

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST**

S ECI 2020 03365

BETWEEN

DANIEL CHRISTIAN O'BRIEN

Plaintiff

and

AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD (ACN 005 357 522)
(and others according to the Schedule attached)

Defendants

ORDER

- JUDGE:** The Honourable Justice John Dixon
- DATE MADE:** 30 April 2024
- ORIGINATING PROCESS:** Writ filed 21 August 2020
- HOW OBTAINED:** By consent
- ATTENDANCE:** Not applicable
- OTHER MATTERS:**
- A. On 20 February 2024 the Court ordered that the parties in each of proceedings S ECI 2020 02946, S ECI 2020 03365 and S ECI 2020 03924 be relieved from the implied undertaking with respect to the documents specified in that order, and for the limited purposes set out in the order.
 - B. On 8 March 2024 the Court ordered that proceedings S ECI 2020 02946, S ECI 2020 03365 and S ECI 2020 03924 be set down for hearing together commencing on 14 October 2024 (**Joint Trial**).

THE COURT ORDERS BY CONSENT THAT:

- 1 The Joint Trial is to be conducted in accordance with the Joint Trial Protocol attached as Schedule 1 to these orders.
- 2 Pursuant to section 27(3)(b) of the *Civil Procedure Act 2010* (Vic) and the inherent jurisdiction of the Court, the parties in each of proceedings S ECI 2020 02946, S ECI 2020 03365 and S ECI 2020 03924 be relieved from the implied undertaking for the limited purposes of providing documents and information to all the parties in



proceedings S ECI 2020 02946, S ECI 2020 03365 and S ECI 2020 03924, to enable those parties to prepare for and conduct the Joint Trial (including for any interlocutory applications in connection with the Joint Trial and for any discussions or applications regarding the resolution of each proceeding).

3 Each of proceedings S ECI 2020 02946, S ECI 2020 03365 and S ECI 2020 03924 is referred to Associate Justice Efthim for further mediation in accordance with such orders or directions as the associate judge may give. All further applications in respect of such mediations are to be directed to the associate judge.

4 Each proceedings S ECI 2020 02946, S ECI 2020 03365 and S ECI 2020 03924 be listed for direction at **9.30am on 4 October 2024**.

DATE AUTHENTICATED: 10 May 2024


The Honourable Justice John Dixon

SCHEDULE 1 – JOINT TRIAL PROTOCOL



IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST

Fox & Anor v Westpac Banking Corporation & Anor (S ECI 2020 02946)
(**Fox Proceeding**)

O'Brien v Australia and New Zealand Banking Group Limited & Anor (S ECI 2020 03365)
(**O'Brien Proceeding**)

Nathan & Anor v Macquarie Leasing Pty Ltd (S ECI 2020 03924)
(**Nathan Proceeding**)

FLEX COMMISSION PROCEEDINGS
JOINT TRIAL PROTOCOL FOR THE CONDUCT OF THE HEARING
30 April 2024

1. In this protocol, unless expressly indicated otherwise, a reference to:
 - a. **Plaintiffs** means the plaintiffs in the Fox Proceeding, the O'Brien Proceeding and the Nathan Proceeding; and
 - b. **Defendants** means the defendants in the Fox Proceeding, the O'Brien Proceeding and the Nathan Proceeding.
 - c. **Flex Commission Proceedings** means the Fox Proceeding, the O'Brien Proceeding and the Nathan Proceeding.

A. TRIAL AND SITTING DAYS

2. The trial of the Flex Commission Proceedings is set down for hearing commencing on 14 October 2024, on an estimate of 30 hearing days, with a 4-day sitting week.
3. Sitting days for the hearing will be determined by the Court, with the working assumption that the usual weekly sitting days will be Monday to Thursday.

B. TRIAL PLAN

4. The Indicative Trial Plan for the Hearing, setting out the proposed allocation of time for submissions and the examination of witnesses by the parties, and concurrent and individual expert topics, as agreed by the parties, is annexed to this protocol.
5. The Indicative Trial Plan is subject to change as directed by the Court, by agreement between the parties or otherwise.

C. RELEASE FROM THE IMPLIED UNDERTAKING

6. On 20 February 2024 and on 30 April 2024, the Court ordered that the parties in the Flex Commission Proceedings are, on the terms identified in the orders, released in each of the proceedings from the implied undertaking (*Hearne v Street* undertaking).
7. For the avoidance of doubt each party to the Flex Commission Proceedings agrees to not use the information or documents for any purpose other than for the purpose set out in the these orders.

