IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2023 00969

BETWEEN:

JARAD MAXWELL ROOKE — Plaintiff

v

AUSTRALIAN FOOTBALL LEAGUE (ACN 004 155 211) — First Defendant

- and -

GEELONG FOOTBALL CLUB LIMITED (ACN 005 150 818) — Second Defendant

---

JUDGE:	Keogh J
WHERE HELD:	Melbourne
DATE OF HEARING:	17 June 2025
DATE OF RULING:	8 September 2025
CASE MAY BE CITED AS:	Rooke v Australian Football League
MEDIUM NEUTRAL CITATION:	[2025] VSC 560

PRACTICE AND PROCEDURE — Representative proceeding — Application for declaration that proceeding not commenced against second defendant in accordance with Pt 4A of *Supreme Court Act 1986* (Vic) — Application for leave to amend to satisfy requirements of s 33C(1) of the Act — Real prospect of establishing that seven or more group members have claims against second defendant — *Bright v Femcare Ltd* (2002) 195 ALR 574 — *Green v Graincorp Oilseeds Pty Ltd* [2023] VSC 395 — *ABL Nominees Pty Ltd v MacKenzie (No 2)* [2014] VSC 529 — Application dismissed — Application to amend group member definition — Proposed definition sufficiently clear to ascertain identity of group members — *Supreme Court Act* s 33H —Leave to amend granted — Application to declass group proceeding — Significant common questions to be determined at trial — Declassing unlikely to save significant time or cost compared to continuing as group proceeding — Where claim period of proceeding spans 38 years — Claim period for initial trial to be limited to lead plaintiff's claim period of nine years — *Supreme Court Act* s 33N — Application dismissed.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	F Forsyth KC with P Hamilton	Margalit Injury Lawyers
For the First Defendant	P Crutchfield KC and B Ihle KC with R Singleton	DLA Piper Australia
For the Second Defendant	M Rush KC with G Coleman	Lander & Rogers

HIS HONOUR:

1 In this group proceeding the plaintiff, Jarad Rooke, alleges that during the period from 1985 to 2023 ('claim period') there were failures by the first defendant, Australian Football League ('AFL') and the second defendant, Geelong Football Club Limited ('Geelong') to take reasonable precautions to manage the risk of harm to AFL football players from concussion injuries.

2 The proceeding was commenced by a writ and general indorsement filed in March 2023. Geelong was joined as the second defendant in September 2024. Geelong has applied for a declaration that Rooke has not commenced the proceeding against it in accordance with the requirements of s 33C of the *Supreme Court Act 1986* (Vic) ('Act') because there are not seven or more group members with related claims against it. Rooke submitted that compliance with s 33C(1)(a) is established because it is not in dispute that there are seven or more group members with claims against the AFL, and that in any event the evidence on the application shows it is likely that seven or more of those members have claims against Geelong.

3 The defendants complain that the current pleading is defective because the definition of injured players ('group member definition') in the amended statement of claim ('ASOC') does not allow AFL players to reasonably ascertain whether they are members of the group, and therefore does not comply with s 33H of the Act. Rooke responded to that criticism by providing a proposed amendment to the group member definition, which he now seeks leave to file. The defendants oppose Rooke having leave to amend the definition as proposed, submitting that the amendment does not cure the defect they identified.

4 Both defendants have also applied for an order under s 33N of the Act that the proceeding not continue against them under Part 4A ('declassing applications'). Those applications are opposed by Rooke.

5 The parties agreed at the hearing that additional issues raised by the defendants' summonses, being class closure and strikeout/summary dismissal of an alternative

statutory duty claim pleaded by Rooke, should be deferred until after the above issues had been determined.

Section 33C

6 In the writ and general indorsement filed in March 2023, Rooke pleaded, in compliance with ss 33C(1)(a) and 33H of the Act, that there were seven or more group members.

7 Rooke joined Geelong to the proceeding by filing an amended writ and the ASOC on 19 September 2024. Rooke did not plead in either of those documents that there are seven or more group members with claims against Geelong that arise out of the same, similar or related circumstances. By summons filed on 31 January 2025, Geelong applied for a declaration that the proceeding was not commenced against it in accordance with the requirements of s 33C of the Act on this basis.

8 By summons dated 16 June 2025, Rooke has now applied for leave to add the following paragraphs to the ASOC:

> 11A. Further, Rooke brings this proceeding on behalf of all persons who are both:
>
> (a) injured players; and
>
> (b) were registered Club players during the period,
>
> ('**the Geelong sub-group**').
>
> 11B. There are seven or more Geelong sub-group members with claims against the Geelong Football Club.

9 The parties relied on the following affidavits in relation to this issue:

(a) Ari Abrahams, solicitor for Geelong, affirmed 31 January, 21 February and 22 May 2025; and

(b) Michel Margalit, solicitor for Rooke, affirmed 8 May and 28 May 2025.

10 In summary, Geelong submitted that:

(a) It was mandatory for Rooke to comply with the requirements of s 33C(1) of the

Act in order to validly commence a proceeding against Geelong under Part 4A.

(b) The s 33C(1) requirements apply separately for each defendant joined to a group proceeding. The allegation that there were seven or more group members with related claims against the AFL when the proceeding was initiated is not enough to satisfy the requirement with respect to Geelong.

(c) Having been challenged on the issue, Rooke has not produced any evidence to show that s 33C(1) is satisfied in relation to Geelong.

11 Rooke submitted as follows:

(a) It is not in issue that Rooke complied with s 33C(1) of the Act when the proceeding was commenced against the AFL. That compliance satisfies the requirement in relation to Geelong.

(b) Alternatively, the proposed pleading amendment satisfies the requirement in relation to Geelong. It is not necessary for a party to verify the pleaded allegation in advance by evidence.

(c) In any event, the evidence establishes that it is likely there are seven or more group members with claims against Geelong.

Provisions and legal principles

12 In s 3 of the Act, 'proceeding' is defined to mean 'any matter in the Court other than a criminal proceeding'. 'Group proceeding' is defined in s 33A to mean a proceeding commenced under Part 4A.

13 Section 33C(1) of the Act reads:

> Subject to this Part, if—
>
> (a) seven 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—

a proceeding may be commenced by one or more of those persons as representing some or all of them.[1]

14 Compliance with s 33C of the Act is dealt with by s 33H, which provides that the indorsement on the writ commencing the proceeding must:

(a) describe or otherwise identify the group members to whom the proceeding relates; and

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

(c) specify the questions of law or fact common to the claims of the group members.[2]

15 It is appropriate to first consider whether the pleading amendment proposed by Rooke satisfies the requirements of s 33C of the Act.

16 Before Rooke proposed the amendment outlined in [8] above, Geelong made the following written submission:

> The Court should not engage in an exercise of determining whether there are seven or more group members with claims against Geelong by receiving and then examining evidence on this question. The answer to this question should be capable of being decided on the pleading.

