

Answers to questions on notice - Revenue NSW - Hearing 24 May 2021

Question 1 (page 20 of the Transcript)

The Hon. DANIEL MOOKHEY: And you are aware that Woolworths has admitted to what they say is an inadvertent underpayment to the magnitude of \$390 million?

Mr JOHNSTON: I can see that, yes.

The Hon. DANIEL MOOKHEY: Can you take us through what steps Revenue NSW has taken to investigate that \$390 million underpayment?

Mr JOHNSTON: To a point, while these are our documents within here, it is very difficult for us to give operational context to every action that we are taking. This information is not new to us and, as you would have seen in many of the documents in the Standing Order 52 that we provided, we have ongoing discussions and investigations with a whole range of businesses, including this one. To the point of what we are working through when we talk about payroll tax, that has to work across the country with the harmonised settings. And so, we work with other States in this endeavour, as well, which provides complexity. It gives us harmony across the decisions across the country, but it also provides some challenges around moving through it quickly. To a point of understanding this—yes, we are well aware of it and we continue to pursue it. The specific actions—I would not have that information at front of mind.

The Hon. ADAM SEARLE: Could you take that on notice?

Mr JOHNSTON: I can take that on notice to give more detail, yes.

Question 1 Response:

The \$390 million underpayment is a national figure, with NSW underpayments accounting for approximately 40% of this amount. Woolworths have also included compensation payments to affected employees in the \$390 million, which are not taxable wages for payroll tax purposes.

Revenue NSW contacted Woolworths on 4 November 2019 following its media release on 30 October 2019 on underpaid wages. A voluntary disclosure from Woolworths was received by Revenue NSW on 28 November 2019.

Revenue NSW agreed to take the lead on behalf of all State and Territory Revenue Offices for the wage underpayment review of Woolworths as their head office is located in NSW. Woolworths voluntarily paid payroll tax on the underpaid wages and included these payments in their monthly returns. They commenced making payments for unpaid wages in

December 2019 covering the period September 2017 to August 2019, with Revenue NSW receiving the first payment in January 2020.

Revenue NSW continues to engage with Woolworths to ensure that the correct amount of payroll tax is paid. Woolworths has advised Revenue NSW that the calculations of General Retail Industry Awards (GRIA) payments are complex and involve consideration of more than 78 million records and the application of more than 2,000 rules to determine what each employee should have been paid under the GRIA for each hour worked.

Question 2 (page 20 of the Transcript)

The Hon. DANIEL MOOKHEY: Thank you, Chief Commissioner. As a result of this, did you initiate a compliance audit after the issues with Woolworths emerged?

Mr JOHNSTON: Yes, we did.

The Hon. DANIEL MOOKHEY: When was that audit initiated?

Mr JOHNSTON: I would have to take the date on notice.

Question 2 Response:

The audit was formally commenced on 29 June 2020. Prior to this, Revenue NSW was engaging with Woolworths on:

- the extent of the issue
- entities in the group affected
- what years the underpayments related to, and
- impacts for the other States and Territories.

Revenue NSW also liaised with other State and Territory Revenue Offices to achieve a consistent approach and sought legal advice to assist its audit.

Question 3 (page 20 of the Transcript)

The Hon. DANIEL MOOKHEY: And you are confident that took place after this came to light?

Mr JOHNSTON: Again, I would have to take that on notice, but noting I am talking about our regular practice where we have information provided from other sources, such as the media or Fair Work, et cetera. We investigate this—that can then lead to an audit. Now, this is a very big company that has a presence across the country and we would continue to be looking at and closely working with them to ensure they are paying the right payroll tax.

Question 3 Response:

As noted in the response to Question 1, Revenue NSW contacted Woolworths after its media release was issued to advise that a payroll tax audit would be conducted.

The audit remains ongoing due to the large volume of records, which are being examined by the Woolworths remediation team.

