

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

Not Restricted

S ECI 2023 04323

PHILLIP BRENT KRAKOUER

Plaintiff

v

AUSTRALIAN FOOTBALL LEAGUE
(ACN 004 155 211)

Defendant

JUDGE: Keogh J
WHERE HELD: Melbourne
DATE OF HEARING: 14 August 2025
DATE OF RULING: 25 September 2025
CASE MAY BE CITED AS: Krakouer v Australian Football League
MEDIUM NEUTRAL CITATION: [2025] VSC 613

PRACTICE AND PROCEDURE – Representative proceeding – Application for leave to amend writ and statement of claim – Amendment to group member definition – Leave granted – Application to dispense with requirements to notify group members – *Supreme Court Act 1986 ss 33V, 33X* – *Crawford v Australia and New Zealand Banking Group Ltd [2022]* VSC 297 – *Hassan v Van Diemen [2021]* VSC 839 – Notice requirement dispensed with.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	F McLeod SC with P Hamilton	Margalit Injury Lawyers
For the Defendant	A Kittikhoun	Gordon Legal



HIS HONOUR:

- 1 This group proceeding was commenced by a generally indorsed writ filed on 15 September 2023. A statement of claim was filed 5 March 2024.
- 2 The plaintiff, Phillip Krakouer now seeks leave to file an amended writ and amended statement of claim ('ASOC') in the form served on the defendant, the Australian Football League ('AFL') on 24 April 2025. The defendant has consented to leave being granted.
- 3 Among other things, the proposed ASOC amends the definition of group members and the claim therein. When the plaintiff sought orders by consent giving leave to file and serve the proposed ASOC, I raised with the parties whether notice of the effect of the amendments was required to be given to group members, applying s 33X(4) of the *Supreme Court Act 1986* (Vic) ('Act'). The parties agree that s 33X(4) applies. As a result, the plaintiff now seeks an order dispensing with the requirements of that provision or in the alternative, orders relevant to the giving of notice.

Statement of claim

- 4 The statement of claim pleads a claim period of 11 June 1975 to 31 December 2022.
- 5 The pleaded definition of group members is as follows:

12. In so far as the claim is brought as a representative proceeding, Krakouer brings this proceeding on behalf of all persons who:

- (a) played in the AFL Competition during the period ('**the abused players**'); and
- (b) are:
 - i. Aboriginal persons, meaning persons who are a descendant of an indigenous inhabitant of Australia; or
 - ii Torres Strait Islander persons, meaning persons who are a descendant of an indigenous inhabitant of the Torres Strait Islands; or
 - iii. persons of colour, meaning people who are not white; and
- (c) who experienced racism, racial vilification, racial discrimination, racial abuse, victimisation based on race, harassment on the basis of race, humiliation of the basis of race,



racist violence, race-related booing and/or spitting ('**abuse**') while participating in the AFL Competition ('**the abuse**').

13. Further, Krakouer brings this proceeding on behalf of persons who:
- (a) were and/or are in the close relationship with those persons set out in the proceeding paragraph ('**the primary victims**'), including within the meaning of section 73 of the *Wrongs Act 1958* (Vic) ('**Wrongs Act**'); and
 - (b) have suffered pure mental harm by way of a recognised psychiatric illness because of the injury suffered by the primary victims ('**the secondary victims**').

6 The group member definition in the general indorsement filed with the writ on 15 September 2023 extended to umpires, officials and other staff. That aspect of the group member definition was not included in the statement of claim.

Proposed ASOC

7 The group member definition pleaded in the proposed ASOC is as follows:

A1. Group Members

1. The plaintiffs bring this proceeding as a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) on their own behalf and on behalf of all persons who in the period between May 1980 and the date of this Amended Statement of Claim (**ASOC**):
- (a) are or were Australian Rules football players who participated in the Australian Rules Football games and competitions conducted by the defendant throughout Australia (but excluding the professional elite Australian Rules Football competitions known as "AFLW Competition") (the **Australian Rules Football Competition**) (**Players**);
 - (b) are **Indigenous** persons, being Aboriginal or Torres Strait Islander persons who:
 - (i) identify as Aboriginal or Torres Strait Islander;
 - (ii) is of Aboriginal or Torres Strait Islander descent; and
 - (iii) is accepted by an Aboriginal or Torres Strait Islander person in the Aboriginal or Torres Strait Islander Community; and
 - (c) are or were victims of physical and/or verbal racist abuse whilst participating in the Australian Rules Football Competition and suffered physical injury, psychological injury, and/or psychiatric injury (**the Injuries**) -
(Abused AFL Players); or



