENT BILL 2018**

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SUPREME COURT CIVIL PROCEDURE AMENDMENT BILL 2018

This Public Bill originated in the House of Assembly, and, having this day passed, is now ready for presentation to the Legislative Council for its concurrence.

SHANE DONNELLY, *Clerk of the House*
29 November 2018

*(Brought in by the Minister for Justice, the Honourable Elise
Nicole Archer)*

A BILL FOR

An Act to amend the *Supreme Court Civil Procedure Act 1932*

Be it enacted by Her Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

1. Short title

This Act may be cited as the *Supreme Court Civil Procedure Amendment Act 2018*.

2. Commencement

This Act commences on the day on which this Act receives the Royal Assent.

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3. Principal Act

In this Act, the *Supreme Court Civil Procedure Act 1932** is referred to as the Principal Act.

4. Section 4 substituted

Section 4 of the Principal Act is repealed and the following section is substituted:

4. Supreme Court may exercise jurisdiction in Admiralty actions

The Supreme Court may exercise the jurisdiction conferred on it in relation to Admiralty causes and matters by or under the *Admiralty Act 1988* of the Commonwealth.

5. Section 9 amended (Application of Act)

Section 9(5) of the Principal Act is amended by omitting “pursuant to the *Colonial Courts of Admiralty Act 1890*, or some later Imperial Act; and the Rules of Court shall not (except as provided by the *Colonial Courts of Admiralty Act 1890*, or some later Imperial Act) be construed as extending to matters relating to the slave trade.” and substituting “under the *Admiralty Act 1988* of the Commonwealth.”.

*No. 58 of 1932

6. Section 18 repealed

Section 18 of the Principal Act is repealed.

7. Section 35A inserted

After section 35 of the Principal Act, the following section is inserted in Part IV:

35A. Interest on judgments

- (1) Unless otherwise agreed by the parties or provided for under section 34 or 35, the court or a judge, when making a judgment requiring the payment of an amount of money, may order that the amount, or part of the amount, carries interest at rate not exceeding the prescribed rate for the whole or any part of the period commencing on the day after the day on which the cause of action arose and ending on the day on which the judgment is entered.
- (2) Subsection (1) does not –
 - (a) authorise the giving of interest on interest; or
 - (b) apply in relation to any amount on which interest is payable as of right whether because of an agreement or otherwise; or
 - (c) affect the damages recoverable for the dishonour of a bill of exchange; or

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(d) limit the operation of any other enactment or rule of law providing for the award of interest.

(3) For the purposes of subsection (1), the prescribed rate is the rate per centum per annum that is from time to time specified in the Rules of Court.

8. Section 38 repealed

Section 38 of the Principal Act is repealed.

9. Section 52 repealed

Section 52 of the Principal Act is repealed.

10. Part VII inserted

After section 63 of the Principal Act, the following Part is inserted:

PART VII – REPRESENTATIVE PROCEEDINGS

Division 1 – Preliminary

64. Interpretation

In this Part –

group member means a member of a group of persons on whose behalf representative proceedings have been commenced;

proceedings means proceedings in the Court, other than criminal proceedings;

representative party means a person who commences representative proceedings;

representative proceedings means proceedings commenced under section 66(1);

sub-group member means a person included in a sub-group established under section 77;

sub-group representative party means a person appointed to be a sub-group representative party under section 77.

65. Application of Part

This Part applies to proceedings commenced after the commencement of this section, whether the cause of action arose before, or arises after, that commencement.

Division 2 – Commencement of representative proceedings

66. Commencement of representative proceedings

- (1) Subject to this Part, if –

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- (a) 7 or more persons have claims against the same person; and
- (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- (c) the claims of all those persons give rise to a substantial common question of law or fact –

proceedings may be commenced by one or more of those persons as representing some or all of them.

- (2) Representative proceedings may be commenced –
 - (a) whether or not the relief sought –
 - (i) is, or includes, equitable relief; or
 - (ii) consists of, or includes, damages; or
 - (iii) includes claims for damages that would require individual assessment; or
 - (iv) is the same for each person represented; and
 - (b) whether or not the proceedings –

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- (i) are concerned with separate contracts or transactions between the defendant in the proceedings and individual group members; or
- (ii) involve separate acts or omissions of the defendant done or omitted to be done in relation to individual group members.

