

4 October 2019

Mr John Gleeson
Australian Taxation Office

By email only: john.gleeson@ato.gov.au

Dear Mr Gleeson

Consultation PCG 2019/D4

Thank you for the opportunity to provide a submission on the Australian Taxation Office's (ATO) draft Practical Compliance Guideline (the **Guideline**) on the expansion of the estimates regime to the GST, luxury car tax (LCT) and wine equalisation tax (WET).

The Australian Institute of Company Directors (AICD) has a membership of more than 44,000 including directors and senior leaders from business, government and the not-for-profit sectors. The mission of the AICD is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society.

In summary, the AICD considers the Guideline should be amended to include the following:

- Tighten the scope of matters which the ATO considers evidences phoenix activity;
- Greater detail on how the Commissioner will make contact; and
- An explicit reference to directors utilising safe harbour provisions.

1. Composition of the Guideline

The AICD notes that the draft Guideline has been prepared on the basis that the changes proposed by Schedule 3 to the *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019* (the Bill) are enacted without amendment. The AICD's substantive position is that we do not support enabling the ATO to make directors personally liable for any outstanding GST, LCT or WET 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 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.

By doing so, honest directors can have greater confidence that the law will protect them in circumstances where GST liabilities have not been paid but there is no indication that they have been engaged in unlawful phoenix activity.

Notwithstanding the views expressed above, and in the event that the Bill is enacted without amendment, then we broadly welcome the intent of the Guideline. It is useful that the Commissioner provide some indication of how they will use these powers in practice.

We note that you have indicated that the Law Administration Practice Statement PS LA 2011/18 *Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts* will also need to be updated if the legislation is enacted. We would welcome the opportunity to make submissions on an updated version of that statement, in particular the section on director penalties, which will now have wider application.

Our key comments in relation to the draft Guideline are outlined below.

2. Date of effect

We note that the Guideline will apply from the first day of the quarter following Royal Assent, in accordance with the effective date of the legislation. 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 other relevant persons are made aware of these new, significant potential liabilities.

3. Dissipation of assets too broad

The second dot point in paragraph 13 of the Guideline is drafted in very general terms and has potentially a very broad application.

In our view, this is the most critical paragraph of the 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 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.

4. Indicators of phoenix behaviour should be more limited

For similar reasons to those set out above, we consider the second and third dot points of paragraph 14 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 criterion is 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.

5. Attempts by the Commissioner to contact

We suggest that paragraphs 15 and 16 of the Guideline should include references to contact other than phone calls, as is no doubt ATO practice. As currently drafted the documents 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.

Accordingly, we suggest amending the draft Guidelines as follows (*italics is new wording*):

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

- the Commissioner has made multiple attempts to contact you *either by telephone, in writing, in person or by some other means* 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,
- *in the case of a company, attempts to contact have included the directors of the company.*

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

- phone calls *and other attempts at contact such as written communication* 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.

6. Reference to safe harbour provisions

We also suggest that the Guideline should include some reference to the safe harbour provisions set out in s.588GA of the *Corporations Act 2001*. This should be in the “*When will the Commissioner make an estimate of a net amount?*” section of the Guidance.

We believe that it is unlikely that the Commissioner would seek to make an estimate in circumstances where a director is developing one or more courses of action that are reasonably likely to lead to a better outcome for the company that may become or be insolvent. Such a person would be required to give returns, notices, statements, applications

or other documents as required by taxation laws in order to avail themselves of the safe harbour laws, so the matters set out in paragraphs 15 and 16 of the Guidelines would probably not be applicable, meaning an estimate is unlikely to be made.

However, 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 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 s.5887GA 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 Guideline. We would be happy to assist in drafting that example.

7. Authorisation to make an estimate

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.

8. Examples

We suggest that the examples included in the guide 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.

9. Next steps

We hope our comments will be of assistance. If you would like to discuss any aspect of this submission further, please contact Christian Gergis, Head of Policy, at cgergis@aicd.com.au or David McElrea, Policy Adviser at dmcelrea@aicd.com.au.

Yours sincerely



CHRISTIAN GERGIS
Head of Policy