


# ***PR 2021/7 - Income tax: tax consequences for a Solar Gardener in a gardener-funded Enova Solar Garden Project***

 This cover sheet is provided for information only. It does not form part of *PR 2021/7 - Income tax: tax consequences for a Solar Gardener in a gardener-funded Enova Solar Garden Project*



## Product Ruling

# Income tax: tax consequences for a Solar Gardener in a gardener-funded Enova Solar Garden Project

Contents	Para
<b>LEGALLY BINDING SECTION:</b>	
<b>What this Ruling is about</b>	<b>1</b>
<b>Date of effect</b>	<b>12</b>
<b>Ruling</b>	<b>17</b>
<b>Scheme</b>	<b>18</b>
<b>NOT LEGALLY BINDING SECTION:</b>	
<b>Appendix 1:</b>	
<b><i>Explanation</i></b>	<b>23</b>
<b>Appendix 2:</b>	
<b><i>Detailed contents list</i></b>	<b>52</b>

### **📌 Relying on this Ruling**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

### **No guarantee of commercial success**

The Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential participants must form their own view about the commercial and financial viability of the product. The Commissioner recommends a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document. If the scheme is not carried out as described, participants lose the protection of this Product Ruling.

### **Terms of use of this Product Ruling**

This Product Ruling has been given on the basis that the entity(s) that applied for the Product Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Product Ruling.

### **What this Ruling is about**

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified in the Ruling section apply to the defined class of entities that participates in the scheme to which this Product Ruling relates.

2. All legislative references in this Product Ruling are to the *Income Tax Assessment Act 1997* unless otherwise indicated. The terms defined in the documents listed in paragraph 18 of this Product Ruling have been capitalised.

3. In this Product Ruling the scheme involves participation in an Enova Solar Garden Project (Enova Project), as a Solar Gardener, by a customer of Enova Energy Pty Ltd (Enova Retail), including the receipt of a credit on the cost of electricity supplied to the Solar Gardener over the term of the Enova Project in consideration for a payment made at the commencement (the Solar Garden Option Payment).

4. This Product Ruling does not address:

- the taxation consequences of any expenditure incurred in relation to an Enova Project, other than the Solar Garden Option Payment
- the taxation consequences for the Incoming Party upon the Solar Gardener's decision to discontinue as a party to the Solar Gardener Agreement (see paragraphs 21(g) and (h) of this Product Ruling)
- the taxation consequences of an assignment of the Solar Gardener's rights under the Solar Gardener Agreement
- the extent to which a commercial Solar Gardener must, for the purposes of section 108-20, use the property nominated by them in accordance with paragraph 21(b)(i) of this Product Ruling as their main residence in order for their rights under the Solar Gardener Agreement to be used or kept 'mainly' for personal use or enjoyment (see paragraph 44 of this Product Ruling)
- what a fair and reasonable method or level of apportionment (as required) would be in the circumstances addressed at paragraph 33 of this Product Ruling, and
- whether this scheme constitutes a financial arrangement for the purposes of Division 230 (taxation of financial arrangements).

## **Class of entities**

5. This part of the Product Ruling specifies which entities can rely on the Ruling section of this Product Ruling and which entities cannot rely on the Ruling section. In this Product Ruling, those entities that can rely on the Ruling section are referred to as a Solar Gardener or, where the context requires, a 'private Solar Gardener' or a 'commercial Solar Gardener'.

6. For the purposes of this Product Ruling:

- a private Solar Gardener consists of a person that does not use the property nominated by them in accordance with paragraph 21(b)(i) of this Product Ruling for a purpose other than as their main residence, and
- a commercial Solar Gardener consists of a person (natural or incorporated) that uses the property nominated by them in accordance with paragraph 21(b)(i) of this Product Ruling for an assessable income-producing purpose.

7. The class of entities that can rely on the Ruling section of this Product Ruling consists of those entities that:

- as customers of Enova Retail, have electricity supplied to a property nominated by them under the Supply Terms, and
- pay the Solar Garden Option Payment and, as a Solar Gardener, enter into an Enova Project as described in paragraphs 18 to 22 of this Product Ruling on or after 14 July 2021 and on or before 30 June 2024.

