

# ***PR 2014/4 - Income tax: Soleir Solar Investment Project 2015***

⚠ This cover sheet is provided for information only. It does not form part of *PR 2014/4 - Income tax: Soleir Solar Investment Project 2015*

⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *12 March 2014*



## Product Ruling

### Income tax: Soleir Solar Investment Project 2015

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#### **ⓘ This publication provides you with the following level of protection:**

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

#### **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) who 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

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1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated.
2. In this Product Ruling this scheme is referred to as the Soleir Solar Investment 2015 or simply as 'the Project'.
3. This Product Ruling does not address:
  - the tax consequences of borrowing funds from financiers to acquire an Interest in the scheme, including the deductibility of interest on funds borrowed;
  - the tax consequences of the removal by a Generator of their Soleir Systems from the Project; and
  - the tax consequences of an early termination of the scheme.

### Class of entities

4. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section of this Product Ruling and which entities cannot rely on those tax benefits. In this Product Ruling, those entities that can rely on the tax benefits set out in this Ruling are referred to as Generators.
5. The class of entities who can rely on those tax benefits consists of those entities that are accepted to participate in the scheme specified below on or after the date this Product Ruling is made and which execute relevant Project Agreements mentioned in paragraph 44 on or before 31 October 2014. They must have a purpose of staying in the scheme until it is completed (that is, being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement.
6. Generators are entities who:
  - are wholesale clients for the purpose of the *Corporations Act 2001*;
  - execute a Purchase Agreement to acquire their Soleir Systems;
  - are allocated Interests in the Project following execution of their Purchase Agreement; and
  - have a purpose of staying in the scheme until it is completed (that is, being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement.

7. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling does **not** include entities who:

- intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- are accepted into the Project before the date of this Ruling, or before they execute their Purchase Agreement;
- are accepted into the Project before the minimum subscription of 2,110 Soleir Systems is achieved, or after the close of date for application on 31 October 2014;
- enter into finance arrangements to acquire their Solar Systems;
- do not have their Soleir Systems certified and installed ready for use on or before 30 June 2015;
- participate in the scheme through offers made other than through the Information Memorandum or who enter into an undisclosed arrangement with the promoter or a promoter associate, or an independent adviser that is interdependent with scheme obligations and/or scheme benefits (which may include tax benefits or proceeds from the sale of electricity or Large-scale Generation Certificates – LGCs) in any way; and
- do not pay the Application Amount in full on or before they execute their Purchase Agreement.

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

8. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA). 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 SISA.

### **Qualifications**

9. 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 54 to 73.

10. 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
- this Product Ruling may be withdrawn or modified.

## Date of effect

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11. This Product Ruling applies prospectively from 12 March 2014, the date it is published. It applies only to the specified class of entities that enter into the scheme from 28 April 2014 until 31 October 2014, being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities for the income years up to the income year in which the scheme is terminated in accordance with the Constitution. 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.

12. 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

13. 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.

14. Entities who 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

15. 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.

### Goods and Services Tax

16. All amounts referred to in this Product Ruling exclude the Goods and Services Tax (GST). The transactions in respect of this scheme may, where appropriate, have GST implications.

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## Ruling

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### Application of this Ruling

17. Subject to the stated qualifications and the assumptions in paragraph 73 of this Product Ruling, this part of the Product Ruling sets out in detail the taxation obligations and benefits for a Generator in the defined class of entities who enter into the scheme described at paragraphs 43 to 73 of this Ruling.

### Carrying on an enterprise

18. Generators who enter into the arrangement described in this Ruling will be carrying on an enterprise for the purposes of subsection 9-20(1) of the *A New Tax (Goods and Services Tax) Act 1999* (GST Act) subject to the exclusions listed in subsection 9-20(2) of the GST Act.

### Carrying on a business

19. A Generator who will stay in the Project until it is completed and does not obtain finance to enter the Project will be considered to be carrying on a business for income tax purposes. Such Generators who are individuals, alone or in partnership, will be subject to the operation of Division 35 (see paragraphs 36 to 40 of this Ruling).

20. Generators who enter into finance arrangements to acquire their Soleir Systems may request a private ruling on whether they will be carrying on a business for income tax purposes.

21. Provided the Project is carried out as described below, the Generator's business will commence from the date of execution of their Purchase Agreement.

### Minimum subscription

22. Under the terms of the Information Memorandum (IM), construction of the Dubbo Solar One Project will not proceed unless at least 2,110 applications have been received from investors before the close of date for applications on 31 October 2014.

