



LEGISLATIVE COUNCIL

PORTFOLIO COMMITTEE NO. 1

# Tax Administration Amendment (Combating Wage Theft) Bill 2021

Report 54

June 2021

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Portfolio Committee No. 1 - Premier and Finance

# **Tax Administration Amendment (Combating Wage Theft) Bill 2021**

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## Terms of reference

That:

- (a) the Tax Administration Amendment (Combating Wage Theft) Bill 2021 be referred to Portfolio Committee No. 1 – Premier and Finance for inquiry and report,
- (b) the bill be referred to the committee at the conclusion of the mover's second reading speech,
- (c) the committee hold a hearing of no longer than one day, and
- (d) the committee report by 8 June 2021.

The terms of reference were referred to the committee by the Legislative Council on 11 May 2021.<sup>1</sup>

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<sup>1</sup> *Minutes*, NSW Legislative Council, 11 May 2021, pp 2150-2151.

## Committee details

### Committee members

<b>The Hon Tara Moriarty MLC</b>	Australian Labor Party	<i>Chair</i>
<b>The Hon Robert Borsak MLC</b>	Shooters Fishers and Farmers Party	<i>Deputy Chair</i>
<b>Ms Abigail Boyd MLC</b>	The Greens	
<b>The Hon Ben Franklin MLC</b>	The Nationals	
<b>The Hon Taylor Martin MLC</b>	Liberal Party	
<b>The Hon Daniel Mookhey MLC*</b>	Australian Labor Party	
<b>The Hon Peter Poulos MLC ***</b>	Liberal Party	
<b>The Hon Adam Searle MLC</b>	Australian Labor Party	
<b>Mr David Shoebridge MLC**</b>	The Greens	

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- \* The Hon Daniel Mookhey MLC was a participating member for the duration of the inquiry.
- \*\* Mr David Shoebridge MLC was a participating member for the duration of the inquiry.
- \*\*\* The Hon Peter Poulos MLC replaced The Hon Natalie Ward MLC as a committee member on 3 June 2021.

## Chair's foreword

The Tax Administration Amendment (Combating Wage Theft) Bill 2021 was referred to Portfolio Committee 1 – Premier and Finance for inquiry and report on 11 May 2021.

The bill seeks to amend the *Taxation Administration Act 1996* and introduce a number of measures to deter the underpayment of wages, including by empowering Revenue NSW to collect payroll tax which is otherwise not collected due to wage theft. The bill would allow Revenue NSW to:

- name employers that have underpaid wages, and therefore minimised payroll tax liability
- disclose information to the Fair Work Ombudsman to assist in wage underpayment investigations
- disclose information to Industrial Relations NSW to assist in investigations of long service leave breaches
- reassess and recover payroll tax on wages underpaid by an employer more than five years after the initial assessment was made.

During this short inquiry, the committee considered the provisions of the bill, and how effective they would be in combating the growing problem of wage theft.

The committee agrees that steps must be taken to address this practice, given the significant impacts it has on individuals, families and the broader community. However, the bill does not go far enough. The committee heard that wage theft should be criminalised in New South Wales and that the proposed measures would be more effective if Revenue NSW is empowered to actively identify and investigate instances of wage theft.

While the committee does not oppose the bill, and agrees that collecting accurate payroll tax is important, it is clear that the role of Revenue NSW must be more effectively leveraged to address wage theft. Therefore, the committee recommends that the Legislative Council proceed to debate the bill, and that concerns identified in this report be addressed during debate in the House. The committee also recommends that the bill be amended to criminalise wage theft.

On behalf of the committee, I would like to thank all stakeholders who participated in the inquiry at short notice. I would also like to thank the secretariat for their assistance, and committee members for their considered contributions.



Hon Tara Moriarty MLC

**Committee Chair**



## Recommendations

### Recommendation 1

13

That the Legislative Council proceed to debate the Taxation Administration Amendment (Combating Wage Theft) Bill 2021, and that the concerns identified by stakeholders as set out in this report be addressed during debate in the House.

### Recommendation 2

14

That the Legislative Council amend the Tax Administration Amendment (Combating Wage Theft) Bill 2021 to criminalise wage theft, or pass specific wage theft legislation to complement the legislation now before the House.

## Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the Legislative Council on 11 May 2021.

The committee received seven submissions and held one public hearings at Parliament House in Sydney.

Inquiry related documents are available on the committee's website, including submissions, hearing transcripts, tabled documents and answers to questions on notice.

## Chapter 1 Overview

This chapter provides a brief overview of the provisions of the Tax Administration Amendment (Combating Wage Theft) Bill 2021, including the background and purpose of the bill, and what it seeks to address.

### Reference

- 1.1 The Tax Administration Amendment (Combating Wage Theft) Bill 2021 (hereafter, the bill) was introduced in the Legislative Council on 5 May 2021 by the Hon Damien Tudehope MLC, Minister for Finance and Small Business (hereafter, the Minister).
- 1.2 On 11 May 2021 the Legislative Council resolved to refer the bill to Portfolio Committee No. 1 – Premier and Finance for inquiry and report.

