

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 LIMITED
(ACN 005 357 522)
(and Another according to the Schedule)

Defendants

ORDER

JUDGE: The Honourable Justice Nichols

DATE MADE: 20 July 2023

ORIGINATING PROCESS: Writ filed 21 August 2020

HOW OBTAINED: On the Court's own motion

ATTENDANCE: Not applicable

OTHER MATTERS: Nil

THE COURT ORDERS THAT:

Mediation

- 1 The date of order 11 of orders made 18 November 2022 (by which mediation by a judicial officer (**Mediation**) is to be fixed) be extended to **15 December 2023**.

Opt Out

- 2 Pursuant to s 33J(1) of the *Supreme Court Act 1986* (Vic) (**Act**), the date by which a group member may opt out of this proceeding be fixed at **28 September 2023 (Deadline)**.
- 3 Pursuant to s 33J(2) of the Act, any group member who wishes to opt out of this proceeding must, before the Deadline, deliver a signed opt out form by email or post to the Commercial Court Registry of the Supreme Court of Victoria.



Registration

4 Pursuant to s 33ZG of the Act, any group member who wishes to participate in any distribution of any in-principle settlement of this proceeding reached at Mediation (subject to Court approval), must register their claim by the Deadline, either by:

- (a) completing and submitting a registration form on Maurice Blackburn's website with the following information:
 - (i) the group member's full name, email and postal address;
 - (ii) the date on which the potential group member entered into a finance agreement with the defendants;
 - (iii) the registration number of the vehicle purchased; and
 - (iv) the account number of the loan; or
- (b) signing a retainer agreement with the plaintiff's solicitors, Maurice Blackburn Lawyers, before the Deadline.

5 For the avoidance of doubt, failure by a group member to provide all the information requested on the registration form will not render the group member's registration invalid provided the group member is identifiable as such based on the information provided.

6 Any group member who has completed the registration process set out in order 4 above is a **Registered Group Member**.

7 Pursuant to ss 33ZF and 33ZG of the Act, and subject to any further order of the Court, any group member who neither opts out nor registers as a Registered Group Member on or before the Deadline in accordance with the manner provided for in these orders:

- (a) shall remain a group member for all purposes of this proceeding, including for the purpose of being bound by any judgment in this proceeding and being entitled to participate in any award of damages by the Court or future settlement of the proceeding if the proceeding does not settle at Mediation; but
- (b) will not, without leave of the Court, be entitled to seek any benefit pursuant to (or monetary compensation from) any settlement (to be approved by the Court) of this proceeding agreed at the Mediation, but will be bound by the terms of any settlement agreement approved by the Court in respect of such settlement.



Notice and Distribution

- 8 Pursuant to s 33X(1)(a) and (5) of the Act, the form and content of the opt out and claim registration notice (**Notice**), correspondence (**Correspondence**) and newspaper advertisement (**Advertisement**) set out in Annexures A, B and C to these orders, are approved.
- 9 Pursuant to s 33Y of the Act, the Notice be distributed to group members or published on or before **3 August 2023** (**Notice Date**) in accordance with the following procedure:
- (a) The solicitors for the defendant/s shall instruct Computer Share to send the Notice under the cover of the Correspondence:
 - (i) by email from a ‘no-reply’ email address to group members for whom the defendants has an email address on file;
 - (ii) by SMS for group members for whom the defendants do not have an email address but have a mobile phone number on file; or
 - (iii) by post for group members for whom the defendants do not have an email address or mobile phone number on file.
 - (b) The subject line of the email shall be “Court Notice regarding Esanda Car Loans (ANZ and Macquarie) Flex Commissions Class Action (S ECI 2020 03365)”.
 - (c) Where an email is not delivered and a ‘bounce-back’ notification is received by the sender of the email, the solicitors for the defendants shall cause Computer Share to send the Notice by SMS or prepaid ordinary post as the case may be, to the mailing address held on file for that group member within 2 business days of that bounce-back notification.
 - (d) The solicitors for the plaintiffs shall cause the Notice to be posted on its website to be displayed until the Deadline.
 - (e) The Commercial Court Registry of the Supreme Court of Victoria shall cause the Notice to be posted on the Supreme Court of Victoria website and be available for inspection at the Commercial Court Registry by the Notice Date.



