



**ENFORCEABLE UNDERTAKING**

*National Consumer Credit Protection Act 2009 (Cth)*

Section 322(1)

The commitments in this undertaking are offered to  
the Australian Securities and Investments Commission by:

**Simply Energy Solutions Pty Ltd**  
ACN 165 627 396  
Level 33, Rialto South Tower  
525 Collins Street  
Melbourne Vic 3000

**1. DEFINITIONS**

In addition to terms defined elsewhere in this Undertaking, the following definitions are used:

**ACL** means Australian Credit Licence;

**ASIC** means the Australian Securities and Investments Commission;

**ASIC Act** means the *Australian Securities and Investments Commission Act 2001* (Cth);

**Cash Price** has the meaning given by s204(1) of the National Credit Code;

**Commencement Date** means the date upon which this Undertaking is accepted by ASIC;

**Consumer** includes the plural and means a natural person who has entered into a Sale Agreement with SE during the Relevant Period;

**Continuing Sale Agreement** means each Sale Agreement entered into during the Relevant Period and on foot at the end of the Relevant Period, other than:

- (a) the three Sale Agreements that have been terminated since the end of the Relevant Period by the relevant Consumer; and
- (b) one Sale Agreement under which the relevant Consumer agreed to pay the price in one upfront payment rather than in monthly instalments;

**Credit** has the meaning given by s3(1) of the National Credit Code;

**Credit Activity** has the meaning given by s6(1) of the National Credit Act;

**Credit Contract** has the meaning given by s4 and s5(1) of the National Credit Code;

**Credit Provider** has the meaning given by s204 of the National Credit Code;

**National Credit Act** means the *National Consumer Credit Protection Act 2009* (Cth);

**National Credit Code** means the National Credit Code at Schedule 1 of the National Credit Act;

**National Credit Regulations** means the *National Consumer Credit Protection Regulations 2010* (Cth);

**Relevant Period** means the period between 5 February 2014 and 2 April 2015;

**Sale Agreement** includes the plural and means a contract relating to the sale and installation of a residential solar system entered into by SE with each Consumer;

**Sale of Goods by Instalment** has the meaning given by s11(1) of the National Credit Code;

**SE** means Simply Energy Solutions Pty Ltd (ACN 165 627 396); and

**Undertaking** means this enforceable undertaking.

## 2. BACKGROUND

### ASIC's Role

2.1. Under s239 of the National Credit Act, ASIC has the general administration of the National Credit Act.

### Details of Conduct

2.2. SE's registered office and principal place of business is Level 33, Rialto South Tower, 525 Collins Street Melbourne VIC 3000.

2.3. During the Relevant Period, SE operated a business selling and installing residential solar systems. SE sourced its solar systems from two suppliers (**Suppliers**).

2.4. SE offered to sell and install the solar systems under a Sale Agreement, the terms of which gave the Consumer the option of paying the price up front or by instalments.

2.5. Under the terms of Sale Agreement, the price was the same whether the Consumer paid up front or by instalments. However, in setting the price SE included an allowance for the cost of capital over the term of the Sale Agreement and a margin on that cost of capital. As a result, the price of the solar systems offered by SE was higher than the price at which the Suppliers offered the solar systems to retail customers. SE promoted the terms of the Sale Agreement as containing 0% interest.

2.6. During the Relevant Period, SE entered into 84 Continuing Sale Agreements.

2.7. After obtaining legal advice SE formed the view that it was not required to hold an ACL, and accordingly, did not hold an ACL during the Relevant Period.

2.8. In ASIC's view under each Sale Agreement entered into during the Relevant Period in which the Consumer opted to pay by instalments:

2.8.1. the Consumer had an obligation to purchase the solar system;

2.8.2. the amount owed by the Consumer to SE was deferred;

2.8.3. the Consumer was required to make monthly instalment payments over the term of the Sale Agreement;

2.8.4. SE provided credit to the Consumer; and

- 2.8.5. the amount payable by the Consumer exceeded the Cash Price for the solar system.
- 2.9. In ASIC's view each Sale Agreement entered into during the Relevant Period is regarded as:
  - 2.9.1. a Sale of Goods by Instalment; and
  - 2.9.2. a Credit Contract.
- 2.10. In ASIC's view by entering into each of the Sale Agreements entered into during the Relevant Period where the Consumer elected to pay by instalments, SE was:
  - 2.10.1. providing Credit;
  - 2.10.2. acting as a Credit Provider; and
  - 2.10.3. engaging in Credit Activity.