### Background and purpose of the bill

- 1.3 The bill proposes amending the *Taxation Administration Act 1996* to introduce a number of measures that seek to deter the underpayment of wages. The Minister told the Parliament during the second reading speech that the bill aims to do this by empowering Revenue NSW to collect payroll tax which is otherwise not collected due to wage theft.<sup>2</sup>
- 1.4 The core functions of Revenue NSW includes the collection, administration and recovery of taxes (including payroll tax) royalties, grants, fines and debts on behalf of the State.
- 1.5 The Minister explained that in New South Wales payroll tax is paid by employers when total wages across a financial year are above \$1.2 million. Further, he noted that 'unpaid wages constitute taxable wages for the purposes of payroll tax'.<sup>3</sup>
- 1.6 The Minister referred to modelling undertaken by PricewaterhouseCoopers which estimated that 13 per cent of Australian workers are underpaid a total of \$1.35 billion per year. This means that millions of dollars of payroll tax revenue is not being collected on these unpaid wages.<sup>4</sup>
- 1.7 When describing how the bill will address these issues and effectively deter wage underpayment, the Minister stated that Revenue NSW would be empowered with the following new functions to effectively collect payroll tax:
  - Name employers that have underpaid wages, and therefore minimised payroll tax liability
  - Disclose information to the Fair Work Ombudsman to assist in wage underpayment investigations

<sup>2</sup> The Hon Damien Tudehope MLC, Second reading speech: Taxation Administration Amendment (Combating Wage Theft) Bill 2021, 6 May 2021.

<sup>3</sup> The Hon Damien Tudehope MLC, Second reading speech: Taxation Administration Amendment (Combating Wage Theft) Bill 2021, 6 May 2021.

<sup>4</sup> The Hon Damien Tudehope MLC, Second reading speech: Taxation Administration Amendment (Combating Wage Theft) Bill 2021, 6 May 2021.

- Disclose information to Industrial Relations NSW to assist in investigations of long service leave breaches
- Reassess and recover payroll tax on wages underpaid by an employer more than five years after the initial assessment was made.<sup>5</sup>

**1.8** These provisions are set out below in detail:

- **Schedule 1[1]** of the Bill allows the Chief Commissioner of Revenue NSW to make a reassessment of a taxpayer's tax liability more than 5 years after the initial assessment in certain circumstances where there has been underpayment of wages to an employee by the tax payer. A tax liability may be reassessed if:
  - an investigation relating to the taxpayer by the Commonwealth Fair Work Ombudsman under the *Fair Work Act 2009* has been finalized and has found underpayment of wages, or
  - the Chief Commissioner is satisfied that the taxpayer has underpaid wages
- **Schedule 1[2]** increases the maximum penalties for the following offences from 100 penalty units (a fine of \$11,000) to 250 penalty units (a fine of \$27,500):
  - Failure to keep proper records (section 48 (1), or additional records as required by the Chief Commissioner (section 49 (2))
  - Failure to keep records that are available to be readily produced to the Chief Commissioner when required (section 51)
  - Failure to keep records in English, or in a form that can be readily converted or translated into English (section 52)
  - Failure to keep records for not less than 5 years (section 53(1))
  - Failure to lodge required documents (section 57)
- **Schedule 1[3]** increases the penalty for providing false or misleading information, which is an offence under section 50 of the Act. The maximum penalty for a first offence is increased from 100 penalty units, to 500 penalty units (a fine of \$55,000). A further penalty of 1,000 penalty units (or \$110,000) is imposed for a second or subsequent offence under this section
- **Schedule 1[4]** increases the maximum penalties for offences under sections 54 and 58 of the Act, being willfully destroying records, and falsifying or concealing the identity, address or location of a taxpayer, respectively. The maximum penalty for these offences is increased from 100 penalty units, to 500 penalty units (\$55,000)
- **Schedule 1[5]** increases the maximum penalties for knowingly giving false or misleading information to a tax officer (section 55), and deliberately omitting information to a tax officer (section 56). The maximum penalty for a first offence is increased from 100 penalty units, to 500 penalty units (a fine of \$55,000). A further penalty of 1,000 penalty units (or \$110,000) or 2 years imprisonment, or both, is imposed for a second or subsequent offence under this section.

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<sup>5</sup> The Hon. Damien Tudehope MLC, Second reading speech: Taxation Administration Amendment (Combating Wage Theft) Bill 2021, 6 May 2021.

- **Schedule 1[6]** creates a new offence of tax evasion, by inserting the following proposed section 58A into the Act:

**58A Tax Evasion**

A person must not, by act or omission, knowingly evade or attempt to evade tax.

Maximum penalty – 1,000 penalty units or 2 years imprisonment, or both.

- **Schedule 1[7]** inserts definitions into Part 9, Division 3 of the Act of *employer, fair work instrument, Fair Work Ombudsman, safety net contractual entitlement and wages*.
- **Schedule 1[8]** allows a tax officer to disclose information obtained under or in relation to the administration of a taxation law to the Fair Work Ombudsman to assist the Fair Work Ombudsman to perform certain statutory functions under the *Fair Work Act 2009* (Cth), and to the Secretary of the Department of Premier and Cabinet for investigating breaches relating to long service leave
- **Schedule 1[9]** allows tax officers to disclose information about employers obtained under or in relation to the administration of a taxation law in circumstances where there has been underpayment of wages by the employer that has resulted in the employers payroll tax liability under the *Payroll Tax Act 2007* not having been assessed, or having been assessed at a lower amount than would otherwise have been assessed had the underpayment not occurred. This disclosure must be in accordance with guidelines issued by the Minister for Finance and Small Business.

**1.9** When referring to the proposed increase in maximum penalties for offences under the *Tax Administration Act 1996*, the Minister stated that while these offences do not specifically relate to wage underpayments, they 'encompass activities that may impede a proper assessment of their liabilities including failing to keep records, or knowingly giving false or misleading information'.<sup>6</sup>

<sup>6</sup> The Hon. Damien Tudehope MLC, Second reading speech: Taxation Administration Amendment (Combating Wage Theft) Bill 2021, 6 May 2021.