8. The class of entities that can rely on the Ruling section of this Product Ruling does **not** include entities that:

- are non-residents for Australian taxation purposes
- participate, as a Solar Gardener, in the 'philanthropic-funded version' of an Enova Project<sup>1</sup>, or
- pay the Solar Garden Option Payment and enter into an Enova Project as described in paragraphs 18 to 22 of this Product Ruling before 14 July 2021 or after 30 June 2024.

### ***Superannuation Industry (Supervision) Act 1993***

9. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993*. The Commissioner gives no assurance that the scheme is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product Ruling as to whether investment in this scheme may contravene the provisions of the *Superannuation Industry (Supervision) Act 1993*.

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<sup>1</sup> Entities that participate as a Solar Gardener in the philanthropic-funded version of an Enova Project may fall within the class of entities that can rely on the Ruling section of Product Ruling PR 2021/8 *Income tax: tax consequences for a Solar Gardener in a philanthropic-funded Enova Solar Garden Project*.

## Qualifications

10. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 18 to 22 of this Product Ruling.

11. If the scheme actually carried out is materially different from the scheme that is described in this Product Ruling, then this Product Ruling:

- has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled, and
- may be withdrawn or modified.

## Date of effect

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12. This Product Ruling applies prospectively from 14 July 2021, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme from 14 July 2021 until 30 June 2024, being its period of application. This Product Ruling will continue to apply to those entities even after its period of application has ended for the scheme entered into during the period of application.

13. However, the Product Ruling only applies to the extent that there is no change in the scheme or in the entity's involvement in the scheme.

## Changes in the law

14. Although this Product Ruling deals with the income tax laws enacted at the time it was issued, later amendments may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to that extent, this Product Ruling will have no effect.

15. Entities that are considering participating in the scheme are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

## Note to promoters and advisers

16. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes such as this. In keeping with that intention, the Commissioner suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling has issued.

## Ruling

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17. Subject to paragraph 4 of this Product Ruling and the assumptions in paragraph 22 of this Product Ruling:

- (a) The Solar Garden Array Electricity Supply Credit provided to the Solar Gardener pursuant to the Solar Gardener Agreement will not be assessable income of the Solar Gardener under section 6-5 or section 6-10.
- (b) The Solar Garden Option Payment incurred by a private Solar Gardener will not be deductible under section 8-1.
- (c) The Solar Garden Option Payment incurred by a commercial Solar Gardener will be deductible under section 8-1 to the extent that the property to which Enova Retail is supplying electricity under the terms of the Solar Gardener Agreement is used for an assessable income-producing purpose (and is not used as the Solar Gardener's main residence). This deduction is allowable in the income year incurred, subject to the application of paragraph 17(d) of this Product Ruling.
- (d) Unless the Solar Garden Option Payment is less than \$1,000, section 82KZMF of the *Income Tax Assessment Act 1936* (ITAA 1936) will apply to set the amount and timing of the deduction allowable under section 8-1 for the Solar Garden Option Payment incurred by a commercial Solar Gardener under an Enova Project.
- (e) The Solar Gardener's legally enforceable rights under the Solar Gardener Agreement are, in their totality, a CGT asset under subsection 108-5(1).
- (f) The Solar Gardener's ownership of the contractual rights under the Solar Gardener Agreement comes to an end upon either the expiry of the term of the Solar Gardener Agreement, the Solar Gardener Agreement's earlier termination, or the Solar Gardener's decision to discontinue as a party to the agreement. CGT event C2 will happen under section 104-25 at this time.
- (g) Where the Solar Gardener's ownership of the contractual rights under the Solar Gardener Agreement comes to an end upon expiry of the term of the Solar Gardener Agreement, the Solar Gardener's capital proceeds from the CGT event referred to in paragraph 17(f) of this Product Ruling will be nil (subsection 116-20(1)).
- (h) Where the Solar Gardener's ownership of the contractual rights under the Solar Gardener Agreement

comes to an end upon the Solar Gardener Agreement's early termination or the Solar Gardener's decision to discontinue as a party to the agreement, the Solar Gardener's capital proceeds from the CGT event referred to in paragraph 17(f) of this Product Ruling will, pursuant to subsection 116-30(1), be the market value of their contractual rights under the Solar Gardener Agreement as at the time of the event.

