Submission No 32

INQUIRY INTO APPLICATION OF THE CONTRACTOR AND EMPLOYMENT AGENT PROVISIONS IN THE PAYROLL TAX ACT 2007

Organisation: Finance Brokers Association of Australasia Ltd

Date Received: 7 February 2025

Parliament of New South Wales
Legislative Council

07 February 2025

Inquiry into the application of the contractor and employment agent provisions in the Payroll Tax Act 2007

The FBAA welcomes the opportunity to make a submission to this inquiry. We represent more than 13,000 finance and mortgage brokers across Australia and New Zealand working under various arrangements including as independent contractors, self-employed and small business owners.

We have been in consultation with many businesses that are extremely concerned with potential ramifications of the decision of the NSW Supreme Court in the matter of Loan Market Group Pty Ltd v Chief Commissioner of State Revenue; Loan Market Pty Ltd v Chief Commissioner of State Revenue [2024] NSWSC 390. We put our full support behind the NSW legislative council amending the law to clarify that arrangements between aggregators and mortgage brokers should remain excluded from payroll tax.

We wrote to the Premier's department in April 2024 detailing our concerns and attach a copy of that letter to this short submission.

The FBAA is aware of submissions made to this inquiry by Denton's Lawyers, Finsure Finance and Insurance Pty Ltd and Yellow Brick Road Group and we stand united with these bodies and the positions they have advanced through their submissions.

Yours faithfully

Peter J White AM MAICD
Managing Director of the FAMNZ
& FBAA in Australia

Life Member – FBAA
Life Member – Order of Australia Association

Advisory Board Member – Small Business Association of Australia (SBAA)
Chairman of the Global Board of Governors – International Mortgage Brokers Federation (IMBF)

The Premier's Department of NSW
GPO Box 5341
Sydney NSW 2001

30 April 2024

We write concerning the decision of the NSW Supreme Court in the matter of Loan Market Group Pty Ltd v Chief Commissioner of State Revenue; Loan Market Pty Ltd v Chief Commissioner of State Revenue [2024] NSWSC 390.

The decision in this matter sets a dangerous precedent and we ask the NSW Government to take urgent steps to address the worrying consequences by effecting immediate legislative reform.

We appreciate that Loan Market has an opportunity to appeal the decision however this situation should not have come to pass where a business must litigate a matter up to NSW Supreme Court to defend itself against a government authority incorrectly characterising a commercial relationship then demanding payment based on that incorrect characterisation.

We recognise that this judgement was quite technical and involved examination of multiple arrangements and a number of different legal entities. We are not wanting to be drawn into technical legal argument in this paper. Instead, our objective is to highlight to Government that the current drafting of the relevant law has potential to create enormous disruption and damage and the outcome of this case at a high level offends every commonsense and commercial principle. The ramifications of this judgment not only affect aggregators and mortgage brokers but challenge arrangements that have been in place for more than 20 years. We are talking about financial advice firms and authorised representatives appointed under the Corporations Act 2001 in addition to credit representatives under the *National Consumer Credit Protection Act* 2009.

For the sake of commercial certainty and fairness, the NSW Government must change the legislation to prevent the risk of a matters such as this recurring.

In the Loan Market matter, His Honor Justice Richardson concluded that mortgage brokers provided services to the aggregator and this finding supported the consequential determinations that the aggregator was an "employer" and that amounts paid by banks to mortgage brokers where such payments were processed through Loan Market were "wages" thus triggering a payroll tax liability.

It is abundantly clear that aggregators are not employers of mortgage brokers who are appointed as credit representatives. Moreover, we believe His Honor mis-characterised the relationship between a broker and an aggregator where he found that brokers provided services to Loan Market, including services of "assisting LML to secure new customers for lenders". The situation is, in fact, quite the opposite. Loan Market derives a benefit from the broker's success, but brokers are not responsible for ensuring the success of Loan Market.

Aggregators perform services for brokers. They exist to facilitate access by brokers to a broader panel of lenders. Without an aggregator, each mortgage broker would be required to gain separate accreditation with each lender before they could recommend their products. This would effectively restrict a mortgage broker to becoming accredited with, and only recommending, a small number of products which is a poor consumer outcome.

Using an apt analogy, the decision of the Court that brokers are providing services to aggregators is the same as suggesting someone using Microsoft Word is providing services to Microsoft. Aggregators are a tool used by brokers to increase their access to a larger panel of lenders which in turn helps each broker build a larger business with more customers and delivers better consumer outcomes.

Brokers work 100% for the customer. This is made explicit by the changes made to the NCCP Act 2010 following the Banking Royal Commission where mortgage brokers were subjected to a duty to act in the best interest of their customers (being the consumer borrower).

The evidence provided by Sam White and detailed from paragraph 46 of the judgment accurately summarises the nature of the aggregator and mortgage broker relationship.

