



Public advice and guidance compendium – PCG 2022/1

❶ Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Practical Compliance Guideline PCG 2022/D2 *Non-commercial business losses – Commissioner’s discretion regarding flood, bushfire or COVID-19*. 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	There appears to be an anomaly in the <i>Income Tax Assessment Act 1936</i> that allows farm management deposit withdrawals to be treated as ordinary assessable or non-primary production income. Surely it is against the policy for farm management deposit withdrawals of \$250,000, withdrawn due to drought, to be treated as income that cannot be offset against substantial losses.	This issue is outside the scope of this Guideline. Rather, it is a question of policy.
2	If drought were included in the proposed safe harbour provisions, it may be a temporary fix for what appears to be an anomaly in the legislation (refer to Issue 1 of this Compendium).	Australia is historically prone to drought, partly because of its geography, and the extent of drought can be difficult to determine. Because of this, it is considered better to deal with these cases as individual discretion requests so that specific facts and circumstances can be considered. Further, adding the special circumstance of drought to paragraph 16(c) of the final Guideline would not necessarily resolve the matter raised in Issue 1 of this Compendium, as the other conditions in that paragraph also need to be met to apply the safe harbour.
3	If non-commercial losses cannot be deducted from an earlier income year, it is my understanding that the excess is treated as being deductible in the following income year (refer to section 35-10(2) of the <i>Income Tax Assessment Act 1997</i>). The draft Guideline is silent on whether this ‘excess’ is included as part of the condition at paragraph 16(b) of the draft Guideline. As the excess may	Paragraph 16(b) of the final Guideline has been updated to clarify that amounts deferred from previous income tax years under the non-commercial loss rules are excluded when calculating if a loss has been made. Example 6 of the final Guideline has also been added to explain this approach.

Issue number	Issue raised	ATO response
	not be attributable to special circumstances, it would be helpful if the Commissioner clarified his views as to how his discretion is intended to be exercised where a taxpayer is claiming excess deductions from the 2019–20, 2020–21 or 2021–22 income years.	
4	The Commissioner's views in the draft Guideline may require amendments to be made to income tax returns for earlier income years. Most taxpayers will have a 2-year amendment period, so the possibility exists that a taxpayer may be out of time to amend by the time the draft Guideline is finalised (for example, in relation to the 2019–20 income year). This may require an objection to be made (with an out-of-time request), which could defeat the purpose of the simplified approach in the Guideline. Some guidance for out-of-time amendments may be useful in this regard. Will the period of review apply to amending past years' returns?	The law sets time limits for amending assessments. Taxpayers wishing to amend previous year's assessment more than 2 years since their original assessment will need to follow the usual process of lodging an objection. Footnote 11 has been added to paragraph 13 of the final Guideline to ensure this is known. The footnote includes a link to the time limits web guidance, which also provides information on how to lodge an objection.
5	Can taxpayers not directly impacted by the special circumstances noted in the draft Guideline 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 being able to meet one of the 4 tests or make a profit in the relevant year. If a business is significantly reliant on businesses directly impacted by special circumstances, due consideration is warranted for similar safe harbour relief. COVID-19-related restrictions are not isolated to lockdown areas as downstream impacts are also common when consumers cannot travel.	A business activity needs to be affected by one or more of the events listed in the final Guideline. The final Guideline enables a taxpayer to manage their tax affairs as if the Commissioner had exercised the discretion in paragraph 35-55(1)(a) of the <i>Income Tax Assessment Act 1997</i> without having to apply for a private ruling. Business operators can still apply for a private ruling asking the Commissioner to exercise discretion based on their circumstances.