The Hon Courtney Houssos MLC
Minister for Finance
Minister for Domestic Manufacturing and Government Procurement
Minister for Natural Resources

Via email: office@houssos.minister.nsw.gov.au

cc
Treasurer Daniel Mookhey c/o michael.buckland@treasurer.nsw.gov.au
Minister for Finance Court Houssos c/o nageb.al-mallah@finance.nsw.gov.au
Minister for Small Business Steve Kamper c/o ed.mcdougall@minister.nsw.gov.au
Minister for Planning Paul Scully c/o paul.scully@minister.nsw.gov.au

4 February 2025

Dear Minister Houssos,

Supporting small business and access to housing in New South Wales

We refer to your letter dated 20 December 2024, in response to the joint letter by the Council of Small Business Organisations of Australia (**COSBOA**), the Mortgage and Finance Association of Australia (**MFAA**) and the Commercial and Asset Finance Brokers Association (**CAFBA**) regarding the application of payroll tax to the mortgage broking industry.

We are deeply disappointed that the NSW Government has chosen not to actively explore policy solutions to address the perverse and unintended consequences of the decision in *Loan Market Group Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 390.

Your response is not only contrary to the Minns Government's clear intention to cut poorly designed taxes weighing down small businesses but also contradicts its commitment to no longer looking "for excuses to say 'no'" and instead seeking "reasons to say 'yes'" to support small businesses.

The assertion that the Loan Market decision does not represent a novel interpretation of payroll tax laws is out of touch with the reality faced by the mortgage broking industry as a result of the precedent set by this case. The decision has fundamentally altered the application of payroll tax in a way that was neither anticipated nor intended by the industry. Nor, as noted by the judge presiding over the Loan Market case, is the interpretation consistent with the objectives of the legislation. To suggest otherwise is to ignore the significant financial and operational upheaval now facing thousands of small broking businesses.

It is also deeply contrary to the NSW Government's policy response to the General Practitioner industry following the *Thomas and Naaz* decision, where the NSW government recognised the need to and did intervene to avoid unintended consequences, yet now refuses to extend the same consideration to the mortgage broking industry.

The NSW Government's insistence on applying payroll tax retrospectively to mortgage aggregators, coupled with the threat of penalties and fines, is nothing short of reckless. It demonstrates a complete disregard for the viability of small businesses and the well-being of NSW residents who rely on brokers to access affordable home loans and business finance.

Let us be clear: the mortgage broking industry is not seeking special treatment. We are seeking fairness. The current interpretation of the payroll tax provisions misrepresents the commercial relationships within the industry, categorising independent brokers as employees of aggregators when, in fact, aggregators provide services to brokers. This misinterpretation threatens to dismantle a critical component of the lending ecosystem, one that promotes competition, reduces borrowing costs, and supports home ownership and small business growth for NSW residents.

We have consistently reiterated the consequences of inaction on the broking industry and its corresponding impact on competition in the lending market. We are genuinely concerned that small broking businesses will be forced to close, and as a consequence home buyers will face higher mortgage costs, eroding the benefits of the Minns Government's ambitious housing policies. The very people you claim to support – first-home buyers, small businesses, and families – will bear the brunt of this policy failure.

The launch of the NSW Parliamentary inquiry referred to in your letter underscores major issues with payroll tax legislation and its enforcement, reflected in prolonged and costly litigation that has placed unnecessary strain on businesses and NSW taxpayers. Each of our organisations is preparing a submission to the Inquiry, with the MFAA specifically highlighting concerns we have repeatedly raised with the NSW Government over several years.

We urge you to reconsider your position, to acknowledge the impact on the broking industry and take immediate action to prevent further damage to the NSW economy.

Yours sincerely

Luke Achestraat, CEO COSBOA

Anja Pannek, CEO MFAA

David Bushby, CEO CAFBA

MFAA
MORTGAGE & FINANCE ASSOCIATION OF AUSTRALIA

Briefing paper to Minister Kamper

- Revenue NSW is seeking to impose payroll tax on contracts between mortgage brokers and aggregators, treating brokers as contractors subject to payroll tax under anti-avoidance provision section 32 of the NSW Payroll Tax Act.
- This approach misinterprets the relationship between brokers and aggregators, as brokers are independent small businesses, not employees or contractors. Aggregators provide services to brokers for example remitting commission payments, business development and compliance services.
- The tax is being applied to commissions brokers earn directly from lenders for assisting their clients to buy a home.
- This expands the payroll tax law in a way that was never intended and unfairly impacts both aggregators and mortgage brokers who already operate on tight margins.

Court cases

- There are 10 major aggregation groups in the mortgage industry. Two groups have taken litigation action against Revenue NSW on payroll tax assessments – Loan Market and Finsure.
- The Loan Market court judgement was received in April 2024. In that case, the court ruled that commissions paid by Loan Market to brokers fell under "relevant contracts" for payroll tax purposes under the Payroll Tax Act. While the judge acknowledged this was a "harsh outcome," the interpretation aligned with the narrow exemptions provided in the legislation. However, the judge sought to interpret these exemptions as broadly as possible within the constraints of the law.
- In the final orders received in November, the court applied these broader interpretations of exemptions. Loan Market's liability was significantly reduced to $1.3 million in payroll tax and $192,118 in penalties, down from the $2.3 million initially assessed, entitling Loan Market to a refund for the overpaid amount.

Here is a breakdown of the re-assessed amounts:

Year	Taxable commission	Primary Tax payable under LMG reassessments	Primary Tax payable under LML reassessments	Primary Tax payable under Judgment and May Orders
2012	3,919,947.64	511,941.61	365,829.40	213,637.15
2013	3,385,650.81	464,700.19	324,451.58	184,517.97
2014	3,388,026.93	478,845.34	323,573.86	184,647.47
2015	3,649,963.88	535,759.34	330,107.21	198,923.03
2016	3,282,015.96	546,110.93	350,513.16	178,869.87
2017	3,365,021.81	584,920.52	367,813.43	183,393.69
2018	3,119,721.01	661,821.34	362,305.48	170,024.80

Year	Taxable commission	Primary Tax payable under LMG reassessments	Primary Tax payable under LML reassessments	Primary Tax payable under Judgment and May Orders
TOTAL	**24,110,348.04**	**3,784,099.27**	**2,424,594.12**	**1,314,013.97**

- The judge also noted that the harshness of its application is a matter for Parliament to resolve through legislative reform.
- The Loan Market case is subject to appeal by both parties. The Finsure case will be heard early next year.

Importance of brokers

- Brokers are critical for providing competition in the home loan market, keeping interest rates lower and supporting small businesses and homebuyers. Applying payroll tax to these arrangements threatens the viability of many brokers, especially smaller operators, and could lead to higher costs for borrowers.
- Without brokers, borrowers would have fewer options and less access to competitive rates, driving more people to major banks and increasing mortgage costs.

What needs to be done

- The industry is asking the NSW Government to intervene by changing the law, granting a 12-month adjustment period, and ensuring no retrospective penalties are applied.
- This is essential to protect brokers, keep credit affordable, and ensure small businesses can continue supporting the NSW economy.

Precedent has been set

- In a similar context, the NSW Government has addressed payroll tax issues concerning GPs. In June 2024, the government announced a payroll tax rebate for contractor GPs at practices, along with a waiver for past unpaid payroll tax liabilities. Other states have done the same.
- This precedent highlights the government's capacity to provide targeted payroll tax relief to essential service providers, acknowledging the unique nature of their contractual arrangements.
- It is not unreasonable for a similar approach to be considered for the mortgage broking industry.

The Hon. Chris Minns MP
Member for Kogarah
Premier of New South Wales
SYDNEY NSW 2000
c/o james.cullen@premier.nsw.gov.au

Cc:
Treasurer Daniel Mookhey c/o michael.buckland@treasurer.nsw.gov.au
Minister for Finance Court Houssos c/o nageb.al-mallah@finance.nsw.gov.au
Minister for Small Business Steve Kamper c/o ed.mcdougall@minister.nsw.gov.au
Minister for Planning Paul Scully c/o paul.scully@minister.nsw.gov.au

24 July 2024

Dear Premier,

Supporting small business – and housing access in New South Wales

On behalf of COSBOA, I thank you for your address to the National Small Business Summit 2024 at the Sofitel Darling Harbour, 4 April.

You spoke about the critical role small business plays in New South Wales and your desire for more NSW residents to access their first home. Your remarks in support of more small businesses, new projects, aspiration, and more home ownership were well received:

> *We are not looking for excuses to say 'no' anymore, but rather reasons to say 'yes'. We want to work with you, we want to back those who are backing themselves. We want practical solutions.*[1]

You also said: "*if poorly designed taxes are weighing down small business, we want to cut these wherever we can. We need to listen to organisations like COSBOA; applying the lessons from lived experiences from small business as they are the lifeblood of the NSW economy*.'

In this vein, I write to bring further to your attention a pressing issue threatening the viability of small businesses and those seeking home ownership in NSW: the application of payroll tax onto independent brokers.

[1] COSBOA National Summit 2024

Small businesses in the finance industry are gravely concerned

As you know, payroll tax is a tax on jobs. COSBOA continues to call for broad-based tax reform in Australia and the raising of payroll tax thresholds.

Specifically, there is an urgent need for the NSW Government to address the damaging and retrospective application of payroll tax to the mortgage and finance broking industry.

This issue will adversely impact first-home buyers, those seeking finance to upsize property for their growing family, as well as small and medium businesses alike as they look to obtain the funds to grow and employ.

Finance brokers – be they mortgage, commercial or asset based – are the critical enablers of enterprise and aspiration in New South Wales. Without decisive action, the Minns Government's stated goal of promoting small business success, growth, and home ownership will be undermined.

That is why COSBOA, representing over 500,000 small businesses in New South Wales and a further 1.1 million businesses nationally, has united with the Mortgage Finance Association Australia (MFAA) and Commercial Asset Finance Brokers Association (CAFBA) on this issue. Together, MFAA and CAFBA represent nearly 7,000 independent brokers in NSW and invest strongly in professional standards for their broking members.

A "harsh outcome" – and the Pandora's Box of unintended consequences

The decision handed down in *Loan Market Group Pty Ltd vs Chief Commissioner of State Revenue* (the 'Loan Market matter') has significant implications.

In effect, the judgement determined that the arrangements between Loan Market (an aggregator) and the brokers that use its services are relevant contracts under section 32 of the Payroll Tax Act. This is a novel interpretation of the Act and, in our view, by incorporating arrangements between brokers and aggregators, significantly expands the remit of the Act. It specifically does so in a way that was never intended.

Aggregators have always played a crucial role in the lending ecosystem. Aggregators provide critical services to brokers. Brokers facilitate competitive loan pricing to borrowers and small businesses. Indeed, the aggregator-broker-lender model is finely calibrated to support and encourage competition in the Australian lending market.

Concerningly, the judgement itself states "*this conclusion may be seen as a harsh outcome…because the contractor provisions now found in section 32 was originally introduced as an anti-avoidance measure which was not intended to catch 'bona fide independent contractors*.'"

This sentiment has been reinforced through recent questions raised in the NSW Parliament as to the need for safeguards against industries inadvertently *"swept up under the new payroll tax interpretation."*

Relevant contract provisions were rightly designed to prevent the misuse of contractor relationships to evade payroll tax. However, the current interpretation by Revenue NSW misaligns with the actual commercial arrangements within the broking industry, categorising independent broking businesses as contractors for aggregators as opposed to aggregators as service providers to brokers.

If Revenue NSW decides to pursue participants in the broking industry based on the Loan Market precedent, the imposition of back taxes, penalties, and fines jeopardises the viability of the smallest broking businesses that provide critical support to NSW residents.

What is at stake? Competition, small business viability, further mortgage stress, and home ownership – just to name a few…

As you know, mortgage and finance brokers operate as independent small businesses. They are essential in helping NSW homeowners and small businesses navigate the lending landscape, particularly in these challenging economic times.

By providing choice and competition in both the home loan and business finance markets, brokers help keep interest rates lower for home loan borrowers.

Price competition in lending markets is particularly important in New South Wales where land values and therefore average mortgage costs are generally higher than other parts of the country. As the NSW Treasurer Daniel Mookhey has rightly identified, interest rate rises have a disproportionate impact and cost on those living in NSW, largely due to the higher land and property values in this state compared to other parts of the country.

This reality, coupled with rapidly growing house prices, only reinforces the role of mortgage and finance brokers that support families putting their own roof over their heads.

Indeed, the role of brokers extends beyond the transaction itself. Brokers provide expert guidance to borrowers, including first home buyers, helping them with budgeting, navigating complex financial decisions, securing competitive interest rates, and managing refinancing options.

This support is particularly vital in the context of 13 successive interest rate increases, mortgage stress and heightened cost of living pressures for NSW residents. The need for borrowers to have access to a professional brokerage service to assist them navigate these challenges is vital.

- ***Risk of further small business closures without action***

Should Revenue NSW pursue mortgage aggregators on the basis of the Loan Market precedent and aggregators be liable not just on a go forward basis, but on a retrospective basis (including fines and penalty interest), we expect aggregators will need to pass the accumulated costs of liabilities onto broking businesses.[2]

By our estimates, the cost of five years retrospective application of payroll tax, plus fines and penalties equates to approximately $68,408 for a single operator broking business, when an average single operator broker business has gross earnings before tax and overheads of approximately $181,687, in a year. [3]

This impact on small broking businesses would lead to many broking businesses closing. This is because unlike general practitioners and many other service providers, brokers are unable to pass the ongoing cost of payroll tax onto their customers.

[2] The payroll tax rate is 5.45%. Aggregator revenue after costs typically run at 5% which is less than the payroll tax rate which means commercially aggregators are unable to absorb the tax and will have to pass wholesale amounts on to broking businesses.

As the NSW Small Business Commissioner reported in their latest Momentum Survey, small business confidence is now lower than at the onset of COVID, a remarkable and alarming statistic.

The Survey went on to identify that **cash flow and access to working capital** is the third biggest issue facing small businesses, with over 70 per cent of respondents in agreement. This only enforces the critical role of brokers in New South Wales to support business survival, and it is worth noting many small businesses use their home as collateral to borrow funds for their business.

Business insolvency rates are already shockingly high, with the latest June 2024 ASIC Insolvency Statistics revealing that:

- Company insolvencies in NSW are up 40 per cent year on year.
- Construction industry insolvencies in NSW are up 45 per cent year on year.
- Retail industry insolvencies in NSW are up 77 per cent year on year.

There is never a good time to increase costs for small businesses, but the midst of a cost crisis is perhaps the most reckless time a government could do so.

- ***More bad news for first-home buyers – benefit of stamp duty reforms eroded***

Without brokers, homeowners and business owners' ability to access a wide range of credit products at competitive rates will be diminished. Mortgage brokers facilitate 74 per cent of mortgages in Australia and have driven competition, reducing the cost of a mortgage by 0.56% over the last 4 years.[4]

Fewer mortgage brokers mean fewer options for borrowers with more borrowers having to go direct to major banks and having to pay more.

