

FEDERAL COURT OF AUSTRALIA

Clean Energy Regulator v MT Solar Pty Ltd [2013] FCA 205

Citation: Clean Energy Regulator v MT Solar Pty Ltd [2013] FCA 205

Parties: **CLEAN ENERGY REGULATOR v MT SOLAR PTY LTD (ACN 143 322 089), GREEN MASTER BUILDING SOLUTIONS PTY LTD (ACN 146 546 349), BO LIU, YONGXIN ZHU and BARRY ELI KIBBLEWHITE**

File number: ACD 29 of 2012

Judge: **FOSTER J**

Date of judgment: 8 March 2013

Catchwords: **ENERGY AND RESOURCES** – consideration of appropriate civil pecuniary penalties to be imposed upon corporations and individuals for contraventions of the *Renewable Energy (Electricity) Act 2000* (Cth) being the provision of false information to issuers of renewable energy certificates under that Act – consideration of other appropriate relief

Legislation: *Clean Energy Regulator Act 2011*, ss 11, 12, 16
Renewable Energy (Electricity) Act 2000 (Cth), ss 3, 24B, 154A, 154B, 154L, 154M, 154N, 154P, 154S, Pt 2, Div 4, subdiv BA
Federal Court Rules 2011, r 30.21(1)(b)(i)

Cases cited: *Attorney-General (SA) v Tichy* (1982) 30 SASR 84 cited
Australian Communications and Media Authority v Bytecard Pty Ltd [2013] FCA 38 followed
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560 applied
Construction, Forestry, Mining and Energy Union v Cahill (2010) 194 IR 461 cited
Johnson v The Queen (2004) 205 ALR 346 cited
Markarian v The Queen (2005) 228 CLR 3 applied
Mill v The Queen (1988) 166 CLR 59 cited
Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd [2004] ATPR 41-993 cited
Minister for Sustainability, Environment, Water, Population and Communities v Woodley [2012] FCA 957 followed

Mornington Inn Pty Ltd v Jordan (2008) 168 FCR 383 applied
NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285 applied
Pearce v The Queen (1998) 194 CLR 610 cited
Secretary, Department of Health and Ageing v Export Corp (Australia) Pty Ltd (2012) 288 ALR 702 cited
Trade Practices Commission v CSR Limited (1991) ATPR 41-076 applied

Date of hearing:	5 November 2012
Place:	Canberra
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	182
Counsel for the Applicant:	Mr T Begbie
Solicitor for the Applicant:	Australian Government Solicitor
Solicitor for the First and Third Respondents:	The Third Respondent appeared in person on his own behalf and on behalf of the First Respondent
Solicitor for the Second and Fourth Respondents:	The Second and Fourth Respondents submitted
Solicitor for the Fifth Respondent:	The Fifth Respondent did not appear

**IN THE FEDERAL COURT OF AUSTRALIA
AUSTRALIAN CAPITAL TERRITORY DISTRICT
REGISTRY**

GENERAL DIVISION

ACD 29 of 2012

BETWEEN: CLEAN ENERGY REGULATOR
Applicant

AND: MT SOLAR PTY LTD (ACN 143 322 089)
First Respondent

GREEN MASTER BUILDING SOLUTIONS PTY LTD
(ACN 146 546 349)
Second Respondent

BO LIU
Third Respondent

YONGXIN ZHU
Fourth Respondent

BARRY ELI KIBBLEWHITE
Fifth Respondent

JUDGE: FOSTER J

DATE OF ORDER: 8 MARCH 2013

WHERE MADE: CANBERRA

THE COURT DECLARES THAT:

Contraventions by MT Solar Pty Ltd

1. Renewable Energy Regulator be removed as the applicant and Clean Energy Regulator be added as the applicant in the place of Renewable Energy Regulator.
2. In the period from 2 August 2010 to 14 October 2010, the first respondent (**MT Solar**) contravened s 24B(1) of the *Renewable Energy (Electricity) Act 2000* (Cth) on 17 occasions in that:
 - 2.1 It provided renewable energy certificate assignment forms and other information to Renewable Energy Traders Pty Ltd in relation to the installation of each of the solar power generation systems on the dates and at the locations specified in rows 1 to 17 in Table A below;

- 2.2 The forms and other information falsely claimed that each of the systems had been installed by a person who:
 - 2.2.1 was accredited to perform those installations under the Clean Energy Council accreditation scheme; and
 - 2.2.2 in the case of the installations described in rows 5 to 17, held an unrestricted electrical licence to perform electrical work in NSW;
 - 2.3 Renewable Energy Traders Pty Ltd relied upon that information to create renewable energy certificates for each system, as specified in rows 1 to 17 in Table A below, that it was not entitled to create; and
 - 2.4 It could reasonably have been expected that Renewable Energy Traders Pty Ltd would rely upon the false and misleading information in that way.
3. In the period from 13 October 2010 to 4 November 2010, MT Solar contravened s 24B(1) of the *Renewable Energy (Electricity) Act 2000* (Cth) on three occasions in that:
- 3.1 It provided renewable energy certificate assignment forms and other information to Greenbank Environmental Pty Ltd in relation to the installation of each of the three solar power generation systems on the dates and at the locations specified in rows 18 to 20 in Table A below;
 - 3.2 The forms and other information falsely claimed that each of the systems had been installed by a person who:
 - 3.2.1 was accredited to perform those installations under the Clean Energy Council accreditation scheme; and
 - 3.2.2 held an unrestricted electrical licence to perform electrical work in NSW;
 - 3.3 Greenbank Environmental Pty Ltd relied upon that information to create renewable energy certificates for each system, as specified in rows 18–20 in Table A below, that it was not entitled to create; and
 - 3.4 It could reasonably have been expected that Greenbank Environmental Pty Ltd would rely upon the false and misleading information in that way.

Contraventions by Green Master Building Solutions Pty Ltd

4. In the period from 28 September 2010 to 19 October 2010, the second respondent (**Green Master**) contravened s 24B(1) of the *Renewable Energy (Electricity) Act 2000* (Cth) on two occasions in that:
 - 4.1 It provided renewable energy certificate assignment forms and other information to Renewable Energy Traders Pty Ltd in relation to the installation of both of the solar power generation systems on the dates and at the locations specified in Table B below;
 - 4.2 The forms and other information falsely claimed that each of the systems had been installed by a person who:
 - 4.2.1 was accredited to perform those installations under the Clean Energy Council accreditation scheme; and
 - 4.2.2 held an unrestricted electrical licence to perform electrical work in NSW;
 - 4.3 Renewable Energy Traders Pty Ltd relied upon that information to create renewable energy certificates for both systems, as specified in Table B below, that it was not entitled to create; and
 - 4.4 It could reasonably have been expected that Renewable Energy Traders Pty Ltd would rely upon the false and misleading information in that way.

Contraventions by Bo Liu

5. In the period from 2 August 2010 to 4 November 2010, the third respondent (**Mr Liu**) contravened s 154N of the *Renewable Energy (Electricity) Act 2000* (Cth) on 20 occasions in that:
 - 5.1 MT Solar contravened s 24B(1) of the *Renewable Energy (Electricity) Act 2000* (Cth) as described in paragraphs 2 and 3 above;
 - 5.2 Mr Liu was a director of MT Solar;
 - 5.3 Mr Liu was reckless as to whether the contraventions by MT Solar would occur; and
 - 5.4 Mr Liu failed to take all reasonable steps to prevent the contraventions by MT Solar.

Contraventions by Yongxin Zhu

6. In the period from 28 September 2010 to 19 October 2010, the fourth respondent (**Mr Zhu**) contravened s 154N of the *Renewable Energy (Electricity) Act 2000* (Cth) on two occasions in that:
 - 6.1 Green Master contravened s 24B(1) of the *Renewable Energy (Electricity) Act 2000* (Cth) as described in paragraph 4 above;
 - 6.2 Mr Zhu was a director of Green Master;
 - 6.3 Mr Zhu was negligent as to whether the contraventions by Green Master would occur; and
 - 6.4 Mr Zhu failed to take all reasonable steps to prevent the contraventions by Green Master.

Contraventions by Barry Kibblewhite

7. In the period from 2 August 2010 to 4 November 2010, the fifth respondent (**Mr Kibblewhite**) contravened s 24B(2) of the *Renewable Energy (Electricity) Act 2000* (Cth) on 22 occasions because:
 - 7.1 MT Solar and Green Master contravened s 24B(1) of the *Renewable Energy (Electricity) Act 2000* (Cth) as described in paragraphs 2, 3 and 4 above; and
 - 7.2 Mr Kibblewhite was knowingly concerned in each of those contraventions in that:
 - 7.2.1 he undertook the physical installation of, and performed electrical wiring work associated with, each of the solar power generation systems on the dates and at the locations specified in Tables A and B below;
 - 7.2.2 in each case he provided false information to MT Solar and to Green Master (as the case may be) that he was accredited to perform those installations under the Clean Energy Council accreditation scheme;
 - 7.2.3 in each case he provided false information to MT Solar and Green Master (as the case may be) that he was authorised to perform the electrical work as though he held an unrestricted licence to perform such work in NSW;

7.2.4 he knew that the false information would be provided by MT Solar and Green Master (as the case may be) to Renewable Energy Traders Pty Ltd and Greenbank Environmental Pty Ltd (as the case may be);

7.2.5 he knew that Renewable Energy Traders Pty Ltd and Greenbank Environmental Pty Ltd (as the case may be) could reasonably be expected to rely upon the false information to create renewable energy certificates for each of the installations, as specified in Tables A and B below; and

7.2.6 he knew that Renewable Energy Traders Pty Ltd and Greenbank Environmental Pty Ltd (as the case may be) would not be entitled to create those certificates.

TABLE A – MT SOLAR INSTALLATIONS

No	Installation Date	Location of installation	No of RECs	REC Trader
1	2/8/2010	4 Currawong Avenue Lane Cove West NSW	170	Renewable Energy
2	12/08/2010	11 Artillery Crescent Holsworthy NSW	189	Renewable Energy
3	17/08/2010	55 Statham Avenue North Rocks NSW	153	Renewable Energy
4	18/08/2010	6 Windhover Court Bella Vista NSW	189	Renewable Energy
5	21/08/2010	50 Casaurina Road Alfords Point NSW	166	Renewable Energy
6	2/09/2010	23 Karowa Street Bomaderry NSW	189	Renewable Energy
7	6/09/2010	10 Bay Road Russell Lea NSW	166	Renewable Energy
8	7/09/2010	20 Malory Avenue West Pymble NSW	185	Renewable Energy
9	9/09/2010	36 Willunga Road Berowra NSW	153	Renewable Energy
10	13/09/2010	86 Railway Parade Canley Vale NSW	339	Renewable Energy
11	14/09/2010	4 Blythe Avenue Glenwood NSW	153	Renewable Energy
12	16/09/2010	28 Prospect Road Summer Hill NSW	153	Renewable Energy
13	17/09/2010	83 Brown Street Penrith NSW	228	Renewable Energy
14	20/09/2010	13 Farrier Way Kellyville Ridge NSW	185	Renewable Energy

No	Installation Date	Location of installation	No of RECs	REC Trader
15	30/09/2010	3 Flemington Street St Johns Park NSW	185	Renewable Energy
16	6/10/2010	77 Woolcott Street Earlwood NSW	166	Renewable Energy
17	6/10/2010	100 Northcote Street Canterbury NSW	166	Renewable Energy
18	13/10/2010	Unit 1/188 Cressy Road Ryde NSW	166	Greenbank
19	22/10/2010	62 Valentia Avenue Lugarno NSW	166	Greenbank
20	24/10/2010	8 Ruby Street Hurstville NSW	228	Greenbank

TABLE B – GREEN MASTER INSTALLATIONS

No	Installation Date	Location of installation	No of RECs	REC Trader
1	28/9/2010	134 Lugarno Parade Lugarno NSW	165	Renewable Energy
2	12/10/2010	Lot 16 Cross Street Kemps Creek NSW	191	Renewable Energy

THE COURT ORDERS THAT:

Pecuniary Penalties

8. MT Solar pay to the Commonwealth of Australia a pecuniary penalty of \$70,000 pursuant to s 154B of the *Renewable Energy (Electricity) Act 2000* (Cth) for the contraventions described in paragraphs 2 and 3 above.
9. Green Master Building Solutions Pty Ltd pay to the Commonwealth of Australia a pecuniary penalty of \$14,500 pursuant to s 154B of the *Renewable Energy (Electricity) Act 2000* (Cth) for the contraventions described in paragraph 4 above.
10. Mr Liu pay to the Commonwealth of Australia a pecuniary penalty of \$14,000 pursuant to s 154B of the *Renewable Energy (Electricity) Act 2000* (Cth) for the contraventions described in paragraph 5 above.

11. Mr Zhu pay to the Commonwealth of Australia a pecuniary penalty of \$2,900 pursuant to s 154B of the *Renewable Energy (Electricity) Act 2000* (Cth) for the contraventions described in paragraph 6 above.
12. Mr Kibblewhite pay to the Commonwealth of Australia a pecuniary penalty of \$108,000 pursuant to s 154B of the *Renewable Energy (Electricity) Act 2000* (Cth) for the contraventions described in paragraph 7 above (other than the contraventions relating to the installations specified in rows 4, 6, 8 and 12 of Table A).

Injunctions

13. Pursuant to s 154S of the *Renewable Energy (Electricity) Act 2000* (Cth), MT Solar:
 - 13.1 Be restrained from providing false or misleading information to any person in relation to the creation of renewable energy certificates associated with the installation of any solar power generation system by or on behalf of MT Solar; and
 - 13.2 Take all reasonable steps to ensure that, before providing information to any person in relation to the creation of renewable energy certificates associated with the installation of any solar power generation system by or on behalf of MT Solar, the information is not false or misleading.
14. Pursuant to s 154S of the *Renewable Energy (Electricity) Act 2000* (Cth), Green Master Building Solutions Pty Ltd:
 - 14.1 Be restrained from providing false or misleading information to any person in relation to the creation of renewable energy certificates associated with the installation of any solar power generation system by or on behalf of Green Master; and
 - 14.2 Take all reasonable steps to ensure that, before providing information to any person in relation to the creation of renewable energy certificates associated with the installation of any solar power generation system by or on behalf of Green Master, the information is not false or misleading.
15. Pursuant to s 154S of the *Renewable Energy (Electricity) Act 2000* (Cth), Mr Liu take reasonable steps to ensure that any company in respect of which he:

15.1 is an executive officer; and

15.2 is in a position to influence the conduct of the company;

does not provide false or misleading information to any person in relation to the creation of renewable energy certificates associated with the installation of any solar power generation system by that company.

16. Pursuant to s 154S of the *Renewable Energy (Electricity) Act 2000* (Cth), Mr Zhu take reasonable steps to ensure that any company in respect of which he:

16.1 is an executive officer; and

16.2 is in a position to influence the conduct of the company;

does not provide false or misleading information to any person in relation to the creation of renewable energy certificates associated with the installation of any solar power generation system by that company.

17. Pursuant to s 154S of the *Renewable Energy (Electricity) Act 2000* (Cth), Mr Kibblewhite be restrained from providing false or misleading information to any person in relation to the creation of renewable energy certificates associated with the installation of any solar power generation system by him.