- (d) are or were:
- (i) a member of the Abused AFL Players' family (howsoever it may be described or referred to in the legislation set out in Schedule A to this ASOC), or are in a close kinship relationship with an Abused AFL Player(s); and
 - (ii) have suffered pure mental harm arising wholly or partly from mental harm in connection with an Abused AFL Player(s) being injured or put in danger by reason of physical and/or verbal racist abuse they experienced whilst participating in the Australian Rules Football Competition –

(Family Group Members); or

- (e) are or were:
- (i) the executors or administrators of, or beneficiaries of or persons with an interest in, the estates of deceased persons who would be Abused AFL Players and/or Family Group Members had they not died prior to the date of this amended Statement of Claim (**deceased Group Members**); or
 - (ii) the dependents of Abused AFL Players and/or Family Group Members and/or deceased Group Members (howsoever described or referred to in the legislation set out in Schedule B to this ASOC) –

where a cause of action had vested in or may be brought by that person (sub-paragraphs 1(e)(i) and (ii) together, **the Estate and Dependency Group Members**).

8 It can be seen that the proposed amendments have the effect of expanding the claim period and group member definition in some respects.

9 Importantly, the claim period and group member definition are also contracted in a number of ways by the proposed amendments. The effect of those contractions is to discontinue or withdraw the following claims:

- (a) claims of physical and/or verbal racist abuse in the period 11 June 1975 to April 1980;
- (b) claims on behalf of 'persons of colour, meaning people who are not white' and who are not Aboriginal or Torres Strait Islander persons; and



- (c) claims on behalf of persons who were 'employed or engaged by the defendant as umpires, officials or other staff'.

Evidence

- 10 I have had regard to the plaintiff's submissions dated 19 August 2025; a joint memorandum provided to the Court by the parties; affidavits affirmed by Michel Margalit on 24 April and 19 August 2025; and the affidavit of Andrew Grech affirmed 20 January 2025.

Grech

- 11 Research verified by the defendant found that between 11 June 1975 and 1982 there were eight Indigenous players who played at least one game in the Victorian Football League ('VFL').
- 12 Analysis and research is more difficult in respect of non-Indigenous persons of colour because of issues with the application of the group member definition and determination of which persons will fall within it.

Margalit

- 13 The intended focus of the proceeding is racist physical and verbal abuse experienced by Indigenous football players. The plaintiff relies on media reporting set out in Schedule C to the proposed ASOC which shows that racist abuse against Indigenous players has been a historically well-known problem. For that reason, the group member definition in the proposed ASOC does not include persons of colour or match officials.
- 14 The plaintiff's lawyers have only received inquiries and formal instructions from persons who meet the group member definition in the proposed ASOC, with the exception of enquiries from:
- (a) one person who played in the AFL competition and is a person of colour; and
- (b) one person who is employed or engaged by the AFL as a [REDACTED].

Neither of those persons has formally provided instructions or indicated a willingness



to provide instructions to, or entered a formal retainer with, the plaintiff's solicitors.

15 Media reporting of this proceeding has largely but not exclusively been directed to the experience of Indigenous football players.

16 The definition of 'family group members' in the proposed ASOC reflects various State and Territory legislation which modifies the common law for pure mental harm arising from shock, and in most States and Territories applies limits on the familial relationships that may form the basis of such a claim. That aspect of the group member definition is intended to recognise the complex familial relationships often present in Indigenous and Torres Strait Islander communities.

17 The alteration of the start date of the claim period is linked to a particular report relevant to knowledge.

18 No presently registered group member will have their claims entirely excluded by the proposed amendments to the group member definition. There are very few former, current and potential group members whose rights will be impacted by the proposed amendment of the group member definition. They include the persons referred to in [14] above, both of whom have said they do not wish to be part of this group proceeding. A third person has advised Margalit that he does not identify as Aboriginal or Torres Strait Islander. It is unclear whether that person would meet the definition of 'person of colour'. A fourth person, who is Indigenous, has not indicated whether he wishes to be part of this group proceeding. A fifth person has signed a retainer with the plaintiff's solicitors. His AFL playing period commenced before [REDACTED] and concluded after that date.