- (i) The cost base or reduced cost base of the Solar Gardener's contractual rights under the Solar Gardener Agreement will include the Solar Garden Option Payment made by the Solar Gardener (pursuant to subsections 110-25(2) and 110-55(2)), to the extent the Solar Garden Option Payment has not and cannot be deducted under section 8-1 (subsections 110-45(2) and 110-55(4)).
- (j) Where the CGT event referred to in paragraph 17(f) of this Product Ruling happens in respect of a private Solar Gardener
  - (i) any capital loss made by the Solar Gardener will be disregarded under subsection 108-20(1), and
  - (ii) if the first element of the cost base of the Solar Gardener's contractual rights under the Solar Gardener Agreement will be \$10,000 or less, any capital gain made by the Solar Gardener will be disregarded under subsection 118-10(3).
- (k) Provided the scheme ruled on is entered into and carried out as described in this Product Ruling, the anti-avoidance provisions in Part IVA of the ITAA 1936 will not apply to the Solar Gardener in respect of their participation in an Enova Project.

## **Scheme**

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18. The scheme that is the subject of this Product Ruling is identified and described in the following:

- application for a Product Ruling as constituted by documents and information received on 15 March 2021, 9 May 2021, 17 May 2021, 18 May 2021 and 16 June 2021
- draft Enova Solar Garden Project – Site Owner Agreement, received on 18 May 2021 (Site Owner Agreement)

- draft Enova Solar Garden Project – Solar Gardener Agreement, received on 18 May 2021 (Solar Gardener Agreement)
- Enova Energy Market Retail Contract – Terms and Conditions dated January 2021, and
- Enova Energy Standard Retail Energy Supply Agreement dated January 2021.

**Note:** Certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

19. For the purposes of describing the scheme to which this Product Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Solar Gardener or any associate of a Solar Gardener will be a party to, which are a part of the scheme.

20. All Australian Securities and Investments Commission requirements are, or will be, complied with for the term of the agreements.

### Overview

21. Following is a summary of the scheme:

- (a) A customer being supplied electricity in accordance with the Supply Terms by Enova Retail, a wholly-owned subsidiary of Enova Community Energy Ltd, may, by making a payment (the Solar Garden Option Payment) to Enova Community Limited (Enova Community), participate in an Enova Project via entry into a Solar Gardener Agreement (as a Solar Gardener) with Enova Community, Enova Retail and Enova Community Solar Garden Limited (ECSGL).<sup>2</sup>
- (b) In consideration for the Solar Garden Option Payment made by the Solar Gardener to Enova Community, Enova Retail will, pursuant to the Solar Gardener Agreement
  - (i) continue, during the term of the Solar Gardener Agreement, to supply electricity to the Solar Gardener
    - from the Grid
    - under the Supply Terms, and

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<sup>2</sup> Enova Community and ECSGL are also wholly-owned subsidiaries of Enova Community Energy Ltd.

- to any property nominated by the Solar Gardener (and within the licensed supply area of Enova Retail), and
- (ii) amend the Supply Terms to the extent that it shall provide to the Solar Gardener a credit on the cost of electricity supplied to the Solar Gardener (the Solar Garden Array Electricity Supply Credit) during the term of the Solar Gardener Agreement.
- (c) The property to which Enova Retail will supply electricity to the Solar Gardener (as nominated by the Solar Gardener) must
  - (i) not be owned by the Solar Gardener
  - (ii) be occupied by the Solar Gardener as lessee or tenant either as a commercial premise or the Solar Gardener's principal place of residence, and
  - (iii) not be in direct receipt of electricity generated by solar panels.
- (d) As part of an Enova Project, ECSGL, Enova Community and Enova Retail will also enter into a Site Owner Agreement with the owner of a Site (the Site Owner) which Enova Retail considers suitable for the purposes of the Enova Project.
- (e) Pursuant to the terms of the Site Owner Agreement
  - (i) the parties acknowledge that ECSGL, Enova Community and Enova Retail intend to enter into Solar Gardener Agreements in respect of the Site with the aim of supporting ECSGL's Charitable Purpose<sup>3</sup> and Enova Community's Charitable Purposes<sup>4</sup>
  - (ii) ECSGL will arrange for its acquisition of the Solar Garden Arrays (if not already done so) with funds received from Enova Community; those being the Solar Garden Option Payments received by Enova Community from Solar Gardeners under the terms of Solar Gardener Agreements

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<sup>3</sup> ECSGL's Charitable Purpose is to make available the benefits of solar electricity to persons who do not own or do not have access to rooftops which are appropriate for the installation and operation of Solar Panels.