D. EVIDENCE AND CROSS-EXAMINATION

8. By 4 October 2024:
 - a. the Plaintiffs and Defendants in the **Fox Proceeding** are to notify each other of any **lay witnesses** required for cross-examination;
 - b. the Plaintiffs and Defendants in the **O'Brien Proceeding** are to notify each other of any **lay witnesses** required for cross-examination; and
 - c. the Plaintiffs and Defendant in the **Nathan Proceeding** are to notify each other of any lay witnesses required for cross-examination.

E. PRE-TRIAL STEPS

9. By no later than 1 July 2024 the parties are to confer with respect to a timetable for the resolution of any dispute with respect to common questions. Unless extant disputes remain unresolved, the parties are to exchange the agreed list of common questions by 12 July 2024.

F. OPENING SUBMISSIONS

10. By 19 July 2024 the Plaintiffs are to serve on the Defendants a draft template containing neutrally expressed headings for opening submissions, which template is to identify the key issues for determination at the Hearing (**Submissions Template**).

11. By 26 July 2024, the Defendants are to serve the Plaintiffs with any amendments to the draft Submissions Template.
12. In the week commencing 29 July 2024, counsel for the parties are to confer to attempt to agree the Submissions Template for the Hearing.
13. By 5 August 2024, the parties are to provide to the Associate to the Honourable Justice Nichols:
 - a. the agreed Submissions Template; or
 - b. in the event that the parties are not able to agree on the Submissions Template, then one version of the draft document with the extent of any disagreement identified in mark-up.
14. By 20 September 2024, the Plaintiffs are to file and serve their written outlines of opening submissions (following the Submissions Template).
15. By 4 October 2024, the Defendants are to file and serve their written outlines of opening submissions (following the Submissions Template).
16. All submissions and authorities will refer to documents by their document ID with hyperlinks to the electronic Court Book.

G. CLOSING SUBMISSIONS

17. Subject to any further direction by the trial judge,
 - a. By 21 November 2024 the Plaintiffs are to serve their written outlines of closing submissions in each Flex Commission Proceeding (following the Submissions Template).
 - b. By 27 November 2024, the Defendants are to serve their written outlines of closing submissions in each Flex Commission Proceeding (following the Submissions Template).
 - c. By 2 December 2024, the Plaintiffs are to serve any reply to the Defendants' written outlines of closing submissions in each Flex Commission Proceeding (following the Submissions Template).

H. ELECTRONIC COURT BOOK AND CONDUCT OF HEARING

Appointment of the Service Provider

18. The parties shall procure that an electronic Court Book is prepared in accordance with *Practice Note SC Gen 5 (Technology)*.
19. The parties agree to engage Epiq (**Service Provider**) to:
 - a. facilitate the creation of an electronic Court Book;
 - b. provide access to the electronic Court Book during the course of the Hearing, and facilitate the electronic presentation of evidence to the parties, Court and witnesses during the Hearing; and
 - c. provide real time transcription services during the Hearing.
20. The costs of the Service Provider are to be costs in the cause, but borne in the first instance as follows:
 - a. one half of the shared costs, being the costs of providing the e-trial facilities and the Service Provider's support staff (including court operator, live stream and/or broadband facilities, and in-court connection to a real-time/progressive transcript service), be borne by the Plaintiffs, with the other half to be borne by the Defendants; and
 - b. any additional costs incurred that are not incidental to facilitation of the e-trial process, and are essentially at the request of and for an individual party, are to be borne by the relevant party, based on each individual party's use of the services.
21. By 31 May 2024 the parties will confer with the Service Provider and agree an electronic document protocol to facilitate the provision of the services described at paragraph 26 (**Electronic Document Protocol**).

Electronic Court Book

22. The electronic Court Book is to comprise:
 - a. Part A: Pleadings and Particulars: including all requests for particulars and responses grouped by proceeding;