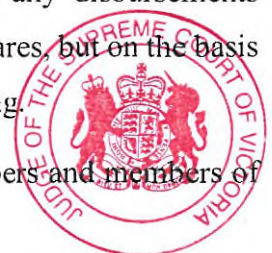
- (f) The solicitors for the plaintiffs shall cause the Advertisement to be published in quarter-page format once in each of the following newspapers by the Notice Date:
- (i) The Australian;
 - (ii) The Age;
 - (iii) The Sydney Morning Herald;
 - (iv) The Herald Sun;
 - (v) The Daily Telegraph;
 - (vi) The Courier Mail;
 - (vii) The West Australian;
 - (viii) The Adelaide Advertiser;
 - (ix) The Mercury; and
 - (x) The Northern Territory News.
- (g) The Notice may be amended by agreement between the parties before it is sent or published and without any further approval of the Court in order to correct any typographical error or any email, website, postal address or telephone number details.

Receipt of Opt Out Notices

- 10 If, between the Notice Date and the Deadline, Computer Share or the solicitors for any party receive a notice purporting to be an opt out notice referable to this proceeding, that notice shall be provided to the Commercial Court Registry of the Supreme Court of Victoria within 3 business days of receipt, with a notation specifying the date it was received, and the notice shall be treated as an opt out notice received by the Court at the time it was received by the parties, their solicitors or Computer Share.

Costs

- 11 The costs of and incidental to sending the Notice (including any disbursements incurred) shall be paid by the plaintiff and defendants in equal shares, but on the basis that those costs will subsequently fall to be costs in the proceeding.
- 12 For the avoidance of doubt, addressing inquiries by group members and members of



the public in relation to the Notice is work that is incidental to the Notice.

Other

13 The parties have leave to inspect the Court file and copy any opt out notices filed.

DATE AUTHENTICATED: 20 July 2023

The image shows a handwritten signature in blue ink, which appears to be 'J. Nichols', written over a circular red seal. The seal is the official emblem of the Supreme Court of Victoria, featuring a central crest with a crown and two lions, surrounded by the text 'SUPREME COURT OF VICTORIA' and 'JUDICIAL AUTHORITY'.

The Honourable Justice Nichols

SCHEDULE OF PARTIES

DANIEL CHRISTIAN O'BRIEN

Plaintiff

and



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

First defendant

and

MACQUARIE BANK LIMITED (ACN 008 583 542)

Second defendant

ANNEXURE A



**THIS NOTICE IS SENT BY ORDER OF
THE SUPREME COURT OF VICTORIA**

**NOTICE TO GROUP MEMBERS:
OPT OUT OR REGISTRATION**

**FLEX COMMISSIONS CLASS ACTION –
ANZ AND MACQUARIE (ESANDA LOANS)**

The Supreme Court of Victoria has ordered that you receive this notice because you may be a group member in *O'Brien, Daniel Christian v Australia and New Zealand Banking Group Ltd & Ors* (Proceeding No S ECI 2020 03365).

If you are a group member:

- You **must** register by 28 September 2023 in order to be eligible to receive any compensation if there is a settlement at the upcoming mediation that will occur by December 2023. Unless you register, you may lose your right to participate in any settlement reached at mediation.
- If you do not want your rights determined by the class action, you may opt out by 28 September 2023.
- If there is anything you are unsure about or do not understand, you should seek independent legal advice or contact the lawyers for the Plaintiff conducting the class action. You can find more information by:
 - visiting the Maurice Blackburn Lawyers website at: **[LINK]**;
 - calling Maurice Blackburn Lawyers on **[TELEPHONE NUMBER]**; or
 - emailing **[EMAIL ADDRESS]**.