67. Standing

- (1) For the purposes of section 66(1)(a), a person has a sufficient interest to commence representative proceedings against another person on behalf of other persons if the person has standing to commence proceedings on the person's own behalf against that other person.
- (2) The person may commence representative proceedings on behalf of other persons against more than one defendant, whether or not the person and each of those persons have a claim against every defendant in the proceedings.
- (3) If a person has commenced representative proceedings, that person retains standing –

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- (a) to continue the proceedings; and
- (b) to bring an appeal from a judgment in the proceedings –

even though the person ceases to have a claim against any defendant.

68. Consent to be a group member not required

- (1) Subject to subsection (2), the consent of a person to be a group member is not required.
- (2) None of the following is a group member in representative proceedings unless the person gives consent in writing to being so:
 - (a) the Commonwealth, a State or a Territory;
 - (b) a Minister of the Commonwealth, a State or a Territory;
 - (c) a body corporate established for a public purpose by a law of the Commonwealth, a State or a Territory, other than an incorporated company or incorporated association;
 - (d) an officer of the Commonwealth, a State or a Territory, in his or her capacity as an officer.

69. Persons under legal incapacity

(1) In this section –

substitute decision-maker means a person who has a legal right or legal obligation to make decisions for another person.

(2) It is not necessary for a person under legal incapacity to have a substitute decision-maker merely in order to be a group member.

(3) A group member who is a person under legal incapacity may only take a step in representative proceedings, or conduct part of the proceedings, by means of the member's substitute decision-maker.

70. Originating process

(1) The originating process in representative proceedings, or a document filed in support of the originating process, must –

(a) describe or otherwise identify the group members to whom the proceedings relate; and

(b) specify the nature of the claims made on behalf of the group members and the relief claimed; and

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- (c) specify the question of law or facts common to the claims of the group members; and
 - (d) include any other matters required by the Rules of Court to be included.
- (2) In describing or otherwise identifying group members for the purposes of subsection (1), it is not necessary to name, or specify the number of, group members.

71. Right of group member to opt out

- (1) The Court is to fix a date before which a group member may opt out of representative proceedings in the Court.
- (2) A group member may opt out of the representative proceedings by written notice given before the date so fixed.
- (3) The Court may, on application by a group member, the representative party or the defendant in the proceedings, fix another date so as to extend the period during which a group member may opt out of the representative proceedings.
- (4) Except with the leave of the Court, the hearing of representative proceedings must not commence earlier than the date before which a group member may opt out of the proceedings.

72. Causes of action accruing after commencement of representative proceedings

- (1) On application by the representative party made at any stage of representative proceedings, the Court may give leave to amend the originating process that commenced the representative proceedings so as to alter the description of the group.
- (2) The description of the group may be altered so as to include a person –
 - (a) whose cause of action accrued after the commencement of the representative proceedings but before such date as the Court fixes when giving leave under subsection (1); and
 - (b) who would have been included in the group, or with the consent of the person would have been included in the group, if the cause of action had accrued before the commencement of the proceedings.
- (3) The date fixed under subsection (2)(a) may be the date on which leave is given or another date.
- (4) If the Court gives leave under subsection (1), it may also make any other orders it thinks just, including an

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order relating to the giving of notice to persons who, as a result of the amendment, will be included in the group and the date before which such persons may opt out of the proceedings.

73. Situation where fewer than 7 group members

If, at any stage of representative proceedings, it appears likely to the Court that there are fewer than 7 group members, the Court, on such conditions (if any) as it thinks fit, may order that the proceedings continue under this Part or order that the proceedings no longer continue under this Part.

74. Distribution costs excessive

If –

- (a) the relief claimed in representative proceedings is or includes payment of money to group members (otherwise than in respect of costs); and
- (b) on application by the defendant, the Court concludes that it is likely that, if judgment were to be given in favour of the representative party, the cost to the defendant of identifying the group members and distributing

to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts –

the Court, by order, may direct that the proceedings no longer continue under this Part or stay the proceedings so far as they relate to relief of the kind referred to in paragraph (a).