In support of this submission, Geelong relied on the decision of the Full Federal Court in *Bright v Femcare Ltd* ('*Femcare*'),[3] where Keifel J (with whom Lindgren J agreed) said:

> It would not seem to follow from s 33C(1), or from *Wong v Silkfield*, that there is a prohibition upon a respondent challenging whether, in truth, the applicant's and the group members' cases had the necessary qualities referred to in s 33C(1). Such an application, to strike out or stay the proceedings, would not however be one based upon non-compliance with s 33C(1), which is to be assessed by reference to the claims, not the true facts. It would be based upon there being an abuse of process because there is no foundation in fact for the required matters. One would not think that such an application is likely to be often made. …[4]

17 In *Green v Graincorp Oilseeds Pty Ltd ('Green')*,[5] John Dixon J said, to similar effect:

> … In evaluating Graincorp's submission it is relevant to recall that, as I

---

1 *Supreme Court Act 1986 (Vic)* s 33C(1) ('*SCA*').
2 Ibid s 33H(2).
3 (2002) 195 ALR 574 ('*Femcare*').
4 Ibid [132].
5 [2023] VSC 395 ('*Green*').

> explained in greater detail in *Fabfloor (Vic) Pty Ltd v BNY Trust Company of Australia Ltd*, it is not now and never has been the law of this State that, absent special circumstances, a party must by evidence verify in advance whether a claim to be pleaded in a proceeding will, on its merits, satisfy the requirements of ss 33C and 33H(2). The court assumes, because the proper basis for the allegations has been certified, that the party advancing the pleading can establish its allegations at trial. This conventional pleading test is well established.
>
> This presumption may be rebutted, but doing so generally raises the distinction between an application for leave to amend a pleading and other application such as for summary judgment or to strike out a pleading or part thereof. Such applications either require, or may be supported by, evidence on affidavit.[6]

18 In .*Au Domain Administration Limited v Domain Names Australia Pty Ltd*,[7] the respondent challenged the applicant's compliance with s 33C(1)(a) of the *Federal Court of Australia Act 1976* (Cth) ('FCA'). Finkelstein J concluded that in some cases it will be possible to infer that the number of group members exceeds seven because of the nature of the claim brought. His Honour said that where that is not the case, an applicant should provide sufficient information when the claim is initiated or in response to an enquiry or challenge by the respondent to demonstrate that there are at least seven group members. Finkelstein J concluded in the case before him that the evidence relied on by the applicant was sufficient to enable him to infer that the s 33C(1)(a) requirement was satisfied.

19 It is not clear whether Finkelstein J took a different approach to Keifel J and Dixon J or whether his Honour's reasoning responded to a particular application made by the respondent, the details of which were not set out in his Honour's ruling. In any event I conclude, with respect, that the approach taken by Keifel J and Dixon J is correct.

20 The proposed addition of paragraphs 11A and 11B to the ASOC addresses the requirements of s 33C(1)(a) and to that extent, s 33H(2) of the Act. As that pleading is only proposed, there has been no strike out, stay or summary judgment application made in relation to it.

21 Prior to these proposed amendments, Geelong relied on r 23.02(c) and (d) of the

---

6 Ibid [32]-[33].
7 (2003) 202 ALR 127.

Supreme Court (General Civil Procedure) Rules 2025 (Vic) ('Rules') to strike out paragraphs of the ASOC on the ground that they did not make clear whether Rooke alleged there were seven or more group members with claims against it. Geelong now submits that leave to replead should not be given because the proceeding should not continue as a group proceeding in any event. I understood this submission to rely on the declassing applications.

22 Leave may be given to amend a pleading for the purpose of determining the real question in controversy between the parties, or avoiding a multiplicity of proceedings.[8] Compliance with s 33C(1)(a) of the Act is a requirement which must be satisfied to bring a group proceeding against a defendant. In those circumstances, the Court has jurisdiction to consider Rooke's application to amend. Further, a party may cure the failure of an indorsement to comply with the Rules by filing an amended indorsement or statement of claim.[9]

23 In *ABL Nominees Pty Ltd v MacKenzie (No 2)*,[10] Derham AsJ summarised the principles that apply to an application to amend the pleadings as follows:

> It is common ground that an amendment which is futile because it is obviously bad in law will not be allowed: *Commonwealth v Verwayen*. Similarly, if a proposed pleading would be liable to be struck out if it had been contained in an original pleading, either because the pleading is bad in law or is defective as a pleading, then leave to file the proposed pleading will not be allowed: *Horton v Jones (No.2)*; *Gimson v Victorian WorkCover Authority*. The Court, on this type of application, will not engage in an examination of the merits of the case foreshadowed by the proposed amendment, but where that amendment introduces a patently hopeless issue for determination then its inclusion will be futile and that will be a significant, and probably decisive, matter in the exercise of the Court's discretion.[11]

Derham AsJ added that the test is best expressed in the words of s 63 of the *Civil Procedure Act 2010* (Vic) ('CPA'), being that if the amendment has no real prospect of success at trial, then that would be a highly relevant factor in the exercise of the discretion to refuse the application.[12] His Honour said that the factors identified by

---

8 *Supreme Court (General Civil Procedure) Rules 2025* (Vic) r 36.01.
9 Ibid rr 5.04, 14.02.
10 [2014] VSC 529 ('*ABL*').
11 Ibid [18].
12 Ibid [19], citing *Matthews v SPI Electricity Pty Ltd (Ruling No 6)* [2012] VSC 70, [34].

the High Court in *Aon Risk Services Australia Ltd v Australian National University*[13] are relevant to the limits on repleading.[14]

24 In summary, Margalit and Abrahams gave the following evidence relevant to this issue:

(a) Two hundred and ninety-two players played one or more AFL games for Geelong in the claim period.

(b) One hundred and eleven people have contacted Rooke's solicitors to express interest in participating in the group proceeding. Ninety of those people have been registered as group members.

(c) Of the 90 registered group members, five (including Rooke) played in the AFL competition for Geelong, and [redacted]. The AFL history of those players is briefly described as follows:

(i) Rooke played 135 games for Geelong between 2002 and 2010;

(ii) 'Player 2' played less than [redacted] games for Geelong in the 1980s;

(iii) 'Player 3' played [redacted] games for Geelong in the 1980s and also played for another AFL club;

(iv) 'Player 4' played [redacted];

(v) 'Player 5' was drafted by [redacted] Geelong, and subsequently played approximately [redacted] games for another club; and

(vi) 'Player 6' played approximately [redacted] games for Geelong.