We estimate if the broking industry were to contract significantly because of the additional payroll tax burden, the cost of an *average* mortgage in NSW accessed through a broker will increase by more than $273 per month, $3,276 per year or $98,280 its life.[5]

In other words, the benefits to a first home buyer under the Minns-Mookhey Stamp Duty Reforms, which save buyers between $23,986 and $30,735 (for a property purchase price between $650,000 and $800,000) would be totally eroded over the course of the mortgage.

These impacts would be felt widely across the state, as you would be aware:[6]

- **Suburbs where the house price median is between $650,000 and $800,000 include:** Colyton, Hassal Grove, Cambridge Park, North St Marys, Richmond, Werrington, Rosemeadow, Warragamba, Leumeah and Whalan.

- **Suburbs where the apartment price median is between $650,000 and $800,000 include:** Waitara, Ashfield, Padstow, Arncliffe, Kogarah, Petersham, Epping, Hillsdale, Sutherland and Wolli Creek.

It would be an ironic failure of policy coordination if thousands of home buyers had their stamp duty benefits totally eradicated through the flow-on effects of higher payroll tax onto the very brokers they borrow through.

[4] Calculated from RBA Housing Lending Rates (FLRHOFP) and the RBA cash rate

[5] Based on an average mortgage in NSW being $721, 599.

[6] https://www.nsw.gov.au/media-releases/stamp-duty-exemptions-increase

- ***Housing supply relies on buyer finance***

As you are aware, many new precincts and housing developments are only viable if developers have confidence that a significant number of 'anchor' buyers are expressing demand, including for off-the-plan properties.

Without a competitive mortgage market, less first-home and second-home aspirants will have relevant pre-finance authorisation required to enter the market and underwrite the confidence of builders.

The Minns Government's bold and ambitious signature plan to boost housing supply relies on more than just planning reform such as the Transport Oriented Development (TOD) precincts. It requires skilled labour, training, and access to finance for both businesses (including small contractors and suppliers) and the home purchasers whose demand helps secure the feasibility of new projects.

What needs to be done? Swift action and leadership - A time bound moratorium and no retrospectivity

The NSW Government has recognised the criticality of providing healthcare to residents in assessing the application of payroll tax to commercial arrangements for GPs.

Similarly, we urge the NSW Government to consider the serious cost of living and economic growth impacts on NSW residents, that the application of payroll tax to commercial arrangements in the mortgage and finance boking industry, will have.

The mortgage and finance broking industry needs time to put in place arrangements to ensure compliance with this new interpretation of the payroll tax legislation. This includes reviewing contracts, establishing processes and commencing record-keeping that industry did not previously expect as a requirement.

We reiterate our request for the NSW Government to provide legislated retrospective relief and a moratorium from the application of the Payroll Tax Act to allow the mortgage and finance broking industry time to meet its regulatory requirements, given the significant ambiguity that has and continues to exist.

Given the devastating impacts this will have on home buyers, small businesses and jobs, we hope to hear urgently from you on this matter.

We seek an urgent meeting to discuss this issue and look forward to genuine engagement to develop a thorough and practical go-forward solution.

Yours sincerely,

Luke Achterstraat, CEO COSBOA

Anja Pannek, CEO MFAA

David Bushby, CEO CAFBA

Mr Nageb Al Malah
Chief of Staff to Minister for Finance Courtney Houssos
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: Nageb.Al-Malah@minister.nsw.gov.au
Cc: Laura Akkari

14 May 2024

Dear Mr Al Malah

APPLICATION OF THE PAYROLL TAX ACT (NSW) ON THE MORTGAGE AND FINANCE BROKING INDUSTRY

Thank you for taking the time to meet with us on 1 May 2024. This is further to our previous meeting on 31 January 2024where it was agreed that it was sensible for the MFAA and the NSW Finance Minister's office to meet again upon the release of the judgement in the matter of *Loan Market Group Pty Ltd vs Chief Commissioner of State Revenue* (**the Loan Market matter**) which occurred on 12 April 2024.

In our meeting with you, we expressed disappointment with the outcome of the Loan Market matter. We also noted the judgement provided some clarity as to the interpretation of section 32 of the Payroll Tax Act and its application to certain, but not all commercial arrangements within the mortgage and finance broking industry.

We reiterated our request for the NSW Government to provide legislated retrospective relief and a moratorium from the application of the Payroll Tax Act to allow the mortgage and finance broking industry time to meet its regulatory requirements, given the significant ambiguity that has and continues to exist.

We also noted given there was an opportunity for both parties to the Loan Market matter to appeal, our expectation was that the undertaking from Revenue NSW to pause new audit activity on the industry will extend to the outcome of the appeal in the Loan Market case (if any). We also noted that a second mortgage aggregator, Finsure, has now commenced legal action against Revenue NSW with respect to a separate set of commercial arrangements in industry. We noted our expectation was that Revenue NSW will not commence any new activity on the industry until the outcome of that matter also. We have accordingly written to Revenue NSW; a copy of this letter is **enclosed** below.

In our meeting with you on 31 January, you indicated that there was a general recognition that the NSW Government faced challenges with respect to the payroll tax legislation beyond the mortgage and finance broking industry and as such the NSW Government was keen to get ideas on fixing the legislation to provide clarity and certainty.

The view that the legislation is in fact broken and is being used outside of its original policy intent is reinforced by comments made by Justice Richmond in the Loan Market judgement as to the 'harsh' application of section 32 to aggregator/broker arrangements.[1]

In our meeting with you on 1 May 2024, we said we would send you a follow up letter, and you committed to responding to our correspondence. We would like to work collaboratively with the NSW Government and have always held this position. We are therefore prepared to provide the NSW Finance Minister with options for changes to section 32 of the Payroll Tax Act to align it with its anti-avoidance purpose, thereby reducing the contentious nature of the legislation.

In your response to this letter, we would appreciate a commitment by the NSW Government that if the MFAA were to provide a constructive and tangible proposal to the NSW Government that the NSW Government will have the appetite and willingness to consider the proposal.

We look forward to hearing from you soon. Please do not hesitate to contact me should you wish to discuss any aspect of this letter.

Regards

Anja Pannek
CEO
Mortgage and Finance Association of Australia

[1] *Loan Market Group Pty Ltd v Chief Commissioner of State Revenue; Loan Market Pty Ltd v Chief Commissioner of State Revenue [2024] NSWSC 390* para 207 and 208.

Mr Nageb Al Malah
Chief of Staff to Minister for Finance Courtney Houssos
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: Nageb.Al-Malah@minister.nsw.gov.au
Cc: Laura Akkari

8 February 2024

Dear Mr Al Malah

APPLICATION OF PAYROLL TAX TO THE MORTGAGE AND FINANCE BROKING INDUSTRY

Thank you for meeting with us last week. In our view it was a constructive meeting, and we appreciate the time you took to meet with us.

In our meeting, we shared our members' significant concerns:

- that the relevant contract provisions were intended to prevent the avoidance of payroll tax by disguising an employment relationship as a contractor relationship,
- that Revenue NSW in their assessment of the broking industry, has failed to understand the commercial arrangements in place within the industry and therefore has formed a view that is contrary to how the industry operates,
- that Revenue NSW is now applying these provisions in a way that was never intended – i.e. to revenue paid to small independent broking businesses, and
- this has led to costly and protracted continuation of legal disputes between aggregators and Revenue NSW (noting there are at least two matters currently before the courts) that will continue to the detriment of NSW taxpayers should this matter not be resolved.

We noted the commitment from Revenue NSW that it will not commence new audits on the mortgage and finance broking industry until a decision is reached in relation to the Loan Market matter (currently awaiting judgement). We confirmed that we have not heard from our members of any failure on the part of Revenue NSW to honour this commitment.

In saying this, we emphasised that while this 'pause' in audit activity has provided some relief to our members, it does not provide anywhere near the certainty of a legislated pause, nor the retrospective treatment of interest, penalties, and fines. We were pleased with your recognition that retrospectivity is a key concern for our members.

Next Steps

There was a general recognition that the NSW Government faced challenges with respect to the payroll tax legislation beyond the mortgage and finance broking industry and as such the NSW Government was keen to get ideas on fixing the legislation to provide clarity and certainty.

We cannot stress the impact this new tax will have on the viability of broking businesses and by extension NSW home loan borrowers. With the current cost of living crisis, now more than ever borrowers need the expert guidance of their mortgage broker to navigate the home loan market, help in understanding options when their fixed rate mortgage reverts to a variable rate, obtaining valuable

assistance to place themselves in the best position to refinance and to obtain a competitive home loan rate and have their broker work on their behalf to do those things.

As such we will continue to advocate for:

- A legislated moratorium on any further action and a clear pause on all audits for at least 12 months from the date clarity is provided through the court.
- Ensure that upon clarity being obtained, any application of payroll tax to the industry will not be retrospective.
- Work to clarify the application of the Payroll Tax Act to the industry going forward.

We agreed that a meeting will be held with you as soon as the Loan Market decision is received, and this is to consider solutions. We look forward to meeting with you at that point in time. Thank you again for your time.

Regards

Anja Pannek
CEO
Mortgage and Finance Association of Australia

Ms Kris Neill
Chief of Staff for the Hon Courtney Houssos
Parliament House
Macquarie Street
SYDNEY NSW 2000

cc The Hon. Courtney Houssos, MLC
Ms Laura Akkari

By email: kris.neill@minister.nsw.gov.au
laura.akkari@minister.nsw.gov.au

25 August 2023

Dear Ms Neill

APPLICATION OF PAYROLL TAX TO THE MORTGAGE AND FINANCE BROKING INDUSTRY

Thank you for your time on the phone with Ms Naveen Ahluwalia, the MFAA's Head of Policy yesterday. We would like to request a meeting with you, further to your invitation, to discuss the issues that we raised with you.

Ms Ahluwalia and I met with the NSW Finance Minister, Ms Houssos on 26 July, where we discussed the serious concerns that we had in relation to the application by Revenue NSW of payroll tax to payments made by aggregator groups to independent small broker businesses.

In our meeting, the Minister noted the significant budgetary challenges faced by the NSW Government and as such that the NSW Government was not in a position to grant **any industry** a mortarium or amnesty relating to payroll tax. The Minister specifically mentioned that she had given the same message to general practitioners (GPs).

Commissioner Cullen Smythe, who was also in the meeting with Minister Houssos, confirmed in the meeting the stop action on new audits for aggregator groups until a decision was reached in the matter currently before the Supreme Court of NSW in respect of application of payroll tax to aggregator and broker commercial arrangements (otherwise known as the Loan Market matter).

Given the ambiguity of the law on these arrangements, it appears harsh and unfair to retrospectively apply fines, penalties and payroll tax until such time as the law is clarified.

As such we asked if the Minister would consider concessions in relation to the retrospective application of fines and penalties. The Minister did undertake to review this with Revenue NSW.

Since then and despite a number of requests and that undertaking, we have yet to hear anything in relation to the Minister's consideration. Instead, we have received correspondence re-directing us to Revenue NSW.

When judgement will be received is unknown, so whilst greatly appreciated, this ‘pause’ gives the mortgage and finance broking industry no certainty as to when activity by Revenue NSW will re-commence and secondly what our members see as harsh and retrospective application of fines and penalties.

Just yesterday we became aware that the Government has moved to legislate a 12 month ‘pause’ on payroll tax audits for GPs and further to that it also includes in effect a waiving of all tax penalties and interest accrued before the beginning of that pause.

We would like to meet with you to understand as a matter of urgency the inconsistency between the representations made to us and the legislated concessions that have been made with respect to general practitioners. In particular, we are asking for a clear pause on all audits for at the very least 12 months from the date decision is received in the Loan Market matter– this aligns to the concessions just given to GPs.

Further to this, we request also that all retrospective interest, penalties and fines be waived in line with previous requests, and in line with what has just been legislated for GPs.

To assist you with background, with this letter, we have included correspondence between the Minister and the MFAA. You will note we have been in touch with your office to find a suitable time to meet and look forward to our discussions.

Regards

Anja Pannek
CEO
Mortgage and Finance Association of Australia

The Hon. Courtney Houssos, MLC
NSW Minister for Finance

Mr Cullen Smythe
Revenue NSW

cc Scott Johnston
cc Laura Akkari

27 July 2023

Dear Ms Houssos and Mr Smythe

BRIEFING NOTE – PAYROLL TAX ON MORTGAGE AND FINANCE BROKERS

Thank you for meeting with us yesterday.

Firstly, we appreciate confirmation from Mr Smythe that RNSW will not commence any new audit activity on the mortgage and finance broking industry until judgement is conclusively received in the Loan Market matter.

In our meeting yesterday, the Minister was clear around the significant budgetary challenges faced by the NSW Government and as such there is a hesitancy to grant any industry a mortarium or amnesty from the application of payroll tax. The Minister did make clear however that brokers run independent businesses and there was a deep appreciation for the impact of the protracted audit and assessment activity on those businesses and the broader industry. As such, the Minister undertook to consider concessions in relation to retrospectivity as well as consideration of a roundtable in relation to the CPN.

Whilst the Loan Market case will not address all arrangements in the mortgage and finance industry, this matter will provide precedent for the industry across certain aspects of the Act in relation to the industry. As such we feel CPN will need to be reviewed once the Loan Market matter is settled conclusively.

As with all regulator guidance notes, we expect RNSW to engage in a consultation process as part of this review. We therefore suggest pragmatically that a roundtable is convened post receipt of the Loan Market judgement at a date and time to be determined between RNSW and industry for the purpose of that consultation.

In our discussions yesterday, we noted Minister Houssos' appreciation for the complex nature of the payroll tax law and that industry has lacked clarity as to the application of the law to arrangements between aggregators and broking businesses. Therefore, with respect to retrospectivity, a pragmatic and fair approach would be to commence assessments from the point in time that the revised CPN is published. This is consistent with the approach taken by the Queensland Revenue Office to limit its audit activities on GP practices onwards of the date of the 2021 *Thomas and Naaz* ruling.

What this would mean in practice is that all inflight audit activity with respect to aggregators is ceased, Revenue NSW withdraws all assessments to date (including interest, fines and penalties levied or proposed) on industry participants and that RNSW limit its audit activity on aggregators onward of the date of the publication of the revised CPN.

Regards

Anja Pannek
CEO
Mortgage and Finance Association of Australia

The Hon. Stephen Kamper MP
Minister for Small Business
GPO Box 5341
SYDNEY NSW 2001

By electronic upload

1 May 2023

Dear Mr Kamper

APPLICATION OF PAYROLL TAX TO THE MORTGAGE AND FINANCE BROKING INDUSTRY

We write to you to seek a meeting on a matter that will have significant impact to small businesses in NSW and may make NSW an uncompetitive state for small businesses to operate.