Costs

18. The question of costs be reserved.

19. The parties have liberty to apply in respect of costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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Fourth Respondent

BARRY ELI KIBBLEWHITE
Fifth Respondent

JUDGE: FOSTER J

DATE: 8 MARCH 2013

PLACE: CANBERRA

REASONS FOR JUDGMENT
(REVISED)

1 These proceedings were commenced on 28 March 2012 by the Renewable Energy Regulator which, at that time, had responsibility under the *Renewable Energy (Electricity) Act 2000* (Cth) (**the REE Act**) for, amongst other things, enforcing the provisions of the REE Act.

2 The powers, duties, functions and responsibilities of the Renewable Energy Regulator under the REE Act were transferred to the Clean Energy Regulator (**the regulator**) when that body was established under the *Clean Energy Regulator Act 2011* (Cth).

3 Under the *Clean Energy Regulator Act 2011* (Cth), the regulator is established as a
body corporate with perpetual succession (s 11 and s 16). Under that Act, the regulator has
such functions as are conferred upon it by a climate change law (s 12). The regulator has
power to do all things necessary or convenient to be done for or in connection with the
performance of its functions.

4 In effect, by reason of the operation of the provisions to which I have referred at [1]–
[3] above, the regulator has replaced the Renewable Energy Regulator as the relevant
regulatory authority under the REE Act. I propose to make an order reflecting that change.
The consequence of my making that order will be that the regulator will be substituted as the
applicant in the present proceedings.

5 In the present proceedings, the regulator seeks declarations, injunctions, pecuniary
penalties and costs in respect of contraventions by the first, second and fifth respondents of
s 24B of the REE Act and by the third and fourth respondents of s 154N(1) of that Act.

6 The first and second respondents (MT Solar Pty Ltd (**MT Solar**) and Green Master
Building Solutions Pty Ltd (**Green Master**)) are alleged to have contravened s 24B(1) of the
REE Act by providing false or misleading information to another person in relation to, or in
relation to the installation of, small generation units (being grid-connected solar power
generation systems) in circumstances where the supply of that information resulted in the
creation of renewable energy certificates (**RECS**) under Pt 2, Div 4, subdiv BA of the REE
Act which the entity that created the RECS was not entitled to create.

7 The third and fourth respondents (Bo Liu (**Mr Liu**) and Yongxin Zhu (**Mr Zhu**)) are
said to have contravened s 154N(1) of the REE Act because, as executive officers of
MT Solar and Green Master respectively who were in a position to influence the conduct of
those corporations in relation to the contraventions of s 24B(1) committed by each of those
corporations, they failed to take all reasonable steps to prevent those contraventions.

8 The fifth respondent (Barry Eli Kibblewhite) (**Mr Kibblewhite**) is alleged to have
contravened s 24B(2) of the REE Act in that he undertook the physical installation of, and
performed electrical wiring work associated with, the relevant solar power generation
systems in circumstances where he was not authorised to perform that electrical work. The

regulator submitted that the alleged contraventions on the part of Mr Kibblewhite led to the creation of RECS in circumstances where they should not have been created. In this way, Mr Kibblewhite is said to have been knowingly concerned in the contraventions of s 24B(1) of the REE Act committed by MT Solar and Green Master.

9 Each of MT Solar, Green Master, Mr Liu and Mr Zhu admits the contraventions alleged against each of them respectively. Each of those respondents filed a Defence. None of those respondents put in issue any matter pleaded by the regulator in its Statement of Claim. Those respondents and the regulator agreed certain facts and matters for the purposes of these proceedings. Those facts and matters are specified in a Statement of Agreed Facts dated 2 October 2012 and filed on 18 October 2012 which has been signed by a representative of the regulator and either by or on behalf of each of those respondents. That Statement of Agreed Facts became Exhibit A at the hearing. I have attached a copy of that Statement of Agreed Facts (without annexures except Table A and Table B) to these Reasons for Judgment as Attachment “A”.

10 Mr Kibblewhite was validly served with the regulator’s Originating Application and accompanying Statement of Claim on 24 July 2012. He has also been informed of each set of orders which I made in the proceedings after that date. I am satisfied that Mr Kibblewhite has been well aware of the existence and nature of the present proceedings since July 2012 and that he was informed of the hearing date well in advance of the hearing.

11 On 10 August 2012, I ordered Mr Kibblewhite to file and serve his Defence by 31 August 2012. Notwithstanding the terms of that order, Mr Kibblewhite has not filed a Defence. In addition, Mr Kibblewhite has taken no part in the proceedings. He did not appear at the hearing and was not represented at the hearing. He has ignored the proceedings.

12 At the commencement of the hearing, upon the application of the regulator, I made an order, pursuant to r 30.21(1)(b)(i) of the *Federal Court Rules 2011* that the hearing proceed generally insofar as it concerned Mr Kibblewhite notwithstanding his absence.

13 In light of the co-operation given by the first, second, third and fourth respondents to the regulator and the terms of the Statement of Agreed Facts agreed amongst those parties, I will proceed to deal with the regulator’s claims for relief against those respondents by

considering the submissions made on behalf of the regulator, the submissions made on behalf of the first to fourth respondents and the Statement of Agreed Facts.

14 As far as the regulator's case against Mr Kibblewhite is concerned, it is necessary for the regulator to prove the contraventions against him before any question of relief can arise. In order to prove its case against Mr Kibblewhite, the regulator read and relied upon the following affidavits:

- (a) The affidavit of Elizabeth Margaret-Anne Rosenberg affirmed on 22 October 2012;
- (b) The affidavit of Michael John Woodbridge sworn on 22 October 2012; and
- (c) The affidavit of Peter Ian Bache sworn on 23 October 2012.

15 I am satisfied that the evidence to which I have referred at [14] above proves the facts set out in the Statement of Agreed Facts and also proves the contraventions alleged against Mr Kibblewhite.

16 The essence of the case put and proven against Mr Kibblewhite is:

- (a) Knowing that, in order to perform the installations for MT Solar and Green Master which he was ultimately retained to perform, he was required to be:
 - (i) Accredited under the Clean Energy Council (**CEC**) accreditation scheme to undertake those installations; and
 - (ii) Appropriately qualified under relevant NSW regulatory requirements which included a requirement that the electrical wiring associated with the installation had to be undertaken by a person holding an unrestricted licence for electrical work issued by the relevant NSW authority

he provided false information and falsely represented to both MT Solar and to Green Master that he was so accredited and qualified in circumstances where he did not hold the relevant CEC accreditation and did not hold an unrestricted licence covering the relevant electrical work issued by the relevant NSW authority. In order to present this false picture, he created false documents.

- (b) As intended and expected by Mr Kibblewhite, both MT Solar and Green Master procured home owners where such installations were carried out to assign to

MT Solar or to Green Master (as the case may be) the home owners' entitlement to create RECS as a result of effecting those installations and then passed on to REC traders the information provided by Mr Kibblewhite to them in connection with the transfer of the home owners' entitlements to create RECS in return for cash in circumstances where the REC traders in question could be expected to and did in fact rely upon the information provided by Mr Kibblewhite in order to create and trade the particular RECS and thereby contravened s 24B(1) of the REE Act.

- (c) The details of the installations, of the RECS issued and of the REC traders involved are set out in Table A and Table B attached to the Statement of Agreed Facts.
- (d) The conduct summarised in subpars (a) to (c) above constituted contraventions of s 24B(1) of the REE Act by MT Solar and by Green Master and of s 24B(2) by Mr Kibblewhite. Mr Kibblewhite was knowingly concerned in the contraventions of s 24B(1) of the REE Act committed by MT Solar and Green Master (as to which see s 24B(2)(c)) and may also have contravened other subpars of s 24B of the REE Act, in particular, subpars (a) and (b) of s 24B(2).

17 Of course, in order to prove its case against Mr Kibblewhite, the regulator must first prove its case against the primary contravenors, MT Solar and Green Master. I am satisfied that it has done so.

THE REGULATORY FRAMEWORK UNDER THE REE ACT

18 Section 3 of the REE Act contains the objects of that Act. In that section, those objects are specified as follows:

The objects of this Act are:

- (a) to encourage the additional generation of electricity from renewable sources; and
- (b) to reduce emissions of greenhouse gases in the electricity sector; and
- (c) to ensure that renewable energy sources are ecologically sustainable.

This is done through the issuing of certificates for the generation of electricity using eligible renewable energy sources and requiring certain purchasers (called *liable entities*) to surrender a specified number of certificates for the electricity that they acquire during a year.

Where a liable entity does not have enough certificates to surrender, the liable entity will have to pay renewable energy shortfall charge.

A partial exemption relating to one or more emissions-intensive trade exposed activities may be taken into account in working out a liable entity's renewable energy certificate shortfall for a year. If it is, it will reduce the renewable energy shortfall charge otherwise payable.

19 Part 2 of the REE Act creates a scheme whereby persons who generate renewable electricity may create RECS. Under the REE Act, where a liable entity does not have enough RECS to surrender, the liable entity will have to pay a renewable energy shortfall charge. RECS are used to avoid or reduce the amount of renewable energy shortfall charges that liable entities who acquire electricity have to pay. The liable entities will generally acquire certificates by purchasing them.

20 A person who, during a year, makes a relevant acquisition of electricity is called a *liable entity* (s 5 and s 35 of the REE Act). A *relevant acquisition of electricity* is a wholesale acquisition of electricity or a notional wholesale acquisition of electricity (ss 5, 31, 32 and 33 of the REE Act).

21 RECS are created by people who generate power from accredited power stations using eligible energy sources where the amount generated exceeds the relevant 1997 eligible renewable power base line. RECS are also created for approved installations of solar water heaters or small generation units (as defined in s 5 of the REE Act). RECS are created based upon the amount of electricity generated from renewable energy sources. The higher the output from such sources, the more RECS are created.

22 A *small generation unit*, as defined in s 5 of the REE Act, is a device that generates electricity that is specified by the regulations to be a small generation unit. The grid-connected solar power generation systems the subject of the installations in question in the present proceedings were all small generation units within the meaning of s 5.

23 A person needs to be registered under Pt 2, Div 2 of the REE Act before that person can create a REC. A REC must be registered when it is created. Every transfer of a REC must also be registered. The initial registration of RECS is done online in an internet-based registry managed by the regulator.

24 When a certificate has been surrendered by a liable entity, it ceases to be valid.

25 Part 2, Divs 1–4 of the REE Act govern the creation, trading and extinguishment of
RECS.

26 RECS may be transferred after they have been registered by the regulator.

27 Part 3 and Pt 4 of the REE Act impose a proportional liability on wholesale purchases
of electricity to hold a prescribed number of RECS in each year (s 35 and s 39 of the REE
Act). Liable entities can satisfy the statutory liability by surrendering RECS to the regulator.

28 The intention of the legislature in creating the scheme which I have described at [18]–
[27] above is to put in place a market incentive to create renewable energy through the
creation, registration, transfer and surrender of RECS in accordance with the statutory
scheme. As submitted by the regulator in the present proceedings, in its implementation of
these measures to achieve renewable energy targets, the REE Act is a cornerstone of
Australia’s response to climate change and thereby contributes to the fulfilment of Australia’s
international obligations in respect of climate change.

29 The integrity of the REC market is secured by the regulatory provisions of the REE
Act. The regulator is charged with the responsibility of administering the regulatory
framework established by the REE Act in order to ensure the efficient and fair operation of
the REC market and in order to support the achievement of the objects of the REE Act.

30 From 2001 to 2010, there was a single certificate commodity, the REC. Since
1 January 2011, RECS have been reclassified into two types of certificate: Large-Scale
Generation Certificates and Small-Scale Technology Certificates. All of the contraventions
in the present case occurred in the period from August to October 2010. Therefore, those
contraventions relate only to the creation of RECS and not to the types of certificate created
from 1 January 2011.

31 Section 24B of the REE Act provides as follows:

**24B False etc. information resulting in improper creation of certificates
under Subdivision B or BA—civil penalty**

(1) A person (*the first person*) contravenes this subsection if:

- (a) the person provides information to another person (*the second person*) in relation to, or in relation to the installation of, a solar

- water heater or a small generation unit; and
- (b) the information:
 - (i) is false or misleading in a material particular; or
 - (ii) omits a matter or thing without which the information is misleading in a material particular; and
- (c) the second person relies on the information to create certificates under Subdivision B or BA in relation to the solar water heater or small generation unit; and
- (d) it could reasonably be expected that the second person would so rely on the information; and
- (e) the second person's reliance on the information results in the second person creating certificates under that Subdivision, in relation to the solar water heater or small generation unit, that the second person is not entitled to create.

Ancillary contraventions

- (2) A person must not:
 - (a) aid, abet, counsel or procure a contravention of subsection (1); or
 - (b) induce, whether by threats or promises or otherwise, a contravention of subsection (1); or
 - (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of subsection (1); or
 - (d) conspire with others to effect a contravention of subsection (1).

Civil penalty provisions

- (3) Subsections (1) and (2) are ***civil penalty provisions***.

Note: Division 1 of Part 15A provides for pecuniary penalties for breaches of civil penalty provisions.

32 Section 154B provides that this Court may order a person who has contravened a civil penalty provision to pay a pecuniary penalty to the Commonwealth (s 154A and s 154B(1)). An order under s 154B(1) is known as a *civil penalty order* (s 154B(2)). Only the regulator may apply for a civil penalty order (s 154C(1)).

33 Section 154M provides:

154M State of mind

Scope

- (1) This section applies to proceedings for a civil penalty order against a person for a contravention of any of the following civil penalty provisions:
 - (a) subsection 24A(1);
 - (b) subsection 24B(1).

State of mind

- (2) In the proceedings, it is not necessary to prove:
 - (a) the person's intention; or
 - (b) the person's knowledge; or
 - (c) the person's recklessness; or
 - (d) the person's negligence; or
 - (e) any other state of mind of the person.
- (3) Subsection (2) does not affect the operation of section 154L.

34 Section 154L exculpates a person from liability to pay a pecuniary penalty if the conduct which is claimed to constitute a relevant contravention of the REE Act was engaged in by that person while operating under a relevant mistake of fact. None of the respondents in the present proceedings relied upon s 154L.

35 Section 154N and s 154P are in the following terms:

154N Civil penalties for executive officers of bodies corporate

- (1) If:
 - (a) a body corporate contravenes a civil penalty provision; and
 - (b) an executive officer of the body corporate knew that, or was reckless or negligent as to whether, the contravention would occur; and
 - (c) the officer was in a position to influence the conduct of the body corporate in relation to the contravention; and
 - (d) the officer failed to take all reasonable steps to prevent the contravention;the officer contravenes this subsection.
- (2) For the purposes of subsection (1), the officer is *reckless* as to whether the contravention would occur if:
 - (a) the officer is aware of a substantial risk that the contravention would occur; and
 - (b) having regard to the circumstances known to the officer, it is unjustifiable to take the risk.
- (3) For the purposes of subsection (1), the officer is *negligent* as to whether the contravention would occur if the officer's conduct involves:
 - (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
 - (b) such a high risk that the contravention would occur;that the conduct merits the imposition of a pecuniary penalty.

Civil penalty provision

- (4) Subsection (1) is a *civil penalty provision*.

Note: Division 1 provides for pecuniary penalties for breaches of civil penalty provisions.