(d) At the time this proceeding was issued, a second group proceeding was

13 (2009) 239 CLR 175.
14 *ABL* (n 10) [20].

commenced by plaintiffs Katherine Tuck, Jay Schulz and Darren Jarman against the AFL, Richmond Football Club, Port Adelaide Football Club, Hawthorn Football Club and Adelaide Football Club ('Tuck proceeding'). Fifty-seven persons were registered with the plaintiffs' solicitors in the Tuck proceeding when it was discontinued in early 2024. Most of those group members have not registered with Rooke's solicitors.

(e) Rooke's solicitors also act for Gary Robert Ablett Sr, who played for Geelong between 1984 and 1996. Ablett brought his own individual proceedings against the AFL, Hawthorn Football Club and Geelong in respect to concussion injuries suffered as an AFL player.

25 Margalit said she had instructed staff members to review video footage of AFL games played by Rooke for the purpose of recording observations of any significant head knocks to players. Margalit said she has been informed by those staff members that they have identified potential concussions sustained by at least 177 other players in those matches.

26 Also under Margalit's instruction, staff members at Rooke's solicitors have identified concussion-related injuries to a further 13 Geelong players from the content of media articles. A number of those articles simply detail concussion injuries suffered by players during AFL games. The subject matter of the articles which contain greater detail can be summarised as follows:

(a) A player who played over 200 games for Geelong and another AFL club who reported very significant symptoms that he said were a direct result of head knocks and concussions experienced during his AFL career.

(b) A player who had a long career and suffered concussions, who was reported to have undergone baseline brain function testing, and who felt that he was 'getting the best possible care'. The media report does not refer to any symptoms experienced by the player.

(c) A player with a long playing career for Geelong and two other AFL clubs who was reported to be 'struggling with the devastating effects of head knocks throughout his storied career, including shocking short and long term memory loss'. The player is reported as saying he suffered chronic traumatic encephalopathy as a result. The media report includes the following:

> **What is brain disease CTE?**
>
> Chronic Traumatic Encephalopathy (CTE) is a degenerative brain disease found in athletes military veterans and others with a history of repetitive brain trauma.
>
> CTE is caused in part by repeated traumatic brain injuries which include concussions and nonconcussive impacts.
>
> Mood behaviour and cognitive symptoms can include:
>
> - Impulse control problems
> - Aggression
> - Mood swings
> - Depression
> - Paranoia
> - Anxiety
> - Problems with executive function
> - Impaired judgment
> - Poor Short-term memory
> - Dementia
>
> Currently CTE can only be diagnosed by an examination of brain tissue after a patient has died.
>
> **Source: Concussion Legacy Foundation**

(d) A player who played over 200 games for Geelong who said he was knocked out four times during his AFL career, and underwent brain function testing. The doctor who performed the test is reported as saying that the player had not shown any symptoms and 'seemed to do all the tests really well'. The media report is dated 2015.

(e) Attempts by 'player agent and concussion campaigner' Peter Jess 'for WorkSafe Victoria to prosecute the AFL for alleged negligence in dealing with concussion'. The report contains a list attributed to Jess of approximately 30 players who 'retired with concussion related issues' between 2004 and 2021.

(f) A Geelong player with a playing career of over 200 games who said he 'began to get migraines, headaches and noticed memory loss' about two years after his playing career ended. The player said 'the symptoms were unexpected and a little scary'. The report includes the following:

> That fear has only heightened in the past 12 months as the concussion discussion has become broader and former players are reporting difficulties which they ascribe to head trauma. Some of their accounts break my heart. I would never want my experience to impact perceptions of what some past players are going through, because their stories are real with crippling symptoms stopping people from working.
>
> I also know each circumstance is different, and many players affected are reluctant to open up because they are concerned as to how it might affect their own employment prospects.
>
> But there are also many ex-players who deal with a range of issues, including the effects of concussion due to their careers, who are fortunate enough to function post-playing, as long as they access and receive appropriate support. I count myself as one of those lucky ones.
>
> As my headaches re-occurred I sought help immediately, seeing [a doctor], who pointed me in the right direction for help. About six years ago, I began seeing a neurologist. I also began seeing a psychologist through the AFLPA network to help me adjust to what was happening, and a pain specialist to assist with the ongoing pain I felt as a result of football.
>
> The neurologist has told me the injuries due to knocks I received aren't great, but by being proactive and seeing professionals as soon as symptoms arose, I can manage the impact it has on my life. I count myself lucky.
>
> …
>
> The issue is real. The difficulties some former players are experiencing are heartbreaking, and we can support them. But our biggest responsibility is acting on what we do know now in a clever way so current and future generations of players are looked after.

27 Margalit said that based on her discussions with registered group members and

potential group members, and information provided by members of her staff, AFL players are reluctant to undergo medical testing and assessment for permanent brain injury and identify as group members because of concerns related to confidentiality, employment and social stigma. She said that in her experience of group proceedings, many group members are more inclined to register once the proceeding is further advanced.

Analysis

28 I conclude for the following reasons that Rooke should be given leave to amend his pleading to satisfy the requirements of s 33C of the Act, because there is a real prospect of establishing the matters pleaded in paragraphs 11 and 11B of the proposed amended ASOC.

29 First, the evidence is sufficient to infer that there is a real prospect of Rooke, registered players 2 and 6, Ablett, and at least three of the players identified in media reporting satisfying the group member criteria and having claims against Geelong. Each of those players has identified themselves as suffering a brain injury resulting from concussions incurred during AFL matches or training. Each player played exclusively or for long periods with Geelong.

30 Second, there are almost 300 players who played AFL games for Geelong during the claim period and who potentially suffered concussions and brain injury. There is a real prospect of Rooke establishing that concussion is not an unusual injury for players to sustain during AFL games or training. Further, the class of group members in this proceeding includes persons who are in a close relationship with injured players and have suffered psychiatric illness because of injury to those players.

31 Third, most of the 58 persons who registered in the Tuck proceeding have not registered as group members in this proceeding. Taken together with Margalit's evidence about the reluctance of potential group members to identify themselves and register, and the media reporting set out in [26] above to similar effect, there appears to be a significant number of AFL players who may meet the group member definition

who have not yet registered in this proceeding. Geelong was an AFL club throughout the claim period. It is realistic that a number of those unidentified group members will have claims against Geelong.

32 It is not strictly necessary to determine Rooke's alternative argument, that it is sufficient that it complied with s 33C(1) in relation to the AFL. However given the issue was argued by the parties I will consider it.