75. Court may order discontinuance of proceedings in certain circumstances

- (1) The Court, on application by the defendant or of its own motion, may order that representative proceedings no longer continue under this Part if it is satisfied that it is in the interests of justice to do so because –
 - (a) the costs that would be incurred, should the proceedings continue as representative proceedings, are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
 - (b) all the relief sought can be obtained by means of proceedings other than representative proceedings under this Part; or
 - (c) the representative proceedings will not provide an efficient and

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- effective means of dealing with
the claims of group members; or
- (d) a representative party is not able to adequately represent the interests of the group members; or
 - (e) it is otherwise inappropriate that the claims be pursued by means of representative proceedings.
- (2) For the purposes of subsection (1)(e), it is not inappropriate for claims to be pursued by means of representative proceedings merely because the persons identified as group members in relation to the proceedings –
- (a) do not include all persons on whose behalf those proceedings might have been brought; or
 - (b) are aggregated together for a particular purpose such as a litigation funding arrangement.
- (3) If the Court dismisses an application under this section, the Court may order that no further application under this section be made by the defendant except with the leave of the Court.
- (4) Leave for the purposes of subsection (3) may be granted subject to such conditions as to costs as the Court considers just.

76. Effect of discontinuance order under this Part

(1) If the Court makes an order under section 73, 74 or 75 that representative proceedings no longer continue under this Part –

(a) the proceedings may be continued as proceedings by the representative party on the party's own behalf against the defendant; and

(b) on the application of a person who was a group member for the purposes of the representative proceedings, the Court may order that the person be joined as an applicant in the proceedings.

(2) In this section –

applicant, in relation to proceedings, includes a claimant or plaintiff in the proceedings.

77. Determination of questions if not all common

(1) If it appears to the Court that determination of the question or questions common to all group members will not finally determine the claims of all group members, the Court may give

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directions in relation to the determination of the remaining questions.

- (2) In the case of questions common to the claims of some only of the group members, the directions given by the Court may include directions establishing a sub-group consisting of those group members and appointing a person to be the sub-group representative party on behalf of the sub-group members.

78. Individual questions

- (1) In giving directions under section 77, the Court may permit an individual group member to appear in the proceedings for the purpose of determining a question that relates only to the claims of that member.
- (2) In such a case, the individual group member, and not the representative party, is liable for costs associated with the determination of the question.

79. Directions relating to commencement of further proceedings

If a question cannot be dealt with properly or conveniently by the Court under section 77 or 78, the Court may give directions for the commencement and conduct of other proceedings,

whether or not representative proceedings.

80. Adequacy of representation

- (1) If, on application by a group member, it appears to the Court that a representative party is not able to represent the interests of the group members adequately, the Court may substitute another group member as representative party and make such other orders as it thinks fit.
- (2) If, on application by a sub-group member, it appears to the Court that a sub-group representative party is not able to represent the interests of the sub-group members adequately, the Court may substitute another person as sub-group representative party and may make such other orders as it thinks fit.

81. Stay of execution in certain circumstances

If a defendant in representative proceedings commences proceedings in the Court against a group member, the Court may order a stay of execution in respect of any relief awarded to the group member in the representative proceedings until the other proceedings are determined.

82. Approval of Court required for settlement or discontinuance

- (1) Representative proceedings may not be settled or discontinued without the approval of the Court.
- (2) If the Court gives such approval, it may make such orders as are just with respect to the distribution of any money, including interest, paid under a settlement or paid into the Court in relation to the representative proceedings.
- (3) Unless the Court is satisfied that it is just to do so, an application for approval of a settlement of representative proceedings may not be determined unless notice has been given to group members in accordance with section 84.

83. Settlement of individual claim of representative party

- (1) A representative party, with the leave of the Court, may settle the party's individual claim in whole or in part at any stage of the representative proceedings.
- (2) If in representative proceedings the representative party is seeking leave of the Court to settle, or has settled, his or her individual claim, the representative

party, with the leave of the Court, may withdraw as representative party.

- (3) If a person has sought leave to withdraw as representative party under subsection (2), the Court, on application by a group member, may make an order for the substitution of another group member as representative party and may make such other orders as it thinks fit.
- (4) Before granting, under subsection (2), a person leave to withdraw as representative party –
 - (a) the Court must be satisfied that notice of the application has been given to group members in accordance with section 84(1) and has been given in sufficient time for them to apply to have another person substituted as the representative party; and
 - (b) any application for the substitution of another group member as representative party must have been determined.