You may be aware from correspondence sent through by our members during the election that the broking industry holds significant concerns around audit and assessment activity undertaken by Revenue NSW against a number of participants within the mortgage and finance broking industry ie aggregators. We also shared correspondence with the NSW Small Business Commissioner's office on this matter earlier this year and we hope you have been provided with an adequate briefing.

Prior to the election, the Labor Party made a commitment to work with the mortgage and finance broking industry to ensure that the payroll tax requirements are transparent and clear. We are seeking a meeting with you in your new role to brief you and your office on this critical matter for our small business members.

Our view is that Revenue NSW in their assessment of the broking industry, has failed to understand the commercial arrangements in place within the industry, both in substance and in form and therefore has formed a view that is contrary to how the industry operates. Their assessment is also flawed in that it fails to recognise brokers operate their own businesses, working to support their customers and their families in doing so.

Mortgage and finance brokers facilitate more than two thirds of all new mortgages in Australia, driving competition and choice in the lending market and providing access to credit to Australians and Australian small businesses. In NSW alone, mortgage brokers facilitated nearly $73 billion in home loans in the 12 months ended 31 March 2023.

In seeking to tax our members, Revenue NSW and the NSW Government:

- places at risk the ability for residents in NSW to access credit in a competitive manner,
- seeks to tax the smallest of small businesses,
- places at risk the ability of all broking businesses to access critical services to support their customers,
- places our aggregator members at financial risk.

Until this matter is clarified at law, we are seeking a moratorium for industry so that small broking businesses can continue to focus on supporting their customers.

We are also seeking to commence discussions with your government on a prospective change to the law to make clear the application of payroll tax to arrangements within the broking industry.

The Payroll Tax Act is harmonised with six other jurisdictions across Australia including Queensland. Noting the lack of awareness of the payroll tax treatment of contractors among GPs, the Queensland Government has shown goodwill through providing a payroll tax amnesty on payments made to contracted GPs until 30 June 2025. We seek the same from the NSW Government.

Why is this important?

There are more than 7,000 mortgage and finance brokers in NSW who are both NSW residents and small businesses owners. Mortgage and finance brokers have worked tirelessly throughout the pandemic to support their customers and to ensure there is continued access to credit within the economy. These businesses are now busy helping NSW homeowners navigate the fixed rate 'cliff' and increasing cost of living pressures.

Mortgage and finance brokers provide the residents of NSW with critical access to credit for both their home and business needs. Brokers drive competition in the lending market through providing choice of lenders and as a result drive competitive interest rates and innovation. Without the competitive pressure brokers provide, consumers and small businesses would find it much harder to access finance and would pay more for their mortgages and small business lending needs.

We note comments made by Mr Annoulack Chanthivong, the former Shadow Finance Minister, in our meeting with him prior to the election that any industry needs certainty and clarity to operate effectively, and that thus far, clarity has not been provided to the mortgage and finance broking industry.

Mortgage and finance brokers rely heavily upon services provided to them by aggregators to operate their businesses. If access to these services is discontinued or scaled back, brokers, as small business owners cannot simply source alternate suppliers for these services in a cost effective or efficient manner. This threatens a broker's ability to support their customers. and which will mean less competition and less choice for NSW borrowers and higher prices.

Who we are

The MFAA is Australia's peak industry body for the mortgage and finance broking industry, with over 14,500 members nationally and with more than 7,000 members in NSW. Our members include mortgage and finance brokers, aggregators, lenders, mortgage managers, mortgage insurers and other suppliers to the mortgage broking industry.

Issues at hand

Revenue NSW have sought to apply payroll tax to payments made by aggregators to small independent broking businesses as if those payments were wages or a salary. In audits and assessments, Revenue NSW has also sought to retrospectively apply penalties and interest for significantly lengthy periods.

The industry position is that payroll tax does not apply to these arrangements, and we have expressed that view in our previous correspondence with you and members of your government.

One aggregator who has had an assessment made against them has commenced litigation against Revenue NSW and another is objecting to an assessment with a strong likelihood the matter will also progress to litigation. It is very likely that other aggregators currently under audit will commence litigation against an adverse assessment. We have no wish to see taxpayer funds being used to defend litigation against Revenue NSW for the foreseeable future.

As we discussed with Mr Chanthivong, the case against Revenue NSW to come before the courts this year may likely not be universal in its application and may fail to provide the clarity needed. This means that clarity needs to be provided through another mechanism, including by way of an amendment to the law.

As the peak industry body for this sector, we have engaged with Revenue NSW and requested this issue be dealt with in a comprehensive and constructive manner that allows our members, both aggregators and mortgage and finance brokers, to operate their businesses in NSW with clarity and certainty.

In discussions and in correspondence, Revenue NSW has expressed a view that it is not undertaking a targeted review of the industry.

In NSW there are approximately 14 aggregators providing services to over 7, 000 mortgage brokers. We are aware of current and previous audit and assessment activity by Revenue NSW against at least half of mainly the larger of these aggregation businesses which approximates to more than 50% of the industry. Based on the number of audits in play, it is clear to us that Revenue NSW's actions are targeted and seeking to place a new and unwarranted tax on the broking industry.

Whilst we were heartened with the recent undertaking by Revenue NSW not to commence any new audits against the mortgage and finance broking industry pending the current court action, our view is that Revenue NSW should cease all activity until there is broad based clarity at law, through the courts or legislative change. This would ensure industry and Revenue NSW do not expend unnecessary effort and activity.

We look forward to hearing from you soon.

Regards

Anja Pannek
CEO
Mortgage and Finance Association of Australia

The Hon. Courtney Houssos, MLC
Minister for Finance
Parliament House
Macquarie Street
SYDNEY NSW 2000

By electronic upload

2 May 2023

Dear Ms Houssos

APPLICATION OF PAYROLL TAX TO THE MORTGAGE AND FINANCE BROKING INDUSTRY

We write to you in your capacity as Finance Minister with shared responsibility for Revenue NSW.

Prior to the election, the Shadow Finance Minister Mr Annoulack Chanthivong made a commitment to work with the mortgage and finance broking industry to ensure that the payroll tax requirements are transparent and clear. We are seeking a meeting with you in your new role to brief you and your office on this critical matter for our members.

You may be aware from correspondence sent through by our members during the election that the broking industry holds significant concerns around audit and assessment activity undertaken by Revenue NSW against a number of participants within the mortgage and finance broking industry ie aggregators.

Our view is that Revenue NSW in their assessment of the broking industry, has failed to understand the commercial arrangements in place within the industry, both in substance and in form and therefore has formed a view that is contrary to how the industry operates. Their assessment is also flawed in that it fails to recognise brokers operate their own businesses, working to support their customers and their families in doing so.

Mortgage and finance brokers facilitate more than 70% of all new mortgages in Australia, driving competition and choice in the lending market and providing access to credit to Australians and Australian small businesses. In NSW alone, mortgage brokers facilitated nearly $73 billion in home loans in the 12 months ended 31 March 2023.

In seeking to tax our members, Revenue NSW and the NSW Government:

- places at risk the ability for residents in NSW to access credit in a competitive manner,
- seeks to tax the smallest of small businesses,
- places at risk the ability of all broking businesses to access critical services to support their customers,
- places our aggregator members at financial risk.

Until this matter is clarified at law, we are seeking a moratorium for industry so that small broking businesses can continue to focus on supporting their customers.

We are also seeking to commence discussions with your government on a prospective change to the law to make clear the application of payroll tax to arrangements within the broking industry.

The Payroll Tax Act is harmonised with six other jurisdictions across Australia including Queensland. Noting the lack of awareness of the payroll tax treatment of contractors among GPs, the Queensland Government has shown goodwill through providing a payroll tax amnesty on payments made to contracted GPs until 30 June 2025. We seek the same from the NSW Government.

Why is this important?

There are more than 7,000 mortgage and finance brokers in NSW who are both NSW residents and small businesses owners. Mortgage and finance brokers have worked tirelessly throughout the pandemic to support their customers and to ensure there is continued access to credit within the economy. These businesses are now busy helping NSW homeowners navigate the fixed rate 'cliff' and increasing cost of living pressures.

Mortgage and finance brokers provide the residents of NSW with critical access to credit for both their home and business needs. Brokers drive competition in the lending market through providing choice of lenders and as a result drive competitive interest rates and innovation. Without the competitive pressure brokers provide, consumers and small businesses would find it much harder to access finance and would pay more for their mortgages and small business lending needs.

We note comments made by Mr Chanthivong in our meeting with him prior to the election that any industry needs certainty and clarity to operate effectively, and that thus far, clarity has not been provided to the mortgage and finance broking industry.

Mortgage and finance brokers rely heavily upon services provided to them by aggregators to operate their businesses. If access to these services is discontinued or scaled back, brokers, as small business owners cannot simply source alternate suppliers for these services in a cost effective or efficient manner. This threatens a broker's ability to support their customers. and which will mean less competition and less choice for NSW borrowers and higher prices.

Who we are

The MFAA is Australia's peak industry body for the mortgage and finance broking industry, with over 14,500 members nationally and with more than 7,000 members in NSW. Our members include mortgage and finance brokers, aggregators, lenders, mortgage managers, mortgage insurers and other suppliers to the mortgage broking industry.

Issues at hand

Revenue NSW have sought to apply payroll tax to payments made by aggregators to small independent broking businesses as if those payments were wages or a salary. In audits and assessments, Revenue NSW has also sought to retrospectively apply penalties and interest for significantly lengthy periods.

The industry position is that payroll tax does not apply to these arrangements, and we have expressed that view in our previous correspondence with you and members of your government.

One aggregator who has had an assessment made against them has commenced litigation against Revenue NSW and another is objecting to an assessment with a strong likelihood the matter will also progress to litigation. It is very likely that other aggregators currently under audit will commence litigation against an adverse assessment. We have no wish to see taxpayer funds being used to defend litigation against Revenue NSW for the foreseeable future.

As we discussed with Mr Chanthivong, the case against Revenue NSW to come before the courts this year may likely not be universal in its application and may fail to provide the clarity needed. This means that clarity needs to be provided through another mechanism, including by way of an amendment to the law.

As the peak industry body for this sector, we have engaged with Revenue NSW and requested this issue be dealt with in a comprehensive and constructive manner that allows our members, both aggregators and mortgage and finance brokers, to operate their businesses in NSW with clarity and certainty.

In discussions and in correspondence, Revenue NSW has expressed a view that it is not undertaking a targeted review of the industry.

In NSW there are approximately 14 aggregators providing services to over 7, 000 mortgage brokers. We are aware of current and previous audit and assessment activity by Revenue NSW against at least half of mainly the larger of these aggregation businesses which approximates to more than 50% of the industry. Based on the number of audits in play, it is clear to us that Revenue NSW's actions are targeted and seeking to place a new and unwarranted tax on the broking industry.

Whilst we were heartened with the recent undertaking by Revenue NSW not to commence any new audits against the mortgage and finance broking industry pending the current court action, our view is that Revenue NSW should cease all activity until there is broad based clarity at law, through the courts or legislative change. This would ensure industry and Revenue NSW do not expend unnecessary effort and activity.

We look forward to hearing from you soon.

Regards

Anja Pannek
CEO
Mortgage and Finance Association of Australia

MFAA
MORTGAGE & FINANCE ASSOCIATION OF AUSTRALIA

The Hon. Chris Minns MP
Premier of New South Wales
GPO Box 5341
SYDNEY NSW 2001

The Hon. Daniel Mookhey, MLC
Treasurer of NSW
52 Martin Place
SYDNEY NSW 2000

By electronic upload

26 April 2023

Dear Mr Minns and Mr Mookhey

APPLICATION OF PAYROLL TAX TO THE MORTGAGE AND FINANCE BROKING INDUSTRY

We refer to our correspondence to you dated 27 March 2023 and 20 February 2023 respectively.

We are writing to follow up on commitments made by your party, specifically Mr Annoulack Chanthivong, to work with the mortgage and finance broking industry to ensure that the payroll tax requirements are transparent and clear. We are seeking a meeting with you as a matter of priority to brief you and your Government on this critical matter for our members.

Revenue NSW in their assessment of the broking industry, has failed to understand the commercial arrangements in place within the industry, both in substance and in form and therefore has formed a view that is contrary to how the industry operates. Their assessment is also flawed in that it fails to recognise brokers operate their own businesses, working to support their customers and their families in doing so.

Mortgage and finance brokers facilitate more than 70% of all new mortgages in Australia, driving competition and choice in the lending market and providing access to credit to Australians and Australian small businesses. In NSW alone, mortgage brokers facilitated nearly $73 billion in home loans in the 12 months ended 31 March 2023.

In seeking to tax our members, Revenue NSW and the NSW Government:

- places at risk the ability for residents in NSW to access credit in a competitive manner,
- seeks to tax the smallest of small businesses,
- places at risk the ability of all broking businesses to access critical services to support their customers,
- places our aggregator members at financial risk.

Until this matter is clarified at law, we are seeking a moratorium for industry so that small broking businesses can continue to focus on supporting their customers.

We are also seeking to commence discussions with your government on a prospective change to the law to make clear the application of payroll tax to arrangements within the broking industry.

The Payroll Tax Act is harmonised with six other jurisdictions across Australia including Queensland. Noting the lack of awareness of the payroll tax treatment of contractors among GPs, the Queensland Government has shown goodwill through providing a payroll tax amnesty on payments made to contracted GPs until 30 June 2025. We seek the same from the NSW Government.

Why is this important?

There are more than 7,000 mortgage and finance brokers in NSW who are both NSW residents and small businesses owners. Mortgage and finance brokers have worked tirelessly throughout the pandemic to support their customers and to ensure there is continued access to credit within the economy. These businesses are now busy helping NSW homeowners navigate the fixed rate 'cliff' and increasing cost of living pressures.

Mortgage and finance brokers provide the residents of NSW with critical access to credit for both their home and business needs. Brokers drive competition in the lending market through providing choice of lenders and as a result drive competitive interest rates and innovation. Without the competitive pressure brokers provide, consumers and small businesses would find it much harder to access finance and would pay more for their mortgages and small business lending needs.

We note comments made by Mr Chanthivong in our meeting with him prior to the election that any industry needs certainty and clarity to operate effectively, and that thus far, clarity has not been provided to the mortgage and finance broking industry.

Mortgage and finance brokers rely heavily upon services provided to them by aggregators to operate their businesses. If access to these services is discontinued or scaled back, brokers, as small business owners cannot simply source alternate suppliers for these services in a cost effective or efficient manner. This threatens a broker's ability to support their customers. and which will mean less competition and less choice for NSW borrowers and higher prices.

Who we are

The MFAA is Australia's peak industry body for the mortgage and finance broking industry, with over 14,500 members nationally and with more than 7,000 members in NSW. Our members include mortgage and finance brokers, aggregators, lenders, mortgage managers, mortgage insurers and other suppliers to the mortgage broking industry.