33 In *Ryan v Great Lakes Council*,[15] Wilcox J considered the equivalent provision found in Part IVA of the FCA.[16] The proceeding concerned a claim by persons who had suffered injury from eating oysters from the Wallis Lakes region. The claim was made against the Great Lakes Council and a number of different oyster farmers and distributors. The applicant conceded that he only had a claim against the Council and one oyster farmer. Wilcox J determined that an applicant must have a personal claim against each respondent that is shared by at least six other persons in order to utilise the Part IVA procedure.[17]

34 The issue in *Cash Converters International Ltd & Ors v Gray*[18] was whether s 33C(1) of the FCA requires that the applicant and each group member they represent have a claim against each respondent to the proceeding. The Full Court, after analysing the text of s 33C(1) and considering that provision in the context of Part IVA, determined that the answer is no. The Court said:

> … If the condition in s 33C(1)(a) is met by observing that 7 or more persons have claims against the same respondent (and sub-paragraphs (b) and (c) are satisfied), that is the end of the enquiry. …[19]

35 Rooke relied on a decision of Lee J in *Turner v Tesa Mining (NSW) Pty Limited*.[20] That case concerned an application for security for costs in two separate (but jointly case managed) proceedings in the Federal Court. Each proceeding was commenced by the

---

15 (1997) 78 FCR 309 ('*Ryan*').
16 *Federal Court of Australia Act 1976* (Cth) s 33H.
17 *Ryan* (n 15) 312.
18 (2014) 223 FCR 139.
19 Ibid [22].
20 [2019] FCA 1644.

same applicant. There were three respondents in each proceeding, one of which was a respondent to both proceedings. In the course of ruling on the security for costs application, and without hearing full argument from the parties on the question, Lee J made the following comments in obiter in relation to the requirements of s 33C of the FCA:

> At the risk of divagation, before leaving the relevant background to the applications, I should expand upon a point raised by me when the proceedings were first listed before me: at present it is far from self-evident to me why two proceedings have been commenced by Shine Lawyers on behalf of Mr Turner. There is a common applicant and one common respondent. Relief in substantially the same form (albeit as an accessory) is sought in each proceeding by the same person against Mt Arthur Coal. Whatever may have been thought to be the position at an earlier time, at least since *Cash Converters International Limited v Gray* [2014] FCAFC 111; (2014) 223 FCR 139, it is now clear that it is unnecessary for each group member to have a claim against each respondent for a class action to be validly constituted and that it is similarly unnecessary for seven or more group members to have a claim against each respondent, so long as: (a) seven group members have a claim against one respondent; (b) the applicant has a claim against each respondent; and (c) the proceeding satisfies the other threshold requirements in s 33C of the *Federal Court of Australia Act 1976* (Cth) (**Act**) (in relation to the circumstances in which the claims arise and the existence of a substantial common issue).[21]

It is not clear whether Lee J meant that a claim against a second or subsequent respondent in such a case can be pursued under Part IVA of the FCA, or that it is simply an individual claim by the applicant against the second respondent in a proceeding which is being conducted as a group proceeding as against the first respondent.

36 In *Green,* John Dixon J determined an application by the plaintiff to amend a pleading in what was an individual proceeding, in order to commence a representative proceeding in accordance with Part 4A of the Act. His Honour noted that the powers in Part 4A are procedural in nature and intended to operate concurrently with other powers and procedures of the Court to manage proceedings.[22] Importantly, Dixon J said that the word 'commenced' where used in Part 4A 'must necessarily be considered in the context of the Act as a whole and the [Rules], since the

21 Ibid [17].
22 *Green* (n 5) [16]–[17].

commencement of a proceeding in the court is regulated by the Act and the Rules made under it.'[23] His Honour distinguished between commencing a proceeding under Chapter 1 of the Rules and a proceeding being 'commenced' in accordance with Part 4A:

> A proceeding to which Chapter 1 of the Rules applies, is ordinarily commenced by filing a writ or originating motion in accordance with Order 5 of the Rules. There are additional requirements that define a group proceeding under Part 4A. The originating process must be a writ (s 33H) and, for a group proceeding to be validly commenced, the requirements of ss 33C and 33D must be met. In order to demonstrate that those matters have been met, the requirements of s 33H must also be met. Whether those requirements are met by the initial process or by amendment, leaves unaffected the sense in which 'commenced' is used in Part 4A, for what is being commenced is not a proceeding *per se* but a group proceeding.
>
> It follows that nothing in the language of Part 4A constrains the notion of amendment of an originating process to commence a group proceeding, whether that be amendment of the parties to the proceeding or of the claims made in the proceeding, pursuant to Chapter 1 of the Rules. If such powers are exercised in a manner that results in an existing (issued and served) proceeding being amended to comply with Part 4A of the Act, then a group proceeding has then been commenced.
>
> … The essential nature of the issued proceeding can be changed in myriad ways. One way is to satisfy the requirements of Part 4A to commence a group proceeding. Another way is to satisfy the requirements of Order 9 of the Rules and join additional parties. The concept with which Part 4A is concerned is the commencement of a group proceeding not the commencement of any proceeding.[24]

37 It is important to note that 'proceeding' may mean the process commenced by a party in a court or a step in that process.[25]

38 Dixon J's observation that an issued proceeding can be changed in myriad ways applies equally to a proceeding commenced under Part 4A of the Act. A proceeding 'commenced' as a group proceeding may be changed by joining additional parties in accordance with orders 9 or 11 of the Rules, or ss 47 and 48 of the CPA. In this case, Geelong has indicated its intention to use the third party procedure in order 11 of the Rules to claim contribution or indemnity against AFL club doctors in relation to the

---

23 Ibid [18].
24 Ibid [19]-[21].
25 *Re Smith; Ex parte Chesson* (1992) 106 ALR 359, 364 [26].

claim made against it by Rooke. The joinder or addition of a party to a proceeding that was commenced as a group proceeding against the original defendant does not mean that the proceeding has been commenced against that additional party under Part 4A of the Act.

39 A proceeding will be commenced as a group proceeding against a defendant if the requirements of ss 33C, 33D and 33H of the Act are met. The satisfaction of those requirements in relation to a defendant leaves open the question of whether the requirements have been satisfied in relation to each other party to the proceeding so as to commence the proceeding against that party as a group proceeding.

Group member definition

40 The amended group member definition proposed by Rooke is as follows:

> 11. In so far as the claim is brought as a representative proceeding, Rooke brings this proceeding on behalf of all persons who:
>
> (a) played in the AFL Competition during the period; and
>
> (b) during the course of matches or training sustained head knocks; and
>
> (c) as a result of sustaining head knocks, suffered from temporary loss of normal brain function or symptoms consistent with temporary loss of normal brain function, known as concussion ('**concussion**'); and
>
> (d) as at 14 March 2023, have suffered a permanent injury of which concussion/s was or were a cause, and have suffered symptoms of that injury ('**the injured players**').

41 The defendants' criticisms focused on sub-paragraph (d) of the definition.

42 Two of those criticisms were resolved in discussion during the hearing on 17 June. The first by adding the word 'brain' to follow the word 'permanent' and precede 'injury' to clarify the nature of the injury contemplated by the definition. The second by adding 'the' before 'concussion/s' in order to clarify the relationship between the matters set out in sub-paragraph (c) of the definition and the injury pleaded in sub-paragraph (d).

