

PCG 2019/D4 (Finalised) - Expansion of estimates regime to GST, LCT and WET

⚠ This cover sheet is provided for information only. It does not form part of *PCG 2019/D4 (Finalised) - Expansion of estimates regime to GST, LCT and WET*

⚠ There is a Compendium for this document: **PCG 2020/2EC** .
This document has been finalised by PCG 2020/2.



Expansion of estimates regime to GST, LCT and WET

Relying on this draft Guideline

This Practical Compliance Guideline is a draft for consultation purposes only. When the final Guideline issues, it will have the following preamble:

This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow this Guideline in good faith, the Commissioner will administer the law in accordance with this approach.

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What this draft Guideline is about

1. This draft Guideline¹ explains how the Commissioner intends to administer changes proposed by Schedule 3 to the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 (Amending Bill) if Schedule 3 is enacted without amendment.
2. Schedule 3 of the Amending Bill brings GST, LCT and WET within the existing estimates and director penalty² regimes.
3. This Guideline focuses on the expansion to estimates. The estimates regime enables the Commissioner to make an estimate of certain unpaid and overdue tax-related liabilities and recover the amount of the estimate.³
4. This Guideline should be read with Law Administration Practice Statement PS LA 2011/18 *Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts*, which will be updated if the Amending Bill becomes law.
5. All legislative references in this Guideline are to Schedule 1 to the *Taxation Administration Act 1953* unless otherwise indicated.

Date of effect

6. If the Amending Bill becomes law, this Guideline will apply from the commencement of Schedule 3, being the first day of the quarter following Royal Assent. Any comments submitted to us during consultation on this Guideline will be considered before finalisation.

Estimates

7. Schedule 3 of the Amending Bill permits the Commissioner to make estimates of an entity's net amount under the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). A net amount under the GST Act will include any applicable luxury car tax (LCT) and wine equalisation tax (WET).⁴
8. The tax law already:
 - allows the Commissioner to estimate the unpaid and overdue amount of a PAYG withholding or SGC liability⁵
 - allows the Commissioner to have regard to anything considered relevant in making the estimate⁶
 - requires that the amount of the estimate be what the Commissioner thinks is reasonable⁷
 - requires the Commissioner to give notice of an estimate, containing specific details including how to have the estimate reduced or revoked⁸, and
 - deems the amount of an estimate to be due and payable when the Commissioner leaves or posts the required notice.⁹

¹ All further references to 'this Guideline' refer to the Guideline as it will read when finalised. Note that this Guideline will not take effect until finalised.

² The director penalty regime is contained in Division 269 – it currently applies to pay as you go (PAYG) withholding liabilities, super guarantee charge (SGC) liabilities, and estimates of those liabilities.

³ The estimates regime is contained in Division 268. It currently applies to PAYG withholding liabilities and SGC liabilities.

⁴ Paragraph 4.27 of the Explanatory Memorandum to the Amending Bill.

⁵ Subsection 268-10(1).

⁶ Subsection 268-10(3).

⁷ Subsection 268-10(2).

⁸ Section 268-15.

⁹ Subsection 268-20(1).

9. The Commissioner may reduce the amount of an estimate or revoke an estimate at any time.¹⁰

10. An entity may reduce the amount of an estimate or cause the estimate to be revoked by making a sworn statement as follows.

Relevant party	Type of sworn statement	Relevant time period
IF the Commissioner gives you notice of an estimate	<p>AND you give the Commissioner a statutory declaration:</p> <ul style="list-style-type: none"> to the effect that a specified lesser amount is the unpaid amount of the underlying liability, or to the effect that the liability never existed, and verifying the requisite facts 	<p><u>WITHIN</u></p> <ul style="list-style-type: none"> seven days after the Commissioner gives you the notice, or a longer period allowed by the Commissioner.
IF you are a party to proceedings before a Court that relate to the recovery of the unpaid amount of the estimate	<p>AND you:</p> <ul style="list-style-type: none"> file an affidavit that verifies <ul style="list-style-type: none"> facts sufficient to prove that a specified lesser amount is the unpaid amount of the underlying liability, or facts sufficient to prove that the liability never existed, and the requisite facts; and serve a copy on the Commissioner 	<p><u>WITHIN</u></p> <ul style="list-style-type: none"> 14 days after you first take a procedural step as a party to the proceedings, or a longer period allowed by the court.

