PCG 2020/2EC - Compendium

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Australian Government
Australian Taxation Office

Public advice and guidance compendium – PCG 2020/2

Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Practical Compliance Guideline PCG 2019/D4 *Expansion of estimates regime to GST, LCT and WET*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
1	The expansion of the estimates regime is strongly supported.	Noted.
2	A director associated with prior deregistrations is not of itself an indicator of phoenix behaviour. We suggest that the reference to deregistrations should more appropriately refer to the Australian Securities and Investments Commission initiated deregistrations or deregistrations that do not comply with the requirements of the *Corporations Act 2001* (Corporations Act).	Noted. A number of stakeholders raised a concern that at least some of the factors listed may occur as part of legitimate business activity, including legitimate restructuring, rather than illegal phoenix behaviour. A qualification has been added after paragraph 14 of the final Guideline, stating that some of the listed factors, either alone or in combination, may not point to phoenix behaviour, and that it is the totality of the circumstances that must be considered in deciding whether the issue of an estimate is justified.
3	Paragraph 17 of the draft Guideline refers to 'an insolvency administration', however we suggest that, having reference to clause 5-15 of Schedule 2 to the Corporations Act, a reference to 'an external administration' would give better alignment with the Corporations Act.	Agreed. Change made to paragraph 18 of the final Guideline.
4	In making a 'reasonable' estimate, and noting the comment at Issue 3 of this Compendium regarding paragraph 17 of the draft Guideline, we suggest that 'information obtained from third parties' should specifically note that this includes information available from external	Agreed. Change made to paragraph 20 of the final Guideline.

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	administrators (subject to the requirements of the Corporations Act).	
5	We do not support enabling the ATO to make directors personally liable for any outstanding goods and services tax (GST), luxury car tax or wine equalisation tax liabilities through the director penalty regime. In our view, it is inappropriate, without a compelling justification, to expand personal liability for all directors rather than targeting those criminals and companies engaged in misconduct. We will continue to make representations to government to that effect. If Parliament is to enact this provision, we believe, as a matter of public policy, that some of the matters contained within the draft Guideline should be legislated. This is particularly the case for the matters contained in the draft Guideline regarding 'When will the Commissioner make an estimate of a net amount?' and 'What will the Commissioner take into account in making a `reasonable' estimate?' A legislative approach is far preferable because as matters stand, as was observed in *CLK Kitchens & Joinery Pty Ltd v Commissioner of Taxation* [2019] FCA 1086 at [113], …'the power of the Commissioner to make an estimate is granted in unconfined terms'. Given the far-reaching effect of an estimate, the appropriate place for these provisions is in legislation that has been subject to a robust parliamentary process, and allows for appropriate restraint on executive power.	Noted. However, these comments relate to the legislative policy.
6	Notwithstanding the views expressed in Issue 5 of this Compendium, and in the event that the Bill is enacted without amendment, then we broadly welcome the intent of the draft Guideline. It is useful that the Commissioner provide some indication of how they will use these powers in practice.	Noted.
7	We submit that the ATO should indicate that it will take a restrained approach over the first 12 months of the existence of the extended power in order to allow time to appropriately bed down its approach to enforcement. This will enable the ATO and others to undertake an education campaign so that companies, directors, managers, accountants and	We recognise the impact this measure could have on directors and note that it would only be exercised where it is considered to be necessary in all the circumstances. This is where we have reasonable grounds for believing that phoenix behaviour is involved and the taxpayer is not engaging with us. The use of the power will therefore be inherently restrained, and a further bedding-down period is not considered