### Small business concessions

23. From the 2007-08 income year, a range of concessions previously available under the Simplified Tax System (STS), will be available to an entity if it carries on a business and satisfies the \$2 million aggregated turnover test (a 'small business entity').

24. A small business entity can choose the concessions that best suit its needs. Eligibility for some small business concessions is also dependent on satisfying some additional conditions. Because of these choices and the eligibility conditions the application of the small business concessions to Generators who qualify as a 'small business entity' is not able to be dealt with in this Product Ruling other than as specified below.

## **Assessable income**

### ***Section 6-5***

25. That part of the gross sales proceeds from the Project attributable to the Generator's output (that is, alternating current (AC) electricity, Renewable Energy Certificates called Large-scale Generation Certificates (LGCs) and avoided Transmission Use of System (TUOS) Credits), less any GST payable on those proceeds (section 17-5), will be assessable income of the Generator under section 6-5.

## **Allowable deductions**

### ***Capital expenditure (small business entities)***

26. A Generator who is a 'small business entity' will be entitled to a tax deduction in respect of their Soleir Systems. Deductions relating to the 'cost' of Soleir Systems may be claimed under either Division 328 or Division 40.

27. Under Division 328, if the 'cost' of a 'depreciating asset' at the end of the income year is less than \$6,500 it can be claimed as an immediate deduction when first used or 'installed ready for use'. This is so provided the Generator is a 'small business entity' for the income year in which it starts to 'hold' the asset and during which it is used or 'installed ready for use' to produce assessable income.

28. The Application Amount per Interest of \$995 will be applied to the Purchase Price of a Soleir System. Each Soleir System is a separate 'depreciating asset'. It cannot be allocated to a 'general small business pool' (subsections 328-180(2) and (3)). Each Generator holds their Soleir Systems and is therefore entitled to a deduction equal to the amount of the expenditure on the Soleir Systems in the income year in which they are first used or 'installed ready for use'. The Soleir Systems will be placed on ground fixed supports located on the Project site and will be installed ready for use during the income year ending 30 June 2015. The Responsible Entity (RE) will inform Generators of when this occurs so as to enable the Generators to calculate the deduction.

29. Where Generators are registered for GST, the 'cost' of each Soleir System will be adjusted as relevant for GST (that is, reduced for any input tax credit entitlement pursuant to Division 27).

**Capital expenditure (non-small business entities)**

30. A Generator who is not a 'small business entity', or a Generator who is a 'small business entity' who does not choose to use Division 328, will be entitled to tax deductions relating to their Soleir Systems under Division 40.

31. Each Soleir System is a separate 'depreciating asset' which has a 'cost' equal to the amount paid by the Generator for the Soleir System. The decline in value of the asset is calculated using the formula in either subsection 40-70(1) (diminishing value method), 40-75(1) (prime cost method) or section 40-440 (low value pool). An asset is eligible for the 'low value pool' where the asset is a 'low-cost asset' (that is, its cost is less than \$1,000 per subsection 40-425(2)).

32. As the Generators will be registered for GST, the 'cost' of each Soleir System will be adjusted as relevant for GST (that is, reduced for any input tax credit entitlement pursuant to Division 27).

33. As the Generators will be registered for GST, each Soleir System which they hold will be a 'low-cost asset' and can be allocated to a 'low-value pool'. Once any 'low-cost asset' of a Generator is allocated to a 'low-value pool', all other 'low-cost assets' the Generator starts to 'hold' in that year or a later year must be allocated to that pool. The establishment of a 'low-value pool' is optional. If the Soleir Systems are allocated to a 'low-value pool', the initial cost of the Soleir Systems will be deducted under the diminishing value methodology of the pool based on a rate of 18.75% in the year the Soleir Systems are first allocated to the pool and a rate of 37.5% in subsequent years (section 40-440).

34. The Soleir Systems will be placed on ground fixed supports located on the Project site and will be installed ready for use during the income year ending 30 June 2015. The RE will inform Generators of when this occurs so as to enable the Generators to calculate the deduction for the decline in value.