Division 3 – Notices

84. Notice to be given of certain matters

- (1) Notice must be given to group members of the following matters in relation to representative proceedings:

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- (a) the commencement of the proceedings and the right of the group members to opt out of the proceedings before a specified date, being the date fixed under section 71(1);
 - (b) an application by the defendant in the proceedings for the dismissal of the proceedings on the ground of want of prosecution;
 - (c) an application for approval of a settlement;
 - (d) an application by a representative party seeking leave to withdraw under section 83 as representative party.
- (2) The Court may dispense with compliance with any or all of the requirements of subsection (1) if the relief sought in the representative proceedings does not include any claim for damages.
- (3) If the Court so orders, notice must be given to group members of the paying into Court of money in answer to a cause of action on which a claim in the representative proceedings is founded.
- (4) The Court, at any stage, may order that notice of any matter be given to a group member or group members.

- (5) Notice under this section must be given as soon as practicable after the occurrence of the event to which it relates.

85. Notices under section 84

- (1) The form and content of a notice under section 84 are to be approved by the Court.
- (2) The Court, by order, is to specify –
- (a) who is to give the notice; and
 - (b) the way in which the notice is to be given.
- (3) An order under subsection (2) may also include provisions –
- (a) directing a party to provide information relevant to the giving of the notice; and
 - (b) relating to the costs of giving the notice.
- (4) An order under subsection (2) may require that notice be given by –
- (a) means of press advertisement, radio broadcast or television broadcast; or
 - (b) any other means.

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- (5) The Court may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.
- (6) A notice that concerns a matter for which the Court's leave or approval is required must specify the period within which a group member or other person may apply to the Court, or take some other step, in relation to the matter.
- (7) A notice that includes or concerns conditions must specify the conditions and the period, if any, for compliance.
- (8) The failure of a group member to receive, or respond to, a notice does not affect a step taken, or an order made or judgment given, in any proceedings.

Division 4 – Powers of Court

86. Judgment – powers of Court

- (1) The Court, in determining a matter in representative proceedings, may do any one or more of the following:
 - (a) determine a question of law;
 - (b) determine a question of fact;
 - (c) make a declaration of liability;
 - (d) grant any equitable relief;

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- (e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts calculated in such manner as the Court specifies;
 - (f) make an award of damages in an aggregate amount without specifying amounts awarded in respect of individual group members.
- (2) In making an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled.
- (3) Subject to section 82, the Court is not to make an award of damages under subsection (1)(f) unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.
- (4) If the Court has made an award of damages, the Court may give such directions (if any) as it thinks just in relation to –
 - (a) the manner in which a group member is to establish the member's entitlement to share in the damages; and

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- (b) the manner in which any dispute regarding the entitlement of a group member to share in the damages is to be determined.
- (5) A judgment given in representative proceedings is to describe or otherwise identify the group members who will be affected by it.

87. Constitution, &c., of fund

- (1) Without limiting the operation of section 86, in making provision for the distribution of money to group members, the Court may provide for –
 - (a) the constitution and administration of a fund consisting of the money to be distributed; and
 - (b) either –
 - (i) the payment by the defendant of a fixed sum of money into the fund; or
 - (ii) the payment by the defendant into the fund of such instalments, and on such terms, as the Court directs so as to meet the claims of group members; and

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- (c) entitlements to interest earned on the money in the fund.
- (2) The costs of administering a fund are to be borne by the fund, or by the defendant in the representative proceedings, or by both, as the Court directs.
- (3) If the Court orders the constitution of a fund referred to in subsection (1), the order is to –
 - (a) require notice to be given to group members in such manner as is specified in the order; and
 - (b) specify the manner in which a group member is to make a claim for payment out of the fund and establish the group member's entitlement to payment; and
 - (c) specify a day (which is not earlier than 6 months after the day on which the order is made) on or before which the group members are to make a claim for payment out of the fund; and
 - (d) make provision in relation to the day by which the fund is to be distributed to group members who have established an entitlement to be paid out of the fund.