**IT IS IMPORTANT THAT YOU READ THIS NOTICE CAREFULLY BECAUSE IT
MAY AFFECT YOUR LEGAL RIGHTS.**



WHAT IS THIS NOTICE?

1. The purpose of this notice is to inform you of a class action in the Supreme Court of Victoria brought against Australia and New Zealand Banking Group Ltd (**ANZ**) and Macquarie Bank Ltd (**Macquarie**), (together, the **Defendants**), to inform you of a mediation to be held before 15 December 2023 and to provide you with options regarding your participation in the class action.
2. This notice provides important information about:
 - (a) the class action, including what it is about and how it is being funded;
 - (b) how you may register to have the opportunity to receive any monetary benefit that may be recovered in the class action and how your legal rights will be affected if you do not register and remain a group member; and
 - (c) what you need to do if you wish to remove yourself from the class action and cease to be a group member, namely by opting out before 28 September 2023.

WHY ARE YOU RECEIVING THIS NOTICE?

3. The Supreme Court of Victoria has ordered that you receive this notice because, according to information available to ANZ, you have been identified as a potential **group member** in the class action.
4. You are a group member if you are a person who entered into a finance agreement for the acquisition of a car:
 - (a) with ANZ;
 - (b) which was obtained through a car dealer who supplied the car;
 - (c) in which a “flex commission” was paid to the car dealer by ANZ; and
 - (d) between 1 January 2011 and 31 March 2016, either commenced entering into discussions concerning finance with the car dealer or executed that finance agreement.



INFORMATION ABOUT THIS CLASS ACTION

5. This class action has been brought by Daniel O'Brien (the **Plaintiff**). The Plaintiff has brought this action on his own behalf and also on behalf of all group members who entered into similar loan arrangements with the Defendants. The Plaintiff is represented by Maurice Blackburn Lawyers.
6. The Plaintiff alleges that car dealers acted on ANZ in providing certain credit services to group members who took out car loans through those dealers. ANZ offered car loans through accredited car dealers through its **Esanda** business, and Macquarie acquired the Esanda car dealer loan portfolio from ANZ in 2016. The claim alleges that "flex commissions" were paid to those car dealers and that certain features of the flex commission arrangements were unfair and/or not disclosed to consumers who paid higher interest rates on their Esanda car loans than would otherwise have been the case. It is claimed that the Defendants are responsible for the flex commission arrangements and non-disclosures, and that ANZ and Macquarie should therefore pay compensation (that is, money) to consumers for the loss they have suffered as a result. The claim seeks to restrain the lenders from charging further interest, the repayment of interest under the loans, or alternatively orders voiding the loan agreements or providing compensation to group members.
7. ANZ and Macquarie deny the claims made against them and are defending the class action.
8. The Court has ordered the parties to attend a mediation by 15 December 2023.

YOUR OPTIONS

9. If you are a group member, you have two options – registering to be eligible to receive compensation if the case settles, and opting out if you want to exclude yourself from the case.



OPTION 1: REGISTER YOUR INTEREST TO RECEIVE COMPENSATION

10. If you would like to be eligible to share in any monetary benefit arising from any settlement reached between the parties at the upcoming mediation, you must register as a Group Member before 28 September 2023.
11. If you register as a Group Member, you will become a **Registered Group Member**.
12. The lawyers for the Plaintiff encourage group members who wish to remain a group member to register their details with them. Becoming a Registered Group Member will help the parties work out if a settlement is possible because information about how many people are participating in the claim is part of that process.

How can you register your claim?

13. For most group members, the easiest way to register your claim will be to complete the online form available at: [\[LINK\]](#)
14. If the online form is not suitable for your needs, please contact Maurice Blackburn Lawyers on [\[TELEPHONE NUMBER\]](#) or at [\[EMAIL ADDRESS\]](#).
15. You do not need to register again if you have already registered with Maurice Blackburn Lawyers for the purpose of the class action. If you are unsure whether you have registered, please contact Maurice Blackburn Lawyers on the details below.

What are the consequences of registration?