43 The defendants' major criticism is that the proposed group member definition is not sufficiently clear to ensure that the identity of group members is ascertainable.

44 Rooke made the following submissions:

(a) An object of Part 4A of the Act is to provide for access to justice and efficiency by allowing as many group members as possible to be part of a proceeding. Consistent with that object, a narrow and prescriptive approach should not be taken to the requirements in s 33H(2).

(b) A definition that is too prescriptive will result in many people with claims arising out of similar or related circumstances not being included in the proceeding. This issue is more likely to arise in personal injuries cases, where there will be variability in injuries and symptoms.

(c) An AFL player will know or be easily able to ascertain whether they were concussed when they played or trained for AFL football. The player will also know whether they suffer symptoms consistent with a brain injury such as mood disorder, cognitive impairment, loss of memory, or loss of executive function, and whether those symptoms persist.

(d) Many players who were concussed and have experienced symptoms will know that they suffer a permanent brain injury and are group members. Other players can achieve that certainty by making enquiries of treating medical practitioners.

45 The AFL submitted as follows:

(a) In some cases it may not be apparent that mild symptoms experienced by a player are the result of a permanent brain injury. The definition proposed by Rooke does not provide certainty in respect of those possible group members.

(b) The definition must stand alone so that a potential group member can clearly understand from reading it what they need to do to be in the class. The

necessity for many, perhaps most, potential group members to go to a doctor and obtain medical advice in order to know whether they are a group member, and whether they should opt out or remain in the class so that they are bound by the outcome, is not made clear by the definition.

(c) If a potential group member goes to a doctor, the only thing that is going to make a difference to whether they are in or out of the proceeding is a diagnosis, albeit possibly a provisional diagnosis. While there might be some other formulation that involves a potential group member obtaining advice from a doctor, the publicly available definition must make clear on its face what a potential group member must do to be a member of the class.

(d) In effect, Rooke is impermissibly attempting to include within the group all players who had experienced symptoms consistent with concussion by the specified date.

46 Geelong submitted as follows:

(a) The group member definition fails to address the relationship between group members and the claims made, and accordingly fails to conform with s 33(2) of the Act. This is because a permanent brain injury resulting in only mild symptoms at the commencement of the proceeding may not sound in loss and damage until after the proceeding has been finalised. The definition does not address that circumstance by providing a link to loss and damage.

(b) The group member definition lacks the necessary objective criteria. The definition requires a person to decide for themselves, potentially after making enquiries of their doctor, whether they have a permanent brain injury that has caused the symptoms they have experienced. It is the subjectiveness of the conclusions formed after making those enquiries that is in issue.

(c) The problem of subjectivity is resolved if the definition includes a requirement that there be a medical diagnosis of permanent brain injury. The diagnosis of

a doctor is an objective fact that provides certainty.

(d) Group members will ultimately be required to provide medical material as to their permanent brain injury. It is important for both the plaintiff and the defendants that this occur in order to inform potential settlement negotiations. In those circumstances, Rooke's argument that it would be unfair or too onerous to require potential group members to take the step of obtaining a diagnosis at an early stage has no merit.

Provisions and legal principles

47 To be validly commenced, a group proceeding must comply with the requirements of ss 33C and 33H of the Act.

48 Compliance with s 33H(2)(a) of the Act requires that at the commencement of the proceeding and while it is on foot, it is possible to identify with sufficient certainty the group members to whom the proceeding relates.[26]

49 A group member definition should enable a person, possibly after obtaining advice or making an enquiry, to determine whether they are within the group as described. However, it is not necessary that the definition is 'so precise as to eliminate all possible ambiguity or room for argument'.[27] An adequate definition allows a person to know whether or not they should opt out of the proceeding, and provides sufficient certainty for the Court to deal with the group under Part 4A of the Act.

50 In *Wright Rubber Products Pty Ltd v Bayer AG*,[28] the Full Court of the Federal Court heard an appeal from a decision striking out the pleaded group definition that included as a criterion whether manufacturers used rubber chemicals in the manufacture of rubber compounds or rubber products. The trial judge concluded that the definition would require some manufacturers to conduct tests on the compounds they used to see if they contained rubber chemicals, or to make enquiries of the

---

26 *El-Helou v Mercedes-Benz Australia/Pacific Pty Ltd* [2025] VSC 211, [19]; *Ethicon Sàrl v Gill* (2018) 264 FCR 394, [37]–[38]; *Impiombato v BHP Group Ltd* (2025) 308 FCR 250, [53] (Beach and O'Bryan JJ).

27 *Petrusevski v Bulldogs Rugby League Ltd* [2003] FCA 61, [30].

28 [2010] FCAFC 85.

compound manufacturer. Moore J, with whom the other members of the Court agreed, determined that the definition was not ambiguous and said:

> … The fundamental statutory requirement is that the application (or some other document supporting the application) 'describe or otherwise identify the group members': s 33H(1)(a). This has been done, in the present case, unambiguously. The fact that enquiries might need to be made by a person uncertain of whether they are a group member does not deprive the description of objective criteria by reference to which membership or non-membership can be established. This was the test applied by the Full Court in *King v GIO Holdings Ltd* [2000] FCA 1543 at [11]. If a person who may be a group member does not wish to ascertain whether they meet those criteria or is unable to do so but in any event does not wish to be involved in the proceedings, they can opt out of the proceedings. If a person who may be a group member is unable to ascertain whether they meet those criteria and wishes to prosecute with certainty a claim of the type being advanced by the applicant, then that person can opt out and pursue an individual claim.[29]

51 In *J Wisbey & Associates Pty Ltd v UBS AG*,[30] Beach J said that an 'unduly narrow or technical approach' should not be taken to application of the requirement in s 33H(2)(a) of the Act. His Honour said:

> The pleading must not be so vague or uncertain that potential group members cannot reasonably ascertain whether they are members of the group. A group definition should not give rise to significant uncertainties or ambiguities in this respect.
>
> … But clearly, the fact that inquiries might need to be made by a person who is uncertain of whether they are a group member does not deprive the description of objective criteria by reference to which membership can be established. …[31]

Analysis

52 The group member definition proposed by Rooke contains four criteria or characteristics of a potential group member.

53 No issue was taken with the first three criteria. The first, being whether a person has played in the AFL competition during the claim period and second, has sustained head knocks during the course of AFL matches or training, are each objectively ascertainable.