**Section 8-1, Division 27 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936 (ITAA 1936)**

35. A Generator may claim tax deductions for the following fees and expenses, disclosed on a per Interest basis in the table below:

| Fee type  | Amount  | Timing of deduction                            |
|---|---|--|
| Responsible Entity Fee                                    | \$3.00 per annum per Soleir System (plus GST), and from 1 July 2016 indexed annually by CPI               | As incurred<br>See Notes (i), (iii), (v)       |
| Rent<br>(for land, Balance of Plant and Additional Panel) | 20.0% (plus GST) of the portion of revenue above the electricity price (including LGCs, excluding Avoided | As incurred<br>See Notes (i), (ii), (iii), (v) |

|  |   |   |
|--|---|---|
|  | TUOS Credit) of \$120/MWh unescalated   |   |
| Operations and Management Fees and Costs | \$9.95 per annum per Soleir System (plus GST)<br><br>Estimate based on expected plant operations, level of maintenance for specific components and general site upkeep. Includes management fee equivalent to 10% of costs. | As incurred<br><br>See Note (i), (iii), (iv), (v) |
| Sales Agency Fee                         | 1% (plus GST) of Gross sales received from the sale of electricity and LGCs.  | As incurred<br><br>See Notes (i), (iii), (v)      |

**Notes:**

- (i) If the Generator is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.
- (ii) Each Generators share of Rent will be based on their Proportional interest in the Scheme.
- (iii) All fees listed above are incurred when paid by Generators by way of deduction from the gross receipts generated from the Project (prior to arriving at the Distributable Amount).
- (iv) The \$9.95 for Operations and Management Fees and Costs is an estimate only, therefore the amount deductible under section 8-1 will be the actual amount incurred and paid by the Generator;
- (v) This Ruling does not apply to Generators who choose to prepay fees. Subject to certain exclusions, amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936. Any Generator who prepays such amounts may request a private ruling on the taxation consequences of the prepayment.

**Division 35 – deferral of losses from non commercial business activities****Section 35-55 – exercise of Commissioner’s discretion**

36. For the 2014-15 income year the Commissioner will exercise the discretion in subsection 35-55(1) for a Generator who:

- is a small business entity that elects to claim their Soleir Systems as a deduction under Division 328;
- has their Soleir Systems certified and installed ready for use on or before 30 June 2015;
- does not enter into finance arrangements to acquire their Solar Systems.

37. The Commissioner will exercise the discretion in paragraph 36 above once the following conditions are satisfied for the 2014-15 income year:

- the Generator carried on their business of electricity generation during the income year; and
- the business activity that is carried on is not materially different to that in the scheme described in this Product Ruling; and
- the Generator has incurred a taxation loss for the income year from carrying on that business activity.

38. If these conditions are met for a given year, the Commissioner will exercise the discretion for that year under:

- paragraph 35-55(1)(b) for a Generator in the Project who satisfies the income requirement in subsection 35-10(2E); and;
- paragraph 35-55(1)(c) for a Generator in the Project who does not satisfy the income requirement in subsection 35-10(2E).

39. If the Commissioner determines that the discretion will not be exercised for the 2014-15 income year the Generator, as outlined in paragraphs 36 and 37 above, will be informed of that decision and the reasons. A Generator, not covered by paragraph 36 and 37 above, will be subject to the loss deferral rule in section 35-10 and the Generator will not be able to offset the losses from the Project against other assessable income in the 2014-15 income year and subsequent income years.

40. The issue of this Product Ruling of itself does not constitute the exercise of the Commissioner’s discretion in subsection 35-55(1) for any income year.

## **Section 82KL – recouped expenditure**

41. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of 'additional benefits(s)'. Insufficient 'additional benefits' will be provided under the scheme to trigger the application of section 82KL of the ITAA 1936. For this reason, section 82KL will not apply to deny the deduction otherwise allowable under section 8-1 of the ITAA 1997.

## **Part IVA – general anti-avoidance provisions**

42. Provided the scheme ruled on is entered into and carried out as described in this Ruling, the anti-avoidance provisions in Part IVA of the ITAA 1936 will not apply to a Generator in respect of the payment of the Application Amount or any other aspect of their participation in the Project.

## **Scheme**

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

- Application for a Product Ruling as constituted by documents and information received on 10 January 2014 and additional correspondence, including emails and documents provided by the Product Ruling applicant on 20 and 24 January 2014 and 20 February 2014;
- Draft Information Memorandum (IM) for the Soleir Solar Investment 2015 received on 10 January 2014 January 2014.
- Draft Constitution of the Soleir Solar Investment 2015 received on 10 January 2014;
- Draft Soleir Systems Purchase Agreement (Purchase Agreement at Schedule C of the Draft Constitution) between each Generator (Buyer) and Red Sky Energy Limited (Seller), received on 10 January 2014;
- Draft Plant Management Agreement between Rhythm Section Investment Management Pty Ltd (RSIM or RE) and Soleir Energy Services Pty Ltd, received on 20 January 2014;
- Draft Sales Agency Agreement (Sales Agency Agreement) between the RE and Soleir Energy Trading Pty Ltd (Sales Agent), received on 20 January 2014;

- Draft Embedded Generator Connection Agreement (Connection Agreement) between the Network Service Provider and Soleir Dubbo Pty Ltd, received on 10 January 2014;
- Draft Lease of the Balance of Plant (Lease) between Soleir Dubbo Pty Ltd (Lessor) and the RE, received on 20 January 2014;
- Sub-lease of Project land between Soleir Pty Ltd (Sub-Lessor), Soleir Dubbo Pty Ltd and the Landlord, received on 20 January 2014;

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

44. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements.

