

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

Not Restricted

S ECI 2020 03402

5 BOROUGHES NY PTY LTD (ACN 632 508 304)

Plaintiff

v

STATE OF VICTORIA & ORS
(according to the attached Schedule)

Defendants

<u>JUDGE:</u>	Watson J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	27 July 2026
<u>DATE OF RULING:</u>	3 August 2026
<u>CASE MAY BE CITED AS:</u>	5 Boroughs NY Pty Ltd v State of Victoria & Ors (No 8)
<u>MEDIUM NEUTRAL CITATION:</u>	[2026] VSC 496

PRACTICE AND PROCEDURE – Group proceeding – Application for leave to amend group definition – Proceeding had been conducted for years on the basis that the group definition had been amended – Whether proposed amendment one of form or substance – Amendment not one of form only – Very small number of objectors given size of group – Not clear any objectors affected by amendment – Importance of clarity and ascertainability of group definition – No prejudice to any group member affected by amendment – Group definition should be amended – Amendment not to apply retrospectively – *Supreme Court Act 1986* (Vic) ss 33K, 33V, 33ZE.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr A Hochroth SC with Mr H Whitwell	Quinn Emanuel
For the Defendants	Ms R Amamoo	HSF Kramer

HIS HONOUR:

Introduction

- 1 This is an application by the plaintiff to amend the group description in a class action. The application arises in somewhat unusual circumstances. The parties and the Court have conducted themselves from 12 February 2021 until 28 April 2026 on the basis that the group definition had been amended. That included the filing of various versions of a statement of claim which contained a group definition in, or substantially in, the same form as the plaintiff now seeks,¹ sending out Court approved notices which described the group definition in terms which the plaintiff now seeks, and reaching an in principle settlement on the basis that the group comprised the persons who would be covered by the group definition the plaintiff now seeks.
- 2 At a case management hearing to consider notices to group members of the proposed settlement it became evident that, despite the way in which the case had been conducted for more than five years, the group definition had not been properly amended, no application under s 33K of the *Supreme Court Act 1986* (Vic) ('the Act') ever having been made.
- 3 The plaintiff's proposed amendment seeks to bring the group definition into conformity with the definition it used in its pleadings and which has been the basis upon which the parties and the Court have, until recently, assumed the action is to be conducted. The defendants consent to the proposed amendment. In those circumstances, in ordinary litigation there would be nothing further to do than to give effect to the parties' consent. The plaintiff's application would properly be described as a 'no brainer'.
- 4 This, however, is not ordinary litigation. It is a class action which affects thousands of Victorian businesses. The Court's role in considering the plaintiff's application to amend the group definition requires it to pay regard to the interests of group members. For this reason, the Court made orders for the giving of notice to group members of the proposed amendment to the group definition. As a result of those

¹ *5 Boroughs NY Pty Ltd v State of Victoria* [2021] VSC 785, [15]; *5 Boroughs NY Pty Ltd v State of Victoria* (No 2) [2022] VSC 494, [8].

notices, 11 group members objected to the change which the plaintiff seeks. Those objectors filed written materials in support of their objections and two objectors made short oral submissions at a hearing conducted on 27 July 2026.

- 5 Having considered the submissions of the plaintiff, the defendants and each of the objectors, and for the reasons given below, I will give leave to the plaintiff to amend the group definition in the class action in the way it seeks.

The proposed amendment

- 6 On 21 August 2020, the plaintiff commenced this class action by a writ with an indorsement of its claim. In that indorsement the group on behalf of whom the proceeding is commenced is relevantly described as all persons:

- (a) who as at 1 July 2020 carried on a business involving the supply of goods or services to members of the general public from one or more premises physically located within Victoria;
- (b) whose ability to supply goods or services to members of the general public from their premises was adversely affected by one or more of:
 - (i) the “**stage 3**” **restrictions** put in place in certain postcodes of Melbourne from 2 July 2020, and in Melbourne and the Mitchell Shire local government area from 9 July 2020;
 - (ii) the “**stage 4**” **restrictions** put in place in Melbourne from 2 August 2020, including the **workplace closures** put in place from 6 August 2020; and
 - (iii) the **regional “stage 3” restrictions** put in place in Victoria outside of Melbourne from 6 August 2020;