Question 4 (page 22 of the Transcript)

The Hon. DANIEL MOOKHEY: I accept that, Chief Commissioner, but this is from a point in time. The problem is that there is no evidence since that point in time that any further compliance activity has been undertaken by Revenue NSW. Has any further compliance activity taken place since April 2020 into Woolworths, since the date of production of these documents?

Mr JOHNSTON: I would have to take that on notice to give the right response, outside of the Standing Order 52 order, in relation to this business but we continue to pursue these—

The Hon. DANIEL MOOKHEY: What I am particularly—

The Hon. NATALIE WARD: Let him finish.

The Hon. DANIEL MOOKHEY: Sorry, please finish.

Mr JOHNSTON: This does take time—and I know that is one of the criticisms of how we can work within this setting—but we maintain vigilance on trying to do this. What is important to me and to Revenue is that we follow that due process in the right way, working with our colleagues in the other States as well—because Woolworths and others roll across the country—so we get to that landing where we have the right point. I will come back with a response about that in the right setting.

The Hon. DANIEL MOOKHEY: I appreciate that, Chief Commissioner. Of course I accept that Revenue NSW has to follow due process. It is very important that the collection agency always follows due process. There is no disagreement about that. If you can, on notice, come back and say whether or not any additional repayments from Woolworths resulted from a Revenue NSW investigation or an updated declaration from Woolworths as part of its remediation project, that would be useful knowledge.

Mr JOHNSTON: Okay.

Question 4 Response:

The Revenue NSW audit of Woolworths relating to payroll tax on wage underpayments continues. No separate audits have been commenced since April 2020.

As noted in the response to Question 1, Woolworths is currently paying monthly payroll tax on the amount of underpaid wages, as such wages are paid to the affected employees.

Revenue NSW expects to complete its audit of underpaid wages for Woolworths by September 2021.

Question 5 (page 22 of the Transcript)

Mr DAVID SHOEBRIDGE: I have one question on this before you move on. Mr Johnston or Mr Smythe, did you ever use your powers under section 72 of the Taxation Administration Act 1996 to issue notices and find information in relation to this matter?

Mr SMYTHE: We would have to that on notice. The reason I say that is section 72 is only ever utilised where—it is not a first step. Usually we would ask for information in any audit, and if people are not forthcoming that is when we would look to pursue a section 72 notice. That is a matter of general practice. In this specific instance that is something that we would need to take on notice.

Question 5 Response:

Revenue NSW has not issued any notices under section 72 of the *Taxation Administration Act 1996* to Woolworths. To date, the use of such notices has not been necessary as Woolworths made a voluntary disclosure regarding the wage underpayments and has been working cooperatively with Revenue NSW during the course of the audit.

Question 6 (page 22 of the Transcript)

Mr DAVID SHOEBRIDGE: Have you used section 72 to get information at any point in the past two years where there has been concern about an underpayment of wages? Has it been used at all in the past two years?

Mr SMYTHE: That is something that we would need to take on notice in that specific instance. The reason being that is an operational decision that is made by the auditors and their managers as part of any ongoing investigative activity.

Question 6 Response:

Revenue NSW has not used section 72 of the *Taxation Administration Act 1996 (TAA)* to obtain information on wage underpayments over the last two years. In situations where Revenue NSW is aware of wage underpayments, employers have either made voluntary disclosures, or are working cooperatively with Revenue NSW and providing requested information as part of a review or investigation.

More generally, yes, Revenue NSW has used section 72 of the TAA to obtain information during payroll tax investigations in the past two years.

Question 7 (page 23 of the Transcript)

Mr DAVID SHOEBRIDGE: There is nothing in the Act that says there are a whole lot of preconditions to the exercise of power under section 72.

Mr SMYTHE: That is correct.

Mr DAVID SHOEBRIDGE: Why do you have such a constrained use of it?

Mr JOHNSTON: It would be an operational decision about whether we are receiving the correct information that we feel we need to make a judgement around payroll tax obligations. We will come back to you about how we have used it in the past couple of years, but if there is no need for us to invoke that ability we will not. We will take it on notice and come back to you, Mr Shoebridge.