---

29 Ibid [34] (Moore J).
30 [2021] FCA 36.
31 Ibid [15]–[16].

54 The third criterion requires that a player was concussed as a result of sustaining head knocks, meaning that they 'suffered from temporary loss of normal brain function or symptoms consistent with temporary loss of normal brain function'. A player will be aware about the severity of head knocks they sustained during their AFL career and the resulting temporary symptoms they experienced. Players are able to seek the advice of medical practitioners if they are unsure about the nature of symptoms consistent with temporary loss of normal brain function resulting from concussion. Concussion is a well-known and well-described injury. In the context of the group member definition, it is a characteristic that is neither vague nor uncertain.

55 The fourth criterion has two requirements. The first is that the player has suffered a permanent brain injury of which the concussions were a cause, and the second is that the player has suffered symptoms of that injury. It should be kept in mind that a player only need consider the fourth criterion if they sustained head knocks resulting in concussion — that is, temporary loss of normal brain function. In other words, the player will have an awareness, perhaps after being medically assessed and receiving advice, that they have suffered a brain injury, albeit a temporary injury. The definition informs the player that to satisfy the criteria, the temporary brain injury or injuries they suffered must, by 14 March 2023, have resulted in a permanent symptomatic brain injury.

56 It will often be the case in personal injury group proceedings that there is significant variability in the nature and extent of injuries and symptoms between group members. However, that does not mean that there is uncertainty or ambiguity about the criteria that must be satisfied for a person to be a group member. In this case, the definition clearly informs a player who already knows they suffered a temporary brain injury or symptoms consistent with such an injury that to satisfy the fourth criteria, they must have suffered a permanent brain injury that is productive of symptoms. Armed with that clear criteria, a player can determine whether they are within the group member definition, possibly by obtaining medical assessment or advice.

57 It is true that on one level, the alternative diagnosis criterion proposed by the defendants would give players certainty about whether they are group members depending on if they have a diagnosis or not. However, players with a diagnosis may not be in a better position to know whether or not they should opt out of the proceeding. Diagnosis of brain injury, especially in subtle cases, may prove controversial and be associated with significant uncertainty. The player may not know how likely it is that the diagnosis will ultimately be established or whether their injury will be progressive over time. Further, the pleading of the statement of claim is a matter for Rooke. The question is whether the group member definition pleaded by him satisfies the requirements of ss 33C and 33H of the Act. That question is not answered by an analysis of the comparative benefits of an alternative form of pleading proposed by the defendants.

58 There is no impermissible uncertainty in the objective criteria of permanent brain injury which is productive of symptoms. A player who cannot or does not wish to obtain advice to ascertain whether they satisfy that criteria can opt out of the proceeding. A player whose medical position is uncertain, perhaps because of the subtlety of injury, can choose to opt out in order to pursue an individual claim at a later date.

Declassing applications

Provisions and legal principles

59 The defendants have applied for the proceeding not to continue under Part 4A of the Act. The declassing applications rely on s 33N(1), which reads:

> The Court may, on application by the defendant, order that a proceeding 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 if the proceeding were to continue as a group proceeding 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 a proceeding other than a group proceeding; or
>
> (c) the group proceeding will not provide an efficient and effective means

of dealing with the claims of group members; or

(d) it is otherwise inappropriate that the claims be pursued by means of a group proceeding.[32]

60 Beach J observed in *Stack v AMP Financial Planning Pty Ltd (No 2)*[33] when discussing the application of s 33N(1) of the Act that:

> Generally speaking, s 33N(1) requires consideration of the comparator of whether it is in the interests of justice that the proceeding be determined in numerous non-representative proceedings. One compares how the factors specified in ss 33N(1)(a) to 33N(1)(d) would apply to hypothetical non-representative proceedings. Such a comparison is expressed in ss 33N(1)(a) and 33N(1)(b) and implied by ss 33N(1)(c) and 33N(1)(d). The implicit focus in s 33N(1)(c) is on the commonality of issues and whether the representative proceeding is efficient and effective to resolve the common issues, rather than resolution by way of individual proceedings. Section 33N(1)(d) is concerned with whether the representative proceeding is an appropriate vehicle to pursue the claims. Generally, the focus of ss 33N(1)(c) and 33N(1)(d) is on the efficiency or appropriateness of the group members' claims being pursued in a representative proceeding.[34]

61 Finkelstein J commented on the 'interests of justice' consideration in *Femcare*:

> An action which has properly been commenced as a representative proceeding (or class action as it is commonly referred to) may be ordered no longer to continue as such a proceeding only "if it is in the interests of justice": s 33N *Federal Court of Australia Act 1976* (Cth). Whether or not it is in the interests of justice to make such an order has to be weighed against the public interest in the administration of justice that favours class actions. That requires one to consider the principal objects of the class action procedure. They are: (1) To promote the efficient use of court time and the parties' resources by eliminating the need to separately try the same issue; (2) To provide a remedy in favour of persons who may not have the funds to bring a separate action, or who may not bring an action because the cost of litigation is disproportionate to the value of the claim; and (3) To protect defendants from multiple suits and the risk of inconsistent findings.[35]

62 Referring to comments made by John Dixon J in *Agnello v Heritage Care Pty Ltd ('Agnello')*,[36] Rooke questioned whether the Court had the power to declass only the Geelong claims, with the claims against the AFL to continue under Part 4A of the Act. I do not accept that there is any doubt about the Court's powers in this regard. In

---

32 *SCA* (n 1) s 33N(1).
33 (2021) 401 ALR 113.
34 Ibid [26].
35 *Femcare* (n 3) [152] (Finkelstein J); cited in *Agnello v Heritage Care Pty Ltd* [2021] VSC 838, [110], [118] ('*Agnello*') and *Andrianakis v Uber Technologies Inc (Ruling No 1)* [2019] VSC 850, [162].
36 *Agnello* (n 35) [104].

Agnello, Dixon J was dealing with a different issue, namely whether in circumstances where there were two separate claims made against a defendant, there was power under s 33N to order that one claim no longer continue under Part 4A leaving the second claim subject to that Part. Further, the comments to which Rooke referred are found in a section of his Honour's ruling which records the defendants' contentions. Dixon J proceeded to deal with and reject the substance of the defendants' s 33N application, which suggests that his Honour considered the Court had the power to make whatever orders were in the interests of justice.[37]

63 For reasons set out above, the success of Geelong in its application under s 33N is not conditional on a declassing order being made in the proceeding against the AFL. Further, the same effect could be achieved by an order made under r 9.04 of the Rules, by setting aside the orders by which Geelong was joined as a party to the proceeding, or by case management orders made under ss 47 or 48 of the CPA.

Analysis

The pleaded case and common issues

64 Rooke's primary claim against both defendants is in negligence. The case concerns the risk of AFL players suffering permanent brain damage as a result of sustaining head knocks and concussions during AFL games and training, and the reasonable response to that risk by persons in the position of the AFL and Geelong. Both the systemic response and the response to individual players' circumstances will be in issue.