<sup>4</sup> Enova Community's Charitable Purposes include to advance the natural environment by reducing carbon emissions generated through the consumption of fossil fuel energy and by promoting development and use of renewable energy resources.

- (iii) subject to paragraph 21(k) of this Product Ruling, ECSGL and the Site Owner will agree that the Solar Garden Arrays shall remain in the ownership of ECSGL alone during the Term of the Site Owner Agreement
  - (iv) the Site Owner shall allow the Solar Garden Array
    - to be installed at the Site in accordance with the Site Owner Agreement (if not already done so), and
    - to remain installed, to be maintained and to generate and supply electricity during the Term of the Site Owner Agreement
  - (v) Enova Retail shall, during the Term of the Site Owner Agreement, provide Installation, Operation and Maintenance Services at no cost to ECSGL, Enova Community and the Site Owner. In return, ECSGL will supply all the electricity which is generated by the Solar Garden Array during the Supply Period (Solar Garden Array Electricity) to Enova Retail
  - (vi) Enova Retail will resupply the Solar Garden Array Electricity during the Supply Period
    - at a reduced rate under amended Supply Terms for use at the Site, and
    - to the extent that the Solar Garden Array Electricity is not consumed in such use, to the Grid
  - (vii) the costs of distributing Solar Garden Array Electricity (the Distribution Costs) shall be borne by Enova Retail, and
  - (viii) during the Term of the Site Owner Agreement the Site Owner shall not transfer title to the Site without the proposed transferees having entered into an agreement with Enova Community, ECSGL and Enova Retail on the same terms as the Site Owner Agreement.
- (f) The Solar Garden Array Electricity Supply Credit referred to in paragraph 21(b)(ii) of this Product Ruling is an amount which shall not exceed the cost to the Solar Gardener of electricity supplied to the Solar Gardener in a particular period, and will be equal in

value (in respect of the Solar Garden Array Electricity for any particular period) to

- (i) the payments made or to be made by the Site Owner to Enova Retail for the Solar Garden Array Electricity in that period, plus
  - (ii) the proceeds from the sale of any surplus Solar Garden Array Electricity by Enova Retail to the Grid in that period, less
  - (iii) the cost to Enova Retail of the Installation, Operation and Maintenance Services, and the Distribution Costs in respect of the Solar Garden Array Electricity, in that period.
- (g) The Solar Gardener may discontinue as a party to the Solar Gardener Agreement and substitute another person (natural or incorporated), referred to as the Incoming Party, in its stead. On and from receipt of Enova Community's and Enova Retail's agreement to this, the Solar Gardener will discontinue as a party to the agreement and shall have no entitlement to any refund of the Solar Garden Option Payment.
- (h) The Solar Gardener may also discontinue as a party to the Solar Gardener Agreement without substituting an Incoming Party in its stead. On and from receipt of Enova Community's agreement to this, the Solar Gardener will discontinue as a party to the agreement and shall have no entitlement to any refund of the Solar Garden Option Payment.
- (i) The Solar Gardener Agreement will terminate on the expiry of its term, being at the earlier of ten years from the Installation Date and any time at which a Termination Notice or Discontinuation Notice is given pursuant to and in accordance with the Site Owner Agreement.
- (j) Unless the Site Owner Agreement is terminated by a 'non-defaulting party' due to circumstances contemplated by the Site Owner Agreement, the Site Owner Agreement will terminate on the expiry of its Term, being at the earlier of twenty years from the Installation Date and any time at which either the Site Owner or Enova Retail gives a Termination Notice under the circumstances contemplated by the Site Owner Agreement, or the Site Owner gives a Discontinuation Notice under the circumstances contemplated by the Site Owner Agreement.
- (k) Subject to paragraph 21(l) of this Product Ruling, unless the Site Owner or Enova Retail gives a Termination Notice or the Site Owner gives a Discontinuation Notice, all title in the Solar Garden

Arrays installed at the Site shall be deemed for all purposes to be vested in the Site Owner at the expiry of the Term of the Site Owner Agreement.