Question 7 Response:

Revenue NSW will issue notices under section 72 of the TAA if it needs to. However, such notices are not necessary if the employer voluntarily complies with requests for information as part of a review or investigation. In most instances, employers comply with Revenue NSW's requests, and therefore, there is no need to issue a formal notice under section 72.

Revenue NSW has issued section 72 notices on numerous occasions over the last 12 months. Examples of where Revenue NSW has issued notices includes, but is not limited to:

- to obtain information on additional group members identified during an investigation. The notice asked for information on the businesses, general ledgers for professional fees, consulting fees and contractors, share registries, and Australian Securities and Investment Commission (ASIC) documents relating to group changes, ownership, and structure
- to identify account signatories and obtain information on business and trading accounts to identify the person with control over particular entities, and

- to identify the entity closest to the end user in a chain of on-hire arrangement during an audit of a security business. Financial statements, general ledgers and contracts were requested.

Question 8 (page 24 of the Transcript)

The Hon. DANIEL MOOKHEY: Are you aware of longstanding issues about wage underpayment and wage theft in the Domino's franchise network?

Mr JOHNSTON: Yes.

The Hon. DANIEL MOOKHEY: Are you in a position to explain what Revenue NSW's strategy has been to investigate this for the purposes of payroll tax collection?

Mr JOHNSTON: The specifics of it I would again have to take on notice.

Question 8 Response:

Under most franchise arrangements, the franchisee operates independently of the franchisor as they are separately owned and controlled. The franchisee is the employer, not the franchisor. There is generally no requirement to advise Revenue NSW of the agreement between the franchisor and the franchisee.

As payroll tax is assessed on the wages paid or payable by an employer, there is no legal requirement on franchisors, such as Domino's, to advise Revenue NSW of their franchisees as they are not liable for any payroll tax that may be payable on wages paid by these independent businesses.

The onus is on the franchisee business to register if their wages exceed the payroll tax threshold. Given the nature of the business being carried on by Domino's franchisees, the number of employees is generally low, and most are typically under the NSW threshold. A liability will only arise where a franchisee operates several Domino's outlets or is part of a group.

When a business registers for payroll tax, it must register as the legal entity it operates under, and not as its business or trading name. This makes it difficult for Revenue NSW to identify customers operating as Domino's franchisees.

As part of Revenue NSW's payroll tax compliance program, instances of wage underpayments are identified through monitoring media articles and Fair Work Ombudsman announcements. Employers with reported underpaid wages are contacted and where appropriate, an investigation commences to address any payroll tax compliance issues.

Revenue NSW has given priority to those matters where the wage underpayment has been significant to ensure cases with the greatest payroll tax shortfall are addressed first. Instances of wage underpayments by members of the “Domino’s franchise network” that had been publicly reported were reviewed under this approach.

Media reports refer to the 2018 Fair Work investigation findings. The investigation reviewed 33 stores operating nationally, with approximately \$500,000 recouped in underpaid wages across 19 stores across Australia. Investigations into any payroll tax non-compliance were therefore conducted under other parts of Revenue NSW’s compliance program, for example, those focusing on unregistered employers.

Question 9 (page 26 of the Transcript)

The Hon. DANIEL MOOKHEY: These issues in Domino’s surfaced back in 2016 but this audit was not commenced until 2019. It is a three-year gap when this was a notorious issue. Why did it take that three years before Revenue NSW acted? To be fair, Chief Commissioner, I know you were not there; maybe Commissioner Smythe might be able to assist us there, or you might need to take it on notice. You are telling us that basically the media is helpful to alert you to where to direct your resources, but this is an example where this was prominent—it could not be more prominent—and it took three years for an audit to commence.

Mr JOHNSTON: I will take it on notice to give some further instruction on what actions we took over that time. It is very difficult to talk back to 2016 and to make judgements around how we performed about that point and how we are doing that now. But—

Question 9 Response:

Investigations of the Domino’s stores referred to were initiated as part of either Revenue NSW’s payroll tax compliance program focusing on unregistered businesses or the identification of a potential compliance risk.