Issues at hand

Revenue NSW have sought to apply payroll tax to payments made by aggregators to small independent broking businesses as if those payments were wages or a salary. In audits and assessments, Revenue NSW has also sought to retrospectively apply penalties and interest for significantly lengthy periods.

The industry position is that payroll tax does not apply to these arrangements, and we have expressed that view in our previous correspondence with you and members of your government.

One aggregator who has had an assessment made against them has commenced litigation against Revenue NSW and another is objecting to an assessment with a strong likelihood the matter will also progress to litigation. It is very likely that other aggregators currently under audit will commence litigation against an adverse assessment. We have no wish to see taxpayer funds being used to defend litigation against Revenue NSW for the foreseeable future.

As we discussed with Mr Chanthivong, the case against Revenue NSW to come before the courts this year may likely not be universal in its application and may fail to provide the clarity needed. This

means that clarity needs to be provided through another mechanism, including by way of an amendment to the law.

As the peak industry body for this sector, we have engaged with Revenue NSW and requested this issue be dealt with in a comprehensive and constructive manner that allows our members, both aggregators and mortgage and finance brokers, to operate their businesses in NSW with clarity and certainty.

In discussions and in correspondence, Revenue NSW has expressed a view that it is not undertaking a targeted review of the industry.

In NSW there are approximately 14 aggregators providing services to over 7, 000 mortgage brokers. We are aware of current and previous audit and assessment activity by Revenue NSW against at least half of mainly the larger of these aggregation businesses which approximates to more than 50% of the industry. Based on the number of audits in play, it is clear to us that Revenue NSW's actions are targeted and seeking to place a new and unwarranted tax on the broking industry.

Whilst we were heartened with the recent undertaking by Revenue NSW not to commence any new audits against the mortgage and finance broking industry pending the current court action, our view is that Revenue NSW should cease all activity until there is broad based clarity at law, through the courts or legislative change. This would ensure industry and Revenue NSW do not expend unnecessary effort and activity.

As it is relevant to their portfolios, we will also separately seek meetings with the Minister for Finance and the Minister for Small Business on this critical matter.

We look forward to hearing from you soon.

Regards

Anja Pannek
CEO
Mortgage and Finance Association of Australia

The Hon. Courtney Houssos, MLC
NSW Minister for Finance

Mr Cullen Smythe
Revenue NSW

cc Scott Johnston
cc Laura Akkari

27 July 2023

Dear Ms Houssos and Mr Smythe

BRIEFING NOTE – PAYROLL TAX ON MORTGAGE AND FINANCE BROKERS

Thank you for meeting with us yesterday.

Firstly, we appreciate confirmation from Mr Smythe that RNSW will not commence any new audit activity on the mortgage and finance broking industry until judgement is conclusively received in the Loan Market matter.

In our meeting yesterday, the Minister was clear around the significant budgetary challenges faced by the NSW Government and as such there is a hesitancy to grant any industry a mortarium or amnesty from the application of payroll tax. The Minister did make clear however that brokers run independent businesses and there was a deep appreciation for the impact of the protracted audit and assessment activity on those businesses and the broader industry. As such, the Minister undertook to consider concessions in relation to retrospectivity as well as consideration of a roundtable in relation to the CPN.

Whilst the Loan Market case will not address all arrangements in the mortgage and finance industry, this matter will provide precedent for the industry across certain aspects of the Act in relation to the industry. As such we feel CPN will need to be reviewed once the Loan Market matter is settled conclusively.

As with all regulator guidance notes, we expect RNSW to engage in a consultation process as part of this review. We therefore suggest pragmatically that a roundtable is convened post receipt of the Loan Market judgement at a date and time to be determined between RNSW and industry for the purpose of that consultation.

In our discussions yesterday, we noted Minister Houssos' appreciation for the complex nature of the payroll tax law and that industry has lacked clarity as to the application of the law to arrangements between aggregators and broking businesses. Therefore, with respect to retrospectivity, a pragmatic and fair approach would be to commence assessments from the point in time that the revised CPN is published. This is consistent with the approach taken by the Queensland Revenue Office to limit its audit activities on GP practices onwards of the date of the 2021 *Thomas and Naaz* ruling.

What this would mean in practice is that all inflight audit activity with respect to aggregators is ceased, Revenue NSW withdraws all assessments to date (including interest, fines and penalties levied or proposed) on industry participants and that RNSW limit its audit activity on aggregators onward of the date of the publication of the revised CPN.

Regards

Anja Pannek
CEO
Mortgage and Finance Association of Australia

Anoulack Chanthivong MP
Shadow Minister for Finance
Shop 3, Ground Floor
2-6 Oxford Road
Ingleburn NSW 2565

By email: anoulack.chanthivong@parliament.nsw.gov.au

23 February 2023

Dear Mr Chanthivong

UNFAIR APPLICATION OF PAYROLL TAX ON MORTGAGE AND FINANCE BROKING INDUSTRY

We appreciate your time meeting with us yesterday.

As discussed with you yesterday and as noted in our letter to you dated 20 February 2023, we have serious concerns on the actions taken by Revenue NSW to apply the Payroll Tax Act to the mortgage and finance broking industry. On behalf of our members, we are seeking clarity of the law, and until the law is clarified, a moratorium on the application of the tax to the mortgage and finance broking industry.

We welcomed your comments that any industry needs certainty and clarity to operate effectively, and that thus far, clarity has not been provided to the mortgage and finance broking industry. We also note your comments that the case against Revenue NSW to come before the courts this year may likely not be universal in its application and may fail to provide the clarity needed. This means that clarity may need to be provided through another mechanism, including by way of an amendment to the law.

We are heartened by the appreciation that you have of the pass-through impact that this tax will have on our small business members, particularly at a time when brokers are focussed on supporting their customers through the cost-of-living crisis and higher interest rates impacting their mortgages. As we collectively agreed in our discussion, this tax will have a significant impact on our small business members, particularly those that are single operator businesses.

We note your commitment, that post-election, both you and your party will work closely with industry to ensure that the payroll tax requirements are transparent and clear. Until there is a clear go forward position, we will continue to request a moratorium for industry so that small broking businesses can continue to focus on supporting their customers. We expect that you will brief Leader Chris Minns accordingly.

We wish you well in the forthcoming NSW Election.

Regards
Anja Pannek
CEO
Mortgage and Finance Association of Australia

The Hon. Dominic Perrottet MP
Premier of New South Wales
52 Martin Place
Sydney NSW 2000

By electronic upload

20 February 2023

Dear Premier

APPLICATION OF PAYROLL TAX TO THE MORTGAGE AND FINANCE BROKING INDUSTRY

In New South Wales, the Mortgage and Finance Association of Australia (**MFAA**) represents more than 6,000 mortgage and finance brokers, who are both New South Wales residents and small businesses owners.

We are writing to you, as the Premier of New South Wales, to express serious concerns on behalf of our members on the unwarranted, unfair, and unreasonable actions undertaken by Revenue NSW regarding the application of the *Payroll Tax Act 2007* (**the Act**) to the mortgage and finance broking industry. We request the Premier urgently meet with the MFAA so our concerns can be appropriately addressed.

The actions that we require as a matter of urgency are:

1. Clarification in law of the application of the Act to the mortgage and finance broking industry – currently the law is unclear and is creating deep uncertainty for the industry.
2. That the law be clarified, either through court and/or by way of amendment to legislation with retrospective effect.
3. Until there is certainty for the industry, either through case law or by legislative change, that Revenue NSW suspend by way of a moratorium, all current activity against the mortgage and finance broking sector in New South Wales. This includes requests for information, audits, and assessments.
4. Until the legal position is certain, that Revenue NSW withdraw all fines and penalties levied or proposed on industry participants.

Mortgage and finance brokers facilitate more than 70% of mortgages and at least 4 in 10 small business loans in Australia. They drive competition and choice in the lending market and provide access to credit. In New South Wales alone, mortgage brokers facilitated nearly $12 billion in home loans in the 12 months ended 31 March 2022.

The erroneous and haphazard application of this tax, including retrospective fines and penalties by Revenue NSW threatens the financial stability of the industry. This places at risk the ability for home borrowers and business owners in New South Wales to access the services of a broker for critical credit assistance. This is at a time when access to credit for economic recovery and managing New South Wales household cost of living pressures, in particular a mortgage, is critical for the state.

We request a meeting with you as soon as possible to discuss this matter. We **enclose** a letter to the State Commissioner of Revenue NSW voicing our concerns.

Regards

Anja Pannek
CEO
Mortgage and Finance Association of Australia

Scott Johnston
Chief Commissioner State Revenue
Revenue NSW
Payroll Tax
GPO Box 4042
Sydney NSW 2001

cc Cullen Smyth, Commissioner State Revenue

By email: scott.johnston@revenue.nsw.gov.au
cullen.smythe@revenue.nsw.gov.au

20 February 2023

Dear Chief Commissioner

APPLICATION OF THE PAYROLL TAX ACT (NSW) ON THE MORTGAGE AND FINANCE BROKING INDUSTRY

The Mortgage and Finance Association of Australia (**MFAA**) is writing to Revenue NSW to express serious concerns on behalf of our members on the actions undertaken by Revenue NSW regarding the application of the *Payroll Tax Act 2007* (**the Act**) to the mortgage and finance broking sector. We request that you and your team urgently meet with the MFAA so that our concerns can be addressed appropriately.

As the peak industry body for this sector, we have previously engaged with Revenue NSW and requested this issue be dealt with in a comprehensive and constructive manner that allows our members, both aggregators and mortgage and finance brokers, to operate their businesses in New South Wales with clarity and certainty. This has not occurred to date.

Instead, we understand there to be a significant escalation of activity by Revenue NSW against the industry. Despite a deep lack of clarity of the law, Revenue NSW has continued to pursue actions that purport to apply the 'relevant contract' provisions within the Act to our members, including through audits and through the issue of assessments. Revenue NSW is also a party to at least one matter before the courts.

The actions being taken by Revenue NSW is creating deep commercial uncertainty to the extent aggregation businesses are pausing further investment in New South Wales until this matter is clarified.

We are aware that Revenue NSW is undertaking audit activity and issuing assessments inconsistently on multiple fronts, including but not limited to:

- understanding of commercial arrangements in the sector
- the interpretation of exemptions within the Act
- evidence required to support these exemptions
- application of penalties
- waiving of penalties
- terms on which penalties apply.

The actions that we require as a matter of urgency are:

1. Clarification in law of the application of the Act to the mortgage and finance broking industry – currently the law is unclear and is creating deep uncertainty for the industry.
2. That the law be clarified, either through court and/or by way of amendment to legislation with retrospective effect.
3. Until there is certainty for the industry, either through case law or by legislative change, that Revenue NSW suspend by way of a moratorium, all current activity against the broking sector in New South Wales. This includes requests for information, audits, and assessments.
4. Until the legal position is certain, that Revenue NSW withdraw all fines and penalties levied or proposed to industry participants.

Issues at hand

Under the Act, payroll tax is a self-assessed tax. Broker aggregation groups have self-assessed that payroll tax does not apply to commission arrangements between aggregation groups and brokers. This is because aggregators are service providers facilitating relationships between independent mortgage and finance brokers (and their clients) and lenders. Brokers are not employees of aggregators, nor are they agents of aggregators. They are independent businesses that are either sole operators or employ staff.

As noted above, despite a lack of clarity within the law, Revenue NSW has continued to pursue actions that purport to apply the 'relevant contract' provisions within the Act to mortgage and finance brokers. This is despite there being no legal basis for the application of this tax to this industry.

A deeper analysis of these issues is outlined in **Attachment A**.

What this means for industry

In New South Wales we represent more than 6,000 mortgage and finance brokers,[1] who are both New South Wales residents and small businesses owners. Mortgage and finance brokers in New South Wales have worked tirelessly throughout the pandemic to support their customers and to ensure there is continued access to credit within the economy. These businesses are now busy helping New South Wales homeowners navigate a rising rate environment and increasing cost of living pressures. The sector also facilitates at least 4 in 10 small business loans in Australia, making it systemically important to the access to credit for households and businesses.

Through using the services of a mortgage and finance broker, consumers and small business owners are able to access multiple lenders which has resulted in significant competition and pricing reductions for mortgages and business lending in Australia.[2] Without the competitive pressure mortgage and finance brokers provide, consumers and small businesses would pay more for their mortgages and small business lending needs.

At a time when access to credit for economic recovery and managing cost of living pressures, in particular a mortgage for a resident of NSW, is critical for the state, we are deeply concerned that Revenue NSW is erroneously pursuing taxing the mortgage and finance broking sector.

Industry practice note issued with little consultation

In 2021, the Commissioner of State Revenue issued CPN 016 which purported to be industry specific guidance. The practise note was issued with very little engagement with industry, despite assurances that this would occur in our meeting in late 2020. Furthermore, the guidance was issued 14 years

[1] MFAA Industry Intelligence Service Report 14th Edition pg 26
[2] The Value of Mortgage Broking by Deloitte Access Economics July 2018, see specifically pg 7 that brokers have contributed to a fall in Net Interest Margins by over 3% over the past 30 years.

after the Act come into effect. Our members have called into question why Revenue NSW took this length of time to form a view on the applicability of the Act to the mortgage and finance broking industry.

CPN 016 was further updated in June 2022, with no notification or engagement with industry as to the rationale or basis for this update. Our view is that the reissue of the practice note is a likely result of Revenue NSW continuing to form an understanding of the industry as it conducts its audits, and this is likely indicative that Revenue NSW is continuously testing its interpretation of the law to the industry in a way that does not allow industry any certainty. The updated practise note still does not reflect the commercial arrangements in this industry and is not based on determinations in a court of law for the mortgage and finance broking industry. We have also been made aware that Revenue NSW has applied penalties to industry participants for periods prior to the issuance of this practise note and the original practise note published in 2021.

A number of the matters under review by Revenue NSW have been pursued for multiple years, because of a lack of clarity provided by the Commissioner's team. The erroneous application of this tax coupled with retrospective fines and penalties threatens the financial stability of and introduces extra cost to the sector, for both aggregators and mortgage and finance brokers.

Next steps

Mortgage and finance brokers rely heavily upon services provided to them by aggregators to operate their businesses, as previously detailed to Revenue NSW. If access to these services is discontinued, brokers, as small business owners cannot simply source alternate suppliers for these services in a cost effective or efficient manner. This threatens a broker's ability to support their customers.

We require urgent action on this matter and request a meeting with you as soon as possible to discuss the next steps.

Regards

Anja Pannek
CEO
Mortgage and Finance Association of Australia

ATTACHMENT A

There is significant lack of clarity with the law on the application of payroll tax to the mortgage and finance broking industry. There are key questions that we, on behalf of our members, consider need to be clarified to provide certainty to both Revenue NSW and to the mortgage and finance broking industry to allow for a clear go forward position.