## Chapter 2 Key issues

This chapter highlights the key issues identified by stakeholders during this inquiry, including whether wage theft should be criminalised in New South Wales and if the measures contained in the bill are an effective means of combating wage theft. The chapter also acknowledges specific issues that were raised in regards to provisions of the bill, including concerns over the size of the penalties as well as the use of Ministerial guidelines and various disclosure requirements.

### Criminalising wage theft

- 2.1** Inquiry participants discussed the need to address wage theft, and noted that the issue has become more prevalent in recent years. Mr Mark Morey, Secretary, Unions NSW, told the committee that he had seen an escalation over the past 10 years, describing wage theft currently occurring at 'extraordinary levels' and that a culture of wage theft as a business model had been allowed to develop due to the lack of legal deterrence.<sup>7</sup>
- 2.2** While many stakeholders reiterated the need to address wage theft, the committee heard evidence that the bill does not go far enough, with some stakeholders recommending wage theft be criminalised in New South Wales. Mr Morey told the committee that:
- There is a need to actually criminalise systematic, repetitive wage theft in this State. I know that this is actually a State responsibility, as Queensland and Victoria have also criminalised wage theft.<sup>8</sup>
- 2.3** The committee heard anecdotal evidence about the positive impacts of criminalisation in Queensland and Victoria from Mr Michael Fraser, Co-Founder, Wage Theft Australia. Mr Fraser said that their organisation had heard from whistleblowers that companies are doing 'little, quiet audits and back pays ... They know that they have been underpaying for years but they are now just fixing things up – not necessarily in the past, but going forward'.<sup>9</sup>
- 2.4** Mr Fraser explained that in these jurisdictions, there is now a 'fear of getting caught', which he described as an 'amazing outcome'.<sup>10</sup>
- 2.5** In the second reading speech, the Hon Damien Tudehope MLC, Minister for Finance and Small Business (the Minister) told the Parliament that wage theft is a serious issue, and requires action to be taken to 'deter, penalise and send a clear message that employees deserve to be paid what they are properly due'.<sup>11</sup>
- 2.6** While the Minister noted that the bill does not seek to criminalise wage theft, he explained that its aim is to deter wage underpayment by way of ensuring Revenue NSW are properly collecting

<sup>7</sup> Evidence, Mr Mark Morey, Secretary, Unions NSW, 24 May 2021, p 3.

<sup>8</sup> Evidence, Mr Morey, 24 May 2021, p 2.

<sup>9</sup> Evidence, Mr Michael Fraser, Co-Founder, Wage Theft Australia, 24 May 2021, p 2.

<sup>10</sup> Evidence, Mr Fraser, 24 May 2021, p 2.

<sup>11</sup> The Hon Damien Tudehope MLC, Second reading speech: Taxation Administration Amendment (Combating Wage Theft) Bill 2021, 6 May 2021.

payroll tax, and increasing penalties for some tax offences that may impede the accurate assessment of payroll tax.<sup>12</sup>

2.7 The Minister explained that while 'wage theft is unacceptable and any employer who is engaging in the deliberate underpayment of their workers should be held to account ... New South Wales is not the jurisdiction to criminalise wage theft'.<sup>13</sup> He argued that this is a national issue, and thus requires a national framework.

2.8 The committee heard that a bill targeting wage theft had been introduced at the Commonwealth level, but had not passed.

### **Effectiveness of the bill in combating wage theft**

2.9 This section examines the likely effectiveness of the bill in combating and preventing wage theft. It will also identify some of the mechanisms proposed by stakeholders to improve the operation of the proposed amendments.

2.10 The committee heard evidence that while the bill had been framed as a mechanism to combat wage theft, its primary impact would be collecting unpaid payroll tax, rather than addressing and preventing the underpayment of wages.

2.11 Unions NSW stated that while they supported the bill and any attempt to stop wage theft, the proposed amendments were not an effective means of decentivising this kind of conduct. Mr Mark Morey, Secretary, Unions NSW, characterised this bill as an 'initial step'<sup>14</sup>, but stated that there are number of other options available to the Government that would be more effective, such as:

- expanding the role of Revenue NSW to identify and investigate wage theft
- provide additional specialist resources for Revenue NSW
- criminalising wage theft.

### **Role of Revenue NSW in addressing wage theft**

2.12 The committee heard different perspectives regarding the appropriate role of Revenue NSW in combating wage theft. Some stakeholders argued that without an expanded role for Revenue NSW, the bill would not be an effective means of addressing this issue.

2.13 Revenue NSW told the committee that its role is to collect payroll tax, and it does not have a primary focus on investigating the occurrence of wage theft. Revenue NSW explained that this

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<sup>12</sup> The Hon Damien Tudehope MLC, Second reading speech: Taxation Administration Amendment (Combating Wage Theft) Bill 2021, 6 May 2021.

<sup>13</sup> The Hon Damien Tudehope MLC, Second reading speech: Taxation Administration Amendment (Combating Wage Theft) Bill 2021, 6 May 2021.