154P Reasonable steps to prevent contravention

- (1) For the purposes of section 154N, in determining whether an executive officer of a body corporate failed to take all reasonable steps to prevent a contravention, a court may have regard to all relevant matters, including:
 - (a) what action (if any) the officer took directed towards ensuring the following (to the extent that the action is relevant to the contravention):
 - (i) that the body corporate arranges regular professional assessments of the body corporate's compliance with civil penalty provisions;
 - (ii) that the body corporate implements any appropriate recommendations arising from such an assessment;
 - (iii) that the body corporate's employees, agents and contractors have a reasonable knowledge and understanding of the requirements to comply with civil penalty provisions in so far as those requirements affect the employees, agents or contractors concerned; and
 - (b) what action (if any) the officer took when he or she became aware of the contravention.
- (2) This section does not limit section 154N.

36 The maximum pecuniary penalty for a contravention of s 24B(1) of the REE Act, if the person is a body corporate, is 500 penalty units (s 154B(6)(b)). This translates to \$55,000 for contraventions in 2010 (\$110 per penalty unit). The maximum pecuniary penalty for a contravention by a person of s 24B(2), if the person is an individual, is 100 penalty units (s 154B(6)(a)). This translates to \$11,000 for contraventions in 2010.

37 The pecuniary penalty for a contravention by an executive officer of a body corporate of s 154N(1) must not be more than the maximum pecuniary penalty that could be imposed on the officer under s 154B if the officer had committed the contravention referred to in s 154N(1)(a) (s 154B(5)). In this case, the maximum pecuniary penalty for a contravention of s 24B(1) by an individual is 100 penalty units (\$11,000) (s 24B(1) and s 154B(6)(b)). Therefore, the maximum pecuniary penalty that can be imposed upon Mr Liu and Mr Zhu for each contravention of s 154N(1) is \$11,000.

38 Subsection 154B(7) provides as follows:

Matters to be taken into account by Court in determining amount of penalty

- (7) In determining the pecuniary penalty, in accordance with this section, for a

contravention by a person of a civil penalty provision, the Court may have regard to all relevant matters, including:

- (a) the nature and extent of the contravention; and
- (b) the nature and extent of any loss or damage suffered as a result of the contravention; and
- (c) the circumstances in which the contravention took place; and
- (d) whether the person has previously been found by a court in proceedings under this Act to have engaged in any similar conduct; and
- (e) the extent to which the person has cooperated with the authorities; and
- (f) if the person is a body corporate:
 - (i) the level of the employees, officers or agents of the body corporate involved in the contravention; and
 - (ii) whether the body corporate exercised due diligence to avoid the contravention; and
 - (iii) whether the body corporate had a corporate culture conducive to compliance; and
- (g) if the contravention is of subsection 24A(1)—whether the person has surrendered any renewable energy certificates under section 28A to compensate for the contravention.

39

Section 154S is in the following terms:

154S Injunctions

- (1) If a person has engaged, is engaging, or is about to engage in any conduct that is or would be:

- (a) an offence against this Act or the regulations; or
- (b) a contravention of a civil penalty provision;

the Federal Court may, on the application of the Regulator or any other aggrieved person, grant an injunction restraining the person from engaging in the conduct.

- (2) If:

- (a) a person has refused or failed, is refusing or failing, or is about to refuse or fail, to do a thing; and
- (b) the refusal or failure is, or would be:
 - (i) an offence against this Act or the regulations; or
 - (ii) a contravention of a civil penalty provision;

the Federal Court may, on the application of the Regulator or any other aggrieved person, grant an injunction requiring the person to do the thing.

- (3) The power of the Federal Court to grant an injunction may be exercised:

- (a) whether or not it appears to the Court that the person intends to engage, or to continue to engage, in conduct of that kind; and

- (b) whether or not the person has previously engaged in conduct of that kind.
- (4) The Federal Court may discharge or vary an injunction granted under this section.
- (5) The Federal Court may grant an interim injunction pending a determination of an application under subsection (1).
- (6) The powers granted by this section are in addition to, and not in derogation of, any other powers of the Federal Court.

A BRIEF SYNOPSIS OF THE RELEVANT FACTS

40 In 2009, the NSW Government announced its Solar Bonus Scheme. The Scheme provided a generous feed-in tariff of 60c per kilowatt hour (**kWH**) of power generated by customers who installed grid-connected solar power generation systems. The tariff was guaranteed to apply until 31 December 2016. As a result, the total of the tariff payments able to be received over a number of years was expected to exceed the purchase and installation costs for small-scale solar power generation systems.

41 As the scheme was designed to end in December 2016, regardless of installation date, the earlier in the life of the scheme that a system was installed, the greater the anticipated return on that system. The NSW Government's Solar Bonus Scheme generated a huge increase in the demand for the speedy installation of small-scale solar power generation systems at residential premises in NSW. The demand was so immediate and so great that the scheme quickly reached the maximum subscription limits and was then closed to new customers. The demand also led to the entry of many new businesses, electricians and operators into the solar power supply market.

42 Because very few home owners were registered under the REE Act, retailers of small-scale solar systems typically offered a point-of-sale discount on the system to be supplied in exchange for the assignment of the home owners' entitlement to create RECS by reason of that installation.

43 Mr Liu and Mr Zhu entered the solar power supply market in early 2010. They established MT Solar on 27 April 2010. Thereafter, MT Solar carried on business in NSW supplying and installing grid-connected solar power generation systems. MT Solar offered point-of-sale discounts in return for the assignment of the home owners' entitlement to RECS.

44 It was Mr Liu who took primary responsibility for MT Solar's commercial dealings with customers and contractors.

45 Most of MT Solar's customers were home owners who were seeking to have small-scale grid-connected solar power generation systems installed at their homes. As neither MT Solar nor its customers were registered to create RECS, MT Solar used registered commercial REC traders to deal with the RECS available for the systems which it supplied and installed. The details of its arrangement with its customers and the REC trader in each case is set out in par 18 of the Statement of Agreed Facts.

46 MT Solar's business grew rapidly. In order to satisfy customers who wished to maximise their returns on the installation of small-scale solar power generation systems, MT Solar was under pressure to have electricians and installers available to perform the relevant installations. MT Solar found it difficult to find appropriately qualified electricians and installers to carry out the installations which it was securing.

47 In the course of enquiring about electricians who might be able to perform appropriate installation work for MT Solar, Mr Liu was given the name and contact details for Mr Kibblewhite. In early July 2010, Mr Liu telephoned Mr Kibblewhite and told him that he had solar power system installation work for which he needed an electrician. In the course of that conversation, Mr Liu asked Mr Kibblewhite whether he had an electrician's licence. Mr Kibblewhite replied that he did have such a licence. Mr Liu told Mr Kibblewhite that he (Kibblewhite) also needed CEC accreditation in order to perform solar installations. Mr Kibblewhite stated that he did not, at that time, have such accreditation but that he would obtain it.

48 In late July 2010, Mr Kibblewhite telephoned Mr Liu and told him that he had now obtained CEC accreditation. He told Mr Liu that his accreditation number from CEC was P3834. The two men then agreed to meet in order to discuss Mr Kibblewhite's performing work for MT Solar.

49 On 26 July 2010, Mr Kibblewhite met with Mr Liu. On this occasion, Mr Kibblewhite confirmed that he had appropriate CEC accreditation. Mr Liu asked to see the CEC accreditation certificate. Mr Kibblewhite stated that he did not yet have it but that it

was expected from the CEC in the next couple of weeks. Mr Liu also asked to see Mr Kibblewhite's electrician's licence. Mr Kibblewhite stated that he only had "*a number*" which had been issued by the Department of Defence and he said that he could use it to work in any State, including NSW. On the strength of these assurances from Mr Kibblewhite, Mr Liu then agreed to engage him to perform electrical installation work on behalf of MT Solar.

50 Mr Liu never followed through with Mr Kibblewhite to verify that he had, in fact, ultimately obtained CEC accreditation nor did he verify Mr Kibblewhite's assertion that he had an appropriate NSW electrician's licence. He did not verify Mr Kibblewhite's claims with the CEC or with the appropriate regulatory authorities in NSW.

51 The fact was, however, that Mr Kibblewhite did not hold an unrestricted electrician's licence issued in NSW and he had never been accredited by the CEC.

52 In the period from early August 2010 to late October 2010, Mr Kibblewhite undertook the installation of 20 grid-connected solar power generation systems for MT Solar.

53 The details of those installations are specified in Table A to the Statement of Agreed Facts.

54 Following completion of the installations which he carried out for MT Solar, Mr Kibblewhite issued to MT Solar a Tax Invoice under the trading name "*Chaser Electrical*" for the services which he had performed.

55 Mr Kibblewhite then either completed or assisted MT Solar to complete various forms in order to enable RECS to be created as a result of the installation of each system and MT Solar to trade the RECS by assigning the home owners' entitlements to a registered REC trader. In the present case, two REC traders were involved, Renewable Energy Traders Pty Ltd and Greenbank Environmental Pty Ltd.

56 The success of MT Solar was so great that Mr Zhu decided to establish his own solar power generation system supply business. He did so through Green Master. Green Master's activities replicated those of MT Solar. Mr Zhu also used Mr Kibblewhite in the same way as

MT Solar had used him. Green Master was responsible for the installation of two systems. Presumably, Mr Zhu retained Mr Kibblewhite on the recommendation of Mr Liu.

57 Mr Kibblewhite's deception was discovered in late October or early November 2010 when checks were undertaken by Integral Energy in relation to his involvement with claims for solar bonus credits under the NSW Solar Bonus Scheme. The detail of these matters is to be found at pars 54–63 of the Statement of Agreed Facts.

58 MT Solar, Green Master, Mr Liu and Mr Zhu have co-operated with the regulator in investigating the alleged contraventions in the present case. As I have already mentioned, each of those parties has made appropriate admissions and co-operated in the formulation of the Statement of Agreed Facts. None of those parties has previously been found by a court to have contravened any provision of the REE Act.

59 Furthermore, Mr Liu has specifically admitted that he was reckless as to whether the contraventions by MT Solar would occur and Mr Zhu has admitted that he was negligent as to whether the contraventions by Green Master would occur. Mr Liu has conceded that he failed to take all reasonable steps to prevent the contraventions by MT Solar and Mr Zhu has made a similar concession in respect of the contraventions by Green Master.

60 These concessions were made by each of Mr Liu and Mr Zhu for the purpose of having their conduct assessed pursuant to s 154N of the REE Act.

61 I wish to make clear that, in assessing the appropriate relief to be granted to the regulator against the first to fourth respondents, I have taken into account the entire contents of the Statement of Agreed Facts which is attached to these Reasons for Judgment (including all documents annexed thereto) and not merely had regard to the brief synopsis which I have set out in this section of my Reasons. Similarly, as far as Mr Kibblewhite is concerned, I have taken into account all of the evidence tendered against him. His conduct was systematic and fraudulent and led to the installation of 22 solar power generation systems by MT Solar and Green Master and the creation of a significant number of RECS which should never have been created. He also put at risk the safety of those persons who occupy the dwellings where he installed systems.

62 MT Solar and Green Master paid the cost of having all of those installations thoroughly checked for quality of workmanship and safety. No problems were found.

CONSIDERATION

The Relevant Principles

The General Approach

63 The contraventions committed by each of MT Solar and Green Master are contraventions of s 24B(1) of the REE Act. In 2010, each contravention of that subsection by a body corporate carried a maximum penalty of \$55,000. MT Solar committed 20 contraventions. The maximum penalty that can be imposed upon it for those 20 contraventions is, therefore, \$1,100,000. Green Master committed two contraventions. The maximum penalty that can be imposed upon it for those two contraventions is, therefore, \$110,000.

64 The contravention alleged against each of Mr Liu and Mr Zhu are contraventions of s 154N(1) of the REE Act. In the case of Mr Liu, the agreed position as between the regulator and him is that he was reckless as to whether the contravention would occur within the meaning of s 154N. The position agreed as between the regulator and Mr Zhu is that Mr Zhu was negligent as to whether the relevant contraventions would occur within the meaning of that section.

65 The maximum penalty for each of the contraventions of s 154N committed by Mr Liu is \$11,000. For 20 contraventions, the aggregate of the maximum penalties that could be imposed upon Mr Liu is \$220,000. The maximum penalty for each of the contraventions of s 154N(1) committed by Mr Zhu is \$11,000. For two contraventions, the aggregate of the maximum penalties that could be imposed upon Mr Zhu is \$22,000.

66 The contraventions committed by Mr Kibblewhite are contraventions of s 24B(2) of the REE Act. The maximum penalty for a contravention of that subsection by an individual is \$11,000. Mr Kibblewhite committed 22 contraventions. The aggregate maximum penalty that could be imposed upon him is, therefore, \$242,000. However, Mr Kibblewhite has already been punished in respect of four of his contraventions as a result of action taken by the NSW Department of Fair Trading (as to which, see pars 94–97 of the Statement of

Agreed Facts). For this reason, the regulator seeks penalties only in respect of only 18 of Mr Kibblewhite's contraventions. Thus, the aggregate maximum penalties that could be imposed upon Mr Kibblewhite is \$198,000.

67 The relevance of maximum penalties when consideration is being given by the Court to the imposition of a pecuniary penalty in a criminal case has been authoritatively determined by the High Court in *Markarian v The Queen* (2005) 228 CLR 357 (*Markarian*). At 372 [31] in *Markarian*, Gleeson CJ, Gummow, Hayne and Callinan JJ said:

It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick. That having been said, in our opinion, it will rarely be, and was not appropriate for Hulme J here to look first to a maximum penalty (The maximum selected by his Honour was not, as will appear, the maximum available in respect of the principal offence.), and to proceed by making a proportional deduction from it. That was to use a prescribed maximum erroneously, as neither a yardstick, nor as a basis for comparison of this case with the worst possible case. That he used the maximum penalty impermissibly appears from his Honour's particular deference to it in this passage ((2003) 137 A Crim R 497 at 506 [37]):

"Parliament cannot have intended that, other things being equal, the penalty for supplying more than 250 g should be less than for supplying that quantity."

The form of the statement is explained by the fact that his Honour did not start with the maximum penalty for an offence involving the quantity in question, but used another maximum penalty as his starting point, that is, the maximum for an offence in the category of seriousness immediately below that of the principal offence.

68 In this Court, these remarks by the High Court in *Markarian* have been held to apply to the imposition of civil penalties (see *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 (*Australian Ophthalmic Supplies*) at 584 [108] (per Buchanan J); *Minister for Sustainability, Environment, Water, Population and Communities v Woodley* [2012] FCA 957 (*Woodley*) at [40]–[41] (per Foster J); *Australian Communications and Media Authority v Bytecard Pty Ltd* [2013] FCA 38 (*Bytecard*) at [38]–[39] (per Foster J); and *Secretary, Department of Health and Ageing v Export Corp (Australia) Pty Ltd* (2012) 288 ALR 702 at 714 [49]–[50] and at 718 [67] (per Perram J)).

69 It is plain that the legislature has given the clearest possible indication that contraventions of s 24B and s 154N of the REE Act are to be considered as serious matters when a court comes to determine an appropriate civil penalty.

70 The principal object of civil penalty provisions is to ensure deterrence. In *Trade Practices Commission v CSR Limited* (1991) ATPR 41-076, which was a case dealing with s 76 of the *Trade Practices Act 1974* (Cth), French J (as he then was) said (at p 52,152):

The principal, and I think the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.

