



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

Case: S ECI 2023 04323

Filed on: 06/02/2026 01:58 PM

No. S ECI 2023 04323

B E T W E E N

PHILLIP BRENT KRAKOUER

First Plaintiff

- and -

NEIL ELVIS WINMAR

Second Plaintiff

- and -

AUSTRALIAN FOOTBALL LEAGUE (ACN 004 155 211)

Defendant

**REPLY TO THE DEFENDANT'S DEFENCE TO THE
AMENDED STATEMENT OF CLAIM**

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|---------------------|-----------------------------|------------------|-----------------------------|
| Date of Document: | 6 February 2026 | Solicitors Code: | 113394 |
| Filed on behalf of: | The Plaintiffs | Telephone: | (03) 9133 0288 |
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In answer to the Defendant's Defence to the Amended Statement of Claim dated 14 November 2025 (**'the Defence'**), the Plaintiffs say:

1. As to sub-paragraph 78(a) of the Defence:
 - a. as to (i), the facts and matters pleaded therein are not exculpatory, rather they confirm the foreseeable and not insignificant risk of harm in circumstances requiring the Defendant to take precautions against that risk of harm, being the Player Abuse Harm (as that term is defined in paragraph 78 of the Amended Statement of Claim dated 9 October 2025 (**'ASOC'**), for the purposes of section 48 of the *Wrongs Act 1958* (Vic) (**'Wrongs Act'**);

- b. they say further to (i) that in any event the existence, rather than source, of a risk of harm is the relevant risk for the purposes of section 48 of the *Wrongs Act 1958* (Vic) (***Wrongs Act***);
- c. as to (ii) say that, whether the risk of a player group member experiencing racist abuse was not limited to the circumstances involving participation in matches within the AFL Competition, is not relevant to assessing the Defendant's breach of duty of care under section 48 of the *Wrongs Act* with respect to the Player Abuse Harm;
- d. the Plaintiffs deny (iii) and say further that, whether the risk of racist abuse occurring in the course of matches within the AFL Competition was comparable to the risk arising in other fields of endeavour and areas of life is not relevant to assessing the Defendant's breach of duty of care under section 48 of the *Wrongs Act* with respect to the Player Abuse Harm;
- e. the Plaintiffs deny (iv) and say further that:
 - i. the Player Abuse Harm was not a risk to be assessed, or alternatively to be assessed solely, by virtue of the number of player group members and matches played across the AFL Competition, as the Defendant alleges, but to be assessed by the not insignificant risk that the Player Abuse Harm would occur to an Abused AFL Player (as that term is defined in paragraph 1(c) of the ASOC) as set out in paragraph 78 of the ASOC;
 - ii. as to the Player Abuse Harm, within the meaning of section 48(2) of the *Wrongs Act*:
 1. there was a high probability that the Player Abuse Harm would occur if care were not taken;
 2. the Player Abuse Harm was likely to be serious;
 3. there was limited burden on the Defendant in taking precautions to avoid the Player Abuse Harm;

4. there was no social utility in failing to take precautions to avoid the Player Abuse Harm; and
 5. there was social disutility in failing to take precautions to avoid the Player Abuse Harm.
2. As to sub-paragraph 80(a) of the Defence:
 - a. as to (i), the Plaintiffs refer to and repeat paragraphs 1(a) and (b) above;
 - b. the Plaintiffs deny (ii) and in any event say that, whether the risk was not appreciably higher than in other comparable fields of endeavour or areas of life is of no relevance to the determination of whether a reasonable person in the position of the Defendant would have taken precautions against the Spectator Abuse Harm within the meaning of section 48(1) of the *Wrongs Act*; and
 - c. the Plaintiffs deny (iii) and refer to and repeat paragraph 1(e) above.
3. As to paragraph 81, the Plaintiffs:
 - a. deny sub-paragraph 81(a) of the Defence and refer to and repeat paragraphs 1(e), and 2(c) above; and
 - b. deny sub-paragraphs 81(b) and (c) of the Defence and say that, at all times during the Relevant Period (May 1980 to 9 October 2025) there existed medical evidence of a relationship between racial abuse and psychological and/or psychiatric injury.