**ASIC's Investigation**

- 2.11. By letter dated 5 May 2015, following a review by new senior management, SE notified ASIC of concerns that it may have breached provisions of the National Credit Act and National Credit Code.
- 2.12. On 14 July 2015, ASIC commenced an investigation under s247 of the National Credit Act into suspected contraventions by SE of the National Credit Act and the National Credit Code (the **Investigation**).

**ASIC's Concerns**

- 2.13. As a result of the Investigation, ASIC is concerned that:
  - 2.13.1. SE contravened s29 of the National Credit Act by engaging in Credit Activity without holding an ACL;
  - 2.13.2. SE contravened s32 of the National Credit Act by demanding, receiving or accepting any fee, charge or some other amount from the Consumers for engaging in the Credit Activity, where that activity contravened s29; and
  - 2.13.3. notwithstanding that SE entered into the Sale Agreements without an ACL, SE also contravened:
    - (a) section 16 of the National Credit Code by failing to provide the Consumers with a pre-contractual statement setting out the matters required by s17 and an information statement; and/or
    - (b) section 17 of the National Credit Code by failing to ensure that the Continuing Sale Agreements contained the matters required under s17.

**Acknowledgement of Concerns**

- 2.14. SE acknowledges ASIC's concerns and that those concerns are reasonably held.

### 3. UNDERTAKINGS

- 3.1. Under s322(1) of the National Credit Act, SE has offered, and ASIC has agreed to accept as an alternative to commencing civil proceedings, the following Undertakings:

#### **Variation of Continuing Sale Agreements**

- 3.2. SE will ensure that, within 28 days of the Commencement Date, the terms of all current Continuing Sale Agreements are varied as set out at paragraph 3.3 below.

#### **Price Reductions, Refunds and Adjustments**

- 3.3. SE will, within 28 days of the Commencement Date, contact each Consumer and offer to:
- 3.3.1. reduce the total amount payable under the Continuing Sale Agreement to an amount equal to the price at which the relevant Supplier offered the solar system for sale to retail consumers at the time the agreement was entered into or, if SE does not know that price, to the amount for which SE reasonably believes the relevant Supplier was selling such solar systems at such time (the **Reduced Price**);
  - 3.3.2. refund to the Customer any amount in excess of the Reduced Price already paid by the Customer under the Continuing Sale Agreement together with interest calculated at the same rate as SE is entitled to charge on late payments; and
  - 3.3.3. allow the Consumer to pay the amount of the Reduced Price outstanding, if any, by instalments over the term of the Continuing Sale Agreement.

#### **Refraining from Credit Activity**

- 3.4. On and from the Commencement Date SE:
- 3.4.1. will not enter into any further agreement under which there is a Sale of Goods by Instalment;
  - 3.4.2. will not enter into any other agreement with residential consumers which might constitute a Credit Contract; and
  - 3.4.3. will not engage in Credit Activity

Without holding an ACL or an authorisation to act as a representative under an ACL.

#### **Employee Training**

- 3.5. SE will, by no later than 60 days following the Commencement Date, engage a suitably qualified organisation to provide training to its employees, directors and officers (the **Employees and Officers**) on compliance with the National Credit Act, National Credit Regulations and National Credit Code.
- 3.6. The organisation, and the terms of engagement of the organisation, are to be approved by ASIC in writing prior to its appointment (such approval not be reasonably withheld).

**Costs**

3.7. SE undertakes that:

- 3.7.1. it will pay the costs of its compliance with this Undertaking; and
- 3.7.2. it will not seek reimbursement of, contribution towards or otherwise directly or indirectly pass on its costs of compliance with this Undertaking or any proportion of those costs to the Consumers.