71 The dictum of French J in *Trade Practices Commission v CSR Limited* which I have extracted at [70] above has been applied not only in the trade practices context but in a wide variety of regulatory regimes. In particular, the need for a penalty to have a proper deterrent effect has been emphasised in the context of laws passed by the Parliament to protect the environment (eg *Woodley* [2012] FCA 957, esp at [53]–[67]).

72 In both *Woodley* and in *Bytecard*, I approached the determination of civil penalties by applying the process commonly called “*instinctive synthesis*”. As I said in both of those cases, that process, as I understand it, has the following attributes:

- (a) There must be a weighing of all relevant factors, rather than starting from a predetermined figure and making incremental additions or subtractions for each separate factor (*Markarian*, at 373–375 [36]–[39] (per Gleeson CJ, Gummow, Hayne and Callinan JJ) and at 385–387 [69]–[73] (per McHugh J); and
- (b) It is critical that the reasoning process involved in synthesising the penalty be transparent (*Markarian* at 373–375 [36]–[39] (per the plurality) and at 390 [84] (per McHugh J).

Some Specific Issues of Principle

73 In detailed Written Submissions filed in the Court and served upon the respondents, Counsel for the regulator made a number of submissions addressing the circumstance that the present case involved multiple contraventions by each of the respondents. Those submissions were made by reference to two principles, namely:

- (a) The “*course of conduct*” principle; and
- (b) The “*totality*” principle.

74 Although related, these two principles are, in truth, distinct. Each case must depend upon its own circumstances. However, a failure to consider whether these principles ought to be applied in any given case may result in error.

THE COURSE OF CONDUCT PRINCIPLE

75 Counsel for the regulator submitted that, in the context of sentencing offenders for criminal offences, it is well recognised that the same, or very similar, conduct may give rise to a number of technically distinct offences. He submitted that the law recognises that an offender who is to be sentenced in such circumstances should be given a sentence which fairly reflects the substance of the offending conduct, rather than a purely mathematical accumulation of sentences for each separate offence which may be able to be technically identified. He said that, in cases where multiple offences truly represent only one multi-faceted course of conduct, the course of conduct principle is a “*tool of analysis*” which can be used to avoid any double punishment for those parts of the legally distinct offences which involve overlap in wrongdoing (*Pearce v The Queen* (1998) 194 CLR 610 (*Pearce*) at 623 [40]–[42]; *Johnson v The Queen* (2004) 205 ALR 346 (*Johnson*) at 348 [4]–[5] and 356 [27]; and *Attorney-General (SA) v Tichy* (1982) 30 SASR 84 (*Tichy*) at 92–93).

76 Counsel went on to submit that the same principles are now accepted as applying in the civil penalty context (*Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 (*Mornington Inn*) at 396–398 [41]–[46] (per Stone and Buchanan JJ); and *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 194 IR 461 at 473–474 [38]–[42] (per Middleton and Gordon JJ)). He submitted that the question which arises in each case is whether the contravention should be treated as being truly a single course of conduct or whether the contravention’s separate character should be maintained when penalties are imposed. He said that this is a factual enquiry to be made having regard to all of the circumstances of the case.

77 I agree with the substance of the submissions made by Counsel on behalf of the regulator which I have summarised at [75]–[76] above.

78 Counsel for the regulator went on to submit that the contraventions in the present case were separate and distinct, not in some purely technical legal sense, but in substance. In support of that submission, Counsel set out eight separate considerations as follows:

15. In this case, despite some similarities, the contraventions should not be seen as constituting a single course of conduct engaged in by each respondent. The following considerations point away from such an approach:
 - 15.1. Each contravention arose from a separate, unrelated contract with a different homeowner. 'Bundling' contraventions into a single course of conduct would not adequately reflect the reality that each contravention related to a different contract with a different homeowner.
 - 15.2. The work performed under each contract, and in respect of which the RECs were wrongly created, was different in each case as to (i) location (ii) timing and (iii) value.
 - 15.3. Mr Kibblewhite was engaged by the corporate respondents on a case-by-case basis, not as an employee or pursuant to any bulk work arrangement. He issued separate tax invoices for each installation in differing amounts depending upon the work performed. Thus a separate, conscious choice was made by the first four respondents to engage him on each occasion, and a separate, conscious choice was made by him to accept that engagement on each occasion.
 - 15.4. Documents containing the false information were created and provided to the REC Traders each time an installation was performed. The creation and provision of these documents thereby represented a distinct act of wrongdoing on each such occasion.
 - 15.5. Different numbers of RECs were created in respect of each installation, according to the specific solar power generation system which was installed in each case.
 - 15.6. The corporate respondents received remuneration from the REC Traders on an installation-by-installation basis in differing amounts depending upon the number of RECs which were created in each case.
 - 15.7. The protracted nature of the conduct was such that later contraventions came to have a different, and more serious, character than the early contraventions. In particular (as will be explained) MT Solar and Mr Liu's failures to check Mr Kibblewhite's false claims became more and more reckless in light of his repeated and increasingly unbelievable excuses. (The progressively serious nature of repeated contravening conduct was treated as a distinguishing feature of separate contraventions by the Full Court in *Mornington Inn* at [58].)
 - 15.8. The Application and Statement of Claim in this matter explicitly articulate that each respondent is alleged to have contravened the REE Act with respect to each separate installation. (For example, the application seeks (i) declarations in terms which explicitly identity the number of separate contraventions alleged against each

respondent and (ii) a pecuniary penalty for 'each of' the contraventions so identified. The Statement of Claim is, likewise, expressed in terms which consistently identify that the respondents are alleged to have committed a contravention in relation to 'each or the installations with which they were involved (see for example paragraphs 43, 44, 54, 60, 63 and 66). The first four respondents have filed defences admitting each of those separately alleged contraventions. Mr Kibblewhite has taken no step to oppose those allegations. The framing of the case in this way is of 'real significance' to treating the contraventions as separate rather than as a single contravening course of conduct. (See *Mornington Inn* at [58]).

79 The respondents argued that they should have the benefit of the application of the course of conduct principle.

80 Counsel for the regulator accepted that allowance should be made for the similarities and possible points of overlap in the contravening conduct by imposing penalties which have regard to the circumstances of each contravention, including its place in the context of the series of contraventions, and, if necessary, moderating the cumulative total of such penalties through the totality principle so as to ensure an appropriate final amount.

THE TOTALITY PRINCIPLE

81 The totality principle operates as a “*final check*” to ensure that the penalties to be imposed on a wrongdoer, considered as a whole, are “*just and appropriate*” (*Mill v The Queen* (1988) 166 CLR 59 (*Mill*) at 62–63 and *Johnson* at 347–348 [3]–[5] (per Gleeson CJ) and at 354–358 [18]–[35] (per Gummow, Callinan and Heydon JJ). The totality principle has been adopted and applied in the civil penalty context (*Mornington Inn* at 386–387 [5]–[7] (per Gyles J) and at 396–398 [41]–[46] and 408 [90]–[92] (per Stone and Buchanan JJ)).

82 Consideration of the totality principle will not necessarily result in a reduction from the penalty considered appropriate prior to the application of that principle. However, in cases where the Court considers that the total penalties to be imposed are inappropriate, the Court should alter the final penalties to ensure that they are “*just and appropriate*”. It is now recognised in the civil penalty context that the proper approach when applying the totality principle is to start by ascertaining the penalty which would be appropriate for each individual contravention and then to reduce the total of the amounts derived in this fashion

for reasons of totality. It is undesirable to start with a single global total penalty and then to divide it among the individual contraventions in order to derive separate penalties.

83 Counsel for the regulator advocated that the Court should not apply the course of conduct principle but rather deal with any lack of proportionality in the penalties to be imposed in the present case through the application of the totality principle.

Single Course of Conduct?

84 There is no doubt that each of MT Solar and Mr Liu committed 20 separate contraventions of the REE Act when Mr Kibblewhite installed solar power generation systems at the 20 locations listed in Table A attached to the Statement of Agreed Facts. There is also no doubt that each of Green Master and Mr Zhu committed two separate contraventions when Mr Kibblewhite installed such systems at the two locations listed in Table B attached to the Statement of Agreed Facts. Finally, there is no doubt that Mr Kibblewhite committed 22 separate contraventions of the REE Act when he provided the false information to MT Solar and Green Master and ultimately to Renewable Energy Traders Pty Ltd and Greenbank Environmental Pty Ltd.

85 The relevant conduct in the present case took place over a period of approximately three months in 2010. The deception practised by Mr Kibblewhite on the other respondents, on the relevant REC traders and on other persons and entities associated with the installations which he carried out was the same deception repeated on 22 separate occasions. The essence of his deception was the making of false statements to the effect that he was accredited by the CEC and licensed by the relevant NSW regulatory authority. The contraventions committed by Mr Liu and Mr Zhu, who were the relevant operatives as far as each of MT Solar and Green Master was concerned, are constituted by their conduct in accepting Mr Kibblewhite's assurances without bothering to verify the truth of those assurances. Because of their failure to take steps to verify the truth of Mr Kibblewhite's assurances, Mr Liu and Mr Zhu did not cause MT Solar and Green Master to cease dealing with Mr Kibblewhite and continued to allow those corporations to pass on false information and documents to Renewable Energy Traders Pty Ltd and Greenbank Environmental Pty Ltd. For present purposes, the position of MT Solar and Green Master is the same in each case as the position of the two individuals, Mr Liu and Mr Zhu.

86 I have carefully considered the eight matters raised by Counsel for the regulator in support of his contention that the contraventions in the present case should not be regarded as constituting a single course of conduct engaged in by each respondent.

87 While it is true that the deception practised by Mr Kibblewhite upon those with whom he dealt was the same deception, in the sense that it comprised false representations as to his CEC accreditation and as to his qualifications and entitlement to work as an electrician, it is nonetheless correct to say, as the regulator does, that each installation was a separate activity which involved separate and distinct physical work and separate and distinct paperwork. Even after Mr Kibblewhite initially deceived Mr Liu and carried out his first installation, he was not compelled to carry out further installations and thereby to continue his deception. He chose to continue his deception and consciously to do so on each occasion that he carried out a subsequent installation. This deception did not occur all at once and was not one incident which led to multiple charges being preferred (as was the case in *Pearce*)—charges which had real overlap in their legal and factual elements. In the present case, Mr Kibblewhite set about using the same deception over and over again in order to make money.

88 Mr Liu's contravening conduct was his failure to take all reasonable steps to prevent MT Solar's contraventions. Initially, he accepted Mr Kibblewhite's assurances. But, as time wore on, he not only accepted Mr Kibblewhite's initial assurances but shut his eyes to the truth by failing to verify those assurances. An occasion for verifying Mr Kibblewhite's CEC accreditation and electrician's licence arose every time that Mr Liu, on behalf of MT Solar, retained Mr Kibblewhite to carry out installations on behalf of MT Solar. Mr Zhu was in a similar position insofar as the business of Green Master was concerned.

89 I think that the correct approach to the imposition of civil pecuniary penalties in the present case is for the Court to treat each installation and the consequential dealings with the relevant REC trader as, in substance, constituting a separate contravention. Any lack of proportionality in the total amounts of the penalties arrived at in this way should then be moderated by the application of the totality principle.

The Penalties in the Present Case

90 In fixing the quantum of the penalties to be imposed in the present case, I propose to have regard to the need for general deterrence, the need for specific deterrence, the specific

matters mentioned in s 154B(7) of the REE Act (which subsection applies to all contraventions in the present case) and any other relevant matter. The determination of what is a “*relevant matter*” in any given case is a matter for the Court. The matters specified in s 154B(7) of the REE Act are matters to which the Court *may* have regard. They are not matters to which the Court *must* have regard. Nonetheless, the catalogue of matters specified in s 154B(7) are matters to which, in most cases, the Court would have regard in determining the appropriate pecuniary penalty.

91 Counsel for the regulator accepted that, in the present case, the Court could properly have regard to the financial position and business arrangements of the respondents and the steps taken by or contributed to by them to remedy any damage caused by their contraventions.

92 The regulator seeks a penalty against MT Solar in the range of \$105,000–\$130,000. The regulator arrived at that suggested range by propounding a starting point penalty range for each contravention which is then discounted by 40% for co-operation. The amount of each penalty is progressively increased over the period during which the contraventions occurred. The appropriate starting point penalty for each of the first five contraventions is suggested to be in the range of \$5,500–\$8,250. The appropriate starting point penalty for each of the next 10 contraventions (ie those which occurred in September 2010) is said to be in the range \$11,000–\$13,750. The appropriate starting point penalty for each of the last five contraventions is said to be in the range of \$16,500–\$19,250. The total sum arrived at by adding the discounted penalties for each contravention is then discounted further by 20% in order to give effect to the totality principle.

93 The mechanics of this approach are explained in Penalty Table A attached to the regulator’s Written Submissions.

94 A very similar approach is suggested in respect of the penalty to be imposed upon Mr Liu. The arithmetic in respect of Mr Liu is contained in Penalty Table B attached to the regulator’s Written Submissions. The regulator seeks a penalty in the range of \$21,000–\$26,000 in respect of Mr Liu. This range is 20% of the range put forward in respect of MT Solar reflecting the relationship between the two levels of penalty in s 154B(6) of the REE Act.

95 In respect of Green Master, the regulator seeks a penalty in the range of \$23,100–\$26,950. As against Mr Zhu, the regulator seeks a penalty in the range of \$4,620–\$5,390. The detailed calculations referable to Green Master and Mr Zhu are found in Penalty Table C attached to the regulator’s Written Submissions. They are based upon a starting point range of penalty of \$16,000–\$19,250 for each contravention to which a discount of 30% is applied for co-operation. No further reduction is applied.

96 The regulator submitted that Mr Kibblewhite is in a different category of offender from the other respondents. In respect of him, the regulator seeks a penalty in the range of \$128,700–\$148,500. That penalty is said to be in the range of 65%–75% of the maximum and has not been reduced on account of the totality principle. The quantum of the penalty sought against Mr Kibblewhite is arrived at by attributing a penalty of \$7,150–\$8,250 for each of 18 contraventions in respect of which a penalty is sought. No reduction is proposed on account of the totality principle or for any other reason.

97 For reasons which I shall shortly explain, I have determined that the following civil pecuniary penalties should be imposed upon the respondents:

- (a) Upon Mr Kibblewhite, \$108,000.
- (b) Upon MT Solar, \$70,000.
- (c) Upon Mr Liu, \$14,000.
- (d) Upon Green Master, \$14,500.
- (e) Upon Mr Zhu, \$2,900.

98 I shall now turn to consider the particular penalties to be imposed in the present case.

MT Solar and Mr Liu

GENERAL DETERRENCE

99 The REC Scheme embodied in the REE Act is a key mechanism used to achieve the Commonwealth Government’s fundamental renewable energy objectives. The provision of false information by participants in the Scheme will undermine the integrity of the REC Scheme and hence the Government’s ability to meet the renewable energy target to which it has committed by undermining consumer confidence in the renewable energy sector in terms

of safety, effectiveness and affordability. Furthermore, if RECS are created by reason of the installation of systems which have not been properly installed, there is a risk that the incorrect number of RECS will be created thereby further weakening the renewable energy objectives.

100 Second, the REC market is a significant one. In 2012, the value of trades in Small-Scale Technology Certificates alone was expected to exceed \$1 billion. Major investors are heavily involved in the REC market and very much in tune to the possibility of disruption through compliance failings.

