INSTITUTE OF PUBLIC ACCOUNTANTS

30 June 2022

Mr Adam Johnson

Australian Taxation Office

By email to: adam.johnson@ato.gov.au

Dear Adam,

Draft PCG 2022/D2 *Non-commercial business losses – Commissioner's discretion regarding flood, bushfire or COVID-19.*

On behalf of the Institute of Public Accountants I submit our comments on Draft PCG 2022/D2 *Non-commercial business losses – Commissioner's discretion regarding flood, bushfire or COVID-19 (draft PCG)*.

We are generally supportive of initiatives that assist tax practitioners with understanding the practical implications and administrative approach that the ATO will adopt when administering taxation laws.

The non-commercial loss rules contained in Division 35 of the *Income Tax Assessment Act* 1997 (ITAA 1997) prevents an individual's losses from non-commercial business activities being offset against the individual's other assessable income in the year the loss is incurred. A loss from each business activity that an individual (alone or in partnership) carries on in a year is deferred to be offset against future income from the same business activity, unless one of the following applies:

- the individual meets the income requirement, and the business activity satisfies one of the four stipulated tests
- the individual has a business activity that is eligible for an exception, or
- the Commissioner exercises the discretion in subsection 35-55 for the business activity for one or more income years.

This draft PCG focusses on the Commissioners discretion that can be exercised in relation to a business activity for one or more income years if the Commissioner is satisfied that it would be unreasonable, by reference to the circumstances specified, to defer the losses.

One of the circumstances in which the discretion may be exercised is where the business activity was or will be affected by special circumstances outside the control of the operators of the business activity which can include drought, flood, bushfire or some other natural disaster.

This discretion is for situations where the business activity was or will be affected by special circumstances that caused it to fail to satisfy one of the four tests or make a profit in the relevant year. Special circumstances outside of the control of the operator of the business activity are those which are sufficiently different to distinguish them from the circumstances that occur in the normal course of conducting a business activity such as drought, flood, bushfire and include government health restrictions (COVID-19), explosions and disturbances to energy supplies.

In recent years, special circumstances such as flood, bushfire and COVID-19 impacts may have caused the non-commercial loss rules to apply to many more businesses than in previous years. As a result, many taxpayers have not been able to meet one of the other requirements for the loss to be offset against their other income, requiring the taxpayer to seek the Commissioner's discretion to allow them to do so. This draft PCG provides a welcomed safe harbour that, provided you satisfy the relevant conditions, allows you to manage your tax affairs as if the Commissioner had exercised the discretion in paragraph 35-55(1)(a).

We welcome the opportunity to provide feedback and make the following comments for consideration.

Given the number of businesses impacted by special circumstances particularly COVID-19 related, a safe harbour to self-assess the Commissioner’s discretion most welcomed. Without this avenue taxpayers would be required to apply for the Commissioners discretion and have to wait for the confirmation that the application was successful. The guidelines in the draft PCG provide the basis for the safe harbour excise of the Commissioners discretion. The draft PCG makes tax administration easier for businesses impacted by floods, bushfires, and COVID-19 events. Impacted businesses within the guidelines of the safe harbour will not need to apply for the discretion for the income years ended 2019-20, 2020-21 and 2021-22.

Taxpayers who fall out of the guidelines are not prevented from applying for an exercise of the discretion in the usual way if their circumstances do not fall within the terms of the safe harbour. This is a good practical way to reduce administration whilst protecting the integrity of the non-commercial loss provisions.

The one suggestion we would like to be further explored, is for taxpayers not directly impacted by the special circumstances noted in the draft PCG to be similarly considered for the purposes of the safe harbour. If a business relies on customers directly impacted by the special circumstances, it in turn would suffer the same consequences of not been able to meet one of the four tests or make a profit in the relevant year. If a business is significantly reliant on businesses directly impact by special circumstances, then due consideration is warranted for similar safe harbour relief. COVID-19 related restrictions are not isolated to lock down areas as downstream impacts are also common when consumers cannot travel.

If you would like to discuss our comments, please do not hesitate to contact me.

Yours sincerely

Tony Greco

General Manager, Technical Policy

Institute of Public Accountants