- 7 On 12 February 2021, the plaintiff filed its statement of claim. That statement of claim relevantly described the group on behalf of whom the claim was brought in different terms to the description indorsed on the writ. Relevantly, it described the group as all persons:

- (a) who as at 1 July 2020 carried on a business (a **retail business**) the ordinary operations of which involved:
 - (i) the supply of goods or services at premises physically located within Victoria; and
 - (ii) the attendance by members of the general public at those premises for the acquisition of the goods or services supplied at those premises;

- (b) who were prevented or prohibited from supplying, or were restricted in their ability to supply, goods or services to members of the general public at such premises, or who operated such premises the attendance by members of the general public at which was prohibited or restricted, by one or more of:
 - (i) the “**stage 3**” **restrictions** put in place in certain postcodes of Melbourne from 2 July 2020, and in Melbourne and the Mitchell Shire local government area from 9 July 2020;
 - (ii) the “**stage 4**” **restrictions** put in place in Melbourne from 2 August 2020, including the **workplace closures** put in place from 6 August 2020; and
 - (iii) the **regional “stage 3” restrictions** put in place in Victoria outside of Melbourne from 6 August 2020;

8 With the exception of the words ‘prevented or’ in paragraph (b) of the statement of claim group definition, the proceeding has been conducted since February 2021 until April 2026 on the basis that the group represented in the proceeding was as defined in the plaintiff’s statement of claim.

9 The statement of claim filed in 2021 was struck out. A substituted statement of claim was filed on 25 March 2022 which deleted the words ‘prevented or’ from the previous version of the group definition which had appeared in the statement of claim. This is the version of the group definition which the plaintiff seeks by its summons.

10 On 28 April 2022, the plaintiff filed an amended writ which, amongst other things, deleted the entirety of the general indorsement, and in particular, deleted the group definition in paragraph 1 in the indorsement on the writ.

11 Under s 33K of the Act, leave is required to alter the description of the group in the writ commencing a proceeding. Leave under s 33K was neither sought nor granted and, as a result:

- (a) the filing of the statement of claim, the substituted statement of claim and subsequent amended versions of the statement of claim was ineffective to alter the description of the group; and

(b) the striking through of the group description was also not effective to alter the description of the group in the writ.²

12 The upshot is that notwithstanding the way in which the proceeding was, in fact, conducted the group definition contained in the indorsement to the writ has not been amended.

Is the amendment one of form or substance?

13 The plaintiff and the defendants submit that the proposed amendment of the group definition is one of form which does not affect anyone's substantive rights. In a sense, that begs the question of why, if that is true, the amendment is necessary. The plaintiff's answer in that respect is that amending the group definition in the way it seeks brings the form of the group definition into conformity with the way in which the proceeding has been conducted.

14 Another question which arises is why, if the change in the group definition is one of form only, the plaintiff used a different form of group definition in its statement of claim and subsequent pleadings. The plaintiff says that the reason it utilised the different form of group definition in its pleadings was because that version of the group definition is clearer, albeit not substantively different.

15 I am not persuaded that the proposed change is one of form only. In short, the supply of services from a person's premises is, at least arguably, a broader concept than the supply of services to persons who attend their premises.

16 To give an example, a plumbing business might base its operations at a particular location, being the place where it receives requests from customers for services and stores equipment and parts used in the business. As a matter of language, it would be appropriate to describe the plumbing business as supplying its services from those premises, even though all of the actual plumbing work would occur at the premises of the clients. In using this example I am conscious that a plumbing business may well not have been adversely affected by the stage 3 or 4 restrictions because of exemptions in those restrictions, but nonetheless it provides an example, in my view, of why

² *Mumford v EML Payments Ltd* [2025] VSC 203, [61]–[63].
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providing services 'from' premises does not always involve the attendance of clients at those premises.

- 17 In one way or another, six of the objectors were businesses who might be thought to have supplied services from premises physically located within Victoria even though a key part of the delivery of that service did not occur at those premises, but rather occurred elsewhere and was affected by the stage 3 and stage 4 restrictions.
- 18 The plaintiff says this is not how the original group definition should be read. It says that when one has regard to the entirety of the group definition it is plain that the service which must be affected by the COVID restrictions is a service provided at the premises. I am disinclined to think that this is the way in which the original group definition should be read, even though I accept that this is the way in which the plaintiff intended it to be read.
- 19 At the very least, there is an ambiguity in the way in which the group definition in the writ is framed.