- (l) Where the Site Owner gives a Termination or Discontinuation Notice pursuant to and in accordance with the Site Owner Agreement, the Site Owner shall purchase from ESCGL all Solar Garden Arrays which have been installed at the Site at a price which, in Enova Retail's reasonable opinion, represents the then current Depreciated Value of the Solar Garden Arrays.

### **Assumptions**

22. This Product Ruling is made on the basis of the following necessary assumptions:

- (a) The cost of electricity supplied to the property nominated by a commercial Solar Gardener in accordance with paragraph 21(b)(i) of this Product Ruling is deductible under section 8-1 to the extent that that property is used for an assessable income-producing purpose.
- (b) The scheme will be executed in the manner described in the Scheme section of this Product Ruling and the scheme documentation referred to in paragraph 18 of this Product Ruling.
- (c) All dealings by the Solar Gardener, the Site Owner, Enova Retail, ECSGL and Enova Community under the scheme will be at arm's length.

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**Commissioner of Taxation**

14 July 2021

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## Appendix 1 – Explanation

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❶ *This Appendix is provided as information to help you understand how the Commissioner’s view has been reached. It does not form part of the binding public ruling.*

### **Solar Garden Array Electricity Supply Credit not assessable to Solar Gardener**

23. Under Division 6, assessable income consists of both ordinary income and statutory income to the extent the ordinary or statutory income is not exempt income or non-assessable non-exempt income.

24. Section 6-5 includes income according to ordinary concepts (ordinary income) in assessable income. The assessable income of an Australian resident includes the ordinary income they derived directly or indirectly from all sources during the income year (subsection 6-5(2)).

25. Subsection 6-5(4) provides that in working out whether an amount of ordinary income has been derived, and (if so) when, it will be taken to be received as soon as it has been applied or dealt with in any way on behalf of or as directed by the taxpayer.

26. Statutory income is an amount included in assessable income by a statutory provision (subsection 6-10(2)). Subsection 6-10(3) provides that an amount that would otherwise be statutory income of a taxpayer but for the fact that it is not received becomes statutory income of the taxpayer as soon as it is applied or dealt with in any way on behalf of or as directed by the taxpayer.

27. Any reduction in expenditure to be incurred by the Solar Gardener in respect of electricity to be used at the relevant property, as a result of having been provided the Solar Garden Array Electricity Supply Credit pursuant to the Solar Gardener Agreement, will not be an amount paid or credited to the Solar Gardener, nor an amount which is applied or dealt with on behalf of the Solar Gardener or as the Solar Gardener directs.

28. As the Solar Garden Array Electricity Supply Credit will not be received by, or credited to the Solar Gardener (either directly or as deemed by subsection 6-5(4) or subsection 6-10(3)), it will not constitute ordinary or statutory income derived by the Solar Gardener and will not be subject to tax pursuant to Division 6.

### **Deductibility of Solar Garden Option Payment under section 8-1**

29. A loss or outgoing is deductible under section 8-1 if its essential character is that of expenditure that has a sufficient connection with the operations or activities which more directly gain or produce a taxpayer’s assessable income, provided that the expenditure is not of a capital, private or domestic nature.

30. In consideration for the Solar Garden Option Payment incurred by a Solar Gardener, the Supply Terms pursuant to which Enova Retail is supplying electricity to the Solar Gardener's nominated property will be amended to the extent that Enova Retail will provide the Solar Garden Array Electricity Supply Credit during the term of the Solar Gardener Agreement.

31. When incurred by a private Solar Gardener such that the Solar Garden Array Electricity Supply Credit provided relates to the cost of electricity supplied to a property not used for any purpose other than the Solar Gardener's main residence, the Solar Garden Option Payment will not have a sufficient connection with the gaining of any assessable income to be deductible under section 8-1 and, in any event, will be of a private or domestic nature.

32. When incurred by a commercial Solar Gardener such that the Solar Garden Array Electricity Supply Credit provided relates to the cost of electricity supplied to a property used solely for an assessable income-producing purpose, where the cost of electricity itself is a fully deductible expense of the Solar Gardener (as assumed at paragraph 22(a) of this Product Ruling), the Solar Garden Option Payment will have a sufficient connection with the gaining of assessable income to be deductible under section 8-1 in full, and will not be of a capital, private or domestic nature.