Revenue NSW generally prioritises the allocation of its resources on the basis of the size of the payroll tax underpayment. As stated in the response to Question 8, given the small size of the wage underpayments identified by the Fair Work Ombudsman, combined with the fact that most Domino’s franchisees are under the payroll tax threshold, Revenue NSW gave these matters a lower priority.

The investigation into the Domino's franchisor was not directly related to any public reports on wage underpayments. The investigation was initiated as part of Revenue NSW's ongoing focus on businesses in various industries and sought to ascertain if there were any specific payroll tax compliance issues for *that* business.

Question 10 (page 27 of the Transcript)

The Hon. DANIEL MOOKHEY: I appreciate that, Chief Commissioner, but just on the Domino's issue—that was the master franchisor. That was the person at the top of the chain. At that time in 2016 and 2017— at least in 2016 and 2017—there are 222 Domino's stores in New South Wales that are held through multiple franchise arrangements. You will have to take my word for that but trust me I checked. We have checked the records in terms of what was produced. Only four of those stores were audited by Revenue NSW. When so much of the wage underpayment took place at the franchisee level, below the master franchisor, only four of the 222 in the Domino's network were ever audited by Revenue NSW. Why were only four out of the 222 undertaken?

Mr JOHNSTON: I would have to take it on notice for a full answer but I would assume that some of this was related to those that were above the payroll tax threshold.

Question 10 Response:

The 222 Domino's stores in NSW are owned and operated by franchisees. Revenue NSW typically finds that businesses operating as franchisees are relatively small and only have a few employees. As such, these businesses usually pay wages below the payroll tax threshold and are not required to register. Franchisees that are (or should be) registered for payroll tax will only be investigated where a payroll tax compliance issue is identified.

Any Domino's franchisee that met the above criteria would have been selected for a payroll tax investigation. It is not feasible for Revenue NSW to investigate all businesses that operate under a particular franchise arrangement in the absence of a potential payroll tax compliance issue that needs to be addressed.

Question 11 (page 27 of the Transcript)

The Hon. DANIEL MOOKHEY: Chief Commissioner, rest assured. I think the return on investment on Revenue NSW's compliance activities is good. I actually think therefore you should have more resources and more powers to do this. As a result I will hold you to account as to what you have done. I want to complete with this. The balance of the documents shows 15 other case studies. I want to put to you and allow you to respond however you see fit to the ones that I say you have not done any investigations into or there is no evidence that you have. There is no evidence in the documents that have been produced that you ever audited Qantas, despite Qantas admitting to underpayment of \$7 million; Sunglasses Hut, despite them admitting to underpayments of \$2.3 million; Super Retail Group, despite them admitting to underpayments of \$61 million; the Commonwealth Bank, despite them admitting to underpayments of \$53 million; the Rockpool Dining Group, given that they have admitted to \$10 million of underpayments; Caltex, at least worth \$5.7 million of underpayment, but to be fair you did audit nine of their franchises; and Subway. I put it to you that you have not audited them at all as a result of the wage theft issues. If I am wrong, either now or notice, tell me.

Mr JOHNSTON: I will have to take it on notice. I think an extra point that is worthy of mentioning is that we have come through the past year with a pandemic where we considered our compliance activity and took a slight step back. We continued with auditing where appropriate but also we were mindful there was an opportunity for some things—not necessarily these cases; I am not talking about wage theft—to pause. I think that was appropriate.

Question 11 Response:

Qantas

Following the wage underpayments reported in early 2019, Qantas was contacted by Revenue NSW on 4 March 2019 to understand the extent of the underpayments. Qantas informed Revenue NSW that there was a misclassification of some employees which led to underpayments, as well as overpayments, for some staff. The company was in the process of conducting a full internal review to assess the impact.