- b. Part B: Lay Evidence filed in each proceeding, grouped by proceeding;
 - c. Part C: Expert Evidence filed in each proceeding, grouped by *expert topic*;
 - d. Part D: Statements of Propositions filed in each proceeding, grouped by proceeding;
 - e. Part E: Documents, with all documents to be in chronological order in accordance with paragraph 6.8 of *Practice Note SC CC 1 (Second Revision)*, and with the index to set out:
 - i. the name, date, description and document identification number for each document. Duplicate documents with different document identification numbers are to be avoided;
 - ii. the party proposing to tender the document and the proceeding(s) in which the document is proposed to be tendered; and
 - iii. a cross-reference to any affidavit, expert report or Statement of Propositions in which the document has been referred;
 - f. Part F: Objections; and
 - g. Part G: Submissions.
23. By 16 August 2024, the Plaintiffs are to:
- a. serve upon the Defendants and provide the Service Provider an electronic index of the Plaintiffs' Parts A, B, C, D, E, and G documents (**Plaintiffs' Index**); and
 - b. provide the Service Provider with copies of all documents referred to in the Plaintiffs' Index in accordance with the Electronic Document Protocol.
24. By 30 August 2024, the Defendants are to:
- a. serve upon the Plaintiffs and the Service Provider electronic indexes of any further documents referred to in clause 28 that were not included in the Plaintiffs' Index (the Defendants' Indexes); and
 - b. provide the Service Provider with copies of all further documents referred to in the Defendants' Indexes in accordance with the Electronic Document Protocol.
25. By 6 September 2024, the Service Provider is to provide the Plaintiffs and Defendants with a

consolidated electronic index (i.e., a consolidation of the Plaintiffs' and Defendants' Indexes) to the electronic Court Book identifying all documents set out in clause 29 and 30 above (**Consolidated Index**).

26. By 6 September 2024, the Service Provider is to make the electronic Court Book available to the parties and to the Court.
27. Documents may be added to the electronic Court Book at the direction of the Court or by email copied to all other parties. The Service Provider will notify all parties of the document ID for any additional documents. If documents are to be added to the electronic Court Book, the tendering party is to arrange for the upload of the documents into the Online Resource, in the folder called "Documents" and is to notify the other parties of the addition.

Electronic Hearing

28. Each party will be responsible for bringing the hardware they require to access their copy of the electronic Court Book. In accordance with *Practice Note SC Gen 5 (Technology)* the Court will provide the hardware necessary for the judge and witnesses to view the electronic Court Book.
29. The Service Provider will create and manage the Online Resource which will house the electronic Court Book and all other documentary material required during the course of the hearing. In this workspace, there will be labelled folders (with indexes at the top level of each folder with document IDs which are automatically hyperlinked within the Online Resource). The workspace is to be organised in accordance with the index to the electronic Court Book and the following folder structure:
 - a. Part A: Pleadings and Particulars;
 - b. Part B: Lay Evidence;
 - c. Part C: Expert Evidence (including joint reports);
 - d. Part D: Statements of Propositions (Reference documents to appear in Part E);
 - e. Part E: Documents;
 - f. Part F: Consolidated Objections Schedule;
 - g. Part G: Submissions;
 - i. G.1: Opening Submissions;
 - ii. G.2: Closing Submissions;

- h. List of Authorities;
 - i. Transcripts;
 - j. Orders;
 - k. Exhibit List;
 - l. MFI List; and
 - m. Documents Referenced List, which is to be a running list of all documents referred to or tendered during the course of the Hearing.
30. Parties are to supply the Service Provider with a list of users to have access to the Online Resource. The Court will provide a list of users to have access.
31. The Online Resource will be accessible 24 hours a day 7 days a week.
32. Users will be supplied with a login ID and password.
33. The parties will each have private staging areas within the Online Resource not accessible by the other parties or the Court.

Testing for hearing

34. The legal teams of each party and the Court will attend a test run of the software to be used for the online hearing the week before the Hearing, or otherwise at a time agreed between the parties or directed by the Court.

Calling documents

35. Subject to further agreement between the Service Provider and the parties, Counsel are to call documents by their document ID, followed by the pinpoint reference to the relevant page. Counsel may wish to provide a list of document IDs to the operator likely to be called that day to assist the process.
36. The Service Provider will provide a court operator who will bring up documents from the Online Resource as they are called.
37. Unless objections to the admissibility of documents have been taken or claims of confidentiality have been made, documents will be live streamed in the usual manner adopted by the service provider, but documents that are subject to objection or claim will not be so broadcast prior to the resolution of such objection or claim. The obligation to notify the

service provider of an objection or claim prior to possible broadcasting rests with the objecting/claiming party.