The objections

- 20 On 5 June 2026, I made orders for the distribution of notices to group members informing them of the plaintiff's application to amend the group definition. In compliance with those orders, the plaintiff's solicitors sent 18,227 emails of which 17,582 were delivered to their intended recipient, and of those 11,274 recipients opened the email; 645 emails were recorded as undelivered and 48 people opted out of receiving further communications. In addition, notices were displayed on a website maintained by the solicitors for the plaintiff in relation to the class action and on the Supreme Court website. An abridged notice was posted to an X account, the Facebook page and on the website of Business Victoria and also published in the Melbourne Herald Sun and The Age in both electronic and hard copy.
- 21 Only 11 objections were received. Whilst those objections need to be considered on their merits, it is of some significance in considering whether to exercise my discretion to allow the plaintiff to amend the group definition that such a small number of objections were received from the very large group of persons who were notified of the proposed amendment.

22 A number of the objections may be dealt with relatively briefly:

- (a) Soon Hin Bong, on behalf of a business known as Costume King, objected to the amendment on a number of bases, but on the face of his objection, his group membership would appear to be completely unaffected by the amendment because members of the public attended the business' premises;
- (b) Hoang Nguyen made a submission which addressed in general terms the alleged injustice of excluding businesses which would otherwise have been caught by the group definition in the writ, but made no submission regarding their own business and any actual prejudice which they might suffer as a result of the amendment. Nor were there concrete examples given of how businesses might be prejudiced by the amendment;
- (c) Nemat Behiar made a submission on behalf of AKN Business Group Pty Ltd which operated Amberlee Receptions. That submission notes that AKN Business Group Pty Ltd is a registered group member in the proceeding. On the face of the submission, the business would not appear to be affected in any way by the proposed amendment because members of the public attended its premises;
- (d) Toby Chambers made a submission on behalf of his family business. In that submission he indicates that he believes he would meet the terms of the proposed new group definition. His concern is that the amendment might bring in new group members who would qualify for registration, but be excluded from participation in the settlement by reason of not having registered. There is, in my view, no prospect that the proposed amendment will bring in new group members; and
- (e) Gemima Weiler made a submission on behalf of Bindaree Outdoor Education Services Pty Ltd. That submission does not in terms oppose the amendment, but seeks clarification of the ambit of the phrase 'members of the public'. The ambit of that phrase will not be any different to the ambit of the phrase 'members of the general public', so that is not an issue which arises in relation to any consideration of the effect of the amendment.

- 23 This leaves six objections from persons who, in one form or another, raise the issue of whether their businesses supplied services to members of the general public 'from their premises' notwithstanding that the delivery of the service occurred wholly or primarily at a place other than their premises.
- 24 It is not entirely apparent that all of those objectors would, in any event, meet that aspect of the group definition which required supply of services 'to members of the general public'. A number appear to have provided what might be described as business to business services or at least do not appear to have provided services to the general public and so, in any event, may not fall within the original group definition. Objectors in this category include:
- (a) C Maragos and Associates Pty Ltd, which appears to have provided consultancy services to other businesses;
 - (b) Telephone Technologies Pty Ltd (trading as Teltech ITC Group), which supplied technology products and services to educational institutions and commercial businesses;
 - (c) ACRES Pty Ltd, which was a professional heritage and geospatial consulting firm; and
 - (d) Humour Australia Pty Ltd, which provided communication, presentation and speaker coaching services to corporate and professional clients.
- 25 I should emphasise that I am not making any determination in this application as to whether those businesses or indeed any others are, or are not, caught by the existing group definition. Nor am I making any determination whether those businesses are, or are not, caught by the proposed amendment. Rather, on the materials provided in those objections, it appears likely that those businesses may not be group members under either definition, and so would be unaffected by the proposed amendment.
- 26 Rayson Lim made a submission on behalf of their business, Concierge Buyers Advocates. That submission states that the business was carried on from a physical commercial office space in Victoria providing services of 'real estate buying and

investment services, property inspections, etc'. The submission states that due to the requirements of that industry:

our standard operating model requires us to leave our office premises to physically visit clients at *their* respective locations across Victoria to execute and deliver our services. We do not solely rely on members of the public walking into our shared office space to buy or receive what we offer, because there isn't a need to. Clients (including corporate clients) contact us over the phone and over the web, and we meet at either the clients home or property we are buying.