Key questions to be clarified:

1. Whether the contractual arrangements between aggregation groups and independent broker businesses are 'relevant contracts' under section 32 of the Act.
2. The roles and activities required to be performed by persons performing mortgage and finance broking activities in order to be eligible to apply the 'two or more persons' or de minimis exemptions.
3. The application of the 'two or more persons' or de minimis exemptions when mortgage broking activities are outsourced to a third party by a broker.
4. The application of exemptions on commissions paid to retired brokers or brokers which have ceased providing mortgage and finance broking services to customers.
5. The application of the exemptions where mortgage and finance broking businesses are subject to ongoing transitions in scale (i.e. increasing scale by hiring additional employees or subsequently downsizing its operations and reducing headcount).

Because of the lack of clarity of the law, and the significant impact of action taken by Revenue NSW on the mortgage and finance broking industry, and the broader New South Wales economy, until key issues are tested, we ask Revenue NSW to suspend its actions against broker aggregation businesses across New South Wales by way of a moratorium until the legal position is clarified.

THE ISSUES

Payroll tax is a self-assessed tax, with businesses who consider the Act to apply to wages that are above the NSW payroll tax threshold to register for payroll tax.

For the reasons we provide below, broker aggregation groups have self-assessed that payroll tax does not apply for commission arrangements between aggregation groups and brokers.

In 2018, the NSW Law Society wrote to the NSW Government to raise concerns that the Act, and in particular Division 7 was complex and contained a high degree of uncertainty for industries predicated on contractor relationships, where those contractors are independent businesses.

Despite significant lack of clarity within the law, Revenue NSW has sought to retrospectively apply the Act to industry participants. Revenue NSW is relying on the judgement of *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* (**Bridges**) a 2005 case which centred around the application of payroll tax to the financial advice industry. The mortgage and finance broking industry considers Bridges to have **no** application to the mortgage and finance broking industry.

As a result, in nearly all instances of aggregator assessment, it was not until audits commenced that taxpayers were made aware of the impact of Division 7 of the Act. The result of Revenue NSW's current enforcement drive will create extensive hardship for aggregators, mortgage and finance brokers who lose access to aggregation services and ultimately result in higher costs to consumers on their mortgages and lending needs.

The issued assessments encompass both what Revenue NSW considers to be the tax liability for those periods as well as fines, effectively levying a significant bill on industry participants. Revenue NSW's apparent failure to recognise that the width and opacity of the relevant contractor provisions affect many businesses that had not previously faced payroll tax liabilities, and which would not

without clear and direct guidance recognise these liabilities, then allowing such businesses to continue to manage their affairs in ignorance of accruing payroll tax liabilities for lengthy periods. The unsurprising outcome of this is that with the imposition of penalties and interest, many aggregators' financial viability could be placed at risk.

We also note that these retrospective penalty periods seem to also be inconsistently applied, with industry participants indicating these periods range between 5 years and 8 years. The Act took effect on 1 July 2007 but there has been no outreach program or notice to the aggregation industry until audit and enforcement action was initiated in around 2013 (roughly 6 years later). No formal guidance was published until 2019 (CPN 07) and no guidance specific to aggregators appeared until 2021 (CPN016) (updated in 2022). The consultation period in relation to CPN 016 was extremely short, and little of industry's views appeared in the final document.

That guidance we consider to be erroneous as it does not properly reflect the way in which the industry operates as we have stated previously when raising concerns with Revenue NSW.

CPN 016 is wrong in its application

The Commissioner's Practice Note 016 reissued in June 2022 (**CPN 016**) deals with the finance broking industry and the operation of the 'relevant contract' provisions.

We consider the application of the provisions of the Act to the mortgage and finance broking industry to be opaque and unclear. In CPN 016, Revenue NSW is relying heavily on the case of Bridges which centred around the application of payroll tax to Australian Financial Services Licensees to extend the provisions of the Act to the mortgage and finance broking industry. The approach by Revenue NSW seems to be premised on the following:

- The aggregator (as the licensee) holds the relationship with the customer and the broker services the customer on behalf of the license holder.
- Brokers provide a service to aggregators by performing various activities to assist them to comply with their licensing obligations.
- Aggregators provide services to lenders with the assistance of brokers.

We consider the position above to be completely erroneous and fails to accurately reflect the way in which the industry operates. Although some mortgage and finance brokers act as credit representatives of aggregators under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP**), the reality of the commercial relationship between aggregator and broker is the reverse of that between an Australian Financial Service License holder and authorised representative in financial planning.

Brokers provide services to consumers seeking mortgages and likewise business owners seeking access to business lending. In order to do this, a range of operational, administrative and regulatory obligations and requirements must be managed by the broker. Aggregators offer their services to brokers to relieve many of these challenges (such offerings vary across aggregators and include contractual arrangements with lenders, the provision of loan lodgement platforms, the pass-through mechanism for commissions from lenders, compliance services as well as marketing services, education, and training). In exchange for these services, mortgage aggregators are remunerated by brokers for the provision of such services which they supply (in most cases via a flat fee paid by brokers or a percentage of the commission paid to brokers by lenders via the aggregator). In this regard, aggregator revenue is linked to the number of brokers they provide services to - their marketing efforts are therefore typically to attract the business of brokers, not customers seeking mortgages. The aggregator is a facilitator that enables brokers to conduct their own broking business. The customers seeking credit assistance from a broker to facilitate a loan rarely have any contact with the mortgage aggregator,

The regulatory regime presented by the NCCP is but one aspect governing the relationships between aggregators, brokers, consumers, and lenders. To rely solely on a definition within the NCCP is to disregard other material facts relevant to the relationships between these parties.

Arrangements exist where brokers are not credit representatives of their chosen aggregator (i.e. the broker holds their own credit license), and such arrangements are often substantially similar to those where the broker is a credit representative under an aggregator's credit licence. This is reflective of the commercial relationship between the parties materially extending well beyond that of the regulatory regime contained within the NCCP.

Whereas the phrase 'on behalf of', as defined in Bridges, has resulted in brokers being referred to in CPN016 as 'agents' of aggregators, brokers are more appropriately described as acting as agents of consumers. This is consistent with the findings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Royal Commission**) and in particular Recommendation 1.2 in the Final Report. It was recognised by the Royal Commission that the legislative framework contained within the NCCP was not comprehensively sufficient for the purpose of defining roles, relationships and obligations of parties within the industry. This furthers the importance of assessing the nature of relationships within the industry by having regard to both substance and the form.

The NCCP provisions expressly deny any agency relationship between an aggregator and broker but rather confirms that:

- A broker is always only the agent for the consumer; and
- A person cannot be an agent for more than one party involved in a transaction (for example, a broker is always an agent for the borrower and is not able to be an agent for the aggregator or a lender in the same transaction).

For the reasons above, we consider CPN 016 to be erroneous.

Exemptions

CPN 016 also notes that a licensee may be liable for payroll tax unless an exemption applies. The primary exemptions are:

- services are provided by the Agent on no more than 90 days in the financial year
- two or more persons to perform the work required under the contract in the financial year and each worker performs work that is not de minimis, or
- the Chief Commissioner is satisfied that the Agent ordinarily performs services of that kind to the public generally (ie for other unrelated licensees) in the financial year.

The MFAA's members have observed in dealings with Revenue NSW, inconsistency in the way in which Revenue NSW has sought to apply the two or more persons exemptions and the de minimis threshold. This includes:

- The apparent reluctance of Revenue NSW to entertain reasonable proxies or attestations concerning the presence of exemptions, in particular section 32(2)((c)(i) ('+1'), and
- Revenue NSW's apparent reluctance to recognise that commission income covers a substantial amount of broker expense that should be treated economically as a non-labour expense.

There is significant clarity required in terms of the application of the exemption provisions, specifically:

- The roles and activities required to be performed by persons performing mortgage broking activities in order to be eligible to apply the 'two or more persons' or de minimis exemptions.
- The application of the 'two or more persons' or de minimis exemptions when mortgage broking activities are outsourced to a third party by a mortgage broker.
- The application of exemptions on commissions paid to retired brokers or brokers which have ceased providing mortgage broking services to customers.

- The application of the exemptions where mortgage broking businesses are subject to ongoing transitions in scale (i.e. increases scale by hiring additional employees or subsequently downsizes its operations and reduces headcount).

Ultimately, industry needs regulatory certainty to be able to operate effectively. The current approach undertaken by Revenue NSW does not provide this certainty. Until the law is clarified, a moratorium on any further action by Revenue NSW and an amnesty for industry from the application of the Act.

The Hon. Matt Kean MP
Treasurer of New South Wales
Suite 5, 25-29 Hunter Street
Hornsby NSW

By electronic upload

20 February 2023

Dear Treasurer

APPLICATION OF PAYROLL TAX TO THE MORTGAGE AND FINANCE BROKING INDUSTRY

In New South Wales, the Mortgage and Finance Association of Australia (**MFAA**) represents more than 6,000 mortgage and finance brokers, who are both New South Wales residents and small businesses owners.

We are writing to you, as the Treasurer of New South Wales, to express serious concerns on behalf of our members on the unwarranted, unfair, and unreasonable actions undertaken by Revenue NSW regarding the application of the *Payroll Tax Act 2007* (**the Act**) to the mortgage and finance broking industry. We request the Treasurer urgently meet with the MFAA so our concerns can be appropriately addressed.

The actions that we require as a matter of urgency are:

1. Clarification in law of the application of the Act to the mortgage and finance broking industry – currently the law is unclear and is creating deep uncertainty for the industry.
2. That the law be clarified, either through court and/or by way of amendment to legislation with retrospective effect.
3. Until there is certainty for the industry, either through case law or by legislative change, that Revenue NSW suspend by way of a moratorium, all current activity against the mortgage and finance broking sector in New South Wales. This includes requests for information, audits, and assessments.
4. Until the legal position is certain, that Revenue NSW withdraw all fines and penalties levied or proposed on industry participants.

Mortgage and finance brokers facilitate more than 70% of mortgages and at least 4 in 10 small business loans in Australia. They drive competition and choice in the lending market and provide access to credit. In New South Wales alone, mortgage brokers facilitated nearly $12 billion in home loans in the 12 months ended 31 March 2022.

The erroneous and haphazard application of this tax, including retrospective fines and penalties by Revenue NSW threatens the financial stability of the industry. This places at risk the ability for home borrowers and business owners in New South Wales to access the services of a broker for critical credit assistance. This is at a time when access to credit for economic recovery and managing New South Wales household cost of living pressures, in particular a mortgage, is critical for the state.

We request a meeting with you as soon as possible to discuss this matter. We **enclose** a letter to the State Commissioner of Revenue NSW voicing our concerns.

Regards

Anja Pannek
CEO
Mortgage and Finance Association of Australia

Scott Johnston
Chief Commissioner State Revenue
Revenue NSW
Payroll Tax
GPO Box 4042
Sydney NSW 2001

cc Cullen Smyth, Commissioner State Revenue

By email: scott.johnston@revenue.nsw.gov.au
cullen.smythe@revenue.nsw.gov.au

20 February 2023

Dear Chief Commissioner

APPLICATION OF THE PAYROLL TAX ACT (NSW) ON THE MORTGAGE AND FINANCE BROKING INDUSTRY

The Mortgage and Finance Association of Australia (**MFAA**) is writing to Revenue NSW to express serious concerns on behalf of our members on the actions undertaken by Revenue NSW regarding the application of the *Payroll Tax Act 2007* (**the Act**) to the mortgage and finance broking sector. We request that you and your team urgently meet with the MFAA so that our concerns can be addressed appropriately.

As the peak industry body for this sector, we have previously engaged with Revenue NSW and requested this issue be dealt with in a comprehensive and constructive manner that allows our members, both aggregators and mortgage and finance brokers, to operate their businesses in New South Wales with clarity and certainty. This has not occurred to date.

Instead, we understand there to be a significant escalation of activity by Revenue NSW against the industry. Despite a deep lack of clarity of the law, Revenue NSW has continued to pursue actions that purport to apply the 'relevant contract' provisions within the Act to our members, including through audits and through the issue of assessments. Revenue NSW is also a party to at least one matter before the courts.

The actions being taken by Revenue NSW is creating deep commercial uncertainty to the extent aggregation businesses are pausing further investment in New South Wales until this matter is clarified.

We are aware that Revenue NSW is undertaking audit activity and issuing assessments inconsistently on multiple fronts, including but not limited to:

- understanding of commercial arrangements in the sector
- the interpretation of exemptions within the Act
- evidence required to support these exemptions
- application of penalties
- waiving of penalties
- terms on which penalties apply.

The actions that we require as a matter of urgency are:

1. Clarification in law of the application of the Act to the mortgage and finance broking industry – currently the law is unclear and is creating deep uncertainty for the industry.
2. That the law be clarified, either through court and/or by way of amendment to legislation with retrospective effect.
3. Until there is certainty for the industry, either through case law or by legislative change, that Revenue NSW suspend by way of a moratorium, all current activity against the broking sector in New South Wales. This includes requests for information, audits, and assessments.
4. Until the legal position is certain, that Revenue NSW withdraw all fines and penalties levied or proposed to industry participants.

Issues at hand

Under the Act, payroll tax is a self-assessed tax. Broker aggregation groups have self-assessed that payroll tax does not apply to commission arrangements between aggregation groups and brokers. This is because aggregators are service providers facilitating relationships between independent mortgage and finance brokers (and their clients) and lenders. Brokers are not employees of aggregators, nor are they agents of aggregators. They are independent businesses that are either sole operators or employ staff.

As noted above, despite a lack of clarity within the law, Revenue NSW has continued to pursue actions that purport to apply the 'relevant contract' provisions within the Act to mortgage and finance brokers. This is despite there being no legal basis for the application of this tax to this industry.

A deeper analysis of these issues is outlined in **Attachment A**.

What this means for industry

In New South Wales we represent more than 6,000 mortgage and finance brokers,[1] who are both New South Wales residents and small businesses owners. Mortgage and finance brokers in New South Wales have worked tirelessly throughout the pandemic to support their customers and to ensure there is continued access to credit within the economy. These businesses are now busy helping New South Wales homeowners navigate a rising rate environment and increasing cost of living pressures. The sector also facilitates at least 4 in 10 small business loans in Australia, making it systemically important to the access to credit for households and businesses.

Through using the services of a mortgage and finance broker, consumers and small business owners are able to access multiple lenders which has resulted in significant competition and pricing reductions for mortgages and business lending in Australia.[2] Without the competitive pressure mortgage and finance brokers provide, consumers and small businesses would pay more for their mortgages and small business lending needs.

At a time when access to credit for economic recovery and managing cost of living pressures, in particular a mortgage for a resident of NSW, is critical for the state, we are deeply concerned that Revenue NSW is erroneously pursuing taxing the mortgage and finance broking sector.