The Fair Work Ombudsman in their March 2020 report indicated back payments of \$7.1 million to 638 employees nationwide.

The audit has been placed on hold pending recommencement of Qantas' normal operations following COVID-19.

Luxottica Retail (Sunglasses Hut)

The last investigation was completed in April 2018 and covered the 2012 to 2017 financial years. An additional payroll tax liability for \$1.6 million was identified.

Luxottica issued media releases in September 2019 acknowledging wage underpayments of approximately \$2.3 million nationally and subsequently engaged with Revenue NSW.

Revenue NSW has not undertaken audit activity more recently due to COVID-19.

Super Retail Group (SRG)

Super Retail Group advised in their half year reports and accounts on 20 February 2020 that they had underpaid employees by approximately \$61 million.

Super Retail Group made a voluntary disclosure in relation to this underpayment and Revenue NSW conducted additional investigations. This investigation has now concluded.

Commonwealth Bank (CBA)

CBA was already being audited by Revenue NSW when the company made an announcement on 13 December 2019 that it had underpaid current and former employees for approximately \$53 million nationally. At the time of the announcement, CBA had already made payments of \$13.2 million (plus interest) to its affected employees, with a further \$14.9 million (plus interest) to be paid in the near future.

Revenue NSW made several enquiries to verify the amount of underpayment as reported in the ASX media release, and this investigation has now concluded.

Urban Purveyor Group (Rockpool)

On 24 October 2019, it was reported in the media that the Rockpool restaurant chain was accused of underpaying their staff by approximately \$10 million Australia wide.

Revenue NSW placed a lower priority on this case given the number of customers with larger wage underpayments being audited in 2019. However, Revenue NSW continues to engage with this taxpayer in relation to these matters.

Caltex

Media articles published in November 2016 highlighted wage underpayments within the Caltex franchisee network. Caltex released an ASX announcement on 1 May 2017 announcing that it has established a fund of \$20 million to cover wage underpayments.

Caltex was contacted in 2017 to enquire about their wage assistance programme. Following investigations, Revenue NSW concluded that the payroll tax liability should be pursued through the Caltex franchisees.

In late 2018 Revenue NSW initiated an investigation into the Caltex Group, which included the franchisor and other grouped entities. Throughout 2017/18, investigations were initiated in relation to five separate franchisee groups, which resulted in 17 entities being investigated.

Subway

In October 2019, the Fair Work Ombudsman reported that \$81,638 was recovered in unpaid wages in respect of 167 employees from 18 franchisees operating in NSW, Queensland and Victoria.

All Subway outlets are owned by franchisees, who are the employers for payroll tax purposes. These are small businesses with fewer employees and wages are often below the payroll tax threshold.

Given the small amount of underpaid wages identified, no audit activity has been undertaken.

Question 12 (page 31 of the Transcript)

Mr DAVID SHOEBRIDGE: Because we are short on time, I will ask you to take them on notice. Could you provide on notice what, if any, skills or positions there are in place to determine what wages were payable? I am particularly looking at what is payable under awards or other employee entitlements.

Mr JOHNSTON: Sure.

Question 12 Response:

Revenue NSW does not have any positions dedicated to determining whether correct amounts are paid by employers under awards or employee entitlements.

Question 13 (page 31 of the Transcript)

Mr DAVID SHOEBRIDGE: And, secondly, what, if any, arrangements you have to drag that information—say, from the Fair Work Ombudsman or some Federal regulators—so as you have that information to hand or if there is an alternate method. If so, how that works in practice and if you have used it.

Mr JOHNSTON: Yes, we can take that on notice.

Question 13 Response:

Revenue NSW does not have any formal arrangement with the Fair Work Ombudsman, or any another Federal regulator, to receive information relating to awards or employee entitlements for the purposes of assisting its compliance efforts.

As noted in the response to Question 8, if instances of wage underpayments (or potential wage underpayments) are identified as part of Revenue NSW's payroll tax compliance program; the affected employers are contacted. More detailed information relating to any underpayments may then be sought.