45. In accordance with the above documents, a Generator who participates in the scheme must be a wholesale client. **This Ruling does not apply** unless the Generator is a wholesale client as defined in section 761G or section 761GA of the Corporations Act. The meaning of wholesale client is explained in the Information Memorandum for this Project.

46. For the purpose of describing the scheme there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Generator, or any associate of a Generator, will enter into, which are a part of the scheme. The effect of these agreements is summarised as follows.

### Overview

47. The main features of the Project are as follows:

|  |  |
|--|--|
| Location   | Dubbo, NSW   |
| Type of business to be carried on by each Generator          | Electricity generation under a utility scale solar project         |
| Term of the Project  | 38 years including construction and operations                     |
| Application Amount per Interest                              | \$995 per Interest, being the Purchase Price of each Soleir System |
| Minimum subscription   | \$49,750, being the amount payable for 50 Soleir Systems           |
| Minimum total application amount for the Project to commence | \$2,099,450, being the amount payable for 2,110 Soleir Systems     |
| Ongoing costs  | Responsible Entity Fee   |

|  |  |
|--|--|
|  | Rent (including for land and Balance of Plant) |
|  | Operation and Management Fees and Costs        |
|  | Sales Agency Commission                        |

48. The Project will be an unregistered managed investment scheme (MIS) under the Corporations Act, with participation available to wholesale investors only. RSIM has been issued with an Australian Financial Services Licence (Licence Number: 437924) and will be the RE of the Project.

49. An offer to participate in the Project will be made under an IM. The Project will involve 'Generator's carrying on a business of generating and selling usable AC electricity and Renewable Energy Certificates called Large-scale Generation Certificates (LGCs) and earning income from Avoided TUOS Credits from a utility-sized solar project'. As a result of the generation and transfer of electricity from the Generator generating units into the Network Service Provider's distribution network, the Network Service Provider will avoid paying variable transmission use of system charges for that electricity. These variable TUOS Charges avoided by the Network Service Provider are referred to as Avoided TUOS Credits.

50. A Generator will be involved in the Project for approximately 38 years during which time it should expect to receive an annual income stream from the sale of electricity and LGCs and income from Avoided TUOS Credits.

### **Application for Interests**

51. The offer under the IM is for a minimum of 2,110 Interests in the Project, which is equivalent to 2,110 Soleir Systems, being the minimum subscription. If the minimum subscription is not achieved by 31 October 2014, amounts will be refunded to Generators and construction of the Project will not proceed.

52. Applicants are required to execute the Power of Attorney as part of the application process. The Powers of Attorney irrevocably appoint RSIM (as Responsible Entity of the scheme) to enter into, on behalf of Applicants the Purchase Agreement, and any other agreements required to hold an Interest in the Project. All Project agreements are executed upon the issue of an Interest to a Generator.

53. This Ruling applies to Generators who execute a Purchase Agreement to acquire a minimum of 50 Soleir Systems. A Purchase Agreement is executed by the Generator for the acquisition of Soleir Systems upon the issue of an Interest in the Project. A Generator's Interest in the Project will be issued by the RE on 31 October 2014 unless maximum subscription is achieved prior to 31 October 2014. If maximum subscription is achieved prior to 31 October 2014, interests will be issued at that point and Construction of the Project may commence earlier.

All Generators who acquire an Interest in the Project will elect to pool their output.

### **Project Entities**

54. The RE will be responsible for undertaking certain obligations on behalf of the Generators, namely:

- processing Applications, collecting Application Amounts and establishing and maintaining three separate funds for the duration of the Scheme: the Application Fund, Proceeds Fund and Sinking Fund;
- applying Application Amounts to the acquisition of Soleir Systems once their application is accepted;
- maintaining a register of Generators that hold Interests in the Project and the individual serial numbers of the Soleir Systems that they own;
- overseeing the construction of the Generator's Soleir Systems and arranging connection of their Soleir Systems to the infrastructure comprising the Balance of Plant;
- entering into arrangements that enable the continuing operation, management and maintenance of their Soleir Systems within the Project;
- entering into arrangements that enable off-take sales for both electricity and LGCs plus the collection of revenue from Avoided TUOS Credits; and
- aggregating the revenues and costs from the Project and distributing the net proceeds to Generators on a proportionate basis.