16. **If a settlement is reached** between the parties at the upcoming mediation:
 - (a) Registered Group Members will be eligible to share in any monetary amount paid by the Defendants in this class action.
 - (b) A single fee will be deducted from the total amount of any monetary amount paid by the Defendants for the costs and risks incurred by Maurice Blackburn Lawyers for running the class action.



- (c) The monetary amount which the Defendants would pay, and the percentage payable to Maurice Blackburn Lawyers, must first be approved by the Court. Before this happens, you will receive a further Notice that provides information about the proposed settlement for your consideration at that time.

17. If the class action does not settle at the upcoming mediation:

- (a) Registered Group Members will be eligible to share in a monetary payment from any future settlement in this class action and will be bound by any final judgment, if the class action is not resolved prior to trial.

18. If the class action is unsuccessful:

- (a) The Defendants are not required to pay any monetary amount to the group members.
- (b) You will not be required to pay anything.

19. Becoming a Registered Group Member does not mean you enter into a contract for Maurice Blackburn Lawyers to represent you.

20. Registered Group Members are not, and will not be, liable for any legal costs out of their own pocket by registering in this class action.

OPTION 2: OPT OUT AND CEASE TO BE A GROUP MEMBER

21. If you meet the description of a group member and do not want your legal rights to be determined by this class action, you must opt out by 28 September 2023.

22. If you choose to “opt out”:

- (a) you will cease to be a group member in the class action;
- (b) you will not be bound by the outcome of the class action and will not be entitled to share in the benefit of any order, judgment or settlement in favour of the Plaintiff and group members in the class action; and
- (c) you may be at liberty to bring your own claims against ANZ and Macquarie, provided that you file court proceedings within the time limit applicable to your claims.



23. If you wish to bring your own claims against ANZ or Macquarie, or are unsure how opting out will affect your legal rights, you should seek your own independent legal advice about your claims and any time limits prior to opting out.

How can you opt out?

24. If you do not wish to remain a group member in this class action, you must opt out by completing an opt out notice in the form set out at **Schedule 1** at the end of this notice.
25. You must then return the completed opt out notice to the Commercial Court Registry of the Supreme Court of Victoria by:
- (a) **Emailing the form to** flexcommissions@supcourt.vic.gov.au; or
 - (b) **Mailing the form to:**

Commercial Court Registry
Supreme Court of Victoria
210 William Street
MELBOURNE VIC 3000
26. Each group member seeking to opt out should complete a separate opt out notice.
27. The opt out notice must reach the Commercial Court Registry by no later than 28 September 2023, or it will not be effective.

WHAT IF YOU DO NOTHING?

28. If you are a group member and you decide not to opt out and do not register:
- (a) You will not be entitled to receive any compensation if the proceeding settles at mediation, unless the Court makes an order permitting you to participate.
 - (b) You may lose your right to seek monetary relief from the Defendants in relation to the same (or similar) claims alleged in this class action if the proceeding settles at mediation.



- (c) You may be given another opportunity to register in the future, but not in relation to any settlement that is achieved at the upcoming mediation.
 - (d) If the class action does not result in a settlement before trial, you will be bound by any final judgment determined at trial.
29. If you are a group member who is not registered you should consider very carefully whether you wish to register. You should not delay in making this decision.

INFORMATION ABOUT HOW THE CLASS ACTION IS BEING FUNDED

30. Group members are not, and will not be, liable for any legal costs out of their own pocket by remaining in the class action.
31. If the class action is **unsuccessful**, group members will not be liable to pay any costs.
32. If the class action is **successful** (that is, if any monetary amount is recovered from ANZ or Macquarie by settlement or judgment), any legal costs that are payable to the lawyers for the Plaintiff will be calculated and deducted as a percentage of the monetary amount recovered for the Plaintiff and group members at the end of the class action. This is because the Supreme Court of Victoria has made a "group costs order" in the proceeding. The Court has set the rate of the group costs order at 24.5% of any monetary amount, although the Court may vary it in the future.
33. For example, if ANZ or Macquarie are ordered to pay \$1,000,000 to compensate the Plaintiff and group members, the Plaintiff and group members will share \$755,000 between them and the Plaintiff's lawyers will be paid \$245,000 for the work they performed on behalf of the Plaintiff and group members in the class action. The Court may, for example, decide to lower the rate of the group costs order if it would result in the lawyers for the Plaintiff being paid an excessive amount of money compared to the work they have performed.