Exhibits / MFIs

38. The Service Provider will maintain a list of documents shown to a witness or displayed in the courtroom with the context in which this was done.
39. Unless subject to an unresolved objection or marked for identification (**MFI**), all documents referred to by a party in submissions or a witness in evidence will form part of the Exhibit Book. Subject to the convenience of the Court, the Service Provider will create and maintain the developing Exhibit Book and MFI list by tagging documents in the Online Resource. A cumulative exhibit list and MFI list will be provided to parties at the end of each day. The parties are to review the lists and notify all other parties and Service Provider if they consider there are errors in a list.
40. Each party is to provide at 4 pm the day before a witness enters the witness box, a list of documents (identified by Document ID), not already tendered into the electronic Court Book, that the party proposes to prove through that witness. Each party is to provide before cross examination of a witness commences, a list of documents (identified by Document ID) that the party proposes to put to the witness.

Courtroom setup

41. The Service Provider will install the necessary hardware in the courtroom required to operate the electronic Court Book system.
42. The parties, the Service Provider and the Court will have Wi-Fi access in the courtroom.

H. OBJECTIONS

43. By 13 September 2024, the parties in each Flex Commission Proceeding are to notify each other of the objections which the notifying party has to material in Parts B, C and E of the electronic Court Book, and in respect of each objection, the ground of the objection and any proposed ruling. The list of objections is to be set out in a schedule in each Flex Commission Proceeding (**Objections Schedule**).
44. By 20 September 2024, the receiving party is to provide a response to the objections to the notifying party that sets out the response to the ground of objection. The response to each objection is to set out if the evidence is pressed, the basis for its admissibility, and any

proposed ruling. The response to the objections is to be set out in the Objections Schedule.

45. By 4 October 2024, junior counsel briefed by each party confer and endeavor to resolve the objections and prepare a consolidated Objections Schedule that contains a list of the objections that are pressed, the grounds of the objection, the response to the objection and the proposed ruling (or competing rulings) in relation to each objection (**Consolidated Objections Schedule**).
46. By 9 October 2024, the Service Provider is to make the Consolidated Objections Schedule, hyperlinked to the relevant documents, available within the Online Resource.

I. LIST OF AUTHORITIES

47. By 20 September 2024, the Plaintiffs are to:
 - a. serve on the Defendants and the Service Provider a list of authorities (**Plaintiffs' List of Authorities**); and
 - b. provide the Service Provider with copies of all documents referred to in the Plaintiffs' List of Authorities processed in accordance with the Electronic Document Protocol.
48. By 4 October 2024, the Defendants are to:
 - a. serve on the Plaintiffs a list of any further authorities which were not included in the Plaintiffs' List of Authorities (**Defendants' List of Authorities**); and
 - b. provide the Service Provider with copies of all further authorities referred to in the Defendants' List of Authorities processed in accordance with the Electronic Document Protocol.
49. By 8 October 2024, the Service Provider is to provide the Plaintiffs and Defendants with a consolidated list of authorities (i.e., a consolidation of the Plaintiffs' List of Authorities and the Defendants' List of Authorities) (**Consolidated List of Authorities**).
50. By 11 October 2024, all documents listed in the Consolidated List of Authorities are to be made available in the electronic Court Book by the Service Provider.

Fox v Westpac (S ECI 2020 02946); O'Brien v ANZ (S ECI 2020 03365); Nathan v Macquarie S ECI 2020 03924
Proposed Trial Plan

	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	W/E
1	<p>14 October - Day 1</p> <p>Plaintiffs' Opening Submissions</p>	<p>15 October - Day 2</p> <p>Plaintiffs' Opening Submissions</p>	<p>16 October - Day 3</p> <p>Defendants' Opening Submissions</p>	<p>17 October - Day 4</p> <p>Defendants' Opening Submissions</p> <p>[Unresolved objections to expert evidence]</p>	<p>[Non-sitting day]</p>	
2	<p>21 October - Day 5</p> <p>Plaintiffs' lay evidence¹ – Fox v Westpac</p> <ul style="list-style-type: none"> • A Fox • B Nastasi <p>Plaintiffs' lay evidence – All proceedings</p> <ul style="list-style-type: none"> • Canstar Representative 	<p>22 October - Day 6</p> <p>Plaintiff's lay evidence – O'Brien v ANZ</p> <ul style="list-style-type: none"> • D O'Brien <p>Plaintiff's lay evidence – Nathan v Macquarie</p> <ul style="list-style-type: none"> • T Nathan • D Nathan 	<p>23 October - Day 7</p> <p>Defendant's lay evidence – Fox v Westpac</p> <ul style="list-style-type: none"> • D Brown • A MacArthur • E Thian 	<p>24 October - Day 8</p> <p>Defendant's lay evidence – O'Brien v ANZ</p> <ul style="list-style-type: none"> • P Burton <p>Defendant's lay evidence – Nathan v Macquarie</p> <ul style="list-style-type: none"> • J Moodie • A Looney 	<p>[Non-sitting day]</p>	
3	<p>28 October - Day 9</p> <p>Defendant's lay evidence – Nathan v Macquarie (cont'd)</p> <ul style="list-style-type: none"> • S Elizj • R Humphries • S Cadden 	<p>29 October – Day 10</p> <p>Concurrent expert evidence topic 1: behavioural economics</p> <ul style="list-style-type: none"> • R Slonim • V Stango • D Pope 	<p>30 October – Day 11</p> <p>Concurrent expert evidence topic 1: behavioural economics (cont'd)</p> <ul style="list-style-type: none"> • R Slonim • V Stango • D Pope 	<p>31 October – Day 12</p> <p>Individual expert/lay evidence topic 2: survey evidence</p> <ul style="list-style-type: none"> • A Perera-Shaw (expert witness) • S Nuttall (lay witness) 	<p>[Non-sitting day]</p>	