55. Soleir Energy Services Pty Ltd will be appointed as operating and maintenance manager of the Project. Soleir Energy Trading Pty Ltd will be appointed as the selling agent on behalf of the RE and Generators and will be responsible for arranging the sale of the output (electricity and LGCs) on a pooled basis.

56. Red Sky Energy Limited will supply and install (construct) the Soleir Systems for the Generators and its subsidiary Soleir Dubbo Pty Ltd will lease to the RE the Balance of Plant to which the Soleir Systems will be connected.

**The Constitution**

57. The Constitution establishes the Project and operates as a deed binding all Generators and the RE. A Generator is deemed to have become a Generator and to be bound by the Constitution upon the issue of an Interest to the Generator. This will become effective by entry into the Register within 2 business days of the Generator being issued an Interest. The Constitution sets out the terms and conditions under which the RE agrees to manage the Project.

58. Under clause 3.2 of the Constitution, the RE holds the Application Amount on trust. The RE will deposit all Application Amounts received from applicants into the Application Fund.

59. Upon the issue of an Interest to a Generator (refer to paragraph 53), the RE will execute as attorney the Purchase Agreement which specifies the number of Soleir Systems to be acquired by each Generator (identifiable by serial number in the scheme register) and will arrange the payment from the Application Fund of the total Purchase Price payable by the Generator. Upon the payment of any part of the Purchase Price being made from the Application Fund, the Generator will be treated by the RE as owning and holding the legal and beneficial title to all the Soleir Systems specified in the Purchase Agreement.

60. In summary, the Constitution also sets out provisions relating to:

- appointment of RSIM as the RE for the Project and the creation of the Application Fund, Proceeds Fund and Sinking Fund as required (Clauses 3.2 – 3.4);
- keeping and maintaining a register of Generators who hold an Interest in the Project (Clause 4.4(e));
- entitlement of each Generator to a proportionate share of the pooled output (comprising electricity and LGCs) and the monies received by the Responsible Entity from off-take sales and Avoided TUOS Credits (Clause 4.8 and Clause 13.9);
- certification of the Soleir Systems and connection with the Balance of Plant (Clause 5.4);
- procedures in the event of damage or destruction to a Soleir System (Clause 6);
- holding of Scheme Property by the RE and the Interest of the Applicants in the Application Fund and Generator's in the Proceeds Fund and Sinking Fund (Clauses 7.1 – 7.7);
- the rights attaching to an Interest in the scheme (Clauses 7.8 – 7.13);

- the exercise and performance of RE's powers, obligations and discretions during the period between Interests being issued to a Generator and the Soleir Systems to which those Interests relate being installed, connected and Certified (Clause 9.7);
- the powers of the RE in relation to the effective operation of the scheme, including off-take and certificate arrangements, leasing the Balance of Plant, enforcing the Plant Management Agreement, managing warranty claims and arranging insurance (Clause 13);
- retirement and removal of the RE (Clause 15);
- procedures regarding the holding of meetings of the Generators and voting rights (Clause 18);
- the rights, liabilities and indemnities of the RE (Clause 19 and 20);
- the procedures on termination and the winding up of the Project (Clause 22.7 and Clause 25); and
- resolution of complaints made by a Generator in relation to the RE (Clause 27).

61. In consideration of the performance of the above functions, the Generators will pay to the RE the 'Responsible Entity Fee'.

### **Plant Management Agreement**

62. The Plant Management Agreement will be executed upon the issue of an Interest in the Project. Under the Plant Management Agreement, Soleir Energy Services Pty Ltd will be appointed as the Plant Manager of the Project to provide the Services to the RE and each Generator. This function involves using all reasonable endeavours to ensure the Project is fully operational at all times and each component is operating at capacity and within warranties. It also includes arranging insurance on behalf of the Generators in respect of each Soleir Systems, noting each Generators interest as owner (Clause 11.2). This is to be a separate insurance policy to that which covers the Balance of Plant.

63. The Services are outlined in Schedule 1 to the Agreement and also include administration services relating to the ongoing management of the Project, as well as accounting and reporting services (e.g. providing periodic performance results to the RE).

64. Soleir Energy Services Pty Ltd will not undertake any work for the RE (and for the Generators) prior to the Generators being issued an Interest in the Project.

65. In accordance with clause 9 and Schedule 2 all expenses in relation to the provision of the Services are at the cost of the RE. The expenses will be paid directly by the RE or to the Plant Manager from the RE for remittance to the appropriate creditors. The Plant Management Fee is 10% of the expenses in relation to the provision of the Services and payable on a quarterly basis.