65 In the proposed amended ASOC, Rooke pleads the risk of harm that he alleges was foreseeable to the defendants as follows:

> (a) a player was at risk of sustaining one or more head knocks during training or matches as a result of, *inter alia*:
>
> i. body contact;
>
> ii. tackles;

[37] See *Nguyen v Rickhuss* [2023] NSWCA 249, [54], [57].

iii. collisions between or among players; and

iv. heavy landings from high marks;

(b) head knocks to a player may cause concussion;

(c) a player returning to matches or training while suffering the effects of concussions caused, or materially increased the risk of, a player sustaining personal injury by way of a:

i. permanent concussion-related injury (*PCRI*); or

ii. aggravation, acceleration or exacerbation of a PCRI; and

(d) a player who was exposed to multiple concussions in their AFL career, in particular in the circumstances set out in sub-paragraph (c) immediately above, was at risk of:

i. suffering a PCRI; or

ii. aggravating, accelerating or exacerbating a PCRI, ('**concussion management risk of harm**').

I understand that 'PCRI' is intended to mean permanent brain injury resulting from head knocks and concussions. The AFL and Geelong make limited partial admissions to the pleaded risk of harm by admitting it was foreseeable that players may sustain head knocks causing concussion. Three critically important common questions remain to be determined in relation to the pleaded risk of harm: did the risk, as pleaded, exist; if yes, what was the degree and magnitude of the risk; and was the risk foreseeable to persons in the position of the AFL and Geelong?

66 I accept the submission made by both defendants that commonality is reduced because of the 38-year claim period. The degree and magnitude of the risk of harm pleaded by Rooke may have varied over this period because of changes to the rules and the way in which AFL football is played. More importantly, it is likely that knowledge of the risk changed over time. I will consider the appropriate response to this concern later in these reasons.

67 The AFL and Geelong each admit that they owed a duty of care to players. However, the AFL denies Rooke's pleaded allegation that the duty it owed to players was personal and non-delegable. More importantly, the defendants either deny or do not admit Rooke's pleaded allegations as to the scope of the duty relevant to the identified

risk of harm, and as to the precautions that a reasonable person in the position of the defendants would have taken in response to that risk. As pleaded by Rooke, the scope of duty and available precautions focus on the systems that he alleges should have been developed and implemented during the claim period. For example, the chapeau to paragraph 30 of the ASOC reads:

> During the period, including by creating and enforcing relevant rules, protocols, guidelines and procedures applicable to AFL players and Clubs, the AFL had available to it, and further or alternatively the Geelong Football Club had available to it with respect to its registered Club players, the following precautions against the concussion management risk of harm, including within the meaning of section 48(1) of the *Wrongs Act* …

68 Pleadings by both defendants further emphasise the existence of common issues in relation to the scope of the duty owed by each defendant and the reasonableness of the response to the risk of harm. Rooke pleads that the AFL was responsible for and/or had the power to make and enforce rules with respect to the management of players who suffered head knocks and concussions during matches and training. The AFL responds in part by alleging that the AFL clubs, as the players' employers, were responsible for the health and wellbeing of the players during matches and training and engaged medical practitioners to provide assessment, advice, care and treatment of injuries to players. Geelong responds by alleging that the AFL had the power to make, amend and enforce relevant rules and regulations and to conduct the AFL competition generally; that Geelong was subject to and required to observe AFL rules and regulations relevant to the management and prevention of injuries; and that its power to make decisions about the participation of its players in matches and training following an injury was subject to compliance with the rules and regulations issued by the AFL. In a further response to the duty allegation made against it, Geelong pleads that the scope and content of the duty it owed to players was informed by the AFL rules and regulations to which it was subject. The AFL on the other hand pleads that the responsibility for the management and assessment of players' injuries, and for the systems of work that applied to players, fell to the clubs.

69 It is clear from the pleadings that there will be common questions for determination.

relevant to the relationships between the parties, and consequentially for the scope of the duty owed by each defendant and the reasonableness of any precautions it is alleged they each ought to have taken in response to the identified risk of harm. Again, I accept that the degree of commonality is significantly reduced at the limits of the pleaded claim period.

70 As in any mass tort class action, there will probably be a need in this proceeding to resolve individual issues in relation to breach, and certainly in relation to causation and damages. However, I do not accept the defendants' submissions that the claims of individual group members will be almost entirely determined by resolution of issues that are individual and not common.[38] As identified above, there will be critically important common questions relevant to the risk of harm, the scope of the duty owed by the defendants, the reasonableness of the systemic precautions pleaded by Rooke, and the impact that the relationship between the parties has on those matters.

Comparative costs and efficiency

71 I have already considered the evidence about the number of players who might satisfy the group member definition. No medical evidence was tendered on these applications relevant to the likelihood that a player will suffer a permanent brain injury resulting from head knocks and concussions sustained during AFL games or training.

72 Abrahams said he was concerned that the current proceeding will require the defendants to undertake a significant amount of work in circumstances where claims by some group members may be statute barred or permanently stayed because the effluxion of time means a fair trial is not possible, or where those group members may not meet the threshold for recovery of non-economic loss damages in Part VBA of the *Wrongs Act 1958* (Vic) ('Wrongs Act'). Margalit appears to accept that Rooke will be required to make an application under s 27K of the *Limitation of Actions Act 1958* (Vic) ('Limitation Act') to extend the time to bring his personal claim. She conceded that

[38] See, for example, *Kamasaee v Commonwealth (No 10)* [2017] VSC 272, [62], [78], [80].

similar applications will need to be made by at least some group members.

73 It is difficult to identify any significant cost saving that would be achieved in relation to the Limitation Act/permanent stay issues if the defendants' declassing applications were granted. Where a limitation period has expired, a group member will be required to apply for an extension of time either after an initial trial of the proceeding if it continues under Part 4A of the Act, or in their individual proceedings. The work associated with applications to extend time may begin earlier if the declassing applications are granted and a large number of individual proceedings are commenced. Conversely, that work may not be required if the proceeding continues under Part 4A and resolves before trial, or to the extent that the answers to common questions determine the proceeding adverse to group members. Further, pleading a limitation defence in an individual proceeding may not result in any cost savings in relation to the preparation for and trial of the substantive claim. The limitation defence and any extension of time application may be determined at the substantive trial, rather than as preliminary issues. Even if this is not the case, it is unlikely that the preliminary determination of a limitation issue or permanent stay application would result in the saving of all costs associated with preparation of the substantive case. Finally, although the issue of extension of time is individual, the determination of that issue in relation to the claim made by Rooke will at least be informative and of guidance to the parties in subsequent claims, potentially resulting in some costs savings. This issue is at best neutral for the defendants.