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	other relevant persons are made aware of these new, significant potential liabilities.	necessary.
8	The second dot point in paragraph 13 of the draft Guideline (regarding dissipation of assets) is drafted in very general terms and has potentially a very broad application. This is the most critical paragraph of the draft Guideline as it triggers the application of the estimate provisions so particular care must be taken in its drafting. The matters set out in that dot point are subjective and broader than what might normally be interpreted as phoenix behaviour. We believe it is more appropriate that this dot point is located within paragraph 14 of the draft Guideline as a potential indicator of phoenix behaviour, in this case, as a precursor of phoenix behaviour. It could then be considered alongside the other possible indicators of phoenix behaviour.	Agreed. Change made to paragraph 14 of the final Guideline.
9	The second and third dot points of paragraph 14 of the draft Guideline are too broad and should not be included as indicators of phoenix behaviour. Many directors are associated with prior liquidations and/or deregistrations and prior instances of insolvency without engaging in any unlawful conduct, meaning that the proposed inclusion of these criteria are casting the net too wide. A more targeted approach is necessary to reflect this commercial reality and not expose a wide cohort of directors to potential personal liability. Of course, a number of these factors may not indicate phoenix behaviour at all. As paragraph 1.2 of the Explanatory Memorandum to the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 notes 'phoenix activity is not defined in legislation and can encompass both legitimate business rescue activities and the use of serial deliberate insolvency as a business model to avoid paying company debts.' We recommend that paragraph 14 of the draft Guideline be qualified, stating that some of these factors, either alone or in combination, may not point to phoenix behaviour, and that it is only when the factors, either alone or in combination, evidence the stripping or transfer of assets from a company to another entity with the intention of defeating	More than one stakeholder has raised a concern that at least some of the factors listed may occur as part of legitimate business activity, including at times legitimate restructuring, rather than illegal phoenix behaviour. Paragraph 15 has been added to the final Guideline to qualify the list of indicators of phoenix behaviour, stating that some of these factors, either alone or in combination, may not point to phoenix behaviour, and that it is the totality of the circumstances that must be considered in deciding whether the issue of an estimate is justified.

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	the interests of the first company's creditors in that company's assets, should making an estimate GST be considered.	
10	We suggest that paragraphs 15 and 16 of the draft Guideline should include references to contact other than phone calls, as is no doubt ATO practice. As currently drafted the document suggests that phone calls will be the only method by which contact is attempted to be established. In our view, the ATO should be encouraged to attempt other methods such as a combination of letters, emails, and text messages. Contact should also specifically refer to directors who may become liable for the debt. As a matter of procedural fairness, the ATO should not proceed with making an estimate unless they have attempted to contact directors as well as employees or other representatives of an entity.	Paragraph 17 of the final Guideline has been amended to refer to phone calls and other attempts at communication. Footnote 15 of the final Guideline has also been added to say that, in the case of a company, attempts at contact may include attempts to contact the directors.
11	To provide guidance and comfort to directors we recommend including a specific reference to the Commissioner not making an estimate of an unpaid net amount when a director is taking a course of action reasonably likely to lead to a better outcome for a company. It would alleviate concerns when directors are trying to make difficult judgments on the best course of action to take in challenging circumstances. We suggest the matter could be addressed by the insertion of a new paragraph 18 of the final Guideline as follows: *An estimate of unpaid net amount will generally not be made where a person is taking a course of action reasonably likely to lead to a better outcome for a company that may become or be insolvent in accordance with the safe harbour provisions of section 588GA of the Corporations Act 2001.* If the ATO accepts this suggestion, we also believe it would be useful to have an example of a director utilising safe harbour provisions and the Commissioner determining not to make an estimate included in the final Guideline.	Agreed. See paragraph 19 of the final Guideline. This paragraph does not mean that the Commissioner will be under any obligation to take active steps to determine whether a director is eligible for a 'safe harbour' under section 588GA of the Corporations Act, before issuing an estimate. We have decided not to add a further example.

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12	Given the far-reaching nature of the power to make an estimate of an unpaid net amount we suggest that written approval be required from a member of the Senior Executive Service.	We consider that officers at the Executive Level 2 level or above are suitable to authorise the issue of an estimate.
13	We suggest that the examples included in the draft Guideline could include the circumstance where a company has or may become insolvent but there is no evidence of phoenix behaviour, so the Commissioner does not make an estimate. This is not intended to be the example referring to the director utilising safe harbour provisions. We have drafted an example below as a suggestion for what that might look like (possible new Example 5): *Example 5 – company winding up imminent, no estimate made* *Li and Wei are directors of ABC Pty Ltd a carpentry business. Monthly BAS statements have been regularly lodged by ABC Pty Ltd for the previous few years. Several months have gone by and no BAS statements have been lodged.* *Initial calls to Li go unanswered. A call is made to Wei who answers. Wei explains that Li was injured at work and that has caused the business financial difficulties. They don't think they can pay their suppliers and they think they won't be able to pay their tax liabilities. They intend to place the company into voluntary administration. The ATO will be a creditor.* *Neither Li or Wei have ever been associated with a company that has gone into liquidation before and they hold no other directorships. Records indicated that ABC Pty Ltd has three employees who are only showing employment income from that company. Third party data does not indicate any drawdown of bank accounts other than for normal business expenses.* *In this circumstance, there is no evidence of phoenix behaviour and the Commissioner will not make an estimate.*	Agreed. We have adopted this suggested example with slight modifications (see Example 5 of the final Guideline).
14	The breadth of the power is emphasised by the fact that 'you are liable to pay the unpaid amount of the estimate even if the underlying liability never existed or has been discharged in full' (subsection 268-25(a) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).	Noted.