PARTICULARS

Particulars of medical evidence regarding the relationship between racial abuse and psychological and/or psychiatric injury during the Relevant Period will be provided following the exchange of expert evidence.

4. As to sub-paragraph 82(c) of the Defence, they deny sub-paragraph 82(c) and say further that, whether, having taken all of the precautions alleged in paragraph 90 of the ASOC still carried some risk of racial abuse (which they deny), is no answer to a failure of the Defendant to take the precautions in accordance with section 48 of the *Wrongs Act*.
5. As to paragraph 112 of the Defence:

- a. the Defendant relies upon alleged releases known as “Form 1 Agreements”, in particular an agreement dated 1 March 1994 pertaining to the Second Plaintiff (**‘the Form’**);
- b. the Second Plaintiff does not admit that the Form comprises a binding agreement between the parties during the 1994 AFL season, and says further that he requires discovery of any 1994 Standard Playing Contract or other contracts between the Second Plaintiff and Defendant executed in or relevant to 1994 before the Second Plaintiff can admit or deny this allegation;
- c. the alleged indemnity provision in clause 3 of the Form does not apply in any circumstances whatsoever where a player has suffered an injury deliberately and wilfully inflicted upon them (**‘the alleged indemnity’**);
- d. the abuse that the Second Plaintiff suffered as set out in paragraph 95 of the ASOC was inflicted, wholly or alternatively in part, upon the Second Plaintiff deliberately and wilfully such that the alleged indemnity does not extend to the Second Plaintiff’s injury, loss and damage alleged in this proceeding or alternatively does not extend to all of the Second Plaintiff’s injury, loss and damage;
- e. further or alternatively to (d) immediately above, and if the alleged indemnity did form part of the contractual agreement between the Defendant and the Second Plaintiff (which the Second Plaintiff denies), its operation and effect is void because the Defendant did not do all that was reasonably necessary to bring the alleged indemnity clause to the Second Plaintiff’s notice; and
- f. further or alternatively to (d) and (e) immediately above, it would be unconscionable for the Defendant to rely on the alleged indemnity in circumstances where:
 - i. the Second Plaintiff was under a special disadvantage due to:
 1. his membership in a vulnerable community of Indigenous persons;
 2. being one of a small number of Indigenous persons playing in the AFL;
 3. his relative lack of education; and

4. his financial need, as a VFL/AFL player since approximately 1986, relying on income from the AFL as the primary source of earnings.
- ii. the Defendant knew or ought to have known of this special disadvantage;
- iii. the Defendant exploited the Second Plaintiff's special disadvantage by requiring the Second Plaintiff to agree to the alleged indemnity as a condition for participating in the 1994 AFL season and/or by failing to explain to him the effect of the alleged indemnity,

and in the circumstances, it is unjust and unfair for the Defendant to rely upon the alleged indemnity and it is void and unenforceable.

6. As to paragraph 114 of the Defence, Part VB of the *Wrongs Act* does not apply in these proceedings by operation of section 28C(2)(a) of the *Wrongs Act*.

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The Plaintiffs rely on and repeat the particulars in paragraphs 97(vi) of the ASOC.

7. As to paragraph 115 of the Defence, Part VBA of the *Wrongs Act* does not apply in these proceedings by operation of section 28LC(2)(a) of the *Wrongs Act*.

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The Plaintiffs refer to and rely upon the particulars subjoined to the preceding paragraph.

8. As to paragraph 116 of the Defence, it is just and reasonable to extend the period of limitation applicable to the Plaintiffs' causes of action within the meaning of section 27K of the *Limitation of Actions Act 1958* (Vic) (***Limitations Act***), having regard to those factors set out in section 27L thereof.

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The Plaintiffs will provide particulars of the reasons it is just and reasonable to extend the period of limitation applicable to the Plaintiffs' causes of action within the meaning of section 27K of the *Limitations Act* when making their application to extend time.

9. As to paragraph 117 of the Defence, the group members' limitation periods are suspended in accordance with section 33ZE of the *Supreme Court Act 1986* (Vic).
10. Save as to admissions contained within the Defence, the Plaintiffs otherwise join issue with each of the denials and non-admissions contained therein.

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