- 27 The submission goes on to state that the stage 3 and 4 restrictions meant that the business was prohibited from visiting clients and, as a result, suffered economic loss.
- 28 It is not entirely clear that Concierge Buyers Advocates would not meet the amended definition. The reference in the submission to not 'solely' relying on members of the public attending their office may suggest that some members of the public do, in fact, attend their office. However, if it is the case that members of the public did not in fact ever attend the offices of Concierge Buyers Advocates they would, in my view, provide a concrete example of a business which did fall within the original group member definition, but would fall outside the proposed group member definition. That said, it appears that Concierge Buyers Advocates is a registered group member and so it seems more likely that some, albeit perhaps a small number of, members of the public attended their offices in order to obtain services.
- 29 Michelle Paproth of Michael Paproth Real Estate also made a submission objecting to the amendment. That submission raises a concern as to whether the real estate agency business will fall within the amended group definition. The relevant portion of that submission is as follows:

Under the proposed amended definition, additional questions arise as to whether a real estate business satisfies the requirement that members of the public attend the relevant premises for the acquisition of services. This creates uncertainty and may narrow the scope of the group in a way that affects substantive rights.

In particular, there is potential ambiguity regarding whether the relevant premises are limited to a real estate agency office or whether they include the properties being marketed and sold. The ordinary operation of a real estate business involves members of the public physically attending properties for inspections and auctions as part of the process of acquiring real estate services and purchasing property. The proposed amendment may give rise to disputes

regarding whether businesses such as real estate agencies fall within the group definition.

- 30 It is not clear from this submission whether Michael Paproth Real Estate says that members of the public never attended its offices, and so it would be affected by the amended group definition, but the submission does indicate that the business registered as a group member. Given that the notice for registration of group members specifically included a reference to the group member definition as it will be if the amendment is approved, it is presumably the case that Michael Paproth Real Estate at the time of registration believed that it did fall within that definition.
- 31 The upshot is that of the 11 objections filed it is not clear that any of the objectors are, in fact, affected by the proposed amendment. That is not to say that they might not be. I have indicated that I am satisfied that there may be businesses who supplied services to the public from premises in Victoria, but the provision of those services did not involve the attendance by members of the public at those premises, and who might have been adversely affected by the stage 3 or stage 4 restrictions.
- 32 Nonetheless, it is a matter of some significance in the consideration of the question before me that, notwithstanding the theoretical possibility of a business being adversely affected by the proposed amendment, after an extensive notification process there is no clear cut example of such a business amongst the very few objectors to the proposed amendment.

The group definition should be amended

- 33 Notwithstanding the possibility that the proposed amendment to the group definition effects a substantive change, I am satisfied that in the circumstances of this case, relevant factors overwhelmingly favour granting the plaintiff's application for amendment.
- 34 First, if there is any ambiguity in the existing group definition it is important that it be resolved. The cases make plain the importance of clarity and ascertainability in the content of a group definition.³

³ *El-Helou v Mercedes-Benz Australia/Pacific Pty Ltd* (2025) 77 VR 51, 59–64 [19]–[33]; *J Wisbey & Associates Pty Ltd v UBS AG* [2021] FCA 36, [13]–[16]; *Green v Graincorp Oilseeds Pty Ltd* [2023] VSC 395.