11. The effectiveness of a sworn statement depends upon its contents; the statutory declaration or affidavit must do more than make assertions without reference to primary facts or primary documents which must have existed.¹¹ The expression ‘to the effect that’ has been interpreted by the courts as directing attention to the substance of the statutory declaration rather than its form.¹² As such, the Commissioner as recipient of the statutory declaration ‘may evaluate it in order to assess its substance or effect’.¹³

12. For the purpose of this Guideline, we use the phrase ‘requisite facts’ to collectively refer to the following facts in relation to the tax period:

- the entity’s net amount
- the entity’s taxable supplies (including taxable supplies of luxury cars) and creditable acquisitions
- the entity’s assessable dealings and wine tax credits, and
- what has been done to comply with the obligation to give a GST return.¹⁴

¹⁰ Section 268-35.

¹¹ *Transtar Linehaul Pty Limited v Deputy Commissioner of Taxation* [2011] FCA 856 at [78-79] (*Transtar Linehaul*), applied in *CLK Kitchens & Joinery Pty Ltd v Commissioner of Taxation* [2019] FCA 1086 (*CLK Kitchens*).

¹² *Transtar Linehaul* at [85], *Deputy Commissioner of Taxation v Armstrong Scalisi Holdings Pty Ltd* [2019] NSWSC 129, *CLK Kitchens*.

¹³ *Transtar Linehaul* at [86].

¹⁴ Paragraph 4.37 of the Explanatory Memorandum to the Amending Bill and proposed subsection 268-90(2B) (item 12 of Schedule 3 of the Amending Bill).

When will the Commissioner make an estimate of a net amount?

13. Having regard to the nature of the amending provisions and the context in which they have been introduced, the powers to make an estimate of an unpaid net amount will only be used in limited circumstances. As a safeguard, approval must be sought from a senior tax officer (Executive level 2 or above). The GST, LCT and WET estimate provisions will only be applied where there are reasonable grounds to believe that:

- the taxpayer, or related entities, are involved in phoenix behaviour, or
- assets are being dissipated with the intention to defeat creditors or other action is being taken to defeat creditors (which may be a precursor to phoenixing).

14. Indicators of phoenix behaviour include (but are not limited to):

- cyclically establishing, abandoning or deregistering companies to avoid paying taxes, creditors or employee entitlements
- a director associated with prior liquidations and/or deregistrations
- a director associated with prior instances of insolvency
- stripping or transfer of assets from the company, ahead of its abandonment, winding up or deregistration
- the transfer of company assets at an undervaluation (often to a related party) to defeat creditors
- the transfer of employees to a new company under the same effective control as the previous company to defeat tax obligations and employee entitlements
- backdating of resignation of a director, appointment of a 'straw' director or abandonment of a company without a resident director
- the concealment of role of a shadow or de facto director
- the concealment or destruction of company records.

15. Further, an estimate of an unpaid net amount will generally not be made unless:

- the Commissioner has made multiple attempts to contact you to establish the overdue and unpaid amount, and
- you fail to engage with us or refuse to cooperate in establishing the overdue and unpaid amount.

16. Examples of when we consider the second dot point in paragraph 15 of this Guideline is satisfied, include:

- phone calls are not returned despite multiple attempts by us to contact you
- you refuse to provide information when requested, or there are continuing delays or excuses for not making information available
- you refuse to give access to, or cooperate with, tax officers, or
- you repeatedly break appointments or refuse to meet with tax officers.

17. Notwithstanding paragraphs 15 and 16, the Commissioner may also make an estimate of an unpaid net amount where an insolvency administration commences, and the Commissioner needs to lodge a proof of debt, but only part of the amount believed to be owing to the Commissioner has been established.

What will the Commissioner take into account in making a ‘reasonable’ estimate?