33. When incurred by a commercial Solar Gardener such that the Solar Garden Array Electricity Supply Credit provided relates to the cost of electricity supplied to a property used partly for an assessable income-producing purpose (as well as their main residence), where the cost of electricity itself is a partially deductible expense of the Solar Gardener (as assumed at paragraph 22(a) of this Product Ruling), the Solar Garden Option Payment will have a sufficient connection with the gaining of assessable income to be deductible under section 8-1 in part (that is, to the extent that it will not be of a private or domestic nature).

#### **Sections 82KZME and 82KZMF – prepaid expenditure and 'tax shelter' style arrangements**

34. The rules in sections 82KZME and 82KZMF of the ITAA 1936 apply, subject to the exceptions in section 82KZME, where expenditure is incurred in relation to a 'tax shelter' style arrangement for the doing of a thing under an agreement that is not to be wholly done within the expenditure year, and where certain requirements for that agreement are met.

35. The Solar Garden Option Payment incurred by a commercial Solar Gardener under an Enova Project is made in return for the Solar Garden Array Electricity Supply Credit applied on the cost of electricity supplied to the commercial Solar Gardener's nominated property for the term of the Solar Gardener Agreement and is to be taken, for the purposes of Subdivision H of Division 3 of Part III of the ITAA 1936, to be expenditure incurred under an agreement in return

for the doing of a thing under the agreement for the term of the Solar Gardener Agreement.

36. For the purposes of section 82KZME of the ITAA 1936, 'agreements' are broadly defined to include an entire arrangement of which a contract may form part. Under subsection 82KZME(4) of the ITAA 1936, the relevant 'agreement' is all the contractual arrangements and activities associated with the participation in the Enova Project.

37. Section 82KZMF of the ITAA 1936 will have application and apportion over the relevant period the Solar Garden Option Payment incurred by a commercial Solar Gardener which is allowable as a deduction under section 8-1 where the Solar Garden Option Payment is not excluded expenditure (that is, less than \$1,000). Each of the requirements for the agreement under subsection 82KZME(3) of the ITAA 1936 are met and none of the other exceptions contained in subsections 82KZME(5), (8) or (9) of the ITAA 1936 apply to exclude the Solar Garden Option Payment incurred from the operation of section 82KZMF of the ITAA 1936.

38. For each year of income during which part of the 'eligible service period' for the Solar Garden Option Payment occurs, the commercial Solar Gardener can deduct an amount using the following formula set out in paragraph 82KZMF(1)(b) of the ITAA 1936:

$$\text{Expenditure} \times \frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$$

39. Pursuant to subsection 82KZL(1) of the ITAA 1936, the eligible service period in relation to the Solar Garden Option Payment will be ten years.

### **Application of the capital gains tax provisions to the Solar Gardener**

40. Under subsection 108-5(1) a CGT asset is any kind of property or a legal or equitable right that is not property. The rights of the Solar Gardener under the Solar Gardener Agreement (including the right to the Solar Garden Array Electricity Supply Credit) are legally enforceable rights and therefore, in their totality, a CGT asset according to the definition in subsection 108-5(1).

41. Where the term of the Solar Gardener Agreement expires, the Solar Gardener's ownership of the contractual rights under the Solar Gardener Agreement will also expire. This expiry will give rise to a CGT event C2 (paragraph 104-25(1)(c)). Where the Solar Gardener Agreement is terminated pursuant to its terms, or the Solar Gardener decides to discontinue as a party to the Solar Gardener Agreement, the Solar Gardener's ownership of the contractual rights under the Solar Gardener Agreement will be discharged or satisfied. This

discharge or satisfaction of the contractual rights will also give rise to a CGT event C2 (paragraph 104-25(1)(b)).

42. The Solar Gardener will make a capital gain from this CGT event if the capital proceeds from the ending of the Solar Gardener's ownership of the asset are more than the asset's cost base or, alternatively, a capital loss from this CGT event if those capital proceeds are less than the asset's reduced cost base (subsection 104-25(3)).

43. Pursuant to subsection 108-20(1), any capital loss made from a personal use asset is disregarded. Under subsection 118-10(3), any capital gain made from a personal use asset is disregarded if the first element of the asset's cost base is \$10,000 or less.