<sup>14</sup> Evidence, Mr Morey, 24 May 2021, p 2.



bill would allow the agency to 'leverage tax and functions and powers of a taxation authority in encouraging employers to do the right thing by their workers'.<sup>15</sup>

**2.14** Further, Mr Scott Johnston, Deputy Secretary, Chief Commissioner of State Revenue, Revenue NSW stated that:

Our primary role is to assess whether employers are paying the correct tax, based on the wages that they are paid. It is not to actively monitor whether employers are paying their workers the right wages; that is an industrial role that is well outside our field of operations.<sup>16</sup>

**2.15** This was reiterated by Mr Cullen Smythe, Commissioner of State Revenue, Revenue NSW, who stated that Revenue NSW does not consider individual award arrangements and determine if workers are being paid at the correct rate. Rather, it determines if the wages declared to Revenue NSW through monthly returns aligns with the amounts identified under the *Payroll Tax Act* as payments that attract payroll tax.<sup>17</sup>

**2.16** Mr Johnston went on to explain that the role of Revenue NSW in this context is enlivened when it becomes aware that an employer has paid incorrect wages, and that underpayment may have resulted in decreased payroll tax liability. He stated that measures contained in the bill, such as increased information sharing with the Fair Work Ombudsman, and being able to reassess historical payroll tax liabilities, would help Revenue NSW ensure the right amount of tax is paid.<sup>18</sup>

***Potential expansion of the role of Revenue NSW***

**2.17** However, the committee heard evidence that Revenue NSW must take on an expanded role when considering wage theft in order for the bill to be impactful.

**2.18** Mr Morey from Unions NSW, explained that the bill does not require Revenue NSW to engage in any preventative work, or otherwise intervene or investigate where there is suspicion of wage theft occurring. The committee heard that in practice, the bill requires third parties such as the Fair Work Ombudsman to first identify the act of wage theft. Following this identification, Revenue NSW can then take action.<sup>19</sup>

**2.19** When explaining their criticism of the bill, Mr Thomas Costa, Assistant Secretary of Unions NSW, said that while the bill represented an opportunity to enable Revenue NSW to more effectively target and combat wage theft, 'all it does is seek to recoup payroll tax from businesses that have already been identified by other agencies as participating in wage theft'<sup>20</sup>, as opposed to effectively detecting and deterring this practice.

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<sup>15</sup> Evidence, Mr Scott Johnston, Deputy Secretary, Chief Commissioner of State Revenue, Revenue NSW, 24 May 2021, p 18.

<sup>16</sup> Evidence, Mr Johnston, 24 May 2021, p 18.

<sup>17</sup> Evidence, Mr Cullen Smythe, Commissioner of State Revenue, Revenue NSW, 24 May 2021, p 25.

<sup>18</sup> Evidence, Mr Johnston, 24 May 2021, p 26.

<sup>19</sup> Evidence, Mr Morey, 24 May 2021, p 4.

<sup>20</sup> Evidence, Mr Thomas Costa, Assistant Secretary, Unions NSW, 24 May 2021, p 7.

- 2.20** Unions NSW stated that this process relies on Revenue NSW waiting for other agencies to first identify wage theft, and only then proceeding to collect unpaid payroll tax, if required. It argued that it would be more effective and efficient for Revenue NSW to be able to identify and investigate wage theft itself, which would avoid potentially lengthy delays between a Fair Work Ombudsman investigation and conviction, and action taken by Revenue NSW.<sup>21</sup>
- 2.21** The committee heard about examples of the lengthy period it took for the Fair Work Ombudsman to conduct its investigations into widely reported incidents of wage theft at 7/11 and Domino's franchises.
- 2.22** The committee heard that systematic wage theft was uncovered across the 7/11 network, with this investigation and subsequent action ultimately resulting in \$170 million in backpay for thousands of workers. The underpayment was exposed as result of work undertaken by Mr Fraser, at Wage Theft Australia and Ms Adele Ferguson, a journalist who undertook further investigations into the issue.<sup>22</sup>
- 2.23** Wage Theft Australia also outlined some of the issues relating to wage underpayment at Domino's Pizza Enterprises. It undertook an investigation into wage theft at Domino's by visiting approximately 70 stores, and asking employees questions. Ms Maddison Johnstone, Co-founder and Director at Wage Theft Australia stated that they found that 'the network was littered with underpayment'.<sup>23</sup>
- 2.24** Further, Wage Theft Australia argued that issues had been identified with the 'aggressive' Domino's business model, and these issues often resulted in franchisees trying to make ends meet, and subsequently engaging in wage theft or tax avoidance.<sup>24</sup>
- 2.25** This argument was refuted by Domino's Pizza Enterprises, which stated that:

Based on extensive investigations, no connection has been found between franchise profitability and the deliberate underpayment of wages. Instead, the behaviour was driven by greed by a small proportion of the Company's franchisee network.<sup>25</sup>

- 2.26** The committee heard that following a Revenue NSW audit, no error was found in relation to Domino's wage declaration. Revenue NSW explained that this is due to their primary responsibility being to determine if monthly returns match up with payments that should be attracting payroll tax, rather than determining if employees are being paid at the correct rate.<sup>26</sup>
- 2.27** Further, it was noted that while these issues were uncovered in 2016, this audit did not occur until 2019. When explaining this process, Revenue NSW informed that:

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

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<sup>21</sup> Evidence, Mr Morey, 24 May 2021, p 2.

<sup>22</sup> Evidence, Mr Fraser, 24 May 2021, p 12.

<sup>23</sup> Evidence, Ms Maddison Johnstone, Co-founder, Director, Wage Theft Australia, 24 May 2021, p 13.

<sup>24</sup> Submission 1, Operation Redress Pty Ltd (Wage Theft Australia), p 2.

<sup>25</sup> Submission 6, Domino's Pizza Enterprises, p 2.