18. By nature, estimates are approximations based upon judgment.¹⁵ The amount of the estimate must be what the Commissioner thinks is reasonable as a matter of law. This means that the Commissioner cannot make an estimate if there is no relevant information available for that purpose, but the Commissioner will have regard to anything thought to be relevant for the purposes of making an estimate. For the purposes of estimating an unpaid net amount, those relevant factors may include things such as:

- any information the Commissioner holds about the scope and extent of a taxpayer's trading activities during a tax period
- any information the Commissioner holds about specific taxable supplies, or creditable acquisitions, made by the taxpayer in a tax period
- information obtained from third parties about supplies or acquisitions, for example, sales of real property or land titles data
- industry benchmarks¹⁶
- the pattern of past behaviour by the taxpayer, including lodgment history, payments of GST, or past claims for input tax credits, including any seasonal fluctuations.

19. The making of a reasonable estimate of an unpaid net amount necessarily involves considering GST on taxable supplies and input tax credits on creditable acquisitions, and arriving at an estimate for each of those amounts that is reasonable. Generally, therefore, acquisitions will be taken into account in making an estimate and credit be given for them.

20. However, there may be exceptions. For example, 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.¹⁷

Who is authorised to make an estimate of an unpaid net amount?

21. An estimate of an unpaid net amount can only be made by a tax officer who is authorised to do so.

22. Further, before officers may issue a notice of estimate of an unpaid net amount, they must obtain written approval from a senior tax officer (Executive Level 2 or above).

Time period for making a sworn statement

23. Paragraphs 10 to 12 of this Guideline explain how an entity can cause an estimate to be reduced or revoked. In summary, where a complying statutory declaration is provided within the statutory timeframe, the Commissioner must accept the statement and reduce or revoke the estimate as submitted.¹⁸ The statutory time frame is seven days, or such longer period as the Commissioner allows.

24. Generally, the Commissioner will allow a period of 21 days from when the notice of estimate is given for a statutory declaration to be provided. This 21 day period will be notified to you when the notice of estimate is sent.

¹⁵ *CLK Kitchens* at [124].

¹⁶ The benchmarks show ratios of business income to business expenses that can be used to compare performance of a business against similar businesses within an industry. Benchmarks use information reported on tax returns and activity statements, are updated each year and are published on ato.gov.au.

¹⁷ Subsection 29-10(3) of the GST Act.

¹⁸ *CLK Kitchens*.

25. If you need more than 21 days to provide your statutory declaration, you may at any time contact us to request a longer period of time. If you provide us with an explanation, and propose an alternative time period within which you will provide the statutory declaration, and we consider both to be reasonable in the circumstances, the Commissioner may allow a longer period. We encourage you to engage with us as early as possible.

26. If you provide a statutory declaration outside of the period (and have not been granted extra time), the ATO will consider the statement. Provided it verifies the requisite facts as required by the legislation¹⁹, we will generally reduce or revoke the estimate accordingly. However, if we have evidence that indicates that the statutory declaration is false or misleading, we will not reduce or revoke the estimate.

27. In Court proceedings that relate to recovery of an unpaid estimate, you have 14 days from when you first take a procedural step to provide an affidavit containing the requisite facts. A longer time period may be allowed by the Court.

Your response to an estimate

28. If you receive a notice of estimate, you may:

- provide a complying statutory declaration within the relevant time (explained in paragraphs 10 to 12 of this Guideline)
- request extra time to lodge a statutory declaration, or
- make a payment of the estimated amount.

29. You should also lodge any GST returns/activity statements that are outstanding.²⁰

30. The Commissioner only seeks to recover an amount equivalent to the underlying liability. If you lodge your activity statement (rather than providing a sworn statement), the information will be reviewed and consideration will be given to whether to reduce or revoke the estimate. The estimate and the actual assessed net amount are separate liabilities.²¹ However, they are also 'parallel liabilities'. This means that payment of one liability discharges the other to the same extent.²²

What might drive the ATO towards making an estimate of a net amount rather than using existing assessment powers?