Industry practice note issued with little consultation

In 2021, the Commissioner of State Revenue issued CPN 016 which purported to be industry specific guidance. The practise note was issued with very little engagement with industry, despite assurances that this would occur in our meeting in late 2020. Furthermore, the guidance was issued 14 years

[1] MFAA Industry Intelligence Service Report 14th Edition pg 26
[2] The Value of Mortgage Broking by Deloitte Access Economics July 2018, see specifically pg 7 that brokers have contributed to a fall in Net Interest Margins by over 3% over the past 30 years.

after the Act come into effect. Our members have called into question why Revenue NSW took this length of time to form a view on the applicability of the Act to the mortgage and finance broking industry.

CPN 016 was further updated in June 2022, with no notification or engagement with industry as to the rationale or basis for this update. Our view is that the reissue of the practice note is a likely result of Revenue NSW continuing to form an understanding of the industry as it conducts its audits, and this is likely indicative that Revenue NSW is continuously testing its interpretation of the law to the industry in a way that does not allow industry any certainty. The updated practise note still does not reflect the commercial arrangements in this industry and is not based on determinations in a court of law for the mortgage and finance broking industry. We have also been made aware that Revenue NSW has applied penalties to industry participants for periods prior to the issuance of this practise note and the original practise note published in 2021.

A number of the matters under review by Revenue NSW have been pursued for multiple years, because of a lack of clarity provided by the Commissioner's team. The erroneous application of this tax coupled with retrospective fines and penalties threatens the financial stability of and introduces extra cost to the sector, for both aggregators and mortgage and finance brokers.

Next steps

Mortgage and finance brokers rely heavily upon services provided to them by aggregators to operate their businesses, as previously detailed to Revenue NSW. If access to these services is discontinued, brokers, as small business owners cannot simply source alternate suppliers for these services in a cost effective or efficient manner. This threatens a broker's ability to support their customers.

We require urgent action on this matter and request a meeting with you as soon as possible to discuss the next steps.

Regards

Anja Pannek
CEO
Mortgage and Finance Association of Australia

ATTACHMENT A

There is significant lack of clarity with the law on the application of payroll tax to the mortgage and finance broking industry. There are key questions that we, on behalf of our members, consider need to be clarified to provide certainty to both Revenue NSW and to the mortgage and finance broking industry to allow for a clear go forward position.

Key questions to be clarified:

1. Whether the contractual arrangements between aggregation groups and independent broker businesses are 'relevant contracts' under section 32 of the Act.
2. The roles and activities required to be performed by persons performing mortgage and finance broking activities in order to be eligible to apply the 'two or more persons' or de minimis exemptions.
3. The application of the 'two or more persons' or de minimis exemptions when mortgage broking activities are outsourced to a third party by a broker.
4. The application of exemptions on commissions paid to retired brokers or brokers which have ceased providing mortgage and finance broking services to customers.
5. The application of the exemptions where mortgage and finance broking businesses are subject to ongoing transitions in scale (i.e. increasing scale by hiring additional employees or subsequently downsizing its operations and reducing headcount).

Because of the lack of clarity of the law, and the significant impact of action taken by Revenue NSW on the mortgage and finance broking industry, and the broader New South Wales economy, until key issues are tested, we ask Revenue NSW to suspend its actions against broker aggregation businesses across New South Wales by way of a moratorium until the legal position is clarified.

THE ISSUES

Payroll tax is a self-assessed tax, with businesses who consider the Act to apply to wages that are above the NSW payroll tax threshold to register for payroll tax.

For the reasons we provide below, broker aggregation groups have self-assessed that payroll tax does not apply for commission arrangements between aggregation groups and brokers.

In 2018, the NSW Law Society wrote to the NSW Government to raise concerns that the Act, and in particular Division 7 was complex and contained a high degree of uncertainty for industries predicated on contractor relationships, where those contractors are independent businesses.

Despite significant lack of clarity within the law, Revenue NSW has sought to retrospectively apply the Act to industry participants. Revenue NSW is relying on the judgement of *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* (**Bridges**) a 2005 case which centred around the application of payroll tax to the financial advice industry. The mortgage and finance broking industry considers Bridges to have **no** application to the mortgage and finance broking industry.

As a result, in nearly all instances of aggregator assessment, it was not until audits commenced that taxpayers were made aware of the impact of Division 7 of the Act. The result of Revenue NSW's current enforcement drive will create extensive hardship for aggregators, mortgage and finance brokers who lose access to aggregation services and ultimately result in higher costs to consumers on their mortgages and lending needs.

The issued assessments encompass both what Revenue NSW considers to be the tax liability for those periods as well as fines, effectively levying a significant bill on industry participants. Revenue NSW's apparent failure to recognise that the width and opacity of the relevant contractor provisions affect many businesses that had not previously faced payroll tax liabilities, and which would not

without clear and direct guidance recognise these liabilities, then allowing such businesses to continue to manage their affairs in ignorance of accruing payroll tax liabilities for lengthy periods. The unsurprising outcome of this is that with the imposition of penalties and interest, many aggregators' financial viability could be placed at risk.

We also note that these retrospective penalty periods seem to also be inconsistently applied, with industry participants indicating these periods range between 5 years and 8 years. The Act took effect on 1 July 2007 but there has been no outreach program or notice to the aggregation industry until audit and enforcement action was initiated in around 2013 (roughly 6 years later). No formal guidance was published until 2019 (CPN 07) and no guidance specific to aggregators appeared until 2021 (CPN016) (updated in 2022). The consultation period in relation to CPN 016 was extremely short, and little of industry's views appeared in the final document.

That guidance we consider to be erroneous as it does not properly reflect the way in which the industry operates as we have stated previously when raising concerns with Revenue NSW.

CPN 016 is wrong in its application

The Commissioner's Practice Note 016 reissued in June 2022 (**CPN 016**) deals with the finance broking industry and the operation of the 'relevant contract' provisions.

We consider the application of the provisions of the Act to the mortgage and finance broking industry to be opaque and unclear. In CPN 016, Revenue NSW is relying heavily on the case of Bridges which centred around the application of payroll tax to Australian Financial Services Licensees to extend the provisions of the Act to the mortgage and finance broking industry. The approach by Revenue NSW seems to be premised on the following:

- The aggregator (as the licensee) holds the relationship with the customer and the broker services the customer on behalf of the license holder.
- Brokers provide a service to aggregators by performing various activities to assist them to comply with their licensing obligations.
- Aggregators provide services to lenders with the assistance of brokers.

We consider the position above to be completely erroneous and fails to accurately reflect the way in which the industry operates. Although some mortgage and finance brokers act as credit representatives of aggregators under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP**), the reality of the commercial relationship between aggregator and broker is the reverse of that between an Australian Financial Service License holder and authorised representative in financial planning.

Brokers provide services to consumers seeking mortgages and likewise business owners seeking access to business lending. In order to do this, a range of operational, administrative and regulatory obligations and requirements must be managed by the broker. Aggregators offer their services to brokers to relieve many of these challenges (such offerings vary across aggregators and include contractual arrangements with lenders, the provision of loan lodgement platforms, the pass-through mechanism for commissions from lenders, compliance services as well as marketing services, education, and training). In exchange for these services, mortgage aggregators are remunerated by brokers for the provision of such services which they supply (in most cases via a flat fee paid by brokers or a percentage of the commission paid to brokers by lenders via the aggregator). In this regard, aggregator revenue is linked to the number of brokers they provide services to - their marketing efforts are therefore typically to attract the business of brokers, not customers seeking mortgages. The aggregator is a facilitator that enables brokers to conduct their own broking business. The customers seeking credit assistance from a broker to facilitate a loan rarely have any contact with the mortgage aggregator,

The regulatory regime presented by the NCCP is but one aspect governing the relationships between aggregators, brokers, consumers, and lenders. To rely solely on a definition within the NCCP is to disregard other material facts relevant to the relationships between these parties.

Arrangements exist where brokers are not credit representatives of their chosen aggregator (i.e. the broker holds their own credit license), and such arrangements are often substantially similar to those where the broker is a credit representative under an aggregator's credit licence. This is reflective of the commercial relationship between the parties materially extending well beyond that of the regulatory regime contained within the NCCP.

Whereas the phrase 'on behalf of', as defined in Bridges, has resulted in brokers being referred to in CPN016 as 'agents' of aggregators, brokers are more appropriately described as acting as agents of consumers. This is consistent with the findings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Royal Commission**) and in particular Recommendation 1.2 in the Final Report. It was recognised by the Royal Commission that the legislative framework contained within the NCCP was not comprehensively sufficient for the purpose of defining roles, relationships and obligations of parties within the industry. This furthers the importance of assessing the nature of relationships within the industry by having regard to both substance and the form.

The NCCP provisions expressly deny any agency relationship between an aggregator and broker but rather confirms that:

- A broker is always only the agent for the consumer; and
- A person cannot be an agent for more than one party involved in a transaction (for example, a broker is always an agent for the borrower and is not able to be an agent for the aggregator or a lender in the same transaction).

For the reasons above, we consider CPN 016 to be erroneous.

Exemptions

CPN 016 also notes that a licensee may be liable for payroll tax unless an exemption applies. The primary exemptions are:

- services are provided by the Agent on no more than 90 days in the financial year
- two or more persons to perform the work required under the contract in the financial year and each worker performs work that is not de minimis, or
- the Chief Commissioner is satisfied that the Agent ordinarily performs services of that kind to the public generally (ie for other unrelated licensees) in the financial year.

The MFAA's members have observed in dealings with Revenue NSW, inconsistency in the way in which Revenue NSW has sought to apply the two or more persons exemptions and the de minimis threshold. This includes:

- The apparent reluctance of Revenue NSW to entertain reasonable proxies or attestations concerning the presence of exemptions, in particular section 32(2)((c)(i) ('+1'), and
- Revenue NSW's apparent reluctance to recognise that commission income covers a substantial amount of broker expense that should be treated economically as a non-labour expense.

There is significant clarity required in terms of the application of the exemption provisions, specifically:

- The roles and activities required to be performed by persons performing mortgage broking activities in order to be eligible to apply the 'two or more persons' or de minimis exemptions.
- The application of the 'two or more persons' or de minimis exemptions when mortgage broking activities are outsourced to a third party by a mortgage broker.
- The application of exemptions on commissions paid to retired brokers or brokers which have ceased providing mortgage broking services to customers.

- The application of the exemptions where mortgage broking businesses are subject to ongoing transitions in scale (i.e. increases scale by hiring additional employees or subsequently downsizes its operations and reduces headcount).

Ultimately, industry needs regulatory certainty to be able to operate effectively. The current approach undertaken by Revenue NSW does not provide this certainty. Until the law is clarified, a moratorium on any further action by Revenue NSW and an amnesty for industry from the application of the Act.

The Hon. Victor Dominello
Minister for Customer Service and Digital Government
Small Business and Fair Trading

By electronic upload

20 February 2023

Dear Minister

APPLICATION OF PAYROLL TAX TO THE MORTGAGE AND FINANCE BROKING INDUSTRY

In New South Wales, the Mortgage and Finance Association of Australia (**MFAA**) represents more than 6,000 mortgage and finance brokers, who are both New South Wales residents and small businesses owners.

We are writing to you, as the Minister for Small Business in New South Wales to express serious concerns on behalf of our members on the unwarranted, unfair, and unreasonable actions undertaken by Revenue NSW regarding the application of the *Payroll Tax Act 2007* (**the Act**) to the mortgage and finance broking industry. We request the Minister to urgently meet with the MFAA so our concerns can be appropriately addressed.

The actions that we require as a matter of urgency are:

1. Clarification in law of the application of the Act to the mortgage and finance broking industry – currently the law is unclear and is creating deep uncertainty for the industry.
2. That the law be clarified, either through court and/or by way of amendment to legislation with retrospective effect.
3. Until there is certainty for the industry, either through case law or by legislative change, that Revenue NSW suspend by way of a moratorium, all current activity against the mortgage and finance broking sector in New South Wales. This includes requests for information, audits, and assessments.
4. Until the legal position is certain, that Revenue NSW withdraw all fines and penalties levied or proposed on industry participants.

Mortgage and finance brokers facilitate more than 70% of mortgages and at least 4 in 10 small business loans in Australia. They drive competition and choice in the lending market and provide access to credit. In New South Wales alone, mortgage brokers facilitated nearly $12 billion in home loans in the 12 months ended 31 March 2022.

The erroneous and haphazard application of this tax, including retrospective fines and penalties by Revenue NSW threatens the financial stability of the industry. This places at risk the ability for home borrowers and business owners in New South Wales to access the services of a broker for critical credit assistance. This is at a time when access to credit for economic recovery and managing New South Wales household cost of living pressures, in particular a mortgage, is critical for the state.

We request a meeting with you as soon as possible to discuss this matter. We **enclose** a letter to the State Commissioner of Revenue NSW voicing our concerns.

Regards

Anja Pannek
CEO
Mortgage and Finance Association of Australia

Scott Johnston
Chief Commissioner State Revenue
Revenue NSW
Payroll Tax
GPO Box 4042
Sydney NSW 2001

cc Cullen Smyth, Commissioner State Revenue

By email: scott.johnston@revenue.nsw.gov.au
cullen.smythe@revenue.nsw.gov.au

20 February 2023

Dear Chief Commissioner

APPLICATION OF THE PAYROLL TAX ACT (NSW) ON THE MORTGAGE AND FINANCE BROKING INDUSTRY

The Mortgage and Finance Association of Australia (**MFAA**) is writing to Revenue NSW to express serious concerns on behalf of our members on the actions undertaken by Revenue NSW regarding the application of the *Payroll Tax Act 2007* (**the Act**) to the mortgage and finance broking sector. We request that you and your team urgently meet with the MFAA so that our concerns can be addressed appropriately.

As the peak industry body for this sector, we have previously engaged with Revenue NSW and requested this issue be dealt with in a comprehensive and constructive manner that allows our members, both aggregators and mortgage and finance brokers, to operate their businesses in New South Wales with clarity and certainty. This has not occurred to date.

Instead, we understand there to be a significant escalation of activity by Revenue NSW against the industry. Despite a deep lack of clarity of the law, Revenue NSW has continued to pursue actions that purport to apply the 'relevant contract' provisions within the Act to our members, including through audits and through the issue of assessments. Revenue NSW is also a party to at least one matter before the courts.

The actions being taken by Revenue NSW is creating deep commercial uncertainty to the extent aggregation businesses are pausing further investment in New South Wales until this matter is clarified.

We are aware that Revenue NSW is undertaking audit activity and issuing assessments inconsistently on multiple fronts, including but not limited to:

- understanding of commercial arrangements in the sector
- the interpretation of exemptions within the Act
- evidence required to support these exemptions
- application of penalties
- waiving of penalties
- terms on which penalties apply.

The actions that we require as a matter of urgency are:

1. Clarification in law of the application of the Act to the mortgage and finance broking industry – currently the law is unclear and is creating deep uncertainty for the industry.
2. That the law be clarified, either through court and/or by way of amendment to legislation with retrospective effect.
3. Until there is certainty for the industry, either through case law or by legislative change, that Revenue NSW suspend by way of a moratorium, all current activity against the broking sector in New South Wales. This includes requests for information, audits, and assessments.
4. Until the legal position is certain, that Revenue NSW withdraw all fines and penalties levied or proposed to industry participants.