74 I reach a similar conclusion in relation to the threshold requirements in Part VBA of the Wrongs Act. If the proceeding continues under Part 4A of the Act, satisfaction of the threshold requirement can be managed within the proceeding for the purposes of mediation and ultimately the determination of individual claims to the extent necessary. If the proceeding does not continue under Part 4A of the Act, individual proceedings will need to be commenced quickly because of limitations issues. The process in Part VBA of the Wrongs Act will need to be attended to in most cases. However, an individual proceeding will not be resolved by a plaintiff's failure to

obtain significant injury certification. All that such a failure will mean is that the plaintiff's claim will be limited to pecuniary damages. It is not possible to identify any comparative cost savings in relation to this issue that would result from the claims of group members being pursued in individual proceedings.

75 The current evidence does not provide an adequate basis for a comparative costs and efficiency analysis between the proceeding continuing under Part 4A of the Act and each group member conducting a separate proceeding. However, I am satisfied for the following reasons that the defendants' evidence and submissions overstate the relative cost savings and efficiencies that would be associated with individual proceedings.

76 Margalit estimated a plaintiff's costs to the end of a two-week trial of an individual claim as complex as Rooke's in a non-group proceeding at around $500,000. She said that if all 90 current registered group members were to run their claims as individual proceedings to the conclusion of trial, it would result in combined costs of over $42,500,000. Margalit emphasised the likelihood that there remain many unregistered group members.

77 Abrahams said that based on his experience, group proceedings generally take significantly longer to resolve than individual proceedings. He estimated that the time and costs for the defendants in making discovery, joining club doctors and others, completing interrogation, collating evidence, participating in interlocutory applications and undertaking the necessary group proceeding steps would be significant, with each step likely taking a number of months. He said that while the time to finalise a proceeding involving an individual claim varies significantly, the standard orders in the County Court of Victoria provide for a 10 to 12-month timetable to trial. He said that an individual group member's claim brought as a non-representative proceeding could go to trial within that timeframe.

78 I do not accept Abrahams' evidence about the comparative efficiencies associated with the time taken to determine proceedings. It is likely that an individual proceeding

involving the legal and factual complexity of the claims made by group members would take significantly longer than 12 months to be ready for trial. Further, case management of individual proceedings involving common issues of fact and law would probably result in trial dates being staggered. It is not possible to come to any firm conclusion about whether group members' claims would be resolved more quickly and efficiently if they were to be pursued in individual proceedings, rather than in the current proceeding under Part 4A of the Act. Margalit's estimates indicate that speedier resolution of individual claims may come at a significant cost.

79 The defendants' submissions emphasised the relatively modest number of group members and the long claim period. They submitted that the evolving state of knowledge over the claim period about the risks associated with player concussions means that the answer to the question as to the defendant's state of knowledge for one year (e.g. 2015) will not answer the same question for a much earlier year (e.g. 1995). They submitted that in its current form, the proceeding is not an efficient or effective vehicle to answer many of the questions that are common to all group members. Geelong submitted that there was a prospect of significant wasted costs and resources in relation to discovery, preparation of lay and expert evidence and the joinder of club doctors as third parties, in preparing for a trial of claims spanning more than 38 years. The defendants submitted those costs are not justified when the number of group members is likely to be small and where the claims of those group members may not cover all of the years within the claim period.

80 There is considerable merit in the defendants' submissions. I have already concluded that changes in knowledge about the risk of harm associated with management of player concussions and the evolution of the defendants' rules, regulations, policies and procedures will mean the degree of commonality across all group members is significantly reduced at the extremes of the very long claim period. I accept that this is likely to have a significant adverse impact on the cost and efficiency of the proceeding if it continues under Part 4A of the Act. The current claim period will result in the need for far more extensive discovery, lay witness evidence and expert

evidence than would a more confined period. This is a reflection of not just the length of the period, but also the likelihood that the answers to common questions will be determined on different evidence over those 38 years. Naturally, this leads to the likelihood that there will be a need to engage in a process of serial determination of the common questions as evidence changes over time.

81 Rooke has proposed to resolve the issue in relation to Geelong by limiting the common issues to be heard and determined at the initial trial to the period that Rooke played in the AFL competition for Geelong, being 2002 to 2010 ('Rooke period').

82 For the following further reasons, I am not satisfied that it is in the interests of justice to order that the proceeding no longer continue under Part 4A of the Act. I conclude that having regard to the interests of justice and the overarching purpose in the CPA, the appropriate case management response is to limit the initial trial to the Rooke period for both defendants.

83 The claim made by Rooke is already underway and is likely to be the first AFL player concussion trial heard and determined, regardless of the outcome of the defendants' declassing applications. Much of the work that would be required to prepare for and run a group proceeding trial for the Rooke period would need to be undertaken in any event for Rooke's individual trial. Further, the time to trial should be comparable for the two options.

84 The nine-year Rooke period is far more digestible than the total 38-year claim period. It should result in the time and costs associated with preparation and trial being much less than for a trial covering the entire claim period.

85 The answers to common questions following the trial will be of direct benefit to the parties in relation to group members covered by that period. Further, the resolution of questions of law and findings of fact in the trial judgment will likely be of significant assistance by informing the parties' consideration of claims that fall outside the Rooke period.

86 While I accept there are some additional costs associated with procedures under Part 4A of the Act, there is also considerable potential benefit in a proceeding which captures the claims of group members for the purposes of mediation and determination of the common questions.

87 To date, progress in this proceeding has been slow. The proceeding is now at a stage where pleadings have closed, subject to an application by the defendants to strike out Rooke's secondary breach of statutory duty claim. Determination of that application will not interfere with the timely progress of the proceeding to trial.

88 Geelong has indicated that it will likely apply to join one or more club doctors as third parties. I will set a timetable when delivering this ruling for the necessary steps to be taken by Geelong.

89 I understand that some documentary exchange has already occurred. The scope and therefore time taken for discovery and the preparation of lay and expert evidence, though still significant for the Rooke period, will be much less than for the claim period. This should be reflected in a reduced timeframe for those steps to occur. There is every prospect of the proceeding remaining bogged down and stalled if preparation for trial involved consideration of common issues over the whole claim period. Reducing the time period with which the initial trial of common questions is concerned to about 25% will result in more streamlined, quicker and less costly preparation to trial, and a trial of shorter duration.

Conclusion

90 I will order that Rooke has leave to amend, file and serve the amended writ and proposed amended ASOC in the form exhibited to Margalit's affidavit dated 16 June 2025; and that paragraphs 1-3 of Geelong's summons dated 31 January 2025, and paragraph 1 of the AFL's summons dated 11 April 2025, are dismissed.

91 I will hear from the parties as to the form of orders sought.

CERTIFICATE

I certify that this and the 31 preceding pages are a true copy of the reasons for Ruling of the Honourable Justice Keogh of the Supreme Court of Victoria delivered on 8 September 2025.

DATED this 8th day of September 2025.

.....
Associate