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	It may also be noted that there are very few constraints or limitations upon the power given to the Commissioner. Although phoenixing activity may have been the stated reason for the introduction of the new law, the power is 'at large' and is by no means limited to phoenixing activity. In this context, the draft Guideline is both welcome and important. That said, it should be understood that there is no legal remedy if an ATO officer fails to follow the Guideline, or misunderstands or misinterprets the Guideline in any way. Accordingly, both the terms of the Guideline, and the ATO's internal processes and controls will be of paramount importance.	
15	Paragraph 15 of the draft Guideline states that an estimate of an unpaid net amount will 'generally' not be made in response to suspected phoenix behaviour unless a taxpayer fails to engage and cooperate with tax officers. We recommend that paragraph 15 of the draft Guideline be expanded to clarify the circumstances in which the powers to estimate unpaid net amounts may be used in circumstances where there is full engagement and cooperation with tax officers.	The paragraph is not meant to suggest that an estimate would be made in circumstances where there is full engagement and cooperation with tax officers. The word 'generally' relates primarily to the first dot point about multiple attempts being made to contact the taxpayer before an estimate is made. There may be an exceptional case which warrants departure from this approach. For example, where significant dissipation of assets is discovered and other factors clearly point to phoenix behaviour, and the Commissioner feels it necessary to issue an estimate immediately in order to take action to protect the revenue (such as action to prevent further significant dissipation of assets).
16	We note that the Commissioner has published extensive guidelines regarding the manner in which industry benchmarking methodology is to be used by tax officers. The draft Guideline should be amended to include a reference to these guidelines and to alert tax officers to the requirement to follow them in the limited circumstances where officers might be using the guidelines to reasonably estimate a net amount.	A sentence has been added to Footnote 18 of the final Guideline, stating that staff should have regard to all existing guidelines when referring to or using benchmarks.
17	The Commissioner states at paragraph 19 of the draft Guideline that, generally, 'acquisitions will be taken into account in making an estimate and credit be given for them'. That is, of course, both appropriate in an 'invoice-credit' based GST, and necessary as a matter of law. Otherwise the estimated amount could not be considered reasonable on any objective basis (refer to subsection 268-10(2) of Schedule 1 to the TAA).	We do not believe any change is warranted. As a general rule, acquisitions will be taken into account in making an estimate. Paragraph 20 of the draft Guideline (now paragraph 22 of the final Guideline) commences with the words. 'However, there may be exceptions.' The situation described in the paragraph is an example of such an exception. It does not deny the general position that credits should be allowed when making an estimate, and does not represent a

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	However, the Commissioner goes on to say, at paragraph 20 of the draft Guideline, that 'if the Commissioner has reason to believe that the entity has operated in the cash economy and has not kept accurate records or obtained a tax invoice as required, the Commissioner may not allow input tax credits in making an estimate, because the taxpayer would in most cases not be entitled to attribute the input tax credits without a tax invoice.' We respectfully disagree with this analysis. It does not appropriately reflect the way in which the GST works, nor as a matter of law accord with the making of a reasonable estimate. There may be many reasons for the absence of a tax invoice and the Commissioner has power in any event to treat a document that is not a tax invoice as a tax invoice. What is more important is to arrive at a reasonable estimate of a net amount, whatever the circumstances, and not to introduce a de facto penalty into the estimating process. Schedule 3 of the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 (Amending Bill) permits the Commissioner to make estimates of an entity's net amount and any estimate of GST taxes should properly include the input tax credits for creditable acquisitions, not just the GST collected on taxable supplies. The inclusion of a power to not allow input tax credits in making an estimate based on a belief that the entity has operated in the cash economy is contrary to the intention of the legislation.	'de facto penalty'.
18	The requirement for approval in writing by an EL 2 officer or above, before an estimate notice is issued, is commended. The EL 2, as approving officer, needs to take into account the whole of the taxpayer's situation, often with a nuanced small business lens, having critically assessed the estimate calculation and the log of all attempts to engage with the taxpayer. The draft Guideline is silent on the APS grade of the tax officer 'authorised' to make the estimate under paragraph 21 of the draft Guideline and we would suggest an experienced APS6 would be appropriate.	Noted. It is not proposed to specify a particular APS level for officers making an estimate, as administrative arrangements may vary. The critical control point will be the need to obtain written approval for the issue of an estimate from an officer at the EL 2 level or above.