19 There will only be a very small number of potential group members impacted by the proposed alteration of the claim period, having regard to the limited number of persons who played in the VFL/AFL competition between 11 June 1975 and 30 April 1980 and who:

(a) are of Aboriginal or Torres Strait Islander descent; or



(b) are persons of colour.

Research by the plaintiff's lawyers shows that there were only five Aboriginal and/or Torres Strait Islander players who played in the VFL/AFL competition in the period between 11 June 1975 and 30 April 1980, [REDACTED].

20 On 14 August 2025, the plaintiff's solicitors shared a 'case update' on their website that described:

- (a) the substantive changes to the group member definition as proposed; and
- (b) the practical effect of those changes, including those persons who would no longer be categorised as group members.

Submissions

Plaintiff

21 It is just to determine the proposed discontinuance without notice to group members for the following reasons:

- (a) the proceeding has been on foot since September 2023 to enable group members to register or make inquiries with [the plaintiff's solicitors];
- (b) to date, [the plaintiff's solicitors] have only received limited enquiries from persons who played in the AFL Competition and who are persons of colour who are not Indigenous players ...;
- (c) to date, [the plaintiff's solicitors] have only received limited inquiries from any person who was employed or engaged by the Defendant as an umpire, official or other staff member ...;
- (d) to date, [the plaintiff's solicitors] has only one registered group member former AFL player who is [REDACTED] ...;
- (e) few known Indigenous players and persons of colour played in the AFL Competition in the period 1975 to May 1980;
- (f) to date, no notice of the commencement of the proceeding has been given to group members under section 33X(1)(a) of the Act;
- (g) the Defendant consents to the proposed amendments;
- (h) [the plaintiff's solicitors'] website has provided an update on the proposed amendments to the pleaded claim following the



- (i) notification in media outlets is likely to be expensive and occasion inconvenience to the solicitors acting for the Plaintiff, in circumstances where few affected players since September 2023 have come forward. Those who have come forward have relevantly been notified of the proposed changes.

22 In the alternative, the plaintiff proposes that any notification be made as follows:

- (a) to those players affected by the proposed changes, as identified in the [plaintiff's solicitors'] August 2025 Affidavit, who have not already received notification of the proposed changes; and, if necessary,
- (b) by placing a notice in a national newspaper; and
- (c) by playing a notice in the "National Indigenous Times" newspaper.

Defendant

23 The defendant consented to the plaintiff having leave to file the proposed ASOC, did not contend that notice should be given in accordance with s 33X(4) of the Act, and made some helpful observations about the content of a notice if one was required.

Provisions and principles

24 A group proceeding may not be discontinued without the court's approval.¹ The requirement for approval extends to discontinuance or withdrawal of substantive claims for categories of group members, even if the whole of the proceeding is not discontinued.² I adopt with respect but without repetition, the statement of principles applicable to an application to discontinue under s 33V of the Act by John Dixon J in *Hassan v Van Diemen*³ and approved by Nichols J in *Crawford v Australia and New Zealand Banking Group Ltd.*⁴

25 The court has a discretion to proceed without a notice requirement if it is just to do so.⁵ In *Turner v Bayer Australia Ltd*,⁶ John Dixon J said that factors relevant to the

¹ *Supreme Court Act 1986* (Vic) s 33V(1) ('*Supreme Court Act*').

² *Bray v F Hoffman-La Roche* [2003] FCA 1505 [23]; *Agnello v Heritage Care & Ors* [2021] VSC 838 [163].

³ [2021] VSC 839 [21].

⁴ [2022] VSC 297 [4].

⁵ *Supreme Court Act* (n 1) 33X(4).