Mortgage brokers are hard-working, small business owners. They shoulder enormous operational risk. Each mortgage broker must hold their own PI Insurance and their own membership to external dispute resolution. They have their own office space, stationery, service providers. All of their business income is "on spec" and they only earn income when they facilitate loan applications that actually settle. Even after the loan is settled, brokers are liable to have commission clawed back for a period of up to 2 years. No part of this arrangement resembles an employer-employee arrangement. If a mortgage broker does not secure settled loan applications, they earn no money. If they were employed and receiving a wage, their employer would be obligated to pay that wage regardless. Mortgage broker commission remuneration does not have the characteristics of a wage. Mortgage brokers employ people and outsource services. Employees do none of these things.

Brokers are now identified as facilitating close to 70% of all mortgage applications in this country. These are applications that are:

- for a mortgage;
- by a consumer;
- made to a bank.

Whether a broker submits an application directly to the bank or uses the administrative services of an aggregator changes nothing of the legal relationship the broker has with their customer. The income paid to the broker for placing the loan application is paid by the bank. This is a commission paid to the broker for a service provided to the customer. Banks pay commission to brokers for arranging loans because they recognise it is a cheaper source of funding loan applications than having in-house staff. Where a bank may pay a salaried staff member $100,000 or more to facilitate applications by customers that come to the branch, banks ONLY pay commission to a broker when an application successfully settles. This is the most efficient form of funding for a bank because it only pays a broker when they get a paying client. For salaried staff, the bank incurs the wage cost regardless of how many applications the staff member facilitates. This is one of the main reasons that applications from mortgage brokers have risen as a percentage of market share from below 30% to more almost 70% of applications in a space of just five or six years.

What is clear is that the arrangement suits the broker and it suits the bank. The broker works for the consumer. The bank gains a customer. The mortgage is merely the end product obtained. The bank has no relationship with the broker other than to pay them when a customer application is approved.

An aggregator sits in the middle of this transaction and provides support services to brokers to increase their access to a wider range of products. Aggregators may also provide additional services such as training and administration, but these are all services provided **by** the Aggregator **to** the broker. The broker uses the services of the aggregator. They most definitely do not provide services to the aggregator as asserted by His Honor in the Loan Market case.

Concerns with application of provisions of the NCCP Act

The *National Consumer Credit Protection Act* 2010 is the primary legislation that impacts mortgage brokers. The NCCP Act defines the term mortgage broker and dictates the appointment arrangements between licensees and representatives. A representative of a credit licensee may be **either** an employee **or** a credit representative. Section 29(3) of the NCCP Act makes it clear that they cannot be both. Under the NCCP Act, the terms *employee* and *credit representative* are mutually exclusive.

It follows that if a person is appointed as a credit representative of a licensee that they are not an employee. It is difficult to reconcile the decision of the NSW Supreme Court against this simple fact.

The Court made observations that clauses in the agreement between Loan Market and each broker supported a finding that the aggregator was an “employer” of the broker. The Court did not acknowledge section 29(3) of the NCCP Act in its judgment.

Sections 75-77 of the NCCP Act make it clear that a credit licensee is liable for the conduct of all people it permits to act under its licence whether they be employees or credit representatives. These clauses do not seek to change the nature of the relationship between a credit licensee and the representative. The liability clause exists to reinforce to a credit licensee that they are liable for the conduct of any person they allow to operate under their licence – whether an employee or a credit representative (i.e. a non-employee).

What makes the reasoning ironic is that a Court would find that clauses in a credit representative agreement would create an employer/employee relationship where it is a NCCP Act requirement for a licensee to use the written agreement for the appointment of non-employee representatives. The Court asserts that the agreement, which is created as a consequence of the non-employee relationship between a licensee and credit representative, actually creates an employer-employee relationship for the purposes of the NSW Payroll Tax Act.

The effect of the Court’s decision is to potentially make every contractor or non-employee appointed under written agreement to a credit or financial services licensee an employee of that licensee under NSW payroll tax legislation. Even where Federal legislation including the Corporations Act, NCCP Act and Taxation Act all recognise that they are not.

To have His Honor arrive at this decision demonstrates that the law in NSW is at best ambiguous and at worst, simply wrong. His Honor at paragraph 208 of the judgement observed that the very specific wording of the legislation operated to exclude “relationships such as those in the present case where the contractor is a genuine independent contractor but may not come within any of the exclusions”.

The anti-avoidance provisions of the NSW Payroll Tax legislation are catching genuine contractor relationships.

It is incumbent on the NSW Government to ensure this is rectified as a matter of priority.

The objective of our correspondence is to open dialogue with the NSW Government to review the legislation to properly recognise mortgage broker arrangements with aggregators as arrangements that should not result in an aggregator being deemed an employer of an independent mortgage broker appointed as a credit representative.

There are multiple potential approaches that may be considered to addressing this issue including the creation of a further exemption or making modifications to the wording of the primary legislation. We would be pleased to make further submissions to assist Government with this task.

Yours faithfully

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