<sup>26</sup> Evidence, Mr Smythe, 24 May 2021, p 25.

and where appropriate, an investigation commences to address any payroll tax compliance issues.<sup>27</sup>

- 2.28** Additionally, the agency told the committee that in the instance of Domino's, investigations 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'.<sup>28</sup>
- 2.29** The committee heard that investigations and convictions are still ongoing six years after these incidents were first reported on.<sup>29</sup>
- 2.30** Mr Morey agreed that these examples showed that the process provided for in the bill would not enable Revenue NSW to play a significant and timely role in addressing the underpayment of wages in New South Wales, given the process relies on other agencies identifying and investigating wage theft, and then Revenue NSW taking action at a later time.<sup>30</sup>
- 2.31** Further, Unions NSW argued it would be more effective for Revenue NSW to undertake its own investigations in addressing and combating wage theft. Mr Thomas Costa, Assistant Secretary, summarised this point:
- Our criticism is that there is a lever available to Government if it wishes to use it, which is to use its powers to collect payroll tax to actually go out and find a number of businesses that we know are engaging in wage theft that are being ignored by agencies at the Federal level and are not being caught by other systems.<sup>31</sup>
- 2.32** Mr Costa went on to explain that while Revenue NSW does not have the explicit power to investigate wage theft, it does have the power to investigate payroll tax theft, which would, in effect, identify wage theft. He argued that Revenue NSW could use its existing powers, and have a more 'concerted approach to investigating payroll tax theft'.<sup>32</sup> This would have 'the ancillary benefit of reducing wage theft in the New South Wales economy'.<sup>33</sup>
- 2.33** Mr Costa advised that these steps would be more effective than those contained in the bill, but have not been pursued by the Government.<sup>34</sup>
- 2.34** Further, Unions NSW noted that if additional steps were not taken to stop wage theft, there would be a risk that businesses would correctly pay payroll taxes, and still continue to engage in systemic wage underpayment.<sup>35</sup>

<sup>27</sup> Answers to questions on notice, Revenue NSW, 26 May 2021, p 6.

<sup>28</sup> Answers to questions on notice, Revenue NSW, 26 May 2021, p 7.

<sup>29</sup> Evidence, Mr Morey, 24 May 2021, p 2.

<sup>30</sup> Evidence, Mr Morey, 24 May 2021, p 2.

<sup>31</sup> Evidence, Mr Costa, 24 May 2021, p 7.

<sup>32</sup> Evidence, Mr Costa, 24 May 2021, p 8.

<sup>33</sup> Evidence, Mr Costa, 24 May 2021, p 8.

<sup>34</sup> Evidence, Mr Costa, 24 May 2021, p 7.

<sup>35</sup> Evidence, Mr Morey, 24 May 2021, p 2.

*Additional resources for Revenue NSW*

- 2.35** The committee heard evidence regarding what additional steps should be taken in order to enable Revenue NSW to be better equipped to target wage theft in the context of their payroll tax collection responsibilities.
- 2.36** As noted above, some stakeholders argued that Revenue NSW should have an expanded role in combating wage theft, and better utilise their functions to identify the underpayment of wages when assessing payroll tax, and refer this conduct to the appropriate agencies. It was argued that in order to do this effectively, additional specialist staff would be required to enable Revenue NSW to undertake these functions.<sup>36</sup>
- 2.37** Unions NSW informed that given the bill makes no provision for additional Revenue NSW inspectors, it was difficult to understand how wage theft would be addressed without any extra enforcement capacity.<sup>37</sup>
- 2.38** The committee heard that if Revenue NSW had additional, specialist staff who could identify wage underpayments when assessing payroll tax and then refer conduct to relevant agencies, wage theft would be more successfully combatted. This would be in addition to the criminalisation of wage theft, which would allow Revenue NSW to refer this type of conduct to the NSW Police Force.<sup>38</sup>

**Size of the penalties**

- 2.39** The committee heard evidence about the size of the penalties contained in the bill, and if such an increase is necessary and effective.
- 2.40** As noted in chapter 1, the provisions of the bill increase penalties for certain tax offences. These offences relate to record keeping, providing false or misleading information, deliberate omission of information, failing to lodge documents and falsifying or concealing identity. The bill also creates a new offence of knowingly evading or attempting to evade tax.
- 2.41** The Australian Industry Group argued that the case for increased tax penalties of this kind has not been made by the NSW Government, and told the committee that there is no substantial evidence regarding a need to increase penalties, or create a new tax evasion offence.<sup>39</sup>
- 2.42** Further, Australian Industry Group argued that these measures would not address wage theft, and claimed that the characterisation of these measures as efforts to do this was lacking in transparency.<sup>40</sup>

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<sup>36</sup> Evidence, Mr Morey, 24 May 2021, p 2.

<sup>37</sup> Submission 5, Unions NSW, p 5.

<sup>38</sup> Evidence, Mr Morey, 24 May 2021, p 10.

<sup>39</sup> Submission 2, Australian Industry Group, p 3.

<sup>40</sup> Submission 2, Australian Industry Group, p 3.

- 2.43 However, this conflicted with evidence from other stakeholders, who argued that significant penalties are an effective means of discouraging certain kinds of conduct. Instead of decreasing the penalties, Mr Morey, Unions NSW stated that 'they probably should go further'.<sup>41</sup>
- 2.44 Revenue NSW confirmed that increasing the penalty regime for offences and introducing a new tax evasion offence is intended to have a deterrent effect on businesses attempting to avoid payroll tax.<sup>42</sup>

## Other matters

- 2.45 The committee heard evidence regarding a number of other issues relating to the bill. This section will identify these concerns, which relate to the proposed disclosure requirements in the bill, the use of Ministerial guidelines and the definition of wage theft.

