

4 October 2019

Mr John Gleeson  
Australian Taxation Office

By e-mail: [john.gleeson@ato.gov.au](mailto:john.gleeson@ato.gov.au)

Dear John

## PCG 2019/D4 – Expansion of estimates regime to GST, LCT and WET

Chartered Accountants Australia and New Zealand (CA ANZ) appreciates the opportunity to comment on PCG 2019/D4 (the draft PCG).

### Introductory comments

The draft PCG explains how the Commissioner intends to administer changes proposed by Schedule 3 to the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 ('the Bill'), insofar as it relates to estimates of GST, LCT and WET (for convenience, we shall refer to GST throughout this submission though our comments apply equally to LCT and WET).

The object of the new law 'is to enable the Commissioner to take prompt and effective action to recover . . . net amounts under the GST Act': proposed s 268-5(c), TAA, Sch 1.

Under the new law, 'the Commissioner may estimate the unpaid and overdue amount of a liability (the *underlying liability*) of yours . . . to pay a net amount for a tax period, to the extent that the net amount has not been assessed before the Commissioner makes the estimate': proposed s 268-10(1)(c), TAA, Sch 1.

The amount of the estimate must be what the Commissioner thinks is reasonable: existing s 268-10(2), TAA, Sch 1. In making the estimate, the Commissioner may have regard to anything he or she thinks relevant: existing s 268-10(2), TAA, Sch 1.

This is undoubtedly an extraordinary power. 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: existing s 268-25(a), TAA, Sch 1.

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 PCG 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 draft PCG, or misunderstands or misinterprets the draft PCG in any way. Accordingly, both the terms of the PCG, and the ATO's internal processes and controls will be of paramount importance.

## Specific comments

The draft PCG states at paragraph 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).'

We respectfully submit that a more appropriate safeguard is that approval must be obtained from a member of the Senior Executive Service. As we stated above, the ATO's internal processes and controls will be of paramount importance and, given the extraordinary nature of the power, should be approved only at SES level.

Paragraph 14 of the draft PCG lists 'indicators of phoenix behaviour'. Of course, a number of these factors may not indicate phoenix behaviour at all. As the Explanatory Memorandum to the Bill notes, at paragraph 1.2, '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 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 the interests of the first company's creditors in that company's assets, should making an estimate of GST be considered.

Paragraph 15 of the draft PCG 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 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.

For the purpose of making an estimate, the Commissioner will have regard to a range of factors, including those set out at paragraph 18 of the draft PCG. One of those factors is 'lodgement history'. We suggest this be deleted as lodgement history can be taken to mean whether lodgements were made on time (which we say is irrelevant to making an assessment), or what is contained in the material lodged (which is relevant but covered by other factors). Another relevant factor is 'industry benchmarks'. We suggest this be qualified to note that care must be taken in the use of these benchmarks as individual taxpayers may vary considerably from the average, and that this should be used as a last resort in the absence of other evidence.

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 PCG 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.

The Commissioner states at paragraph 19 of the draft PCG 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 s 268-10(2), TAA, Sch 1.

However, the Commissioner goes on to say, at paragraph 20 of the draft PCG, 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.

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We trust that these comments are of assistance to you in finalising the draft. We would appreciate the opportunity to discuss any aspect of the draft with you should you so desire.

If you wish to discuss any aspect of our submission, please contact Kevin O'Rourke on 0417 677 600 or by email at [kevin@orourkeconsulting.com.au](mailto:kevin@orourkeconsulting.com.au)

Yours sincerely



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## Appendix A

### Chartered Accountants Australia and New Zealand

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