Issues at hand

Under the Act, payroll tax is a self-assessed tax. Broker aggregation groups have self-assessed that payroll tax does not apply to commission arrangements between aggregation groups and brokers. This is because aggregators are service providers facilitating relationships between independent mortgage and finance brokers (and their clients) and lenders. Brokers are not employees of aggregators, nor are they agents of aggregators. They are independent businesses that are either sole operators or employ staff.

As noted above, despite a lack of clarity within the law, Revenue NSW has continued to pursue actions that purport to apply the 'relevant contract' provisions within the Act to mortgage and finance brokers. This is despite there being no legal basis for the application of this tax to this industry.

A deeper analysis of these issues is outlined in **Attachment A**.

What this means for industry

In New South Wales we represent more than 6,000 mortgage and finance brokers,[1] who are both New South Wales residents and small businesses owners. Mortgage and finance brokers in New South Wales have worked tirelessly throughout the pandemic to support their customers and to ensure there is continued access to credit within the economy. These businesses are now busy helping New South Wales homeowners navigate a rising rate environment and increasing cost of living pressures. The sector also facilitates at least 4 in 10 small business loans in Australia, making it systemically important to the access to credit for households and businesses.

Through using the services of a mortgage and finance broker, consumers and small business owners are able to access multiple lenders which has resulted in significant competition and pricing reductions for mortgages and business lending in Australia.[2] Without the competitive pressure mortgage and finance brokers provide, consumers and small businesses would pay more for their mortgages and small business lending needs.

At a time when access to credit for economic recovery and managing cost of living pressures, in particular a mortgage for a resident of NSW, is critical for the state, we are deeply concerned that Revenue NSW is erroneously pursuing taxing the mortgage and finance broking sector.

Industry practice note issued with little consultation

In 2021, the Commissioner of State Revenue issued CPN 016 which purported to be industry specific guidance. The practise note was issued with very little engagement with industry, despite assurances that this would occur in our meeting in late 2020. Furthermore, the guidance was issued 14 years

[1] MFAA Industry Intelligence Service Report 14th Edition pg 26
[2] The Value of Mortgage Broking by Deloitte Access Economics July 2018, see specifically pg 7 that brokers have contributed to a fall in Net Interest Margins by over 3% over the past 30 years.

after the Act come into effect. Our members have called into question why Revenue NSW took this length of time to form a view on the applicability of the Act to the mortgage and finance broking industry.

CPN 016 was further updated in June 2022, with no notification or engagement with industry as to the rationale or basis for this update. Our view is that the reissue of the practice note is a likely result of Revenue NSW continuing to form an understanding of the industry as it conducts its audits, and this is likely indicative that Revenue NSW is continuously testing its interpretation of the law to the industry in a way that does not allow industry any certainty. The updated practise note still does not reflect the commercial arrangements in this industry and is not based on determinations in a court of law for the mortgage and finance broking industry. We have also been made aware that Revenue NSW has applied penalties to industry participants for periods prior to the issuance of this practise note and the original practise note published in 2021.

A number of the matters under review by Revenue NSW have been pursued for multiple years, because of a lack of clarity provided by the Commissioner's team. The erroneous application of this tax coupled with retrospective fines and penalties threatens the financial stability of and introduces extra cost to the sector, for both aggregators and mortgage and finance brokers.

Next steps

Mortgage and finance brokers rely heavily upon services provided to them by aggregators to operate their businesses, as previously detailed to Revenue NSW. If access to these services is discontinued, brokers, as small business owners cannot simply source alternate suppliers for these services in a cost effective or efficient manner. This threatens a broker's ability to support their customers.

We require urgent action on this matter and request a meeting with you as soon as possible to discuss the next steps.

Regards

Anja Pannek
CEO
Mortgage and Finance Association of Australia

ATTACHMENT A

There is significant lack of clarity with the law on the application of payroll tax to the mortgage and finance broking industry. There are key questions that we, on behalf of our members, consider need to be clarified to provide certainty to both Revenue NSW and to the mortgage and finance broking industry to allow for a clear go forward position.

Key questions to be clarified:

1. Whether the contractual arrangements between aggregation groups and independent broker businesses are 'relevant contracts' under section 32 of the Act.
2. The roles and activities required to be performed by persons performing mortgage and finance broking activities in order to be eligible to apply the 'two or more persons' or de minimis exemptions.
3. The application of the 'two or more persons' or de minimis exemptions when mortgage broking activities are outsourced to a third party by a broker.
4. The application of exemptions on commissions paid to retired brokers or brokers which have ceased providing mortgage and finance broking services to customers.
5. The application of the exemptions where mortgage and finance broking businesses are subject to ongoing transitions in scale (i.e. increasing scale by hiring additional employees or subsequently downsizing its operations and reducing headcount).

Because of the lack of clarity of the law, and the significant impact of action taken by Revenue NSW on the mortgage and finance broking industry, and the broader New South Wales economy, until key issues are tested, we ask Revenue NSW to suspend its actions against broker aggregation businesses across New South Wales by way of a moratorium until the legal position is clarified.

THE ISSUES

Payroll tax is a self-assessed tax, with businesses who consider the Act to apply to wages that are above the NSW payroll tax threshold to register for payroll tax.

For the reasons we provide below, broker aggregation groups have self-assessed that payroll tax does not apply for commission arrangements between aggregation groups and brokers.

In 2018, the NSW Law Society wrote to the NSW Government to raise concerns that the Act, and in particular Division 7 was complex and contained a high degree of uncertainty for industries predicated on contractor relationships, where those contractors are independent businesses.

Despite significant lack of clarity within the law, Revenue NSW has sought to retrospectively apply the Act to industry participants. Revenue NSW is relying on the judgement of *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* (**Bridges**) a 2005 case which centred around the application of payroll tax to the financial advice industry. The mortgage and finance broking industry considers Bridges to have **no** application to the mortgage and finance broking industry.

As a result, in nearly all instances of aggregator assessment, it was not until audits commenced that taxpayers were made aware of the impact of Division 7 of the Act. The result of Revenue NSW's current enforcement drive will create extensive hardship for aggregators, mortgage and finance brokers who lose access to aggregation services and ultimately result in higher costs to consumers on their mortgages and lending needs.

The issued assessments encompass both what Revenue NSW considers to be the tax liability for those periods as well as fines, effectively levying a significant bill on industry participants. Revenue NSW's apparent failure to recognise that the width and opacity of the relevant contractor provisions affect many businesses that had not previously faced payroll tax liabilities, and which would not

without clear and direct guidance recognise these liabilities, then allowing such businesses to continue to manage their affairs in ignorance of accruing payroll tax liabilities for lengthy periods. The unsurprising outcome of this is that with the imposition of penalties and interest, many aggregators' financial viability could be placed at risk.

We also note that these retrospective penalty periods seem to also be inconsistently applied, with industry participants indicating these periods range between 5 years and 8 years. The Act took effect on 1 July 2007 but there has been no outreach program or notice to the aggregation industry until audit and enforcement action was initiated in around 2013 (roughly 6 years later). No formal guidance was published until 2019 (CPN 07) and no guidance specific to aggregators appeared until 2021 (CPN016) (updated in 2022). The consultation period in relation to CPN 016 was extremely short, and little of industry's views appeared in the final document.

That guidance we consider to be erroneous as it does not properly reflect the way in which the industry operates as we have stated previously when raising concerns with Revenue NSW.

CPN 016 is wrong in its application

The Commissioner's Practice Note 016 reissued in June 2022 (**CPN 016**) deals with the finance broking industry and the operation of the 'relevant contract' provisions.

We consider the application of the provisions of the Act to the mortgage and finance broking industry to be opaque and unclear. In CPN 016, Revenue NSW is relying heavily on the case of Bridges which centred around the application of payroll tax to Australian Financial Services Licensees to extend the provisions of the Act to the mortgage and finance broking industry. The approach by Revenue NSW seems to be premised on the following:

- The aggregator (as the licensee) holds the relationship with the customer and the broker services the customer on behalf of the license holder.
- Brokers provide a service to aggregators by performing various activities to assist them to comply with their licensing obligations.
- Aggregators provide services to lenders with the assistance of brokers.

We consider the position above to be completely erroneous and fails to accurately reflect the way in which the industry operates. Although some mortgage and finance brokers act as credit representatives of aggregators under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP**), the reality of the commercial relationship between aggregator and broker is the reverse of that between an Australian Financial Service License holder and authorised representative in financial planning.

Brokers provide services to consumers seeking mortgages and likewise business owners seeking access to business lending. In order to do this, a range of operational, administrative and regulatory obligations and requirements must be managed by the broker. Aggregators offer their services to brokers to relieve many of these challenges (such offerings vary across aggregators and include contractual arrangements with lenders, the provision of loan lodgement platforms, the pass-through mechanism for commissions from lenders, compliance services as well as marketing services, education, and training). In exchange for these services, mortgage aggregators are remunerated by brokers for the provision of such services which they supply (in most cases via a flat fee paid by brokers or a percentage of the commission paid to brokers by lenders via the aggregator). In this regard, aggregator revenue is linked to the number of brokers they provide services to - their marketing efforts are therefore typically to attract the business of brokers, not customers seeking mortgages. The aggregator is a facilitator that enables brokers to conduct their own broking business. The customers seeking credit assistance from a broker to facilitate a loan rarely have any contact with the mortgage aggregator,

The regulatory regime presented by the NCCP is but one aspect governing the relationships between aggregators, brokers, consumers, and lenders. To rely solely on a definition within the NCCP is to disregard other material facts relevant to the relationships between these parties.

Arrangements exist where brokers are not credit representatives of their chosen aggregator (i.e. the broker holds their own credit license), and such arrangements are often substantially similar to those where the broker is a credit representative under an aggregator's credit licence. This is reflective of the commercial relationship between the parties materially extending well beyond that of the regulatory regime contained within the NCCP.

Whereas the phrase 'on behalf of', as defined in Bridges, has resulted in brokers being referred to in CPN016 as 'agents' of aggregators, brokers are more appropriately described as acting as agents of consumers. This is consistent with the findings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Royal Commission**) and in particular Recommendation 1.2 in the Final Report. It was recognised by the Royal Commission that the legislative framework contained within the NCCP was not comprehensively sufficient for the purpose of defining roles, relationships and obligations of parties within the industry. This furthers the importance of assessing the nature of relationships within the industry by having regard to both substance and the form.

The NCCP provisions expressly deny any agency relationship between an aggregator and broker but rather confirms that:

- A broker is always only the agent for the consumer; and
- A person cannot be an agent for more than one party involved in a transaction (for example, a broker is always an agent for the borrower and is not able to be an agent for the aggregator or a lender in the same transaction).

For the reasons above, we consider CPN 016 to be erroneous.

Exemptions

CPN 016 also notes that a licensee may be liable for payroll tax unless an exemption applies. The primary exemptions are:

- services are provided by the Agent on no more than 90 days in the financial year
- two or more persons to perform the work required under the contract in the financial year and each worker performs work that is not de minimis, or
- the Chief Commissioner is satisfied that the Agent ordinarily performs services of that kind to the public generally (ie for other unrelated licensees) in the financial year.

The MFAA's members have observed in dealings with Revenue NSW, inconsistency in the way in which Revenue NSW has sought to apply the two or more persons exemptions and the de minimis threshold. This includes:

- The apparent reluctance of Revenue NSW to entertain reasonable proxies or attestations concerning the presence of exemptions, in particular section 32(2)((c)(i) ('+1'), and
- Revenue NSW's apparent reluctance to recognise that commission income covers a substantial amount of broker expense that should be treated economically as a non-labour expense.

There is significant clarity required in terms of the application of the exemption provisions, specifically:

- The roles and activities required to be performed by persons performing mortgage broking activities in order to be eligible to apply the 'two or more persons' or de minimis exemptions.
- The application of the 'two or more persons' or de minimis exemptions when mortgage broking activities are outsourced to a third party by a mortgage broker.
- The application of exemptions on commissions paid to retired brokers or brokers which have ceased providing mortgage broking services to customers.

- The application of the exemptions where mortgage broking businesses are subject to ongoing transitions in scale (i.e. increases scale by hiring additional employees or subsequently downsizes its operations and reduces headcount).

Ultimately, industry needs regulatory certainty to be able to operate effectively. The current approach undertaken by Revenue NSW does not provide this certainty. Until the law is clarified, a moratorium on any further action by Revenue NSW and an amnesty for industry from the application of the Act.

Chris Minns MP
The Hon. Daniel Mookhey MLC
Anoulack Chanthivong MP
Yasmin Catley MP

By email: kogarah@parliament.nsw.gov.au
daniel.mookhey@parliament.nsw.gov.au
macquariefields@parliament.nsw.gov.au
swansea@parliament.nsw.gov.au

20 February 2023

Dear Ministers

APPLICATION OF PAYROLL TAX TO THE MORTGAGE AND FINANCE BROKING INDUSTRY

In New South Wales, the Mortgage and Finance Association of Australia (**MFAA**) represents more than 6,000 mortgage and finance brokers, who are both New South Wales residents and small businesses owners.

We are writing to you to express serious concerns on behalf of our members on the unwarranted, unfair, and unreasonable actions undertaken by Revenue NSW regarding the application of the *Payroll Tax Act 2007* (**the Act**) to the mortgage and finance broking industry. We note we have a meeting with the Shadow Finance Minister Mr Chanthivong this week to discuss our concerns.

The actions that we require as a matter of urgency are:

1. Clarification in law of the application of the Act to the mortgage and finance broking industry – currently the law is unclear and is creating deep uncertainty for the industry.
2. That the law be clarified, either through court and/or by way of amendment to legislation with retrospective effect.
3. Until there is certainty for the industry, either through case law or by legislative change, that Revenue NSW suspend by way of a moratorium, all current activity against the mortgage and finance broking sector in New South Wales. This includes requests for information, audits, and assessments.
4. Until the legal position is certain, that Revenue NSW withdraw all fines and penalties levied or proposed on industry participants.

Mortgage and finance brokers facilitate more than 70% of mortgages and at least 4 in 10 small business loans in Australia. They drive competition and choice in the lending market and provide access to credit. In New South Wales alone, mortgage brokers facilitated nearly $12 billion in home loans in the 12 months ended 31 March 2022.

The erroneous and haphazard application of this tax, including retrospective fines and penalties by Revenue NSW threatens the financial stability of the industry. This places at risk the ability for home borrowers and business owners in New South Wales to access the services of a broker for critical credit assistance. This is at a time when access to credit for economic recovery and managing New South Wales household cost of living pressures, in particular a mortgage, is critical for the state.

We **enclose** a letter to the State Commissioner of Revenue NSW voicing our concerns.