## **Sales Agency Agreement**

66. The Sales Agency Agreement will be executed upon the issue of an Interest in the Project. The RE will be authorised by the Generators to 'pool' the collective output generated by the Project. Under clause 2 Soleir Energy Trading Pty Ltd will be appointed as non-exclusive sales agency of the RE to carry out marketing of the output and enter into selling arrangements. These arrangements will be entered into with electricity off-take customers and purchasers of LGCs as well as participants in the derivatives market.

67. Although the size of the Project (in terms of output) will not require a formal generation licence, the RE is expected to engage in electricity off-take transactions with entities which have been registered as licensed retailers.

68. As well as selling the electricity produced from the Project, Soleir Energy Trading Pty Ltd will also be responsible for trading in Energy Certificates called Large-scale Generation Certificates (LGCs).

69. In accordance with clause 7 and Schedule One, in consideration of the performance of the sales function, the RE will pay 1% of the gross sales revenue to Soleir Energy Trading Pty Ltd within ten working days of receipt of the proceeds from sale.

## **Balance of Plant (BoP) Lease**

70. The BoP Lease will be executed upon the issue of an Interest in the Project. Under the Scheme, the Generators will have ownership of their Soleir Systems, but will have no ownership interest in the BoP to which their Soleir Systems are connected. Rather, Soleir Dubbo Pty Ltd will be responsible for the construction of the BoP and the procurement of the rights to the land on which the BoP is located. The RE will enter into the BoP Lease with Soleir Dubbo Pty Ltd (Lessor) to lease the BoP and will have rights to use the land on which the BoP is located. Under the Constitution, the RE will grant the Generators (collectively) a right to use the BoP to which their Soleir Systems are connected. Rent will be payable to the Lessor in accordance with the formula set out in the following paragraph.

**Fees and Costs**

71. Section 6 of the IM for the Project sets out the fees and costs payable by a Generator on a per Soleir System basis. These fees and costs include the following:

*Responsible Entity Fee*

\$3.00 per annum up to 30 June 2016, indexed by CPI from 1 July 2016. The Responsible Entity Fee will be deducted from gross revenue received.

*Operating and Management Fees and Costs*

Estimated to be \$9.95 per annum based on expected plant operations, level of maintenance for specific components and site upkeep.

*Rent*

20.0% of the portion of revenue above the electricity price (including LGCs, excluding Avoided TUOS Credit) of \$120/MWh unescalated *Commission on Sale of Electricity and LGC's*

*Commission on sales*

1% of gross proceeds of sale.

**Finance**

72. There is no finance facility offered by the RE or any other party to the arrangement. Generators can fund their Application Amount themselves, or borrow from an independent lender. Regardless of the source of loan funds, this Ruling does not apply to Generators who enter into finance arrangements to acquire their Solar Systems.

**Assumptions**

73. This Ruling is made on the basis of the following assumptions:

- all of the Generators are Australian residents for taxation purposes, including individuals, companies, trusts and complying superannuation funds;
- the scheme will be executed in the manner described in the Scheme section of this Ruling and the scheme documentation mentioned in paragraph 43 of this Ruling; and
- all dealings between the Generators, RSIM and other Red Sky Energy associated entities will be at arm's length.

Product Ruling

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Page status: **legally binding**

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**Commissioner of Taxation**

12 March 2014

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## Appendix 1 – Explanation

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**ⓘ** *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.*

### Is the Generator carrying on an enterprise?

74. An entity may be registered for GST if it is carrying on an 'enterprise' (section 23-10 of the GST Act).

75. The term 'enterprise' is defined in section 9-20 of the GST Act and includes an activity, or series of activities, done in the form of a business (paragraph 9-20(1)(a) of the GST Act). The use of the phrase 'in the form of' has been interpreted to indicate a wider meaning than the word 'business' in isolation.

76. However, subsection 9-20(2) provides that the term 'enterprise' does not include an activity, or series of activities, done by an individual or partnership without a reasonable expectation of profit or gain.

77. Miscellaneous Taxation Ruling MT 2006/1 *The New Tax System: the meaning of entity carrying on an enterprise for the purpose of entitlement to an Australian Business Number* (MT 2006/1) sets out the Commissioner's views on when an entity is carrying on an enterprise for the purposes of section 9-20 of the GST Act.

78. ATO Interpretive Decision ATO ID 2010/197 *Goods and Services Tax: GST and agricultural managed investment scheme – investor carrying on an enterprise* considers a managed investment scheme similar to that which is the subject of this Ruling. This decision applies the principles set out in MT 2006/1 to conclude that the 'Grower' in that scheme was carrying on an enterprise for the purpose of section 9-20 of the GST Act.