31. The object of the estimates regime is to enable the Commissioner to take prompt and effective action to recover amounts not paid as required.²³

32. In 2009 the Australian Government published the *Action against fraudulent phoenix activity Proposals Paper* which noted that 'existing mechanisms do not provide a sufficient disincentive to prevent fraudulent phoenix activity' and recommended the extension of the estimates and director penalty regimes to super guarantee and GST.²⁴

¹⁹ Proposed subsection 268-90(2B).

²⁰ Payment of an estimated amount does not relieve a tax debtor of the obligation to lodge a GST return and pay any amount of the underlying liability in excess of the estimate.

²¹ Subsection 268-20(2).

²² Subsection 268-20(3).

²³ Section 268-5.

²⁴ Australian Government, 2009, [Action against fraudulent phoenix activity – Proposals Paper](#), the Treasury, Canberra.

33. When the estimates regime was extended in 2012 to include SGC, the Explanatory Memorandum to the Tax Laws Amendment (2012 Measures No. 2) Bill 2012 explained the rationale as follows²⁵:

The ability to estimate a superannuation guarantee charge reduces the scope of phoenix operators and other non-compliant corporate entities to escape liabilities once they become aware that the Commissioner is pursuing them. For example, the issue of an estimate enables the Commissioner to take prompt action when an opportunity arises to secure recovery, without having to delay recovery by waiting for an assessment to be issued.

Like the director penalty regime, the estimates regime treats the superannuation guarantee charge as being payable even if it has not been assessed, to avoid problems with delaying or avoiding quantification.

34. Therefore, where there are reasonable grounds to believe that the circumstances outlined in paragraph 13 of this Guideline are present, the Commissioner may be more inclined to issue an estimate of a net amount, rather than making an assessment (see paragraphs 37 to 54 of this Guideline for examples).

35. The rationale for the making of an estimate rather than making an assessment was recently explained in the Federal Court decision of *CLK Kitchens*. The Court noted that²⁶:

It is necessarily implicit that the taking of prompt and effective action will often occur on limited information where the actual liability of the payer is not fully ascertainable. Requiring the Commissioner to delay to acquire more fulsome information and to more fully assess the actual liability would undermine Parliament's express intention.

36. The Court also noted that²⁷:

After all, the recipient of the estimate who has all the information and knows the true facts can immediately cause the estimate to be reduced by the giving of a statutory declaration.

Estimates examples

Example 1 – BAS lodged late, no estimate made

37. *Bob the builder has been particularly busy recently and forgot to lodge his BAS until it was two months late. He may be subject to a penalty for lodging late and interest on any liability that is outstanding. Apart from this occasion, he has a good compliance history, generally lodging on time and paying any liabilities as they are due. There is no indication of phoenix behaviour, assets being dissipated or actions being taken to defeat creditors in this case. The Commissioner will not seek to make an estimate of Bob's GST liability.*

Example 2 – missed BAS lodgment date, no estimate made

38. *Angie runs a small business. When she started her business last year, she preferred to lodge her BAS on paper as she liked that the due date for lodging and paying is displayed on her BAS. Last quarter, Angie decided to switch to lodging electronically and did so for the first time. She made sure to update her contact details on myGov and awaited the reminder email for the next quarter. Unfortunately the ATO reminder email was automatically sent to her junk mail folder. A month after she would usually lodge, she wonders whether something has gone awry and finds the email in her junk mail folder. She calls the ATO and is advised to lodge her BAS as soon as possible to minimise any interest charges or penalties. In this case, there is no indication of phoenix behaviour, assets being dissipated or actions being taken to defeat creditors. The Commissioner will not make an estimate of Angie's GST liability in this scenario.*

²⁵ At paragraphs 1.33 and 1.34.

²⁶ *CLK Kitchens* at [127].

²⁷ *CLK Kitchens* at [130].