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- (4) The Court may allow a group member to make a claim after the day specified under subsection (3)(c) if –
 - (a) the fund has not already been fully distributed or applied in accordance with an order under subsection (5); and
 - (b) it is just to do so.
- (5) On the application of the defendant made after the day by which the fund is to be distributed to group members, as referred to in subsection (3)(d), the Court may make such orders as it thinks fit for the payment from the fund to the defendant of the money remaining in the fund.

88. Effect of judgment

A judgment given in representative proceedings binds all group members affected by it, other than any person who has opted out of the proceedings under section 71.

Division 5 – Appeals

89. Appeals

- (1) Subject to the Rules of Court and without limiting the application of section 40, the following appeals from a judgment of the Court in representative proceedings may

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be brought under that section as representative proceedings:

- (a) an appeal by the representative party on behalf of group members in respect of a judgment to the extent that it relates to questions common to the claims of the group members;
 - (b) an appeal by a sub-group representative party on behalf of sub-group members in respect of a judgment to the extent that it relates to questions common to the claims of the sub-group members.
- (2) The parties to an appeal in respect of the determination of a question that relates only to the claim of an individual group member are that group member and the defendant.
- (3) If the representative party or the sub-group representative party does not institute an appeal within the time allowed for doing so, another member of the group or sub-group may, within a further 21-day period, institute an appeal as representing the group members or sub-group members.
- (4) If an appeal is brought from the judgment of the Court in representative proceedings, the Court hearing the appeal

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may direct that notice of the appeal be given to such persons, and in such manner, as it considers appropriate.

- (5) This Part, other than section 71, applies to appeal proceedings that relate to representative proceedings despite any other provisions of this Act, the provision of any other Act or any other law.
- (6) The notice instituting an appeal in relation to questions that are common to the claims of group members or sub-group members must describe or otherwise identify the group members or sub-group members but need not specify the names or number of those members.

Division 6 – Miscellaneous

89A. Costs

In any representative proceedings, the Court may not award costs against a person on whose behalf the proceedings have been commenced (other than a representative party) except as authorised by section 77 or 78.

89B. Suspension of limitation periods

- (1) On the commencement of any representative proceedings, the running of the limitation period that applies to the

claim of a group member to which the proceedings relate is suspended.

- (2) The limitation period does not begin to run again unless –
 - (a) the member opts out of the proceedings under section 71; or
 - (b) the proceedings are discontinued; or
 - (c) the proceedings, and any appeals arising from the proceedings, are determined without finally disposing of the group member's claim.
- (3) However, nothing in this section affects the running of a limitation period in respect of a group member who, immediately before the commencement of the representative proceedings, was barred by the expiration of that period from commencing proceedings in the member's own right in respect of a claim in the representative proceedings.
- (4) This section applies despite anything in the *Limitation Act 1974* or any other law.

89C. General power of Court to make orders

In any proceedings, including an appeal, conducted under this Part, the Court, of its own motion or on application by a

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party or a group member, may make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings.

89D. Reimbursement of representative party's costs

- (1) If the Court has made an award of damages in representative proceedings, the representative party or a sub-group representative party, or a person who has been such a party, may apply to the Court for an order under this section.
- (2) If, on an application under subsection (1), the Court is satisfied that the costs reasonably incurred in relation to the representative proceedings by the applicant are likely to exceed the costs recoverable by the applicant from the defendant, the Court may order that an amount equal to the whole or a part of the excess be paid to the applicant out of the damages awarded.
- (3) On an application under subsection (1), the Court may also make any other order that it thinks just.

11. Section 195 amended (Rules of Court)

Section 195 of the Principal Act is amended as follows:

- (a) by omitting from subsection (3) “provisions of section 9(5)” and substituting “*Admiralty Act 1988* of the Commonwealth and the Rules made under section 41 of that Act,”;
- (b) by omitting subsection (4).

12. Section 197 amended (Power of judges to make Rules of Court)

Section 197(1)(f) of the Principal Act is amended by omitting subparagraph (ii) and substituting the following subparagraph:

- (ii) appeals, other than a review of a taxation of costs by an officer of the Court; and

13. Repeal of Act

This Act is repealed on the three hundred and sixty fifth day from the day on which it commences.