101 Third, the effective operation of the REC market relies heavily upon voluntary compliance with the REE Act. Therefore, when non-compliance is detected, significant penalties are warranted in order to ensure that others may not think that the risk of being caught is well worth taking, having regard to the likely financial rewards of non-compliance. As submitted by the regulator, where the legislature entrusts people with responsibility for compliance, non-compliance should properly attract a strong deterrent penalty.

102 Fourth, non-compliance may not be readily detected. It is well recognised that difficulties in detecting contraventions are a significant factor in the need for general deterrence. In the present case, in the end, the contraventions were readily detected. However, this may not always be so. The imposition of substantial penalties for involvement in the provision of false information will provide a strong incentive to industry participants to establish robust mechanisms for ensuring compliance and accuracy. This will not only reduce the risks of non-compliance by them but may also lead to more ready detection of others.

103 For the above reasons, I should give significant weight to the need for general deterrence when determining the appropriate penalty for MT Solar. I propose to do so.

104 There is also a need to impose a significant penalty upon Mr Liu in order to ensure that executives in positions such as the one he occupied in relation to MT Solar take all necessary steps to prevent contraventions of the REE Act.

105 Specific deterrence, in the present case, is not a significant factor. MT Solar is no
longer in business. Mr Liu may, in the future, commence another business. There is,
therefore, some significance in specific deterrence in his case.

106 I now turn to consider the factors adumbrated in s 154B(7) of the REE Act.

THE NATURE AND EXTENT OF THE CONTRAVENTIONS (S 154B(7)(a))

107 MT Solar and Mr Liu committed 20 separate contraventions over a period of nearly
three months. The detail of these contraventions is set out in the Statement of Agreed Facts.

108 As a result of these contraventions, a total of 3,695 RECS were created when there
was no entitlement to have any RECS created. MT Solar was paid over \$120,000 by the
REC traders in respect of those RECS. Accordingly, as submitted by the regulator, the
contraventions were significant as to number, time frame and total value.

**THE NATURE AND EXTENT OF ANY LOSS OR DAMAGE SUFFERED AS A RESULT OF THE
CONTRAVENTIONS (S 154B(7)(b))**

109 This is not a significant factor.

110 The 20 installations effected by Mr Kibblewhite at the behest of MT Solar have all
been retested and found to be satisfactory. They have all been recertified. Furthermore, the
home owners in question all received a point-of-sale discount upon the basis that valid and
appropriate RECS would be created by reason of the installation at their residences.

111 It may be argued that the contraventions in the present case caused significant harm to
the REC Scheme and the REC market. But that harm is substantially addressed by the
imposition of significant penalties directed to general and specific deterrence.

THE CIRCUMSTANCES IN WHICH THE CONTRAVENTIONS TOOK PLACE (S 154B(7)(c))

112 MT Solar and Mr Liu were motivated by the prospect of making large amounts of
easy money. Mr Liu gave no real attention to ensuring that he and MT Solar complied with
the REE Act. When confronted with the choice between ensuring appropriate compliance
with the provisions of the REE Act by only dealing with qualified installers, on the one hand,

and taking advantage of the huge demand for the installation of grid-connected solar power generation systems, on the other hand, Mr Liu chose the latter and disregarded the former.

113 The regulator made the following submissions at pars 52–54 of its Written Submissions:

52. Secondly, although Mr Liu and (through him MT Solar) were misled by the active and deliberate deceptions of Mr Kibblewhite, they were well aware of a number of matters which should have alerted them to the risks that Mr Kibblewhite was not properly qualified to perform the work in such a way as would permit the creation of RECs. (These are set out in detail in the SOAF at paragraphs 66–70 and 76.) the more fundamental of these included the following:
 - 52.1. His only claimed electrical qualifications were through the Department of Defence, such that he clearly did not hold a licence issued by NSW authorities (as required under the REE Act). Additionally, he was unable to produce a licence when requested, claiming only to have ‘a number’.
 - 52.2. He did not hold a CEC accreditation in early July and, despite his claim to have obtained such accreditation later that month, he was unable to produce a certificate from the CEC. Over the next two months he made excuses as to why he remained unable to produce a copy of such a certificate.
 - 52.3. As at late July/early August 2010 Mr Kibblewhite was not listed on the CEC website of accredited installers. When asked by Mr Liu about this he suggested that the website may be updated later.
53. Thirdly, there were numerous simple, fast and effective checks which could have been undertaken to verify (or, as it turns out, disprove) Mr Kibblewhite’s claims. Despite what they knew about him, no steps were taken by MT Solar or Mr Liu throughout the course of the contraventions to verify those claims (beyond asking Mr Kibblewhite himself for a copy of the certificate). Nor did they alert the REC Traders to the unverified nature of any of Mr Kibblewhite’s claims. Mr Liu and MT Solar accept that the implausibility of these claims should have caused them to verify Mr Kibblewhite’s qualifications before engaging him. (SOAF at paragraphs 71 and 74).
54. These significant failings became more and more serious as time progressed. Whatever plausibility Mr Kibblewhite’s initial claims may have had, it was seriously eroded as the weeks went by and as his repeated excuses were left unchecked. The repeated decisions to engage Mr Kibblewhite throughout this period ultimately represented a significant prioritising of MT Solar’s commercial interests over the fulfilment of its regulatory responsibilities.

114 I agree with the substance of those submissions.

115 The regulator seeks the imposition of ever increasing penalties over the relevant period upon the basis that the later contraventions by MT Solar and Mr Liu should properly be viewed as more serious than the early ones. I think that, in the circumstances of this case, that approach is warranted, but not to the extent sought by the regulator. In my judgment, because the contraventions took place over a relatively short period of time and in a period marked by rapid installation activity, it is more appropriate to apply only two differential starting point ranges of penalty in respect of the contraventions, rather than to apply an ever increasing scale referable to particular months, as was submitted by the regulator.

116 After taking all relevant factors into account, including the need for general and special deterrence and the factors adumbrated in s 154B(7) of the REE Act, I have in mind using the range suggested by the regulator in respect of the first five contraventions by MT Solar (\$5,500–\$8,250) and the range \$8,250–\$11,000 (15%–20% of the maximum) for all of the remaining 15 contraventions.

PREVIOUS SIMILAR CONDUCT (S 154B(7)(d))

117 Neither MT Solar nor Mr Liu has previously been found by the Court in proceedings under the REE Act to have engaged in any similar conduct. The absence of any prior contraventions is an important mitigating factor.

CO-OPERATION (S 154B(7)(e))

118 Co-operation with authorities in the course of investigations and subsequent proceedings will be a mitigating factor that almost certainly will reduce the penalty that would otherwise be imposed. A reduction on this account reflects the fact that such co-operation:

- (a) Is usually evidence of contrition and an acceptance of responsibility;
- (b) Increases the likelihood of co-operation in a way that furthers the object of the legislation;
- (c) Frees up the regulator's resources, thereby increasing the likelihood that other contravenors will be detected and brought to justice; and
- (d) Reflects a willingness to facilitate the course of justice (see generally *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR

285 at 293–294 (per Burchett and Kiefel JJ); *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] ATPR 41-993 at p 48,627 [55] (per Branson, Sackville and Gyles JJ); and *Mornington Inn* at 404 [73]–[74] (per Stone and Buchanan JJ)).

119 The size of the discount will vary depending upon the circumstances of the case. A significant discount is warranted if the fullest possible co-operation is afforded to the regulator right from the commencement of its investigation.

120 MT Solar and Mr Liu have co-operated fully with the regulator's investigation in relation to the contraventions proven in these proceedings, including by making appropriate admissions. These admissions have assisted significantly in enabling the contraventions to be proven. In particular, Mr Liu has accepted that he was reckless in his failure to verify Mr Kibblewhite's assertions, an acceptance which carries with it an admission that there are aggravating circumstances in respect of the relevant contraventions. Significant credit should be given to MT Solar and Mr Liu for making these admissions and accepting the complexion placed upon them by the regulator. Furthermore, Mr Liu provided real and substantial assistance to NSW Fair Trading in its investigation and prosecution of Mr Kibblewhite.

121 The regulator submitted that MT Solar and Mr Liu should receive the benefit of a discount for co-operation of 40%. I think that is an appropriate discount factor and propose to apply it in the present case.

**ADDITIONAL FACTORS RELEVANT TO MT SOLAR AS A CORPORATE RESPONDENT
(s 154B(7)(f))**

122 There was no proper or adequate system in place at MT Solar designed to ensure that it complied with all relevant provisions of the REE Act. Essentially, the corporation was controlled by Mr Liu. Mr Liu rushed headlong into taking advantage of the commercial opportunities presented by the NSW Solar Bonus Scheme without informing himself or taking appropriate advice as to the systems that should be put in place in order to ensure compliance with the REE Act and the REC Scheme. He was well aware of the twin requirements that his installers be appropriately accredited by the CEC and be qualified and licensed under the relevant State legislation. However, he did not follow through in order to

ensure that those requirements were met but rather took the easy option of accepting Mr Kibblewhite's unsubstantiated assurances.

123 This is not a significant matter adverse to MT Solar and Mr Liu but is to be given some weight nonetheless.

**THE FINANCIAL POSITION AND BUSINESS ARRANGEMENTS OF MT SOLAR AND MR LIU
(S 154B(7)(f))**

124 Although MT Solar derived significant revenue from its activities, it did not make a profit, according to financial records available to the regulator. The company was deregistered and then reinstated for the purposes of these proceedings. It may be inferred that the company will never be able to pay any penalty which may be imposed upon it. Mr Liu has not placed before the Court any evidence as to his own financial circumstances.

125 Given the importance of deterrence in determining the appropriate penalty, I do not place much weight upon the fact that MT Solar might be impecunious. As far as Mr Liu is concerned, there is no suggestion that the penalties which have been sought will lead to his financial ruin. There is no reason to think that, contrary to the information before the Court, MT Solar and Mr Liu derived significant financial benefit from the contraventions.

STEPS TAKEN TO REMEDY ANY DAMAGE

126 As I have already mentioned at [110] above, MT Solar took appropriate steps to ensure that all of the installations carried out by Mr Kibblewhite at its instigation were satisfactorily carried out. It should be given credit for taking these steps.

TOTALITY

127 The regulator submitted that I should apply a 20% discount by reason of the application of the totality principle. This submission related to penalties at the level sought by the regulator. However, I think that such a reduction is appropriate in any event to the penalties which I propose to apply.

THE QUANTUM OF THE APPROPRIATE PENALTIES

128 For all of the reasons set out above, I think that the appropriate starting point penalty for each of the contraventions committed by MT Solar in August 2010 is in the range submitted by the regulator viz \$5,500–\$8,250. For the contraventions committed in September and October 2010, I think that the appropriate range is \$8,250–\$11,000.

129 When those starting point penalties are applied and totalled, the range of starting point penalties is \$151,250–\$206,250. To that range, I propose to apply a 40% discount for co-operation thereby reducing the range to \$90,750–\$123,750. I propose also to apply a further 20% discount to take account of the totality principle. When that discount is applied, the proposed range of penalty is \$72,600–\$99,000. I think that that range throws up a penalty which is still too high. I think that a penalty just under the lower end of the range is justified. In all the circumstances, I will impose a penalty of \$70,000 upon MT Solar.

130 I would take a similar approach to the penalties to be imposed upon Mr Liu. That is to say, I accept the starting point penalty range suggested by the regulator for the first five contraventions. However, for the next 15 contraventions, I think that a penalty range of \$1,650–\$2,200 is more appropriate. I would then apply the same discounts as I have applied to MT Solar for the same reasons. I also propose to impose a penalty upon Mr Liu which is 20% of that which I have decided to impose upon MT Solar. This maintains the relationship between the maximum penalty to which MT Solar is liable (as to which see s 154B(6)(b) of the REE Act) and the maximum penalty to which Mr Liu is liable (as to which see s 154B(a) of the REE Act). This leads me to the conclusion that a penalty of \$14,000 upon Mr Liu is the appropriate penalty.

Green Master and Mr Zhu

GENERAL DETERRENCE

131 The general and specific deterrence considerations to which I have referred at [99]–[105] above in respect of MT Solar and Mr Liu apply equally to Green Master and Mr Zhu.

132 I now turn to consider the factors adumbrated in s 154B(7) of the REE Act insofar as they may be applicable to the cases of Green Master and Mr Zhu.

THE NATURE AND EXTENT OF THE CONTRAVENTIONS (S 154B(7)(a))

133 Green Master and Mr Zhu committed two separate contraventions over a two week
period. The detail of these contraventions is set out in the Statement of Agreed Facts.

134 As a result of these contraventions, a total of 356 RECS were created when there was
no entitlement to have any RECS created. Green Master was paid over \$12,000 by the REC
traders in respect of those RECS. Accordingly, as submitted by the regulator, the
contraventions were limited as to number, timeframe and total value.

**THE NATURE AND EXTENT OF ANY LOSS OR DAMAGE SUFFERED AS A RESULT OF THE
CONTRAVENTIONS (S 154B(7)(b))**

135 As was the case with MT Solar and Mr Liu, this is not a significant factor.

136 The systems installed at the behest of Green Master were satisfactorily installed.

137 As was the case with MT Solar and Mr Liu, it may be argued that the contraventions
on the part of Green Master and Mr Zhu caused significant harm to the REC Scheme and to
the REC market. But that harm is substantially addressed by the imposition of appropriate
penalties directed to general and specific deterrence.

THE CIRCUMSTANCES IN WHICH THE CONTRAVENTIONS TOOK PLACE (S 154B(7)(c))

138 Similar considerations arise here as arose in respect of MT Solar and Mr Liu with the
exception that, to some extent, Mr Zhu relied upon Mr Liu and, in any event, the number of
contraventions was fewer and the time period over which they were committed much shorter.

139 The regulator made the following submissions at par 74 and par 75 of its Written
Submissions:

74. As discussed in relation to MT Solar (at paragraphs 50 to 55 above), the
circumstances in which Green Master and Mr Zhu committed the
contraventions suggest a significant level of recklessness and wrongdoing.
Briefly:

74.1. Green Master was, like MT Solar, created in circumstances which
sought to capitalise upon the strong market demand and
Mr Kibblewhite was engaged immediately to satisfy Green Master
contracts which were not otherwise able to be fulfilled by it using its
preferred electrician. The urgency with which he was engaged is

illustrated by the fact that he performed Green Master's first installation on 28 September 2010, the day after Mr Zhu had arranged for the company to be incorporated. (SOAF at paragraphs 38–41)

74.2. Secondly, Mr Zhu and Green Master were (like MT Solar and Mr Liu) well aware of a number of matters which should have alerted them to the risks that Mr Kibblewhite was not properly qualified to perform the work in such a way as would permit the creation of RECs. (SOAF at paragraphs 42 and 72.) These included:

74.2.1 over the two month period in which he had been working with Mr Zhu on MT Solar installations Mr Kibblewhite continued to assert that he had not received his CEC certificate;

74.2.2. he did not in fact claim to have any electrical qualifications from NSW authorities (as the REE Act required) but rather said they were from the Department of Defence; and

74.2.3. he was not listed on the CEC website as an accredited installer, and had explained this to Mr Zhu on the basis that his details were kept confidential by the Department of Defence.