Example 3 – missed multiple BAS lodgment dates, no estimate made

39. Carl is a sole trader carpenter. After operating his business for 10 years, he decides to take a break and go on holiday driving around Australia for six months. He usually engages a tax agent to lodge his quarterly BAS. He has a good compliance history, generally lodging on time and paying any tax-related liabilities as they are due. As Carl has temporarily stopped working, and he hasn't been to visit his tax agent recently, he has not lodged a BAS. After his first lodgment date passes without anything being lodged, the ATO systems send him a reminder text message and reminder prompts via the myGov portal. Carl does not receive these messages as he is outside of phone signal range. Carl's tax agent has noticed that the BAS is overdue but similarly can't reach him. When the next lodgment date passes without anything being lodged, further reminders are sent to Carl by both the ATO and his tax agent. When Carl goes into a town, gets phone reception and receives his messages he calls his tax agent to inform her that he's been on holiday and has not been trading. The tax agent lodges a nil BAS for the two periods via the portal for Carl. Despite the missed lodgments, there are no indicators of phoenix behaviour, assets being dissipated or actions being taken to defeat creditors, therefore the Commissioner has not made an estimate of Carl's GST liability in the interim.

Example 4 – indicators lead to an audit being commenced

40. Suzie operates an art gallery business. She has employed a bookkeeper to help her with her accounts but otherwise lodges her own BAS and tax returns. A friend recommends a tax agent to her as they were very helpful in reducing their taxes last year. Suzie visits the tax agent and likes what she hears but wonders if it is too good to be true. She asks the tax agent whether the tax law really allows for what is being proposed, seeking some assurance; the tax agent explains to her that they can seek a private ruling if she wants certainty. The tax agent submits a private ruling request to the ATO containing four questions. The Commissioner rules favourably for the first two questions and unfavourably for the last two questions.

41. A year later an ATO team is reviewing Suzie's business' tax affairs and notices some inconsistencies between what was proposed in the private ruling request and what the business seems to have implemented, and their self-assessed tax treatment seems inconsistent with the ruling provided. Suzie's quarterly BAS lodgments show sales on trend with her previous quarters, but significantly higher input tax credits being claimed. The compliance team attempt to contact Suzie via phone but she does not answer and does not return calls after messages are left. The tax agent is no longer listed as an authorised contact on Suzie's account. ATO staff check the data the business is reporting about payments to employees and notice the payments and withholding have continued in a similar pattern to previous years. This risk review identifies some concerns so the ATO commences an audit on the art gallery business. There is no indication of phoenix behaviour, assets being dissipated or actions being taken to defeat creditors. The business' BAS lodgments are up to date. The Commissioner will not make an estimate in this case.

Example 5 – estimate made as phoenix behaviour indicated

42. Sebastian and Henry are directors of a company, KeenOne Enterprises Pty Ltd, which provides a luxury goods sales assistance service. The company was registered on 1 July 2018 and has an ABN and a tax file number. Monthly BAS were lodged within due dates for the 2018-19 year, some resulting in a refund being paid to the company, other resulting in GST liabilities. The company has not lodged any BAS since. ATO data indicates that the company does not employ staff, however three individuals (unrelated to

Sebastian and Henry) have lodged their 2019-20 income tax returns showing employment income from the company and claiming credits for income tax withheld by the company.

43. The 2018 company tax return shows significant income but with an overall loss. The director payments disclosed in the company tax return have not been declared as income by the directors as they have not lodged their personal income tax returns either.

44. BAS lodgment reminders have been sent to the company and the directors. Attempts to contact the directors have not been successful. Third party data indicates that the company bank accounts are being drawn down; ad hoc withdrawals of amounts under \$10,000 commenced in July 2019 and have been increasing in size and frequency since.

45. A check with the Australian Securities and Investments Commission shows that Sebastian and Henry have recently registered a new company, Keen2Go Enterprises Pty Ltd, with the same business address as KeenOne Enterprises Pty Ltd. Further checks show that the new company has just applied for an ABN and GST registration. In this scenario, there are reasonable indicators of phoenix behaviour. The Commissioner uses the estimates regime to estimate the PAYG withholding, SGC and GST liabilities of the company for periods after the last BAS was lodged.

Example 6 – estimate made as phoenix behaviour indicated

46. Mandy and Christina are directors of Cars Co, a car dealership and servicing company. The entity reports and pays GST quarterly. Their GST net amounts have been in the range between \$18,000 and \$25,000 for each quarter from the beginning of 2018.