### Proposed section 83A

#### *Disclosure requirements and the use of Ministerial guidelines*

- 2.46 The committee heard evidence regarding the proposed insertion of section 83A, which permits a tax office to disclose information about an employer in certain circumstances. The proposed section states that a disclosure may be made if an investigation into an employer by the Fair Work Ombudsman:
- has been finalised, and
  - has found that the employer has not complied with the *Fair Work Act 2009*, or another fair work instrument, or, has contravened a safety net contractual entitlement, and
  - has found that the non-compliance or contravention has resulted in an underpayment of wages to an employee, and
  - has found that as a result of that underpayment, the employer's liability to pay payroll tax was not assessed, or assessed at a lower amount than would have otherwise occurred.
- 2.47 The proposed section also creates a requirement for the Minister for Finance and Small Business to issue guidelines regarding the exercise of the discretion to disclose information under the section.
- 2.48 Unions NSW argued that in order for this section to be effective, there should be a requirement and an obligation to disclose wage theft, rather than the exercise of a discretionary power.<sup>43</sup>
- 2.49 Further, Unions NSW noted that it may be more appropriate for this power to be provided by way of regulation, rather than Ministerial guidelines. This would ensure further parliamentary scrutiny and oversight, given the guidelines would then be subject to disallowance, in addition to increasing transparency.

<sup>41</sup> Evidence, Mr Morey, 24 May 2021, p 3.

<sup>42</sup> Evidence, Mr Smythe, 24 May 2021, pp 32 -33.

<sup>43</sup> Evidence, Mr Morey, 24 May 2021, p 10; Evidence, Mr Costa, 24 May 2021, p 10.

- 2.50** Unions NSW also argued that the guidelines should be as prescriptive as possible to ensure better compliance.<sup>44</sup>
- 2.51** However, Revenue NSW told the committee that guidelines are helpful in providing parameters in a flexible way. Further, it noted that given the guidelines apply to the 'name-and shame' provisions in the bill, it is important to exercise these powers appropriately and fairly. It was argued that the flexibility of guidelines will allow Revenue NSW to better strike a balance between deterrence, and being overly punitive with this provision.<sup>45</sup>

### **Treatment of inadvertent 'wage theft'**

- 2.52** The committee heard evidence regarding the importance of defining wage theft to ensure that businesses who have mistakenly underpaid their staff are not unfairly captured by various provisions in the bill, such as the disclosure provisions, which have also been described as the 'naming-and-shaming' provisions.
- 2.53** Business NSW told the committee that it can be difficult for employers to calculate their workers' pay correctly, and that it can often be a 'highly technical and sometimes confusing exercise'.<sup>46</sup>
- 2.54** This was reiterated by the Australian Industry Group, who argued that wage theft, by definition, must be deliberate and involve intent. The group stated that inadvertent underpayment should not be considered wage theft, given it does not involve intent, and may be a genuine mistake.<sup>47</sup>
- 2.55** Australian Industry Group stressed that it is important to make this distinction, and argued that the bill does not contain sufficient clarity to ensure various provisions, such as those relating to information sharing, do not apply to businesses who have not engaged in deliberate wage theft.<sup>48</sup>
- 2.56** However, Unions NSW put a different view to the committee. It argued that incidents of deliberate wage theft are far more common than is reported, and state that wage theft practices have become a part of some business models. Unions NSW stated that business owners regularly have to navigate complex matters such as commercial leases and sale and structure contracts, and have a range of resources available to them to ensure they correctly pay their employees.<sup>49</sup>
- 2.57** While Unions NSW acknowledged that businesses who genuinely make an error are not engaging in systematic wage theft, it reiterated the importance of combating wage theft and developing effective disincentives.<sup>50</sup>

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<sup>44</sup> Evidence, Mr Morey, 24 May 2021, p 10.

<sup>45</sup> Evidence, Mr Smythe, 24 May 2021, p 34.

<sup>46</sup> Submission 4, Business NSW, p 1.

<sup>47</sup> Submission 2, Australian Industry Group, pp 4 -5.

<sup>48</sup> Submission 2, Australian Industry Group, pp 4 -5.

<sup>49</sup> Submission 2, Unions NSW, p 3.

<sup>50</sup> Evidence, Mr Morey, 24 May 2021, pp 2 -3.

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## Committee comment

- 2.58** The committee notes that all stakeholders support the need to address the deliberate underpayment of wages in New South Wales. Further, the committee supports the sentiment expressed by the Minister during the second reading speech regarding the Government's commitment to combating wage theft, and deterring this kind of conduct which unfairly harms individuals, families and the community.
- 2.59** While the committee does not oppose the passage of the bill, some issues have been identified, specifically in regards to its effectiveness in combating wage theft. It is evident that wage theft has become increasingly prevalent over the past 10 years, with underpayment now being built into some business models. The publicised instances of wage theft demonstrate the significant scope of this issue, and the outstanding need to address it.
- 2.60** The committee heard that the bill will allow Revenue NSW to collect payroll tax from employers who may have had their payroll tax liability incorrectly assessed, due to the underpayment of wages.
- 2.61** However, as noted by Unions NSW, the bill does not require Revenue NSW to use its assessment of payroll taxes to determine if employers are paying correct wages, as per the relevant award or other industrial arrangement. Rather, they will be empowered to reassess payroll tax liabilities if instances of underpayment are uncovered by other agencies.
- 2.62** While the committee does not oppose this change, and agrees that it is important for payroll tax to be accurately collected, it is evident that the role of Revenue NSW could be more effectively leveraged to better combat wage theft in New South Wales.
- 2.63** The committee agrees with evidence arguing that Revenue NSW is well placed to take on an expanded role to identify wage theft, and take action by referring the matter to the appropriate agencies in a swift and effective way. The committee notes that Revenue NSW will need to be effectively resourced by the NSW Government to ensure this can occur.
- 2.64** While the bill does not deal expressly with the criminalisation of wage theft, the committee is of the view that any effort to seriously combat this growing problem requires it becoming a criminal offence. The committee encourages the NSW Parliament and the NSW Government to take steps to ensure this occurs.