74.3. Thirdly, the same simple, fast and effective checks could have been undertaken to verify (or, as it turns out, disprove) Mr Kibblewhite's claims. Despite what they knew about Mr Kibblewhite, no steps were taken by Green Master or Mr Zhu to verify those claims nor to alert the REC Traders to the unverified nature of those claims. Green Master or Mr Zhu accept that the implausibility of these claims should have caused them to verify Mr Kibblewhite's qualifications before engaging him. (SOAF at paragraphs 66, 67, 73 and 74.)

75. These failings were comparable in seriousness to the failings by MT Solar and Mr Liu in October 2010 (ie towards the end of its involvement with Mr Kibblewhite) This is because Green Master's engagement of Mr Kibblewhite first began 2 months after he was known to have claimed to have relevant qualifications. The acceptance of his implausible explanations and the failure to conduct checks at that time was considerably more reckless than at an earlier point in time. The proposed penalty ranges reflect this.

140 I agree with the substance of those Submissions.

141 The regulator seeks the imposition of penalties at the highest end of its suggested range of penalties in respect of both contraventions committed by Green Master and by Mr Zhu. For the same reasons as I considered the highest ranges propounded by the regulator in respect of MT Solar and Mr Liu to be too severe, I consider the suggested range in respect of Green Master and Mr Zhu also to be too severe.

142 After taking all relevant factors into account, including the need for general and special deterrence and the factors adumbrated in s 154B(7) of the REE Act, I have in mind using the higher of the two ranges arrived at by me in respect of MT Solar and Mr Liu (\$8,250–\$11,000) in respect of the two contraventions by Green Master and Mr Zhu.

PREVIOUS SIMILAR CONDUCT (S 154B(7)(d))

143 Neither Green Master nor Mr Zhu has previously been found by the Court in proceedings under the REE Act to have engaged in any similar conduct. The absence of any prior contraventions is an important mitigating factor.

CO-OPERATION (S 154B(7)(e))

144 I have addressed the relevance of co-operation at [118]–[121] above. The relevant principles to which I adverted at those paragraphs apply equally to Green Master and Mr Zhu. The level of co-operation on the part of Green Master and Mr Zhu, however, was not quite as fulsome as that given by Mr Liu. Green Master and Mr Zhu did not, for example, co-operate as fully as Mr Liu had done in the Fair Trading NSW investigation. The regulator has suggested that, nonetheless, there was very significant co-operation on the part of Green Master and Mr Zhu. I agree. The regulator has proposed a discount on account of those parties' co-operation of 30%. This seems an appropriate discount factor and I will apply that discount in the present case.

ADDITIONAL FACTORS RELEVANT TO GREEN MASTER AS A CORPORATE RESPONDENT (S 154B(7)(f))

145 The same considerations as were discussed at [122]–[123] above apply with equal force to Green Master and Mr Zhu.

146 As was the case with MT Solar and Mr Zhu, these matters are not significant but are to be given some weight in the determination of an appropriate penalty.

THE FINANCIAL POSITION AND BUSINESS ARRANGEMENTS OF GREEN MASTER AND MR ZHU (S 154B(7)(f))

147 Green Master was in business for only a very short time. Over the course of its business operations, it installed 13 solar power generation systems using three different

electricians. It received gross revenue of \$107,587 in respect of those installations. As was the case with MT Solar, it was not ultimately profitable and the company was deregistered.

148 Mr Zhu has not placed before the Court any evidence as to his financial circumstances.

149 The apparent impecuniosity of Green Master is no reason not to impose a significant penalty.

STEPS TAKEN TO REMEDY ANY DAMAGE

150 Green Master and Mr Zhu arranged for each of the systems installed by Mr Kibblewhite to be recertified. The customers of Green Master did not lose the opportunity to participate in the NSW Solar Bonus Scheme. Green Master and Mr Zhu should be given credit for taking these steps.

TOTALITY

151 The regulator submitted that there was no warrant for applying the totality principle in respect of Green Master and Mr Zhu. The regulator submitted that, as there are only two contraventions, there is no real overlap or double punishment which might engage that principle.

152 Given that I have applied a starting penalty lower than the starting penalty suggested by the regulator, I think that it is appropriate, in the case of Green Master and Mr Zhu, not to apply any further reductions on account of the totality principle.

THE QUANTUM OF THE APPROPRIATE PENALTIES

153 For all of the reasons set out above, I think that the appropriate starting point penalty for each of the contraventions committed by Green Master and Mr Zhu in September 2010 and in October 2010 is \$8,250–\$11,000.

154 When those starting point penalties are applied and totalled, the range of starting point penalties is \$16,500–\$22,000. To that range, I propose to apply a 30% discount for co-operation reducing the range to \$11,550–\$15,400. I think that a penalty near the upper end of

that range is justified. In all the circumstances, I propose to impose a penalty of \$14,500 upon Green Master.

155 I would take a similar approach to the penalties to be imposed upon Mr Zhu. That is to say, I will apply the same starting point penalty range as I have in respect of Green Master and then apply the same discount for co-operation as I have applied in respect of Green Master for the same reasons. This leads me to the conclusion that a penalty of \$2,900 is the appropriate penalty to be imposed upon Mr Zhu. \$2,900 is 20% of \$14,500.

Mr Kibblewhite

GENERAL DETERRENCE

156 The considerations discussed at [99]–[105] above in respect of deterrence apply equally to Mr Kibblewhite. However, those considerations, when applied to Mr Kibblewhite, have greater weight than when applied in respect of the other respondents. Mr Kibblewhite was engaged in a dishonest abuse of the REC Scheme. Conduct of that kind must receive the Court’s firm disapprobation and must be visited with a penalty which operates as a significant deterrent to other persons from considering engaging in similar conduct. As submitted by the regulator in the present case:

... The penalties to be imposed must leave no doubt in the minds of other would-be contravenors that such conduct will not pay.

157 In addition, in the case of Mr Kibblewhite, there is also a compelling need for the penalty to be imposed upon him to operate as a powerful specific deterrent. He has ignored the present proceedings and has demonstrated no acceptance of wrongdoing on his part. Nor has he shown any remorse or contrition for his conduct.

158 I now turn to consider the factors adumbrated in s 154B(7) of the REE Act.

THE NATURE AND EXTENT OF THE CONTRAVENTIONS (S 154B(7)(a))

159 Mr Kibblewhite was guilty of seriously dishonest conduct on 22 separate occasions, each of which contravened the REE Act. His conduct was calculated, conscious and brazen.

160 As a result of his dishonesty, he received payments of approximately \$16,000 from MT Solar and \$1,100 from Green Master. His dishonesty led to the creation of over 4,000 RECS which should never have been created and the payment of approximately \$135,000 by the two REC traders with whom MT Solar and Green Master dealt in this case.

161 The contraventions occurred over a period of several months. As I have already noted, they were dishonest and calculated. They warrant penalties towards the higher end of the appropriate range. However, it must be remembered that the financial benefit obtained by Mr Kibblewhite was relatively insignificant. It must also be remembered that, apparently, the work which he performed was satisfactory. I propose to take these two matters into account in arriving at the appropriate penalty. However, I recognise and accept that one of the critical matters to be addressed when determining the appropriate penalty is the need for the Court to impose a penalty which operates as an effective deterrent to others from engaging in similar dishonest conduct.

THE NATURE AND EXTENT OF ANY LOSS OR DAMAGE SUFFERED AS A RESULT OF THE CONTRAVENTIONS (S 154B(7)(b))

162 As with the other contravenors, the main potential harms were likely harms to the regulatory scheme. There was no direct loss to any consumers.

THE CIRCUMSTANCES IN WHICH THE CONTRAVENTIONS TOOK PLACE (S 154B(7)(c))

163 Mr Kibblewhite's conduct is described in detail in the Statement of Agreed Facts. I have also attempted to capture the serious nature of that conduct in what I have said at [159]–[161] above.

164 There is no doubt that Mr Kibblewhite appreciated that he did not have CEC accreditation and was not licensed to perform electrical work in NSW and that both of those requirements were necessary prerequisites for his carrying out the work which he did. As submitted by the regulator, Mr Kibblewhite took the opportunity of seizing work, and consequent commercial gain, in circumstances where, as a result of the NSW Solar Bonus Scheme, there was a shortage of properly qualified electricians to install solar power generation systems.

165 His initially dishonest conduct was compounded when he created the false CEC
accreditation documentation. This was a crude attempt to cover up his primary deception.

166 Mr Kibblewhite has demonstrated utter disregard for the organisations which retained
him to do the installations, for the customers with whom he dealt, for the REC traders who
were deceived by his conduct and for the laudable aims of the REC Scheme as embodied in
the REE Act.

PREVIOUS SIMILAR CONDUCT (S 154B(7)(d))

167 Mr Kibblewhite has not been found to have previously contravened the REE Act.

CO-OPERATION (S 154B(7)(e))

168 Mr Kibblewhite has not offered any co-operation whatsoever, either to the regulator
or to Fair Trading NSW. He has not participated in the present proceedings and has thus not
taken steps to reduce the time, cost and effort required to establish the contraventions which
he has committed.

169 He will get no discount for co-operation.

STEPS TAKEN TO REMEDY ANY DAMAGE

170 Mr Kibblewhite has taken no steps to recognise, much less remedy, any of his
wrongdoing. On the other hand, others have done so in respect of their contraventions.
Mr Kibblewhite will get no credit for the steps taken by MT Solar, Green Master, Mr Liu and
Mr Zhu in this regard.

TOTALITY

171 The regulator submitted that the penalty range recommended by it should not be
reduced in any way by reason of the application of the totality principle. I agree. An
appropriate penalty range should be derived by the application of the instinctive synthesis
principles and then an actual penalty selected from within that range.

THE QUANTUM OF THE APPROPRIATE PENALTIES

172 In respect of Mr Kibblewhite, the regulator submitted that I should apply a penalty in the range \$7,150–\$8,250 for each contravention in respect of which a penalty is sought (ie the 18 contraventions relied upon by the regulator). That penalty sits in the range of 65%–75% of the maximum amount. Approached in this way, the regulator submitted that the appropriate range for consideration in respect of Mr Kibblewhite was \$128,700–\$148,500. The detail of the penalties sought by the regulator in respect of Mr Kibblewhite are set out in Penalty Table E attached to the regulator’s Written Submissions.

173 For all of the reasons set out above, I think that the appropriate penalty range for each of the contraventions committed by Mr Kibblewhite over the period August 2010–October 2010 is in the range \$5,500–\$6,600 (50%–60% of the maximum).

174 I think that a penalty of \$6,000 per contravention is appropriate.

175 This results in a total penalty of \$108,000. That is the penalty which I intend to impose upon Mr Kibblewhite.

Declarations and Injunctions

176 There was no real opposition on the part of any of the respondents who appeared at the hearing to the making of the declarations and injunctions sought by the regulator.

177 Notwithstanding that circumstance, the Court must be satisfied that the declarations and injunctions sought by the regulator are appropriate.

178 In the circumstances of this case, given the serious nature of the contraventions and the public interest in giving full effect to the policies and desirable regulatory outcomes embodied in the REE Act, I think that it is appropriate to make the declarations and injunctions sought by the regulator.

179 I propose to do so.

Costs

180 When the parties were notified that judgment was to be delivered today, the solicitors
for the regulator requested that the question of costs be deferred pending further submissions
that the regulator may wish to make in light of the Court's Reasons for Judgment. The
respondents did not make any submissions to the contrary.

181 In those circumstances, I propose to reserve the question of costs.

Conclusions

182 For all of the above reasons, there will be orders, declarations and injunctions in
accordance with these Reasons for Judgment.

I certify that the preceding One-
hundred and eighty-two (182)
numbered paragraphs are a true copy
of the Reasons for Judgment herein
of the Honourable Justice Foster.

Associate:

Dated: 8 March 2013

ATTACHMENT "A"



STATEMENT OF AGREED FACTS

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: AUSTRALIAN CAPITAL TERRITORY
DIVISION: GENERAL

NO ACD 29 OF 2012

CLEAN ENERGY REGULATOR

Applicant

MT SOLAR PTY LTD

ACN 143 322 089

First Respondent

and others named in the Schedule

PART I INTRODUCTION

1. This case relates to the creation of renewable energy certificates (**RECs**) under the *Renewable Energy (Electricity) Act 2000 (REE Act)*. The RECs in question were created in relation to the installation of small-scale solar power generation systems at 22 houses in Sydney and surrounding areas. In each case the relevant installation company, its key director and contracted installer provided false and misleading information which led to the creation of RECs which there was, in fact, no legal entitlement to create.
2. This statement of facts is agreed as between the applicant (the **CER**) and the First, Second, Third and Fourth Respondents.

PART II THE USE OF RECS AND THE NSW SOLAR BONUS SCHEME

Government renewable energy objectives rely upon creation and trade of certificates

3. The Commonwealth Government's renewable energy objectives include:
 - 3.1. encouraging the additional generation of electricity from renewable sources;
 - 3.2. reducing emissions of greenhouse gases in the electricity sector; and
 - 3.3. ensuring that renewable energy sources are ecologically sustainable.
4. One of the key mechanisms used to achieve these objectives is the creation, trading and surrender of online certificates. This is done through the REC Registry, an

Filed on behalf of the Applicant, and the First, Second, Third and Fourth Respondents.

File ref: 11049127

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internet-based registry managed by the Clean Energy Regulator (previously the Office of the Renewable Energy Regulator).

5. Certificates are created in relation to eligible renewable energy sources (for example, small-scale solar panel systems) based on the amount of electricity generated - the higher the output, the more RECs that may be created. A corresponding obligation is placed on liable entities (usually electricity retailers) to purchase and surrender a certain number of certificates each year. This generates a trade in certificates which provides a financial incentive for investment in renewable energy power stations, and for the installation of solar water heaters, heat pumps, and small-scale solar panel, wind, and hydro systems.
6. In this way, the creation and trading of RECs has significantly increased the installation of small-scale renewable energy systems and stimulated investment in renewable energy power stations. For example, from 2001 to 2011, more than 1,329,000 small-scale installations such as solar panels and solar water heaters had certificates created and validated against them in the REC Registry.
7. From 2001 to the end of 2010, there was a single certificate commodity, the REC. Since 1 January 2011 RECs have been reclassified into two types of certificate, Large-scale Generation Certificates and Small-scale Technology Certificates, to correspond with the two schemes which together comprise the Renewable Energy Target. These certificates continue the fundamental market-based mechanism for achieving renewable energy objectives, using the same framework within which RECs were created and traded. As the contraventions in this case occurred in 2010, the original RECs were the relevant commodity at the time. For convenience, current as well as previous trading certificates are referred to as 'RECs' throughout this statement of agreed facts.

RECs for small solar systems were generally used to obtain a purchase discount

8. In order for a person to be entitled to create and trade RECs, it is necessary that they be registered under the REE Act. Very few domestic purchasers of small scale solar systems wish to incur the costs and make the effort necessary to be registered. Accordingly, retailers of small scale solar systems typically offer a point of sale discount on the supply and installation of the system in exchange for the assignment of the owner's entitlement to create RECs. Such a discount makes it easier for purchasers to obtain the financial benefits of the RECs and, in turn, improves sales for the retailer.
9. In exchange for the point of sale discount, the homeowner typically agrees in advance that when they become entitled to create RECs (upon installation of the system) they will transfer that entitlement to either:
 - 9.1. the retailer from whom they are purchasing the system (where the retailer is registered to create RECs under the REE Act); or
 - 9.2. a registered REC trader nominated by that retailer.
10. The point of sale discount is generally calculated by reference to the current market value of the number of RECs which are able to be created for the installation in

question. For example, a 3 kilowatt (kW) system installed in Sydney in 2010 would have given rise to an entitlement to create 186 RECs. During 2010 RECs were typically worth in the order of \$35 per certificate. Thus the financial benefit available through the creation and sale of those certificates would generally have been in the order of \$6,510.