47. Cars Co fails to lodge its quarterly BAS for the January–March 2020 and April–June 2020 tax periods.

48. A tax officer attempts to contact Mandy and Christina to encourage lodgment of their outstanding BAS. Despite numerous promises to do so, they do not comply. Through investigation, a tax officer discovers that Mandy and Christina have previously been directors of three other similar companies, which operated from the same premises as Cars Co, and have been placed into liquidation leaving multiple tax debts unpaid.

49. This pattern of behaviour indicates that Cars Co may soon be liquidated to avoid outstanding debts, including unpaid GST and falls within the circumstances described in paragraph 13 of this Guideline. There is a time-sensitive risk to revenue which warrants speedy recovery action, so an estimate of unpaid tax-related liabilities is made.

50. To calculate the estimate, the tax officer takes into account:

- information the Commissioner holds about the company in relation to total sales and acquisitions, and taxable supplies and creditable acquisitions in past periods
- the pattern of past payments of GST by the entity, and past claims for input tax credits, including any seasonal fluctuations
- likely annual turnover and relevant industry benchmarks.

51. In these circumstances, the reasonable estimate of unpaid amounts for each period are considered and the Commissioner issues a notice of estimate pursuant to Division 268 to Cars Co for the unpaid and overdue amounts of \$22,000 for the quarter ended 31 March 2020 and \$19,000 for the quarter ended 30 June 2020.

52. The notice is taken to be given at the time the Commissioner posts it to Cars Co. In the letter accompanying the notice of estimate, the Commissioner allows 21 days for the making of a statutory declaration in response.

53. **If the company engages with the tax system:** Mandy and Christina, as directors of Cars Co, provide the Commissioner, within 21 days, a complying statutory declaration verifying the requisite facts (see paragraphs 10 to 12 of this Guideline) and with sufficient

evidence to demonstrate that their business is seasonal and their GST liabilities were significantly less for the last two quarters of the income year. As the complying statutory declaration is provided within the relevant period, the reduction of the estimate is automatic.

54. **Alternatively, if the company ignores the notice:** *Cars Co fails to engage with the Commissioner and does not discharge any of the estimated GST liabilities, and Mandy and Christina fail to cause Cars Co to comply with its obligations under the TAA to pay the estimate. The Commissioner can commence immediate action to recover the unpaid amount of the estimate.*

Commissioner of Taxation

6 September 2019

Your comments

55. You are invited to comment on this draft Guideline. Please forward your comments to the contact officer by the due date.

56. A compendium of comments is prepared for the consideration of relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments may also be prepared to:

- provide responses to comments, and
- be published on **ato.gov.au**

Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 4 October 2019

Contact officer details have been removed following publication of the final guideline.

References

ATOlaw topics	Administration ~~ Other ATO processes
Legislative references	ANTS(GST)Act 1999 ANTS(GST)Act 1999 29-10(3) TAA 1953 TAA 1953 Sch 1 Div 268 TAA 1953 Sch 1 268-5 TAA 1953 Sch 1 268-10(1) TAA 1953 Sch 1 268-10(2) TAA 1953 Sch 1 268-10(3) TAA 1953 Sch 1 268-15 TAA 1953 Sch 1 268-20(1) TAA 1953 Sch 1 268-20(2) TAA 1953 Sch 1 268-20(3) TAA 1953 Sch 1 268-35 TAA 1953 Sch 1 Div 269 Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019
Case references	<i>CLK Kitchens & Joinery Pty Ltd v Commissioner of Taxation</i> [2019] FCA 1086 <i>Deputy Commissioner of Taxation v Armstrong Scalisi Holdings Pty Ltd</i> [2019] NSWSC 129; 2019 ATC 20-684 <i>Transtar Linehaul Pty Limited v Deputy Commissioner of Taxation</i> [2011] FCA 856; 196 FCR 271
Other references	PS LA 2011/18 <i>Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts</i> Explanatory Memorandum to the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 Explanatory Memorandum to Tax Laws Amendment (2012 Measures No. 2) Bill 2012 Australian Government 2009, <i>Action against fraudulent phoenix activity, Proposals Paper</i> , The Treasury, Canberra

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