¹ In relation to lay evidence in all Flex Commission Proceedings, unresolved objections to lay evidence will be determined prior to the lay witness giving evidence.

Fox v Westpac (S ECI 2020 02946); O'Brien v ANZ (S ECI 2020 03365); Nathan v Macquarie S ECI 2020 03924
Proposed Trial Plan

	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	W/E
4	<p>4 November – Day 13 [Non-sitting day]</p>	<p>5 November <i>Non-sitting day – public holiday in Victoria</i></p>	<p>6 November – Day 14 Concurrent expert evidence topic 3: linguistics</p> <ul style="list-style-type: none"> • C Schneider • E Stracke 	<p>7 November – Day 15 Individual expert evidence topic 4: autofinance</p> <ul style="list-style-type: none"> • R Wijetunga <p>Concurrent expert evidence topic 4: economics / autofinance / [accounting]</p> <ul style="list-style-type: none"> • B Quach • [M Jennings-Jones] • R Wijetunga 	<p>[Non-sitting day]</p>	
5	<p>11 November – Day 16 Concurrent expert evidence topic 5: economics / accounting</p> <ul style="list-style-type: none"> • B Quach • M Jennings-Jones 	<p>12 November – Day 17 Concurrent expert evidence topic 6: accounting</p> <ul style="list-style-type: none"> • M Cairns • M Jennings-Jones 	<p>13 November – Day 18 Document tender (if required otherwise <i>Non-sitting day – preparation of submissions</i>)</p>	<p>14 November – Day 19 <i>Non-sitting day – preparation of submissions</i></p>	<p>[Non-sitting day]</p>	
6	<p>18 November – Day 20 <i>Non-sitting day – preparation of submissions</i></p>	<p>19 November – Day 21 <i>Non-sitting day – preparation of submissions</i></p>	<p>20 November – Day 22 <i>Non-sitting day – preparation of submissions</i></p>	<p>21 November – Day 23 Plaintiffs' closing submissions and filing of their written closing submissions</p>	<p>22 November 2024 – Day 24 Plaintiffs' closing submissions</p>	
7	<p>25 November – Day 25 <i>Non-sitting day – preparation of submissions</i></p>	<p>26 November – Day 26 <i>Non-sitting day – preparation of submissions</i></p>	<p>27 November – Day 27 Defendants' closing submissions and filing of their written closing submissions</p>	<p>28 November – Day 28 Defendants' closing submissions</p>	<p>29 November – Day 29 Defendants' closing submissions</p>	

Fox v Westpac (S ECI 2020 02946); O'Brien v ANZ (S ECI 2020 03365); Nathan v Macquarie S ECI 2020 03924
Proposed Trial Plan

	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	W/E
8	2 December – Day 30 Plaintiffs' reply submissions	[Reserved for plaintiffs' reply if required]				

Key:

- Opening / closing submissions
- Lay evidence
- Expert evidence
- Document tender
- Potential non-sitting day

SCHEDULE 2 – SCHEDULE OF PARTIES



DANIEL CHRISTIAN O'BRIEN

Plaintiff

and

**AUSTRALIA AND NEW ZEALAND
BANKING GROUP LTD (ACN 005 357 522)**

First Defendant

and

MACQUARIE BANK LTD (ACN 008 583 542)

Second Defendant

and

MACQUARIE LEASING PTY LTD (ACN 002 674 982)

Third Defendant