⁶ [2021] VSC 241 [29] (citations omitted).



exercise of that discretion include:

- (a) whether there was any real prospect that a group member, acting rationally, would oppose the orders sought;
- (b) whether the expense and inconvenience of requiring the notice to be provided to group members would be disproportionate to any benefit that would arise;
- (c) whether provision of notice will create a risk of confusion or uncertainty on behalf of group members; and
- (d) the court's statutory obligation, enshrined by s 8 of the *Civil Procedure Act 2010* (Vic), to seek to give effect to the overarching purpose to facilitate the just, efficient, timely, and cost effective resolution of the real issues in dispute in the proceeding.

Analysis

- 26 For the following reasons, I conclude that the discontinuation of the claims should be approved and the plaintiff granted leave to file the amended writ and ASOC in the form proposed. I also conclude that it is just to dispense with the notice requirement in s 33X(4) of the Act.
- 27 First, the focus of the proceeding is the racist physical and verbal abuse experienced by Indigenous football players while they were playing in the AFL competition, and what the defendant could and should have done to protect those players from abuse, or minimise such abuse from other players and spectators. To date, most of the media reporting on the proceeding has related to Indigenous football players.
- 28 Second, while the proceeding has been on foot since September 2023, it is still in its infancy. The two years since the proceeding was commenced has been entirely consumed by debates about the substance and form of the claim and the different iterations of the pleading proposed. The plaintiff's pleading will only be in a form that is sufficiently settled to allow the proceeding to move forward after the proposed ASOC is filed and served. Notice of the commencement of the proceeding under s 33X(1) of the Act is yet to be given to group members. The reality is that earlier iterations of the pleading proposed by the plaintiff were so contested that it was not realistic that such notice be given to group members. While approval is formally required, I note that:



- (a) the *Supreme Court (General Civil Procedure) Rules 2025* (Vic) do not require a plaintiff to obtain leave to discontinue or withdraw at this early stage of the proceeding; and
- (b) discontinuance is not a bar to a subsequent proceeding by an affected group member for the same cause of action.

29 Third, there is only [REDACTED] who has been identified as falling within the group member definition in the general indorsement and who the plaintiff's lawyers have had contact with. That person does not wish to be part of the group proceeding.

30 Fourth, to date, the plaintiff's solicitors have received only one enquiry from an AFL player who is a person of colour (and not Indigenous). That person has instructed that he does not wish to be part of the group proceeding.

31 Fifth, there is currently only one registered group member who is affected by [REDACTED] in the proposed ASOC. The results of research by the solicitors for both parties is that there are few known Indigenous players who played in the AFL/VFL competition in the period from June 1975 to 30 April 1980.

32 Sixth, I accept Margalit's evidence that there are very few former, current and potential group members whose rights will be impacted by the amendment of the group member definition, based on the very limited number of affected group members who have already contacted the plaintiff's solicitors and the investigatory work that has been undertaken to prepare the ASOC.

33 Seventh, the plaintiff's solicitors have uploaded a 'case update' to their website which describes the substantive changes made in the proposed ASOC and the practical effect of those changes, including those persons who would no longer be categorised as a group member in the proceeding.

34 Eighth, none of the presently registered group members will have their claims entirely excluded by the proposed amendments to the group member definition.



35 Ninth, there is a risk that provision of a notice may cause confusion or uncertainty to group members in circumstances where, to date, there has been no group member definition or pleaded claim sufficient to allow the proceeding to progress; formal notice of the commencement of the proceeding has not yet been given; the claims for the majority of group members remain unaffected; and the impact of the amendments on the rights of affected group members will be difficult to explain.

36 I also accept Margalit's evidence that the expense and inconvenience associated with providing a formal notice to group members in media outlets would be disproportionate to any benefit that would arise, in circumstances where few affected group members have come forward since September 2023.

37 I will direct that the plaintiff's solicitors write to group members of whom they are aware and whose claims are affected by the amendments to the group member definition or claim period, to advise them of the impact these amendments may have on their claims.

Conclusion

38 I will grant the plaintiff leave to file and serve the proposed ASOC and make orders dispensing with the notice requirement in s 33X(4) of the Act.

CERTIFICATE

I certify that this and the 9 preceding pages are a true copy of the reasons for Ruling of the Honourable Justice Keogh of the Supreme Court of Victoria delivered on 25 September 2025.

DATED this 25th day of September 2025.



Associate