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### Recommendation 1

That the Legislative Council proceed to debate the Taxation Administration Amendment (Combating Wage Theft) Bill 2021, and that the concerns identified by stakeholders as set out in this report be addressed during debate in the House.

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**Recommendation 2**

That the Legislative Council amend the Tax Administration Amendment (Combating Wage Theft) Bill 2021 to criminalise wage theft, or pass specific wage theft legislation to complement the legislation now before the House.

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## Appendix 1 Submissions

<b>No.</b>	<b>Author</b>
1	Operation Redress Pty Ltd
2	Australian Industry Group (Ai Group)
3	Revenue NSW
4	Business NSW
5	Unions NSW
6	Domino's Pizza Enterprises Limited
7	National Retail Association

## Appendix 2 Witnesses at hearing

Date	Name	Position and Organisation
<b>Monday 24 May 2021</b> <b>Macquarie Room</b> <b>Parliament House, Sydney</b>	Mr Mark Morey	Secretary, Unions NSW
	Mr Thomas Costa	Assistant Secretary, Unions NSW
	Mr Michael Fraser <i>(via videoconference)</i>	Co-Founder, Director, Wage Theft Australia
	Ms Maddison Johnstone <i>(via videoconference)</i>	Co-Founder, Director, Wage Theft Australia
	Mr Scott Johnston	Deputy Secretary, Chief Commissioner of State Revenue, Revenue NSW
	Mr Cullen Smythe	Commissioner of State Revenue, Revenue NSW

## Appendix 3 Minutes

### Minutes no. 36

Thursday 13 May 2021

Portfolio Committee No. 1 – Premier and Finance

Parkes Room, Parliament House, Sydney at 2.02 pm

#### 1. Members present

Ms Moriarty, *Chair*

Ms Boyd (*from 2.04 pm*)

Mr Franklin (*from 2.05 pm*)

Mr Martin

Mr Mookhey (participating member for the duration of the inquiry into the Tax Administration Amendment (Combating Wage Theft) Bill 2021)

Mr Poulos (*substituting for Mrs Ward*)

Mr Searle

#### 2. Apologies

Mr Borsak, *Deputy Chair*

Mr Shoebridge (participating member for the duration of the inquiry into the Tax Administration Amendment (Combating Wage Theft) Bill 2021)

#### 3. Inquiry into the Tax Administration Amendment (Combating Wage Theft) Bill 2021

##### 3.1 Terms of reference

The committee noted the referral on 11 May 2021 of the following terms of reference:

That:

- (a) the Tax Administration Amendment (Combating Wage Theft) Bill 2021 be referred to Portfolio Committee No. 1 – Premier and Finance for inquiry and report
- (b) the bill be referred to the committee at the conclusion of the mover's second reading speech
- (c) the committee hold a hearing of no longer than one day, and
- (d) the committee report by 8 June 2021.

##### 3.2 Participating members

The committee noted that Mr Mookhey and Mr Shoebridge will be participating members for the duration of the inquiry.

Resolved, on the motion of Mr Searle: That any member who intends to participate for the duration of the inquiry into the Tax Administration Amendment (Combating Wage Theft) Bill 2021, be provided with copies of all inquiry related documents, including meeting papers, unpublished submissions and the Chair's draft report.

##### 3.3 Proposed timeline

Resolved, on the motion of Mr Searle: That the committee adopt the following timeline for the administration of the inquiry:

- Thursday 20 May 2021 – closing date for submissions
- Monday 24 May 2021 – public hearing
- Wednesday 2 June 2021 – circulation of Chair's draft report
- Friday 4 June 2021 – report deliberative
- Tuesday 8 June 2021 – tabling of report in the House.

### 3.4 Stakeholder list

Resolved, on the motion of Mr Searle: That the following stakeholders be invited to make a submission and appear to give evidence at the hearing:

- Revenue NSW
- Business NSW
- Australian Industry Group (AIG)
- Unions NSW
- Michael Fraser, Wage Theft Australia
- 7/11
- Dominoes
- Caltex.

Resolved, on the motion of Mr Searle: That members forward any additional stakeholders to the secretariat by 3.00 pm Friday 14 May 2021 and indicate whether they wish for them to make a submission and/or give evidence at the hearing.

### 3.5 Submissions, online questionnaire and proformas

Resolved, on the motion of Mr Martin:

- That the committee accept submissions from nominated stakeholders and other interested parties, including individuals.
- That the committee not conduct an online questionnaire.
- That the committee not accept any proformas.

### 3.6 Questions on notice

Resolved, on the motion of Mr Searle: That witnesses be given 48 hours to respond to any answers to questions on notice following the public hearing on Monday 24 May 2021.

## 4. Adjournment

The committee adjourned at 2.09 pm, *sine die*.

Madeleine Dowd  
Committee Clerk

## Minutes no. 37

Monday 24 May 2021 2021

Portfolio Committee No. 1 - Premier and Finance

Macquarie Room, Parliament House, Sydney, at 9.05 am

### 1. Members present

Ms Moriarty, *Chair*

Ms Boyd

Mr Franklin (*from 9.34 am*)

Mr Martin

Mr Mookhey (participating member)

Mr Searle

Mr Shoebridge (participating member) (*from 9.23 am*)

Mrs Ward

### 2. Apologies

Mr Borsak, *Deputy Chair*

**3. Draft minutes**

Resolved, on the motion of Mrs Ward: That draft minutes no. 36 be confirmed.