- 35 Secondly, the parties, and indeed the Court, have conducted themselves for a period in excess of five years on the basis that the proposed group definition was, in fact, the group definition which applied to the proceeding.
- 36 Thirdly, despite notice of the proposed amendment having been sent to more than 18,000 group members or potential group members, only 11 objections were received to the proposed amendment and, on the basis of the materials contained in those objections, it is not plain that any of those objectors would, in fact, be affected by the proposed amendment.
- 37 Fourthly, even if some businesses might be affected by the proposed change to the group definition, they do not suffer any prejudice because:
- (a) those group members have had no claim advanced on their behalf in the proceeding since the filing of the plaintiff's statement of claim in February 2021;
 - (b) if the settlement was not approved the case would proceed to trial without any claim being advanced on behalf of those group members; and
 - (c) any group member who is excluded by the proposed amendment will have a right to bring their own proceeding against the defendants.
- 38 For all of these reasons it is appropriate to grant the plaintiff's application to amend the group definition in the terms it seeks.
- 39 In its summons, the plaintiff sought an order that any amendment take effect from 12 February 2021. The defendants consented to that retrospective effect. Whilst there is undoubtedly some attraction to that course, as it would mean that various procedural steps which have been taken in the proceeding would have been taken in conformity with the group definition, I am disinclined to order retrospective effect. Group members have the benefit of a suspension of limitation periods under s 33ZE of the Act. If any group member is removed from the group as a result of the amendment, it would seem unfair to deprive them of five years of that suspension of limitation period by giving the amendment retrospective effect. In the end, I note neither the plaintiff nor the defendants pressed for retrospective effect.

40 Finally, I note that a question arises as to whether s 33V approval is required for the amendment because, in effect, it constitutes a discontinuance of a substantive portion of the plaintiff's claim. In the unusual circumstances which pertain in this case, even if the amendment does have the practical effect of narrowing the group by excluding some businesses from making a claim, I am of the view that that does not constitute a discontinuance of any substantive part of the group proceeding. As I have indicated above, no claim has been advanced on behalf of those group members since 12 February 2021. The amendment therefore does not effect any discontinuance of any substantive portion of the claim. To the extent that any discontinuance of any substantive portion of the claim on 12 February 2021 needed to be regularised by approval under s 33V that can be considered at the settlement approval hearing.

41 As I noted above, the need for an amendment to the group definition became evident at a case management hearing to determine appropriate notices to group members of the proposed settlement of this matter and a timetable for the hearing of the settlement approval application. At that hearing I indicated that, subject to the resolution of the issue regarding the group definition and some minor amendments, I was prepared to make orders in the form proposed by the plaintiff. Those orders will now also need to be amended as to dates.

42 Further, in light of this decision, it is also appropriate that the notice to group members include the following paragraph at the conclusion of the section 'Am I Group Member of the Class Action':

On 3 August 2026, the Court approved an amendment to the group member definition in this class action. Details of that amendment and the reasons for it can be found in the Court's ruling: *5 Boroughs NY Pty Ltd v The State of Victoria & Ors (No 8)* [2026] VSC 496 which may be found on the Austlii website at <https://www.austlii.edu.au/>. If you believe you would have been a group member under the previous group member definition, but are not a group member under the current group member definition, you should immediately seek legal advice regarding your rights.

43 The parties should confer and provide consent orders which have a hearing of the approval application in the weeks commencing 28 September 2026 or 5 October 2026.

CERTIFICATE

I certify that the 11 preceding pages are a true copy of the reasons for Ruling of the Honourable Justice Watson of the Supreme Court of Victoria delivered on 3 August 2026.

DATED this third day of August 2026.



SCHEDULE OF PARTIES

S ECI 2020 03402

5 BOROUGHES NY PTY LTD (ACN 632 508 304)

Plaintiff

- and -

STATE OF VICTORIA

First Defendant

THE HONOURABLE JENNY MIKAKOS (IN HER
CAPACITY AS THE FORMER MINISTER FOR HEALTH
AND THE FORMER MINISTER FOR THE
COORDINATION OF HEALTH AND HUMAN SERVICES:
COVID-19)

Second Defendant

THE HONOURABLE MARTIN PAKULA (IN HIS
CAPACITY AS THE FORMER MINISTER FOR JOBS,
INNOVATION AND TRADE AND THE FORMER
MINISTER FOR THE COORDINATION OF JOBS,
PRECINCTS AND REGIONS: COVID-19)

Third Defendant

KYM LEE-ANNE PEAKE (IN HER CAPACITY AS THE
FORMER SECRETARY, DEPARTMENT OF HEALTH AND
HUMAN SERVICES)

Fourth Defendant

SIMON GRANT PHEMISTER (IN HIS CAPACITY AS THE
SECRETARY, DEPARTMENT OF JOBS, PRECINCTS AND
REGIONS)

Fifth Defendant