34. The group costs order also means that the lawyers for the Plaintiff are required to pay any costs payable to ANZ and Macquarie if the class action is unsuccessful or give any security for costs that the Court may order in the class action.
35. No amounts will be paid from any settlement or judgment to Maurice Blackburn for the work they have done, unless the Court approves those amounts.

WHERE CAN YOU OBTAIN FURTHER INFORMATION?

36. Copies of relevant documents, including this notice and the pleadings, may be obtained by:
- (a) visiting the Maurice Blackburn Lawyers website at:
[\[LINK\]](#)
 - (b) visiting the Supreme Court of Victoria website at:
<https://www.supremecourt.vic.gov.au/areas/group-proceedings/flex-commissions-anz-macquarie>
37. Please consider the above matters carefully. If there is anything you are unsure about, you can:
- (a) contact Maurice Blackburn Lawyers at: [\[TELEPHONE NUMBER\]](#) or at [\[EMAIL ADDRESS\]](#); or
 - (b) seek independent legal advice.
38. Please do not contact the Court for legal advice, as it will be unable to assist you.
39. This notice was approved by the Court and distributed and published pursuant to orders made on 20 July 2023
40. You should not delay in making any decision to opt out or seek further advice.



SCHEDULE 1

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 LIMITED
(ACN 005 357 522) & ANOTHER

Defendants

NOTICE OF OPTING OUT BY GROUP MEMBER

DO NOT COMPLETE AND RETURN THIS FORM UNLESS YOU WISH TO OPT OUT OF
THE ESANDA CAR LOAN FLEX COMMISSIONS CLASS ACTION.

IF YOU OPT OUT, YOU WILL NO LONGER BE A GROUP MEMBER

To: Commercial Court Registry
Supreme Court of Victoria
210 William Street
Melbourne VIC 3000
flexcommissions@supcourt.vic.gov.au

I, [print name]

am a group member in the above group proceeding.

I give notice under s 33J(2) of the *Supreme Court Act 1986* (Vic) that I am opting out of this proceeding.

Dated:	
Signature of group member or the group member's solicitor:	
Address of group member:	
Email address of group member:	

If you would like to **opt out** of the Esanda Car Loans (ANZ and Macquarie) Flex Commissions Class Action, please return this form to the Commercial Court Registry of the Supreme Court of Victoria by email or post at the above addresses by 28 September 2023.



ANNEXURE B
EMAIL CORRESPONDENCE

Attachment: Long-Form Notice set out at Annexure A of orders made 20 July 2023

Email Text:

This communication contains important information that has been approved by the Supreme Court of Victoria ('the Court') to be sent to you because you have been identified as a likely group member in a class action commenced against Australia and New Zealand Banking Group Ltd (ANZ) and Macquarie Bank Ltd in relation to certain credit services provided to group members who took out car loans through those dealers, and "flex commissions" that were paid to those car dealers.

This is not a scam. To confirm, please visit the Supreme Court of Victoria website at: <https://www.supremecourt.vic.gov.au/areas/group-proceedings/flex-commissions-anz-macquarie> or search "Flex Commissions Group Proceeding (Class Action) - ANZ and Macquarie" using your preferred search engine.

A class action has been commenced against ANZ and Macquarie. You have been identified as someone who is likely to be a group member in the class action. An important notice regarding the class action has been approved by the Court and is attached to this email.

It is important that you read the notice carefully as it contains information that may impact your legal rights. **The deadline for taking action in response to the notice is 28 September 2023.**

If you have questions in relation to this notice you can also contact Maurice Blackburn, the solicitors for the class members, on [insert email and phone details] or visit the Esanda Car Loans Class Action page on Maurice Blackburn's website at [insert URL].

