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Payment Times Reporting Act Review Secretariat
Small and Family Business Division

The Treasury
Langton Crescent
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Via email: PaymentTimesReview@treasury.gov.au

The FBAA appreciates the opportunity to make a submission in relation to the Statutory Review of the Payment Times Reporting Act 2020.

We have some specific concerns we wish to draw out in this consultation paper response. Our submission does not address each of the questions posed in the consultation paper.

The FBAA represents more than 10,500 members, most of who are self-employed individuals or small businesses. Our members are heavily impacted by slow payment times and the unfair application of provisions created under the National Consumer Credit Protection Act.

For the majority of FBAA members, their income is derived from commission payments from financial institutions. Different financial institutions adopt different approaches to making payments, however commissions are usually calculated at the time an application is submitted to the institution and paid within a reasonable period after settlement of the loan facility.

There has been substantial interference with the payment of commissions from financial institutions to brokers resulting in members reporting that they are waiting up to 12 months for commission payment on some settled loan applications.

This is a growing problem. Financial institutions are delaying and interfering with payments to brokers citing an obligation to comply with rules under the National Consumer Credit Act 2009.

These “rules” relate to conflicted remuneration which is part of the best interests duty for mortgage brokers introduced into the NCCP Act in response to recommendations from the Royal Commission into misconduct in the Banking, Superannuation and Financial Services Industry. Under the best interests duty provisions, the legislation imposes a ban on licensees paying, and brokers accepting, conflicted remuneration.

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The post-Royal Commission reforms introduced additional rules for how commissions were to be calculated. Financial institutions have taken a liberal interpretation of the rules to justify withholding and delaying commission payments to brokers – in some cases for up to 12 month. FBAA market research reveals a 342% increase in this type of behaviour over the past 2 years.

What are the rules?

Section 158N of the NCCP Act introduces the concept of conflicted remuneration. The regulations provide detail as to what it is.

The most relevant situation identified by the regulations is where a ***drawdown cap*** applies. This is addressed by *National Consumer Credit Protection Regulations* 28VB(3)(d), 28VC and 28VD.

In simple terms, the conflicted remuneration provisions seek to ensure that a broker can only receive commission on the amount of a loan that is drawn down and utilised by a consumer within the first 12 months after the loan is approved. This requirement was introduced in response to (misguided) concerns that brokers could increase their commission income by recommending consumers borrow more money than they required. For example, if a consumer required $900,000 to buy a home but they secured a loan for $1,000,000 from the bank with the intention of leaving $100,000 undrawn for future contingencies, Government was concerned to ensure that a broker could only receive commission on the $900,000 and not the $1,000,000….unless the consumer subsequently utilised that additional $100,000 within 12 months.

To give effect to this, Government introduced a drawdown cap and drafted regulations to say that a broker could only receive commission on the maximum amount drawdown net of any offset within the first 12 months of the loan. Regulation 28VD enunciates this requirement.

Owing to the drafting of Regulation 28VD, financial institutions must monitor utilisation of affected accounts for a period of 12 months to determine the maximum figure of drawn down funds net of offset during that period. This determines the maximum amount of commission that can be paid to a mortgage broker. Some financial institutions delay commission payments to brokers until the 12 month period has elapsed and the final maximum drawn down amount net of offset can be definitively identified.

It was always our expectation that commission would be paid on loans and that any subsequent adjustment required by the net of offset calculations would be made at a later stage.

We would like to see this grossly unfair practice addressed through any reforms to the Payments Times Reporting Act. We support the introduction of statutorily mandated timeframes.

Question 3
In response to question 3 **we support 30 days being a reasonable timeframe in which small business in our industry services sector** should be paid.

An issue that is raised for us by the discussion around the guiding principles are the notions of ***payment term*** and ***payment practice***. What we are seeing with large financial institutions is inconsistent behaviour around when they determine that a payment becomes due. An entity may claim to have good conduct in respect of making payment within their payment terms of 30 days, while the potential poor behaviour sits around how that time period is determined. Perhaps there is scope to introduce additional consideration around the term ***payment practice*** to help identify practices that attempt to manipulate the contractually agreed period for payment. If a question were to focus on the period of time between when a product or service is provided and when full payment is made, this could identify potential mischief.

The above point is also relevant to questions 4, 5 and 6.

The information presently reported to the Payment Times Report Register does not appear to reflect the extraordinary delays between when an application is lodged by a broker and commission payment is made. This may be caused by an interpretation that a present obligation to pay a commission only arises after any deferral or set-off period has expired.

We support mandated payment periods and also support work being done to be undertaken to ensure there is no ability to manipulate the timing of when an amount becomes contractually due.

Yours faithfully

Peter J White AM MAICD
Managing Director

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)