Regards

Anja Pannek
CEO
Mortgage and Finance Association of Australia

Scott Johnston
Chief Commissioner State Revenue
Revenue NSW
Payroll Tax
GPO Box 4042
Sydney NSW 2001

cc Cullen Smyth, Commissioner State Revenue

By email: scott.johnston@revenue.nsw.gov.au
cullen.smythe@revenue.nsw.gov.au

20 February 2023

Dear Chief Commissioner

APPLICATION OF THE PAYROLL TAX ACT (NSW) ON THE MORTGAGE AND FINANCE BROKING INDUSTRY

The Mortgage and Finance Association of Australia (**MFAA**) is writing to Revenue NSW to express serious concerns on behalf of our members on the actions undertaken by Revenue NSW regarding the application of the *Payroll Tax Act 2007* (**the Act**) to the mortgage and finance broking sector. We request that you and your team urgently meet with the MFAA so that our concerns can be addressed appropriately.

As the peak industry body for this sector, we have previously engaged with Revenue NSW and requested this issue be dealt with in a comprehensive and constructive manner that allows our members, both aggregators and mortgage and finance brokers, to operate their businesses in New South Wales with clarity and certainty. This has not occurred to date.

Instead, we understand there to be a significant escalation of activity by Revenue NSW against the industry. Despite a deep lack of clarity of the law, Revenue NSW has continued to pursue actions that purport to apply the 'relevant contract' provisions within the Act to our members, including through audits and through the issue of assessments. Revenue NSW is also a party to at least one matter before the courts.

The actions being taken by Revenue NSW is creating deep commercial uncertainty to the extent aggregation businesses are pausing further investment in New South Wales until this matter is clarified.

We are aware that Revenue NSW is undertaking audit activity and issuing assessments inconsistently on multiple fronts, including but not limited to:

- understanding of commercial arrangements in the sector
- the interpretation of exemptions within the Act
- evidence required to support these exemptions
- application of penalties
- waiving of penalties
- terms on which penalties apply.

The actions that we require as a matter of urgency are:

1. Clarification in law of the application of the Act to the mortgage and finance broking industry – currently the law is unclear and is creating deep uncertainty for the industry.
2. That the law be clarified, either through court and/or by way of amendment to legislation with retrospective effect.
3. Until there is certainty for the industry, either through case law or by legislative change, that Revenue NSW suspend by way of a moratorium, all current activity against the broking sector in New South Wales. This includes requests for information, audits, and assessments.
4. Until the legal position is certain, that Revenue NSW withdraw all fines and penalties levied or proposed to industry participants.

Issues at hand

Under the Act, payroll tax is a self-assessed tax. Broker aggregation groups have self-assessed that payroll tax does not apply to commission arrangements between aggregation groups and brokers. This is because aggregators are service providers facilitating relationships between independent mortgage and finance brokers (and their clients) and lenders. Brokers are not employees of aggregators, nor are they agents of aggregators. They are independent businesses that are either sole operators or employ staff.

As noted above, despite a lack of clarity within the law, Revenue NSW has continued to pursue actions that purport to apply the 'relevant contract' provisions within the Act to mortgage and finance brokers. This is despite there being no legal basis for the application of this tax to this industry.

A deeper analysis of these issues is outlined in **Attachment A**.

What this means for industry

In New South Wales we represent more than 6,000 mortgage and finance brokers,[1] who are both New South Wales residents and small businesses owners. Mortgage and finance brokers in New South Wales have worked tirelessly throughout the pandemic to support their customers and to ensure there is continued access to credit within the economy. These businesses are now busy helping New South Wales homeowners navigate a rising rate environment and increasing cost of living pressures. The sector also facilitates at least 4 in 10 small business loans in Australia, making it systemically important to the access to credit for households and businesses.

Through using the services of a mortgage and finance broker, consumers and small business owners are able to access multiple lenders which has resulted in significant competition and pricing reductions for mortgages and business lending in Australia.[2] Without the competitive pressure mortgage and finance brokers provide, consumers and small businesses would pay more for their mortgages and small business lending needs.

At a time when access to credit for economic recovery and managing cost of living pressures, in particular a mortgage for a resident of NSW, is critical for the state, we are deeply concerned that Revenue NSW is erroneously pursuing taxing the mortgage and finance broking sector.

Industry practice note issued with little consultation

In 2021, the Commissioner of State Revenue issued CPN 016 which purported to be industry specific guidance. The practise note was issued with very little engagement with industry, despite assurances that this would occur in our meeting in late 2020. Furthermore, the guidance was issued 14 years after the Act come into effect. Our members have called into question why Revenue NSW took this

[1] MFAA Industry Intelligence Service Report 14th Edition pg 26
[2] The Value of Mortgage Broking by Deloitte Access Economics July 2018, see specifically pg 7 that brokers have contributed to a fall in Net Interest Margins by over 3% over the past 30 years.

length of time to form a view on the applicability of the Act to the mortgage and finance broking industry.

CPN 016 was further updated in June 2022, with no notification or engagement with industry as to the rationale or basis for this update. Our view is that the reissue of the practice note is a likely result of Revenue NSW continuing to form an understanding of the industry as it conducts its audits, and this is likely indicative that Revenue NSW is continuously testing its interpretation of the law to the industry in a way that does not allow industry any certainty. The updated practise note still does not reflect the commercial arrangements in this industry and is not based on determinations in a court of law for the mortgage and finance broking industry. We have also been made aware that Revenue NSW has applied penalties to industry participants for periods prior to the issuance of this practise note and the original practise note published in 2021.

A number of the matters under review by Revenue NSW have been pursued for multiple years, because of a lack of clarity provided by the Commissioner's team. The erroneous application of this tax coupled with retrospective fines and penalties threatens the financial stability of and introduces extra cost to the sector, for both aggregators and mortgage and finance brokers.

Next steps

Mortgage and finance brokers rely heavily upon services provided to them by aggregators to operate their businesses, as previously detailed to Revenue NSW. If access to these services is discontinued, brokers, as small business owners cannot simply source alternate suppliers for these services in a cost effective or efficient manner. This threatens a broker's ability to support their customers.

We require urgent action on this matter and request a meeting with you as soon as possible to discuss the next steps.

Regards

Anja Pannek
CEO
Mortgage and Finance Association of Australia

ATTACHMENT A

There is significant lack of clarity with the law on the application of payroll tax to the mortgage and finance broking industry. There are key questions that we, on behalf of our members, consider need to be clarified to provide certainty to both Revenue NSW and to the mortgage and finance broking industry to allow for a clear go forward position.

Key questions to be clarified:

1. Whether the contractual arrangements between aggregation groups and independent broker businesses are 'relevant contracts' under section 32 of the Act.
2. The roles and activities required to be performed by persons performing mortgage and finance broking activities in order to be eligible to apply the 'two or more persons' or de minimis exemptions.
3. The application of the 'two or more persons' or de minimis exemptions when mortgage broking activities are outsourced to a third party by a broker.
4. The application of exemptions on commissions paid to retired brokers or brokers which have ceased providing mortgage and finance broking services to customers.
5. The application of the exemptions where mortgage and finance broking businesses are subject to ongoing transitions in scale (i.e. increasing scale by hiring additional employees or subsequently downsizing its operations and reducing headcount).

Because of the lack of clarity of the law, and the significant impact of action taken by Revenue NSW on the mortgage and finance broking industry, and the broader New South Wales economy, until key issues are tested, we ask Revenue NSW to suspend its actions against broker aggregation businesses across New South Wales by way of a moratorium until the legal position is clarified.

THE ISSUES

Payroll tax is a self-assessed tax, with businesses who consider the Act to apply to wages that are above the NSW payroll tax threshold to register for payroll tax.

For the reasons we provide below, broker aggregation groups have self-assessed that payroll tax does not apply for commission arrangements between aggregation groups and brokers.

In 2018, the NSW Law Society wrote to the NSW Government to raise concerns that the Act, and in particular Division 7 was complex and contained a high degree of uncertainty for industries predicated on contractor relationships, where those contractors are independent businesses.

Despite significant lack of clarity within the law, Revenue NSW has sought to retrospectively apply the Act to industry participants. Revenue NSW is relying on the judgement of *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* (**Bridges**) a 2005 case which centred around the application of payroll tax to the financial advice industry. The mortgage and finance broking industry considers Bridges to have **no** application to the mortgage and finance broking industry.

As a result, in nearly all instances of aggregator assessment, it was not until audits commenced that taxpayers were made aware of the impact of Division 7 of the Act. The result of Revenue NSW's current enforcement drive will create extensive hardship for aggregators, mortgage and finance brokers who lose access to aggregation services and ultimately result in higher costs to consumers on their mortgages and lending needs.

The issued assessments encompass both what Revenue NSW considers to be the tax liability for those periods as well as fines, effectively levying a significant bill on industry participants. Revenue NSW's apparent failure to recognise that the width and opacity of the relevant contractor provisions affect many businesses that had not previously faced payroll tax liabilities, and which would not

without clear and direct guidance recognise these liabilities, then allowing such businesses to continue to manage their affairs in ignorance of accruing payroll tax liabilities for lengthy periods. The unsurprising outcome of this is that with the imposition of penalties and interest, many aggregators' financial viability could be placed at risk.

We also note that these retrospective penalty periods seem to also be inconsistently applied, with industry participants indicating these periods range between 5 years and 8 years. The Act took effect on 1 July 2007 but there has been no outreach program or notice to the aggregation industry until audit and enforcement action was initiated in around 2013 (roughly 6 years later). No formal guidance was published until 2019 (CPN 07) and no guidance specific to aggregators appeared until 2021 (CPN016) (updated in 2022). The consultation period in relation to CPN 016 was extremely short, and little of industry's views appeared in the final document.

That guidance we consider to be erroneous as it does not properly reflect the way in which the industry operates as we have stated previously when raising concerns with Revenue NSW.

CPN 016 is wrong in its application

The Commissioner's Practice Note 016 reissued in June 2022 (**CPN 016**) deals with the finance broking industry and the operation of the 'relevant contract' provisions.

We consider the application of the provisions of the Act to the mortgage and finance broking industry to be opaque and unclear. In CPN 016, Revenue NSW is relying heavily on the case of Bridges which centred around the application of payroll tax to Australian Financial Services Licensees to extend the provisions of the Act to the mortgage and finance broking industry. The approach by Revenue NSW seems to be premised on the following:

- The aggregator (as the licensee) holds the relationship with the customer and the broker services the customer on behalf of the license holder.
- Brokers provide a service to aggregators by performing various activities to assist them to comply with their licensing obligations.
- Aggregators provide services to lenders with the assistance of brokers.

We consider the position above to be completely erroneous and fails to accurately reflect the way in which the industry operates. Although some mortgage and finance brokers act as credit representatives of aggregators under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP**), the reality of the commercial relationship between aggregator and broker is the reverse of that between an Australian Financial Service License holder and authorised representative in financial planning.

Brokers provide services to consumers seeking mortgages and likewise business owners seeking access to business lending. In order to do this, a range of operational, administrative and regulatory obligations and requirements must be managed by the broker. Aggregators offer their services to brokers to relieve many of these challenges (such offerings vary across aggregators and include contractual arrangements with lenders, the provision of loan lodgement platforms, the pass-through mechanism for commissions from lenders, compliance services as well as marketing services, education, and training). In exchange for these services, mortgage aggregators are remunerated by brokers for the provision of such services which they supply (in most cases via a flat fee paid by brokers or a percentage of the commission paid to brokers by lenders via the aggregator). In this regard, aggregator revenue is linked to the number of brokers they provide services to - their marketing efforts are therefore typically to attract the business of brokers, not customers seeking mortgages. The aggregator is a facilitator that enables brokers to conduct their own broking business. The customers seeking credit assistance from a broker to facilitate a loan rarely have any contact with the mortgage aggregator,

The regulatory regime presented by the NCCP is but one aspect governing the relationships between aggregators, brokers, consumers, and lenders. To rely solely on a definition within the NCCP is to disregard other material facts relevant to the relationships between these parties.

Arrangements exist where brokers are not credit representatives of their chosen aggregator (i.e. the broker holds their own credit license), and such arrangements are often substantially similar to those where the broker is a credit representative under an aggregator's credit licence. This is reflective of the commercial relationship between the parties materially extending well beyond that of the regulatory regime contained within the NCCP.

Whereas the phrase 'on behalf of', as defined in Bridges, has resulted in brokers being referred to in CPN016 as 'agents' of aggregators, brokers are more appropriately described as acting as agents of consumers. This is consistent with the findings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Royal Commission**) and in particular Recommendation 1.2 in the Final Report. It was recognised by the Royal Commission that the legislative framework contained within the NCCP was not comprehensively sufficient for the purpose of defining roles, relationships and obligations of parties within the industry. This furthers the importance of assessing the nature of relationships within the industry by having regard to both substance and the form.

The NCCP provisions expressly deny any agency relationship between an aggregator and broker but rather confirms that:

- A broker is always only the agent for the consumer; and
- A person cannot be an agent for more than one party involved in a transaction (for example, a broker is always an agent for the borrower and is not able to be an agent for the aggregator or a lender in the same transaction).

For the reasons above, we consider CPN 016 to be erroneous.

Exemptions

CPN 016 also notes that a licensee may be liable for payroll tax unless an exemption applies. The primary exemptions are:

- services are provided by the Agent on no more than 90 days in the financial year
- two or more persons to perform the work required under the contract in the financial year and each worker performs work that is not de minimis, or
- the Chief Commissioner is satisfied that the Agent ordinarily performs services of that kind to the public generally (ie for other unrelated licensees) in the financial year.

The MFAA's members have observed in dealings with Revenue NSW, inconsistency in the way in which Revenue NSW has sought to apply the two or more persons exemptions and the de minimis threshold. This includes:

- The apparent reluctance of Revenue NSW to entertain reasonable proxies or attestations concerning the presence of exemptions, in particular section 32(2)((c)(i) ('+1'), and
- Revenue NSW's apparent reluctance to recognise that commission income covers a substantial amount of broker expense that should be treated economically as a non-labour expense.

There is significant clarity required in terms of the application of the exemption provisions, specifically:

- The roles and activities required to be performed by persons performing mortgage broking activities in order to be eligible to apply the 'two or more persons' or de minimis exemptions.
- The application of the 'two or more persons' or de minimis exemptions when mortgage broking activities are outsourced to a third party by a mortgage broker.
- The application of exemptions on commissions paid to retired brokers or brokers which have ceased providing mortgage broking services to customers.

- The application of the exemptions where mortgage broking businesses are subject to ongoing transitions in scale (i.e. increases scale by hiring additional employees or subsequently downsizes its operations and reduces headcount).

Ultimately, industry needs regulatory certainty to be able to operate effectively. The current approach undertaken by Revenue NSW does not provide this certainty. Until the law is clarified, a moratorium on any further action by Revenue NSW and an amnesty for industry from the application of the Act.