**Reporting to ASIC**

3.8. Within 120 days of the Commencement Date SE will provide to ASIC a report containing the following information:

- 3.8.1. the precise and complete arrangements made between SE and the Consumers with regard to the Continuing Sale Agreements; and
- 3.8.2. details of the training provided to the Employees and Officers.

3.9. SE will provide all documents and information requested by ASIC from time to time for the purpose of assessing SE's compliance with the terms of this Undertaking.

**Undertakes to Act in Good Faith**

3.10. SE will do all acts reasonably necessary to ensure compliance with this Undertaking and refrain from doing any acts which are inconsistent with the terms and objectives of this Undertaking.

3.11. SE, to the extent possible, will take all practicable steps to ensure that its subsidiaries, associates, related parties, contractors and Employees and Officers act consistently within the terms and objectives of this Undertaking.

3.12. Without limiting the generality of the previous paragraph, a reference to acts which are inconsistent with the terms and objectives of this Undertaking includes publishing or making any statement which is derogatory of, denigrates or trivialises the terms, objectives or any other aspect of this Undertaking.

**4. ACKNOWLEDGMENTS**

**ASIC**

4.1. SE acknowledges that ASIC:

- 4.1.1. may issue a media release on execution of this Undertaking referring to its terms and to the concerns of ASIC which led to its execution;
- 4.1.2. may from time to time publicly refer to this Undertaking;
- 4.1.3. may from time to time publicly report about the compliance with this Undertaking; and
- 4.1.4. will make this Undertaking available for public inspection.

**Undertaking**

4.2. SE acknowledges:

- 4.2.1. that ASIC's acceptance of this Undertaking does not affect ASIC's power to investigate, conduct surveillance or pursue a criminal prosecution or its power to lay charges or seek a pecuniary civil order in relation to any contravention not the subject of the background section of this Undertaking or arising from future conduct;
- 4.2.2. that this Undertaking in no way derogates from the rights and remedies available to any other person or entity arising from any conduct described in this Undertaking or arising from future conduct;
- 4.2.3. ASIC's concerns as outlined in paragraph 2.14 above, and has offered Undertakings in the terms outlined in section 3 above; and
- 4.2.4. that this Undertaking has no operative force until accepted by ASIC, and SE acknowledges that the date of the Undertaking is the date on which it is accepted by ASIC.

**5. NOTIFICATION**

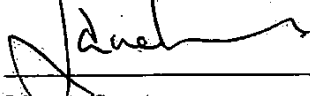
- 5.1. The address for providing ASIC with any document or notification required by the Undertaking is:

The Senior Manager  
Financial Services Enforcement  
Australian Securities and Investments Commission  
GPO Box 9827  
Melbourne VIC 3001

- 5.2 The address for providing SE with any document or notification required by the Undertaking is:

David Curtain  
Head of Legal  
Simply Energy  
Level 33, Rialto South Tower  
525 Collins Street  
Melbourne Vic 3000

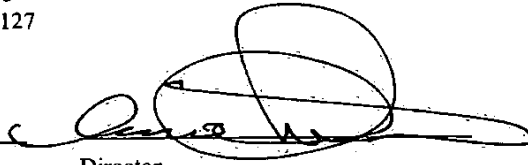
Executed by **SIMPLY ENERGY SOLUTIONS PTY LTD** (ACN 165 627 396) in accordance with section 127 of the *Corporations Act 2001* (Cth):



Director/Secretary

**Lawrence Kim**

Full Name (Please Print)

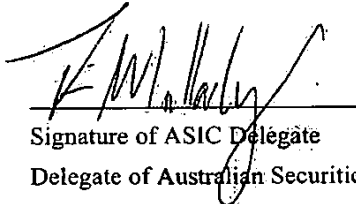


Director

**MASAO OMURA**

Full Name (Please Print)

Accepted by the **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** under s322(1) of the *National Consumer Credit Protection Act 2009* (Cth) by its duly authorised delegate:



Signature of ASIC Delegate

Delegate of Australian Securities and Investments Commission

**TIM MULKALY**

Print name

**22/12/2015**

Date