79. Application of these principles to the arrangement set out in this Ruling leads to the conclusion that a Generator (as described in paragraphs 5 of this Ruling) will be carrying on an enterprise for the purpose of section 9-20 of the GST Act where there is a reasonable expectation of profit or gain from their participation in the Project.

### Is the Generator carrying on a business?

80. For the 'cost' of the Soleir Systems set out in paragraph 48 of this Ruling to give rise to an allowable deduction under section 328-180, the Generator's activities of renewable energy generation as a participant in the Soleir Solar Investment 2015 must amount to the carrying on of a business.

81. The general indicators used by the Courts in determining whether an entity is carrying on a business are set out in Taxation Ruling TR 97/11 Income Tax: *am I carrying on a business of primary production?* Whilst the business in question does not involve that of 'primary production', the principles established by the Commissioner in TR 97/11 are equally relevant to the business of renewable energy generation.

82. More recently, and in relation to a managed investment scheme similar to that which is the subject of this Ruling, the Full Federal Court in *Hance v. FC of T; Hannebery v. FC of T* [2008] FCAFC 196; 2008 ATC 20-085 applied these principles to conclude that 'Growers' in that scheme were carrying on a business of producing almonds (at FCAFC 90; ATC 90).

83. Having applied these principles to the arrangement set out above, a Generator in the Soleir Solar Investment 2015 is accepted to be carrying on a business involving renewable electricity generation from the date the Purchase Agreement, Plant Management Agreement, Sales Agency Agreement and Balance of Plant Lease are executed.

### **Deductibility of the Responsible Entity Fee, Rent, Plant Management Fee and Sales Agency Commission**

#### **Section 8-1**

84. The Responsible Entity Fee, Rent, Plant Management Fee and Sales Agency Commission are deductible when incurred under section 8-1. A 'non-income producing' purpose is not identifiable in the arrangement and there is no capital component evident in these fees.

85. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

### **Expenditure of capital nature – Division 40 and 328**

86. Any part of the expenditure of a Generator that is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and will not be an allowable deduction under section 8-1. In this Project, the expenditure attributable to the acquisition of the Soleir Systems is of a capital nature. This expenditure falls for consideration under Division 40 and Division 328.

87. The application and extent to which a Generator can claim deductions under Division 40 and Division 328 depends on whether they are a 'small business entity'. The tax treatment of capital expenditure incurred by Generators in respect of their Soleir Systems has been dealt with in a representative way at paragraphs 26 to 34 of this Ruling.

**Small business entity****Sections 328-110 to 328-130**

88. A 'small business entity' is an entity that carries on a business and which, in the previous income year, had an 'aggregated turnover' of less than \$2 million or, objectively, is likely to have an 'aggregated turnover' of less than \$2 million in the current year (subsection 328-110(1)). However, an entity cannot be a 'small business entity' if its 'aggregated turnover' in the previous two income years was \$2 million dollars or more (subsection 328-110(3)).

89. An entity's 'aggregated turnover' is the sum of the 'relevant annual turnovers' but with certain amounts excluded (subsections 328-115(1) and 328-115(3)). The 'relevant annual turnovers' are those of the entity itself, any 'connected entity's' annual turnover and any 'affiliate's' annual turnover (subsection 328-115(2)). The meaning of 'connected entity' is explained in section 328-125 and 'affiliate' is explained in section 328-130.

**Deferral of losses from non-commercial business activities and the Commissioner's discretion****Sections 35-10 and 35-55**

90. Based on information provided with the application for this Product Ruling, a Generator accepted into the Project in the year 30 June 2015 who carries on a business of renewable electricity generation is expected to incur losses from their participation in the Project in the relevant income year of installation and commencement of the Project, which will be subject to Division 35. These losses will be subject to the loss deferral rule in section 35-10 unless an exception applies or, for that income year in which the losses are incurred, the Commissioner exercises the discretion in subsection 35-55(1).

91. The Commissioner will apply the principles set out in Taxation Ruling TR 2007/6 Income tax: *non-commercial business losses: Commissioner's discretion when exercising the discretion*.