44. Section 108-20 defines a personal use asset as a CGT asset that is used or kept mainly for the personal use or enjoyment of the taxpayer having made the capital loss, or their associate, and does not include a collectable or land, a stratum unit or a building.

45. The Federal Court in *Favaro, Gerald Antonio & Anor v Commissioner of Taxation* [1996] FCA 877 considered the term 'personal use' in the definition of personal use asset (as referred to in former section 160B of the ITAA 1936) and stated:

... the expression 'personal use' is used in s 160B of the ITAA in contradistinction to use for business or profit making purposes.

46. The word 'contradistinction' means distinction by contrast (Moore B (ed.) (2004) *Australian Oxford Dictionary*, 2nd edition, Oxford University Press, Melbourne). Therefore, an asset that is not used for business or profit making purposes is, by default, used or kept mainly for personal use and enjoyment. The two categories are mutually exclusive.

47. It follows that the contractual rights under the Solar Gardener Agreement of a private Solar Gardener, which will not be used for business or profit making purposes, will be a personal use asset. Therefore, any capital loss made by a private Solar Gardener from the CGT event C2 referred to in paragraph 41 of this Product Ruling will be disregarded under subsection 108-20(1), and any capital gain made by a private Solar Gardener from that event will be disregarded under subsection 118-10(3) where the first element of the cost base of the asset is \$10,000 or less.

48. Generally (and subject to specific exceptions), where no capital proceeds are received from a CGT event the market value substitution rule under subsection 116-30(1) will apply to include the market value of the CGT asset that is the subject of the event (as at the time of the event) as the amount received. One exception to the application of the market value substitution rule under subsection 116-30(1) is where the relevant event is CGT event C2 which happens as a consequence of the expiry of a CGT asset (subparagraph 116-30(3)(a)(i)).

49. As the Solar Gardener will not receive any capital proceeds from the ending of their contractual rights under the Solar Gardener Agreement, they will therefore be taken to have received the market value of those rights<sup>5</sup> as at the time of the ending pursuant to the market value substitution rule under subsection 116-30(1) where the ending happens by discharge or satisfaction under either of the circumstances contemplated by paragraph 41 of this Product Ruling. Where, however, the rights have ended by expiry under the circumstance contemplated by paragraph 41 of this Product Ruling, the market value substitution rule under subsection 116-30(1) will not apply (and the capital proceeds of the Solar Gardener will be nil).

50. Subsections 110-45(2) and 110-55(4) prevent expenditure that has or can be deducted under section 8-1 from forming part of a CGT asset's cost base and reduced cost respectively. Therefore, to the extent that a commercial Solar Gardener may claim a deduction under section 8-1 for the Solar Garden Option Payment they will incur as part of an Enova Project (in accordance with this Product Ruling), that expenditure will not be included in the determination of the cost base and reduced cost base of their contractual rights under the Solar Gardener Agreement.

## **Part IVA – anti-avoidance**

51. Provided that the scheme ruled on is entered into and carried out in the manner described in the scheme documentation and in the Scheme section of this Product Ruling, it is accepted that Part IVA of the ITAA 1936 will not apply.

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<sup>5</sup> Worked out as if the event had not occurred and was never proposed to occur (subsection 116-30(3A)).

## **Appendix 2 – Detailed contents list**

52. The following is a detailed contents list for this Product Ruling:

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
Class of entities	5
<i>Superannuation Industry (Supervision) Act 1993</i>	9
Qualifications	10
<b>Date of effect</b>	<b>12</b>
Changes in the law	14
Note to promoters and advisers	16
<b>Ruling</b>	<b>17</b>
<b>Scheme</b>	<b>18</b>
Overview	21
Assumptions	22
<b>Appendix 1 – Explanation</b>	<b>23</b>
Solar Garden Array Electricity Supply Credit not assessable to Solar Gardener	23
Deductibility of Solar Garden Option Payment under section 8-1	29
Sections 82KZME and 82KZMF – prepaid expenditure and ‘tax shelter’ style arrangements	34
Application of the capital gains tax provisions to the Solar Gardener	40
Part IVA – anti-avoidance	51
<b>Appendix 2 – Detailed contents list</b>	<b>52</b>

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PR 2018/8

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