TEXT MESSAGE

You have been identified as a likely group member in a class action commenced against ANZ and Macquarie.

This is not a scam. To confirm, please visit the Supreme Court of Victoria website by searching "Flex Commissions Group Proceeding (Class Action) - ANZ and Macquarie" using your preferred search engine.

An important notice regarding the class action has been approved by the Supreme Court of Victoria and is available to review. You can find the notice on the Supreme Court of Victoria website or Maurice Blackburn's website.

Please read the notice carefully as it contains information that may impact your legal rights. The deadline for taking action in response to the notice is 28 September 2023.

You can also contact Maurice Blackburn for further information [insert MB email and phone].



ANNEXURE C

NEWSPAPER ADVERTISEMENT

NOTICE TO GROUP MEMBERS SUPREME COURT OF VICTORIA

Esanda Car Loans Flex Commissions Class Action
O'Brien, Daniel Christian v Australia and New Zealand Banking Group Ltd & Ors
(Proceeding No S ECI 2020 03365)

The Supreme Court of Victoria has ordered that this notice be published to notify persons who might have claims affected by a class action (**Esanda Car Loans Flex Commissions Class Action**) brought against Australia and New Zealand Banking Group Ltd (ANZ) and Macquarie Bank Ltd.

The Claim

The Plaintiffs allege that car dealers acted on behalf of ANZ and Macquarie in providing certain credit services to group members who took out car loans through those dealers. ANZ offered car loans through accredited car dealers through its Esanda business, and Macquarie acquired the Esanda car dealer loan portfolio from ANZ in 2016. The claim alleges that “flex commissions” were paid to those car dealers and that certain features of the flex commission arrangements were unfair and/or not disclosed to consumers who paid higher interest rates on their Esanda car loans than would otherwise have been the case. It is claimed that the Defendants are responsible for the flex commission arrangements and non-disclosures, and that ANZ and Macquarie should therefore pay compensation (that is, money) to consumers for the loss they have suffered as a result. The claim seeks to restrain the lenders from charging further interest, the repayment of interest under the loans, or alternatively orders voiding the loan agreements or providing compensation to group members. ANZ and Macquarie deny the claims made against them and are defending the class action.

The Court has ordered the parties to attend a mediation by 15 December 2023.

Group Member Options

You are a group member if you are a person who entered into a finance agreement for the acquisition of a car:

- (a) with ANZ and Macquarie;
- (b) which was obtained through a car dealer who supplied the car;
- (c) in which a “flex commission” was paid to the car dealer by ANZ and Macquarie; and
- (d) between 1 January 2011 and 31 March 2016, either commenced entering into discussions concerning finance with the car dealer or executed that finance agreement.

If you are a Group Member and you wish to participate in this class action, you must register by 28 September 2023 in order to be eligible to receive any compensation if there is a settlement at the upcoming mediation that will occur by December 2023. Unless you register, you will lose your right to participate in any settlement reached at mediation.



If you are a Group Member and you do not wish to participate in this class action, you must provide an Opt Out Notice to the Supreme Court of Victoria by 28 September 2023. The Opt Out Notice is available on Maurice Blackburn's website: [insert URL].

Group members are not, and will not be, liable to pay for any legal costs out of their own pocket by remaining in the Esanda Car Loans Flex Commissions Class Action. All of the Plaintiffs' costs associated with running the class action will be borne by Maurice Blackburn, unless there is a successful outcome (either by settlement or by Court judgment).

IMPORTANT: There is a Long Form Notice with more detail that you should read before deciding whether or not to opt out of the Esanda Car Loans Flex Commissions Class Action

For further information or to obtain a copy of a Long Form Notice which provides more detail about the Esanda Car Loans Flex Commissions Class Action and the matters referred to in this notice, please visit either:

- The Supreme Court's website: <https://www.supremecourt.vic.gov.au/areas/group-proceedings/flex-commissions-anz-macquarie>; or
- Maurice Blackburn's website: [insert URL]; or
- Contact Maurice Blackburn on [insert number] or [insert email]