92. Where a Generator with income for non-commercial loss (NCL) purposes of less than \$250,000 (that is, the Generator satisfies the income requirement in subsection 35-10(2E)) incurs a loss in the year ending 30 June 2015 where the Project commences in that year, from carrying on their business activity in a way that is not materially different to the scheme described in this Product Ruling, and the discretion in paragraph 35-55(1)(b) is exercised for that year (refer to paragraph 36), the Commissioner will be satisfied that:

- It is because of its nature that the business activity of the Generator will not satisfy one of the four tests in Division 35 in the income year of installation and commencement (that is, . 30 June 2014 or 30 June 2015); and

- there is an objective expectation that within a period that is commercially viable for the renewable energy industry (particularly utility scale solar projects), the Generator's business activity will satisfy one of the four tests set out in Division 35 or produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and (2C)). Indeed, based on objective evidence, the Project is expected to meet one of the four tests in the first income year after installation and commencement.

93. Where a Generator with income for NCL purposes of \$250,000 or more (that is, the Generator does not satisfy the income requirement in subsection 35-10(2E)) incurs a loss in the year ending 30 June 2015 where the Project commences in that year, from carrying on their business activity in a way that is not materially different to the scheme described in this Product Ruling, and the discretion in paragraph 35-55(1)(c) is exercised for that year (refer to paragraph 36), the Commissioner will be satisfied that:

- It is because of its nature that the business activity of the Generator will not produce assessable income greater than the deductions attributable to it in the income year of installation and commencement; and
- there is an objective expectation that within a period that is commercially viable for the renewable energy industry (particularly utility scale solar projects), the Generator's business activity will produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and (2C)). Indeed, based on objective evidence, the Project is expected to satisfy this test in the first income year after installation and commencement.

94. A Generator will satisfy the income requirement in subsection 35-10(2E) where the sum of the following amounts is less than \$250,000:

- taxable income for that year (ignoring any loss arising from participation in the Project or any other business activity);
- total reportable fringe benefits for that year;
- reportable superannuation contributions for that year; and
- total net investment losses for that year

95. In each individual year where the Commissioner's discretion is exercised a Generator within either paragraph 36 or paragraph 37 of this Ruling who would otherwise be required to defer a loss arising from their participation in the Project under section 35-10 until a later income year is able to offset that loss against their other assessable income.

96. The exercise of the Commissioner's discretion under paragraphs 35-55(1)(b) and 35-55(1)(c) is conditional on the Project being carried out in the manner described in this Ruling during the income years specified. If the Project is carried out in a materially different way to that described in the Ruling, a Generator will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

### **Section 82KL – recouped expenditure**

97. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of 'additional benefits(s)'. Insufficient 'additional benefits' will be provided under the scheme to trigger the application of section 82KL of the ITAA 1936. For this reason, section 82KL will not apply to deny the deduction otherwise allowable under section 8-1 of the ITAA 1997.

### **Interest on borrowed funds**

98. Generators should note that the deductibility of interest is outside the scope of this ruling and Generators who enter into finance arrangements to acquire their Solar Systems are outside the class of entities to which this ruling applies (refer to paragraphs 3 and 7).

### **Part IVA – general tax avoidance provisions**

99. For Part IVA of the ITAA 1936 to apply, there must be a 'scheme' (subsection 177A(1) of the ITAA 1936), a 'tax benefit' (section 177C of the ITAA 1936) and a purpose of entering into or carrying out the scheme to obtain a tax benefit (subsection 177D(1) of the ITAA 1936).

100. The Soleir Solar Investment 2015 will be a 'scheme'. A Generator will obtain a 'tax benefit' from entering into the scheme in the form of a tax deduction equal to the Application Amount, being the amount applied to the Purchase Price of the Soleir Systems (detailed at paragraph 47 of this Ruling) that would not have been obtained but for the scheme. However, it is not possible to conclude that the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

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101. Generators to whom this Ruling applies intend to stay in the scheme for its full term or, as a minimum, for the period beyond which their aggregate net return will have exceeded their Application Amount. There are no facts that would suggest that Generators have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(2)(b) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

102. Provided that the scheme ruled on is entered into and carried out as described in this Ruling, it is accepted that the scheme is an ordinary commercial transaction and that Part IVA of the ITAA 1936 will not apply.

**Appendix 2 – Detailed contents list**

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

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## References

*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*TR 97/11; TR 2007/6; TR 2012/2;  
MT2006/1*Subject references:*

- carrying on a business
- carrying on an enterprise
- producing assessable income
- product rulings
- tax avoidance
- tax administration

*Legislative references:*

- ITAA 1936 82KL
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 Pt IVA
- ITAA 1936 177A(1)
- ITAA 1396 177C
- ITAA 1936 177D(1)
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|---------------|--------------------------------|
| NO:           | 1-51UZESB                      |
| ISSN:         | 1441-1172                      |
| ATOlaw topic: | Income Tax ~~ Product ~~ solar |

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