11. Such a discount can be significant in the context of the overall purchase cost. For example, the average total cost of installation of a 3kW system would have been between \$15,000 and \$20,000. However, the average out of pocket expense for a householder in 2010 would have been of the order of \$9,000 to \$14,000. Such point of sale discounts have therefore proven to be a powerful incentive for consumers who are contemplating the purchase of small scale solar power generation system.

The NSW Solar Bonus Scheme commences

12. In 2009 the NSW Government announced its Solar Bonus Scheme. The Scheme provided a generous feed-in tariff of 60 cents per kilowatt hour (kWh) of power generated by customers who installed grid-connected solar power systems. The tariff was guaranteed to apply until 31 December 2016. As a result, the tariff payments able to be received over a number of years would typically exceed the purchase and installation costs for small scale solar power systems.
13. For example, the same 3kW system in Sydney, properly installed, would be expected on average to generate in the order of 4,146 kW hours (kWh) of electricity each year. Accordingly, over the 6 year period of the Solar Bonus Scheme, the system would be estimated to generate around 24,876kWh by the end of 2016. At the guaranteed feed-in tariff of 60 cents per kWh, the owner would receive approximately \$14,925 in tariff payments over that time. Additionally, the owner would thereafter continue to obtain whatever benefits may then be available (through reduced power consumption and any tariff which remained applicable).
14. Taking into account the point of sale discount able to be obtained by assigning RECs, and the significant returns through the guaranteed feed-in tariff, consumers were able to obtain systems which were fully paid for in 6 years. If the system was obtained relatively cheaply they were even able to make a substantial profit if they obtained the full benefit of the Solar Bonus Scheme. As the Scheme was designed to end in December 2016, regardless of installation date, the earlier in the life of the Scheme a system was able to be installed, the greater the anticipated return on that system.
15. As a result, the introduction of the Solar Bonus Scheme generated a huge increase in the demand for the quick installation of small-scale solar power generation systems at residential premises in NSW. The demand was so immediate and so great that the Scheme quickly reached the maximum subscription limits and was then closed to any new customers. The demand also led to the entry of many new businesses, electricians and operators into the solar power supply market.

PART III THE CONTRAVENTIONS

MT Solar begins business

16. The Third Respondent (**Mr Liu**) and the Fourth Respondent (**Mr Zhu**) were among the persons who entered the solar power supply market at this time. On 27 April 2010 they formed the First Respondent (**MT Solar**). Thereafter MT Solar carried on business in NSW supplying and installing grid-connected solar power generation systems.
17. Both Mr Liu and Mr Zhu were directors and shareholders of MT Solar. Both performed a range of tasks for the business. However, it was Mr Liu who took primary responsibility for MT Solar's commercial dealings with customers and contractors. Mr Zhu was involved with more practical aspects of the business, including assisting in the physical installation of the systems.
18. MT Solar's customers were predominantly homeowners who were seeking to have small-scale solar power systems installed at their homes. As neither MT Solar nor its customers were registered to create RECs under the REE Act, MT Solar used registered commercial REC traders to deal with the RECs available for the systems which it supplied and installed. MT Solar's arrangement with the homeowner and the REC trader in each case was as follows:
 - 18.1. MT Solar provided the homeowner with a quote for the supply and installation of the system. The quote built in a point of sale discount based upon the value of the RECs to be generated by the system.
 - 18.2. The homeowner entered a contract with MT Solar for the supply and installation of the system for a fixed price. MT Solar often sought a deposit from the homeowners, in which case the homeowner would pay an agreed sum up front and the balance upon installation.
 - 18.3. In exchange for the point of sale discount, the homeowner agreed to assign the rights to create the RECs to a REC Trader specified by MT Solar.
 - 18.4. MT Solar (i) supplied the solar system to the premises (ii) undertook the physical installation of the system and (iii) had the system connected to the grid by an electrician.
 - 18.5. MT Solar (or the installer/electrician engaged by it) filled out (i) REC assignment forms for signature by the owner and (ii) other documentation to demonstrate that the system had been installed in a way which attracted the entitlement to create RECs.
 - 18.6. MT Solar then provided the completed forms to its nominated REC trader who (i) created the RECs in relation to the system and (ii) paid MT Solar for those RECs.

MT Solar's business grows and it engages Mr Kibblewhite

19. MT Solar was successful in obtaining orders from many customers, both because its quotes were cheap and because it promised to be able to install the systems more quickly than other competitors were able to. The customers sought to have their installations performed as quickly as possible in order to maximise their returns under the Solar Bonus Scheme. As a result, MT Solar was under pressure to have electricians and installers available to it to perform installations. The large amount of work generated by the NSW Solar Bonus Scheme meant that properly licensed electricians and accredited installers were very busy and it was difficult for new companies such as MT Solar to engage installers with these necessary qualifications.
20. In the course of enquiring about electricians who may be able to perform such work, Mr Liu was given contact details for the Fifth Respondent (**Mr Kibblewhite**). In early July 2010 Mr Liu telephoned Mr Kibblewhite and advised him that he had solar system work for which he needed an electrician. In the course of that conversation Mr Liu asked whether Mr Kibblewhite had an electrician's licence - Mr Kibblewhite said he had. Mr Liu advised Mr Kibblewhite that he also needed Clean Energy Council (**CEC**) accreditation in order to perform solar installations. Mr Kibblewhite stated that he did not have such accreditation but that he would seek it.
21. In late July 2010 Mr Kibblewhite called Mr Liu and stated that he had now obtained CEC accreditation and that his number was P3834. They agreed to meet to discuss Mr Kibblewhite performing work for MT Solar.
22. On 26 July 2010 Mr Kibblewhite met with Mr Liu. He advised that he had obtained accreditation from the CEC and again stated that his accredited installer number was P3834. Mr Liu asked to see the CEC accreditation certificate and Mr Kibblewhite stated that the CEC was sending it to him by mail and it would take a couple of weeks. Mr Liu also asked to see Mr Kibblewhite's electrician's licence. Mr Kibblewhite stated that he only had 'a number' which had been issued by the Department of Defence and he said that he could use it to work in any state, including NSW. Mr Liu then agreed to engage Mr Kibblewhite to perform installation work on behalf of MT Solar.
23. In fact, as was later discovered, Mr Kibblewhite did not hold an unrestricted electrical licence issued in NSW and he had never been accredited by the CEC.

Mr Kibblewhite performs installations for MT Solar

24. From 2 August 2010 to 24 October 2010, Mr Kibblewhite undertook solar system installation work on behalf of MT Solar. The systems installed in each case were 'small generation units' under the REE Act and the *Renewable Energy (Electricity) Regulations 2001* (the **REE Regulations**). The dates and locations of each of the installations are described in Table A to this statement of agreed facts.
25. In each case Mr Kibblewhite's work included:
 - 25.1. undertaking the physical installation of solar systems which MT Solar had been contracted to supply and install;

- 25.2. performing electrical wiring work associated with the installation of those systems, including the work necessary for the system to be connected to the electricity distribution grid; and
- 25.3. completing paperwork associated with the installations and necessary in order to create RECs (described in more detail below).
- 26. Following completion of the work Mr Kibblewhite issued to MT Solar a tax invoice, under the trading name 'Chaser Electrical', for the services he had performed. The amounts of those invoices ranged from \$550 to \$1,540, and totalled around \$16,000 for all of the MT Solar installations. An example of one of those invoices is included in the accompanying Exhibits Folder at SOAF 1.

The Exhibits Folder will be tendered jointly by the parties.

Mr Kibblewhite assists in completing paperwork to permit creation of RECs

- 27. MT Solar was required to prepare and provide paperwork to the REC trader from whom it sought payment for the RECs for each system. There were three different types of forms which were used. In each case these forms were completed by Mr Kibblewhite or, with his approval, included details provided by him.

(i) REC assignment forms

- 28. Firstly, in each case the paperwork associated with the installation included a REC assignment form in which:
 - 28.1. Mr Kibblewhite was described as the installer of the system;
 - 28.2. 'P3834' was inserted as the CEC installer accreditation number;
 - 28.3. '15184B' was inserted as the CEC installer electrical licence number (except for the REC assignment forms for the installations described in rows 1 to 5 of Table A to this statement of agreed facts, which did not require an electrical licence number to be stated);
 - 28.4. the number of RECs able to be created in respect of the system was specified (save in the case of 4 systems in which that part of the form had been left blank);
 - 28.5. the homeowner assigned their right to create the RECs to a REC trader; and
 - 28.6. the REC trader was directed to make payment for those RECs to MT Solar.
- An example of a completed REC assignment form is included in the accompanying Exhibits Folder at SOAF 2.

(ii) Certificates of compliance for electrical work

- 29. Secondly, in each case Mr Kibblewhite completed a 'Certificate of Compliance' for electrical work in which:

29.1. details of the electrical work associated with the installation of the solar system were described;

29.2. 'Barry Kibblewhite' was inserted as the person who carried out or supervised the electrical work;

29.3. his licence number was given as '15184B'; and

29.4. he certified that certain tests and inspections had been carried out and that the work described had been completed in accordance with regulations.

An example of a completed Certificate of Compliance is included in the accompanying Exhibits Folder at SOAF 3.

(iii) Statements by CEC installer

30. Thirdly, in the case of the installations described in rows 5 to 17 of Table A to this statement of agreed facts Mr Kibblewhite also completed a 'Statement by CEC Installer' (required by the REC trader for those installations) in which he:

30.1. stated that the electrical wiring was undertaken by an electrical worker holding an unrestricted licence for electrical work issued by the state in which the unit was installed;

30.2. stated that he carried out or supervised the electrical work;

30.3. gave his licence number as '15184B'; and

30.4. signed as a 'CEC Installer' and inserted 'P3834' as the CEC accreditation number.

An example of a completed Statement by CEC Installer is included in the accompanying Exhibits Folder at SOAF 4.

31. Furthermore, in the case of the installations described in rows 18 to 20 of Table A to this statement of agreed facts Mr Kibblewhite completed a 'Mandatory Written Statement by the CEC Installer' (incorporated into the REC assignment form used by the REC trader for those installations) in which he verified by signature:

31.1. he was the accredited CEC installer that completed the installation and installed the system to meet the requirements of the CEC accreditation guidelines;

31.2. all applicable Australian Standards and federal, state and territory government requirements for the installation had been met for the siting of the unit and the connection of the system to the grid; and

31.3. the Low Voltage electrical wiring was undertaken by a fully licensed electrician, whose licence was valid in the state in which the unit was installed.

An example of a completed REC assignment form incorporating a 'Mandatory Written Statement by the CEC Installer' is included in the accompanying Exhibits Folder at SOAF 5.

RECs are improperly created in relation to the MT Solar installations

32. MT Solar provided the completed forms in each case to one or other of two REC traders:
 - 32.1. Renewable Energy Traders Pty Ltd ACN 140 736 849 (**Renewable Energy Traders**), in the case of each of the installations identified in rows 1-17 of Table A; and
 - 32.2. Greenbank Environmental Pty Ltd ACN 130 715 534 (**Greenbank Environmental**), in the case of each of the installations identified in rows 18-20 of Table A.
33. Mr Liu, and through him MT Solar, knew that in order to be entitled to create RECs in respect of each of the solar systems it was necessary that:
 - 33.1. it have been installed by a person who had been accredited to do so by the CEC or by the Australian Business Council for Sustainable Energy; and
 - 33.2. for the installations after 20 August 2010, the electrical wiring associated with the installation have been undertaken by an electrical worker with an unrestricted licence for such work in NSW.
34. As such, Mr Liu, and through him MT Solar, knew that the information to this effect contained in the completed forms would be relied upon by the REC traders.
35. The REC traders did rely upon the information in the forms in each case, including the following:
 - 35.1. The solar system in question had been installed by a person (Mr Kibblewhite) who was accredited for grid-connected power systems under the CEC accreditation scheme.
 - 35.2. In respect of the solar systems referred to in rows 5-17 of Table A, the electrical wiring associated with the installation had been undertaken by an electrical worker holding an unrestricted licence for electrical work issued by the State authority for the place where the system was installed. (The systems referred to in rows 1-4 of Table A were installed prior 20 August 2010, from which date the REE Regulations required that RECs could only be created where the electrical wiring had been undertaken by an electrical worker holding an unrestricted licence in the relevant State or Territory. As such, Renewable Energy Traders did not seek or rely upon such information when creating the RECs for those systems.)
36. As Mr Kibblewhite held no such accreditation or licence, the MT Solar systems had not in fact been installed by a person with the necessary licence or accreditation to enable

the creation of RECs. As such, the information relied upon by Renewable Energy Traders and Greenbank Environmental in relation to those installations was false and misleading.

37. The REC traders created RECs in respect of each system. In so doing they were wholly unaware of the false and misleading nature of the information, and had no reason to doubt its accuracy. The number of RECs which they created, and the amount paid to MT Solar by the REC trader for those RECs, is set out in Table A.

A second company, Green Master, begins business

38. The success of MT Solar was such that Mr Zhu sought to operate his own solar power supply business. He entered into agreements with homeowners to supply and install grid-connected solar power systems, the first of which was to be installed on 28 September 2010. The day prior to this installation, 27 September 2010, he arranged for the Second Respondent (**Green Master**) to be incorporated. Thereafter Green Master was the corporate entity through which Mr Zhu carried on business in NSW supplying and installing grid-connected solar power generation systems.
39. Mr Zhu was a director and shareholder of Green Master, and was responsible for its day-to-day dealings with customers and contractors. Mr Liu was not involved with Green Master or its business activities.
40. As with MT Solar, Green Master's customers were predominantly homeowners who were seeking to have small-scale solar power systems installed at their homes. In running Green Master, Mr Zhu essentially followed the business model which had been used by Mr Liu in running MT Solar. As such, Green Master entered into arrangements with each of its customers of the same kind as those made by MT Solar (described in paragraph 18 above).

Green Master engages Mr Kibblewhite

41. In anticipation of the solar system installation which Mr Zhu had undertaken to perform for a customer on 28 September 2010, he made enquiries of his preferred electrician and discovered that he would not be available to perform the work. As a result, Mr Zhu arranged for Mr Kibblewhite to be available.
42. As part of his work with MT Solar, Mr Zhu had worked with Mr Kibblewhite in installing a number of solar systems and knew that he had been performing the services described in paragraph 25 above. In the course of that work for MT Solar, and prior to 28 September 2010, Mr Kibblewhite had advised Mr Zhu that:
 - 42.1. he had CEC accreditation to install grid-connected solar power systems, his accreditation number was P3834 and the CEC would be sending his certificate to him in the post; and
 - 42.2. he had an electrical licence issued by the Department of Defence which permitted him to carry out work in any State or Territory and his electrical licence number was 15184B.

43. On 28 September 2010, the date of Mr Kibblewhite's first installation for Green Master, Mr Zhu spoke with Mr Kibblewhite and asked for his CEC accreditation certificate. Mr Kibblewhite said that he had still not received it from the CEC. Mr Zhu said he had been unable to find Mr Kibblewhite's accreditation on the CEC website, and asked Mr Kibblewhite why this was so. Mr Kibblewhite stated that his information and particulars were confidential to the Department of Defence and were not available to the public. Mr Zhu accepted Mr Kibblewhite's explanation and engaged him to proceed with the installation on behalf of Green Master.