**4. Correspondence**

The committee noted the following items of correspondence:

***Received:***

- 17 May 2021 – Letter from Mr Angus McKay, CEO, 7/11, to the secretariat declining the invitation to appear as a witness at the public hearing on 24 May 2021
- 18 May 2021 – Email from Mr Stephen Smith, Head of National Workplace Relations Policy, to the secretariat declining the invitation to appear as a witness at the public hearing on 24 May 2021
- 19 May 2021 – Email from Mr Nathan Scholz, Head of Investor and Government Relations, Domino's, to the secretariat declining the invitation to appear as a witness at the public hearing on 24 May 2021
- 19 May 2021 – Email from Ampol (formerly Caltex), to the secretariat declining the invitation to appear as a witness at the public hearing on 24 May 2021
- 20 May 2021 – Emails from Ms Jenny Buchan to the secretariat providing information regarding format franchises, including research papers.

**5. Inquiry into the Tax Administration Amendment (Combating Wage Theft) Bill 2021****Public submissions**

The committee noted that submissions nos 1-5 were published by the committee clerk under the authorisation of the resolution appointing the committee.

**Public hearing**

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Mr Mark Morey, Secretary, Unions NSW
- Mr Thomas Costa, Assistant Secretary, Unions NSW

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Michael Fraser, Co-Founder, Director, Wage Theft Australia
- Ms Maddison Johnstone, Co-Founder, Director, Wage Theft Australia

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Scott Johnston, Deputy Secretary, Chief Commissioner of State Revenue, Revenue NSW
- Mr Cullen Smythe, Commissioner of State Revenue, Revenue NSW

Mr Mookhey tabled a bundle of documents from returns to orders for papers.

The evidence concluded and the witnesses withdrew.

The public and media withdrew.

The public hearing concluded at 12.00 pm.

## 6. Deliberative meeting

### 6.1 Tabled documents

Resolved, on the motion of Mr Searle: That the committee accept and publish the following documents tendered by Mr Mookhey during the hearing:

- Sydney Morning Herald article, 'Woolworths underpayments blow out to \$390 million; 1350 jobs to go'
- Audit Report of Woolworths Limited
- Sydney Morning Herald article, 'Domino's Pizza workers kept in the dark about underpayment for almost two years'
- Audit Report of Domino's.

## 7. Adjournment

The committee adjourned at 12.02 pm until Friday 4 June 2021 at 2.00 pm in Room 1043 for the report deliberative.

Madeleine Dowd  
**Committee Clerk**

### Draft minutes no. 39

Friday 4 June 2021

Portfolio Committee No. 1 - Premier and Finance

Meeting Room 1043, Parliament House, Sydney, at 2.58 pm

### 1. Members present

Ms Moriarty, *Chair*

Ms Boyd (via WebEx)

Mr Franklin (via teleconference)

Mr Martin

Mr Mookhey (participating member)

Mr Poulos

Mr Searle

### 2. Apologies

Mr Borsak, *Deputy Chair*

Mr Shoebridge (participating member)

### 3. Draft minutes

Resolved, on the motion of Mr Searle: That draft minutes no. 37 be confirmed.

## 4. Inquiry into the Tax Administration Amendment (Combating Wage Theft) Bill 2021

### Submissions

The committee noted it received late submissions from Domino's Pizza Enterprises and the National Retail Association, which have been previously circulated, and were published by the committee clerk under the authorisation of the resolution appointing the committee.

### Answers to questions on notice and supplementary questions

The committee noted that the following responses have been received and published on the committee's website as per the resolution establishing the committee:

- Revenue NSW received on 26 May 2021

- Unions NSW received on 27 May 2021.

#### **Additional information from Unions NSW**

The committee noted that additional information was received from Unions NSW on 24 May 2021 and has been published by the committee clerk under the authorisation of the resolution appointing the committee. The additional information included the following four reports:

- Lighting Up the Black Market: Enforcing Minimum Wages (2017)
- Wage Thieves: Enforcing Minimum Wages (2018)
- Wage Theft The Shadow Market, Part Two: The Horticulture Industry (2021)
- Wage Theft: the Shadow Market (2020).

#### **Consideration of Chair's draft report**

The Chair submitted her draft report entitled Tax Administration Amendment (Combating Wage Theft) Bill 2021, which, having been previously circulated, was taken as being read.

Resolved, on the motion of Mr Searle: That paragraph 2.64 be amended by inserting 'the NSW Parliament and' before 'the NSW Government'.

Resolved, on the motion of Mr Searle: That the following new recommendation be inserted after Recommendation 1:

##### Recommendation 2

That the Legislative Council amend the Tax Administration Amendment (Combating Wage Theft) Bill 2021 to criminalise wage theft, or pass specific wage theft legislation to complement the legislation now before the House.

Resolved, on the motion of Mr Franklin: That:

- a) the draft report, as amended, be the report of the committee and that the committee present the report to the House;
- b) the transcripts of evidence, submissions, tabled documents, and correspondence relating to the inquiry be tabled in the House with the report;
- c) upon tabling, all unpublished transcripts of evidence, submissions, tabled documents, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- d) the committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- e) the committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- f) dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;
- g) the report be tabled in the House on 8 June 2021.

#### **5. Adjournment**

The committee adjourned at 3.04 pm until *sine die*.

Sam Griffith  
Committee Clerk