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19	The posting of the GST taxes notice immediately creates a debt for the small business, attracts general interest charges compounding daily, and possibly debt action by the ATO. Schedule 3 of the Amending Bill includes a seven-day time frame for taxpayers and the draft Guideline states the ATO will generally extend this to 21 days. It would be reasonable to expect the ATO to provide service standards aligned with their expectations of taxpayers. A regular complaint from small business is that the ATO calls from a 'private number' and if a voicemail is left, the call back number is a general ATO line with long wait times. Taxpayer contact with the ATO needs to be made easy to encourage engagement and support good outcomes.	Noted.
20	We strongly encourage the removal of paragraph 11 of the draft Guideline. Paragraph 23 of the draft Guideline compels the ATO to reduce or revoke the estimate where a complying statutory declaration is provided by the taxpayer. The ATO's power in paragraph 11 of the draft Guideline to evaluate the statutory declaration in order to assess its 'substance or effect' is misplaced. The ATO should be proactive in assisting small business taxpayers with what is required for the document to be effective and compliant, rather than a discretionary evaluation process.	Paragraph 11 of the final Guideline points out that it is the substance of the statutory declaration, rather than its form, that is important in deciding whether it meets the requirements of the legislation. The reference to being able to evaluate a statutory declaration in order to assess its substance is a quote from *Transtar Linehaul Pty Limited v Deputy Commissioner of Taxation* [2011] FCA 856, at [86] (*Transtar Linehaul*). However, to remove any impression that this process of evaluation is simply a matter for the Commissioner's discretion, we have added the remaining words from *Transtar Linehaul* at [86] ... *'although in the case of dispute it would ultimately be for a court to decide whether the statutory declaration was to the effect required by the statute'.* In footnote 12 of the final Guideline, we have also added a quote from *CLK Kitchens & Joinery Pty Ltd v Commissioner of Taxation* [2019] FCA 1086 at [173] '…The effect of a declaration is not conditioned on whether the Commissioner *accepts* that it has the required effect, but whether it *is* of the required effect.'
21	The word 'verifies' in paragraph 26 of the draft Guideline is a misnomer. The taxpayer is required to 'provide' the requisite facts, not 'verify' assumptions and calculations which gave rise to an estimate notice. Further, if the ATO has evidence that the statutory declaration may be false or misleading, we urge the ATO to reduce or revoke the estimate and engage directly with the taxpayer to resolve the conflict	The newly enacted subsection 268-90(2A) sets out the requirements for a statutory declaration or affidavit. It provides that 'the statutory declaration or affidavit must verify the following facts…'. This is what paragraph 28 of the final Guideline is referring to. The paragraph has been amended to clarify what is required, and also to bear in mind the findings of the Federal Court in *Transtar Linehaul*.

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	in information underlying the estimate.	
22	Small and micro businesses operate within a very wide range of size and scale. Industry benchmarks are less useful to assess the data of those micro and small businesses and we urge caution in applying standard industry benchmarks.	Agreed. Changes have been made to footnote 18 of the final Guideline.
23	To support the correct contextual application of the extended estimate powers in Schedule 3 of the Amending Bill, the ATO should include in the final Guideline a requirement to prepare a statement of reasons and attach it to the notice of estimate of net amount; specifically addressing the evidence as to illegal phoenixing activity or dissipation of assets or other action to defeat creditors.	This suggestion will not be expressly included in the final Guideline but its adoption as a matter of practice is being further considered by the ATO.