Mr Kibblewhite performs installations, and completes paperwork, for Green Master

44. On 28 September 2010 and 12 October 2010, Mr Kibblewhite undertook solar system installation work on behalf of Green Master as described in Table B to this statement of agreed facts. Both of the systems which he installed were 'small generation units' under the REE Act and the REE Regulations. In both cases Mr Kibblewhite performed services for Green Master of the kind described in paragraph 25 above.
45. Green Master was required to prepare and provide paperwork to Renewable Energy Traders (the REC trader with which it was dealing) in order to obtain payment for the RECs. The paperwork in each case (i) assigned to Renewable Energy Traders the owner's right to create RECs in respect of the system and (ii) certified that the system had been installed in such a way as attracted an entitlement to create RECs.
46. In respect of both installations Mr Kibblewhite assisted Green Master to meet these requirements by providing it with signed REC assignment forms, Certificates of Compliance and CEC Accredited Installer Statements (of the same kinds as described in paragraphs 28 to 30 above). Examples of those documents as prepared for Green Master are included in the accompanying Exhibits Folder at SOAF 6.
47. Mr Kibblewhite charged Green Master \$600 and \$700 respectively for the installations identified in Table B.

RECs are improperly created in relation to the Green Master installations

48. Green Master provided the completed forms in each case to Renewable Energy Traders.
49. Mr Zhu, and through him Green Master, knew that in order to be entitled to create RECs in respect of each of the solar systems it was necessary that:
- 49.1. it have been installed by a person who had been accredited to do so by the CEC or by the Australian Business Council for Sustainable Energy; and
- 49.2. the electrical wiring associated with the installation have been undertaken by an electrical worker with an unrestricted licence for such work in NSW.
50. As such, Mr Zhu, and through him Green Master, knew that the information to this effect contained in the completed forms would be relied upon by Renewable Energy Traders.

51. Renewable Energy Traders did rely upon the information in the forms in each case, including the following:
- 51.1. The solar system in question had been installed by a person (Mr Kibblewhite) who was accredited for grid-connected power systems under the CEC accreditation scheme.
- 51.2. The electrical wiring associated with the installation had been undertaken by an electrical worker holding an unrestricted licence for electrical work issued by the State authority for the place where the system was installed.
52. As Mr Kibblewhite held no such accreditation or licence, the Green Master systems had not in fact been installed by a person with the necessary licence or accreditation to enable the creation of RECs. As such, the information relied upon by Renewable Energy Traders in relation to those installations was false and misleading.
53. Renewable Energy Traders created RECs in respect of both systems. In so doing it was wholly unaware of the false and misleading nature of the information and had no reason to doubt its accuracy. The number of RECs which it created, and the amount paid to Green Master for those RECs, is set out in Table B.

Mr Kibblewhite's deception is discovered by Integral Energy

54. Integral Energy (now Origin Energy Electricity Ltd) was the major electricity retailer in NSW then responsible for processing applications for solar bonus credits under the NSW Solar Bonus Scheme. This involved administrative staff from Integral Energy entering data from the applications, including the details of the installer's CEC accreditation and their licence to perform electrical work. During this process, the data was automatically checked against lists provided by the CEC and NSW Fair Trading.
55. Following checks of the MT Solar installations over a number of weeks in October 2010, Integral Energy became aware that Barry Kibblewhite's name and accreditation numbers as given on the applications for solar bonus credits did not match the list of accredited installers provided to Integral Energy by the CEC. Integral Energy had also become aware that Mr Kibblewhite was submitting Certificates of Compliance without holding an electrician's license.
56. Integral Energy sent an email to the CEC at 1:34pm on 3 November 2010 asking why Barry Kibblewhite had the same CEC accreditation number as that which was listed by the CEC as being held by a different accredited installer, Jonathon Paul Edginton. Integral Energy attached to that email a copy of a document, purportedly issued by the CEC, stating that Mr Kibblewhite had been accredited and had been given accreditation number P3834.
57. The CEC responded by email on 4 November 2010, advising that it held no records for Mr Kibblewhite and that the accreditation number P3834 belonged to Jonathon Paul Edginton. The CEC also said that they did not recognise the attached letter as something the CEC sends out to designers and installers.

58. On 5 November 2010 the CEC informed Integral Energy that as far as the CEC was aware, Mr Kibblewhite was using Jonathon Paul Edginton's number fraudulently, and that they had referred the matter to the Office of the Renewable Energy Regulator. These emails and the fraudulent CEC certificate are included in the accompanying Exhibits Folder at SOAF 7. A copy of the accreditation letter and certificate which was in fact in use by the CEC at that time is included in the accompanying Exhibits Folder at SOAF 8.

Mr Kibblewhite's deception is discovered by Greenbank Environmental

59. On 25 October 2010 Greenbank received from MT Solar the REC assignment forms and associated documentation for the installations described in rows 18 to 20 of Table A. When processing those forms on 27 October 2010 it conducted checks in relation to the CEC accreditation number given for Mr Kibblewhite and ascertained that it was listed by the CEC as having been given to Jonathon Paul Edginton.
60. On around 3 November 2010 Greenbank telephoned Mr Kibblewhite and was advised by him that he had been given the number P3834. It then raised the issue with the CEC on 4 November 2010 and was advised that Mr Kibblewhite was not accredited. Greenbank immediately appreciated that there had been no entitlement to create RECs in respect of installations performed by Mr Kibblewhite. Accordingly, on 4 November 2010 Greenbank contacted the Office of the Renewable Energy Regulator and alerted it to the issue. Greenbank requested that the regulator fail certain applications which had already been submitted by it for the registration of such RECs. Additionally, Greenbank did not create RECs or submit a registration application in respect of a further installation which had been performed by Mr Kibblewhite for MT Solar. That installation is not included in these proceedings.

Mr Kibblewhite's deception is discovered by Mr Liu

61. On 2 November 2010 Mr Kibblewhite sent Mr Liu an email attaching a document on CEC letterhead which purported to set out CEC accreditation details for him. Mr Liu sent a copy of the document to the CEC by email at 2:37pm on 3 November 2010, seeking confirmation that accreditation number P3834 had been given to Mr Kibblewhite. The CEC responded on 5 November 2010, advising that it held no records for Mr Kibblewhite and that the document was fake. A copy of those emails are included in the accompanying Exhibits Folder at SOAF 9.
62. On 5 November 2010 the Office of the Renewable Energy Regulator emailed Mr Liu asking for Mr Kibblewhite's contact details and asking Mr Liu to have Mr Kibblewhite call the regulator. Mr Liu telephoned Mr Kibblewhite later that same day and passed the message on.
63. At about this time Mr Liu advised Mr Zhu of his discovery.

The respondents failed to conduct checks in relation to Mr Kibblewhite

Respondents were wholly unaware of Mr Kibblewhite's deception

64. Prior to the discovery of Mr Kibblewhite's deception in early November 2010, Mr Liu (and through him MT Solar) and Mr Zhu (and through him Green Master) were wholly unaware that Mr Kibblewhite:
- 64.1. had no authority to perform unrestricted electrical work in NSW; and
 - 64.2. had no accreditation from the CEC.
65. As such, none of those respondents were aware that the information which was being provided to the REC traders was false and misleading, or that there was no entitlement to create the RECs which were being created in relation to those installations.

Respondents accept that they ought to have conducted proper enquiries

66. However, all of those respondents accept that they ought to have verified that Mr Kibblewhite held the necessary licence and accreditation before relying upon him to perform installations in respect of which RECs were to be created.
67. Further, all of those respondents had been aware of particular information which, they now accept, should have caused them to make proper enquiries to investigate whether Mr Kibblewhite held the necessary licence and accreditation. That information and the circumstances in which it was obtained are described below.

Information known to Mr Liu and MT Solar at various times

68. Firstly, Mr Liu, and through him MT Solar, were aware prior to first engaging Mr Kibblewhite that:
- 68.1. he did not claim to have a relevant electrical licence issued by NSW authorities at all, but rather some form of qualification issued by the Department of Defence which authorised him to perform such work;
 - 68.2. when asked to produce his electrician's licence he admitted that he did not have a licence document and only had 'a number' issued by the Department of Defence;
 - 68.3. he had initially not been accredited by the CEC and, when asked for his certificate to verify his later claim to have been accredited, was unable to do so; and
 - 68.4. he claimed that he had been issued a specific number by the CEC but said that the certificate itself would take 'a couple of weeks'.
69. Secondly, on 18 August 2010 MT Solar performed the installation of a solar system for a homeowner, Mr Alan Williamson, at Bella Vista NSW. This was the fourth installation performed by Mr Kibblewhite for MT Solar. Mr Kibblewhite told Mr Williamson that he was trained and accredited in the army. Mr Williamson then checked on the NSW Fair

Trading website and saw that Mr Kibblewhite was not included in the list of electricians with the special accreditation necessary to install electricity metering equipment. Mr Liu attended the house later that day, and Mr Williamson had a conversation with Mr Liu and Mr Kibblewhite, during which Mr Williamson queried why Mr Kibblewhite was not included on the NSW Fair Trading list. Mr Kibblewhite explained that the reason he was not on the Fair Trading website was that he gained his accreditation in the Defence force. Mr Liu explained to Mr Williamson that the electricity meter was not available yet and that the specialist meter installation work would be done by an electrician with the necessary accreditation on a later date.

70. Thirdly, on a number of occasions during August and September 2010, Mr Liu asked Mr Kibblewhite for a copy of his CEC certificate of accreditation. Mr Kibblewhite repeatedly failed to provide any such document, stating variously that it had not yet arrived and that he had not had time to check the mail box. Despite these statements, and the absence of any explanation as to why it would take so long for a certificate to be obtained, MT Solar continued to use Mr Kibblewhite to perform installations during August, September and October 2010.
71. Despite all of the above matters, neither Mr Liu nor MT Solar made any further enquiries prior to engaging Mr Kibblewhite to check whether he held the necessary licence and accreditation. Nor did they alert the REC traders to any of these matters.

Information known to Mr Zhu and Green Master at various times

72. Mr Zhu, and through him Green Master, were aware prior to first engaging Mr Kibblewhite that:
 - 72.1. he claimed to have a specific CEC accreditation number and had used it for many installations on behalf of MT Solar over the previous two months;
 - 72.2. he claimed that he had not received the accreditation certificate from the CEC over that two month period;
 - 72.3. Mr Kibblewhite's details were not in fact included on the CEC website;
 - 72.4. Mr Kibblewhite's explanation for that non-inclusion was that they were kept confidential by the Department of Defence; and
 - 72.5. he did not claim to have a relevant electrical licence issued by NSW authorities, but rather some form of qualification and number issued by the Department of Defence which authorised him to perform such work.
73. Despite these matters, neither Mr Zhu nor Green Master made any further enquiries prior to engaging Mr Kibblewhite to check whether he held the necessary licence and accreditation. Nor did they alert the REC traders to any of these matters.

Checks which could have been performed

74. Simple, fast and effective methods were available to check Mr Kibblewhite's licence and accreditation claims, should Mr Liu, MT Solar, Mr Zhu or Green Master have chosen to conduct them. These included:
- 74.1. performing searches on the CEC website using Mr Kibblewhite's name (as was done by Mr Zhu in September 2010);
 - 74.2. sending an email to the CEC requesting confirmation of Mr Kibblewhite's accreditation (as was eventually done by Mr Liu on 3 November 2010);
 - 74.3. checking on the NSW Fair Trading website to ascertain whether Mr Kibblewhite was entitled to perform the relevant electrical work in NSW;
 - 74.4. searching the public register maintained by NSW Fair Trading under s 120 of the *Home Building Act 1989* (NSW) to check what, if any, licence or authority was held by Mr Kibblewhite;
 - 74.5. emailing or otherwise contacting NSW Fair Trading to make enquiries about Mr Kibblewhite's claimed electrical qualifications and authorisation (including whether it was able to be treated as an unrestricted licence to perform electrical work issued by NSW authorities);
 - 74.6. emailing or otherwise contacting the Department of Defence to make enquiries about Mr Kibblewhite's claimed electrical qualifications and authorisation; and
 - 74.7. making enquiries with the Office of the Renewable Energy Regulator as to what was necessary in order to properly create RECs, and how checks could be performed to verify such matters.

Explanation of failure to conduct checks

Mr Liu

75. Mr Liu did not check Mr Kibblewhite's electrical licence number before MT Solar engaged Mr Kibblewhite to perform the MT Solar Installations. Mr Liu simply relied upon Mr Kibblewhite's assertion that as he had gained an accreditation in the Defence force which allowed him to perform electrical work anywhere in Australia, he was not listed on the NSW Fair Trading website.
76. Around the end of July or early August 2010, Mr Liu checked the CEC website for Mr Kibblewhite's CEC accreditation. At that time, the CEC website contained a list of the names of CEC accredited installers, but the website did not list their corresponding accreditation numbers. Mr Liu searched the list of CEC accredited installers and could not find Mr Kibblewhite's name. When Mr Liu asked Mr Kibblewhite why his name was not on the CEC website, Mr Kibblewhite suggested that as he had just recently been accredited, maybe the CEC would update the website later. Mr Liu did not subsequently check the CEC website.

77. Mr Liu accepted Mr Kibblewhite's explanation and decided to engage Mr Kibblewhite on behalf of MT Solar to perform the MT Solar installations as:

77.1. MT Solar was under pressure from homeowners to proceed with installations as quickly as possible - especially as it was anticipated that the NSW Government would soon cut the tariff from 60 cents to 20 cents per kilowatt hour, and introduce a total capacity cap of 300 megawatts;

77.2. the other electricians MT Solar regularly engaged did not have capacity to perform more installations; and

77.3. the price of RECs was falling at that time, such that delays in installing systems would result in lower payments to MT Solar for the associated RECs.

78. Mr Liu assumed that if there were any problems with Mr Kibblewhite's accreditation, it would be picked up by the REC Traders or the CEC when the RECs were created and registered. As Mr Kibblewhite continued to perform more installations for MT Solar without any of the RECs being rejected, Mr Liu continued to assume that there was no problem with Mr Kibblewhite's CEC accreditation or licence for electrical work. As a result, aside from asking Mr Kibblewhite to provide his CEC accreditation certificate from time to time, Mr Liu did not take any further steps to conduct checks.

MT Solar

79. Mr Liu had used the CEC website to check the CEC accreditation of the other electricians that MT Solar engaged to perform installations.
80. However, aside from relying on the judgment of Mr Liu, MT Solar did not have any systems in place to check the qualifications of the people it engaged to perform installations.

Mr Zhu

81. Mr Zhu of Green Master had naively accepted and relied upon Mr Kibblewhite's representations and explanations in relation to his licensing status (as set out in paragraphs 42 and 43). He also relied upon the fact that Mr Kibblewhite had already been carrying out work for MT Solar for a number of months, apparently without problem. In hindsight, Mr Zhu accepts that he placed too much faith in these matters.

Green Master

82. Two other electricians were used by Green Master at that time. Green Master had checked their licensing status. However, aside from relying on the judgment of Mr Zhu, Green Master did not have any systems in place to check the qualifications of the people it engaged to perform installations.

The respondents rectified the relevant installations

83. Following the discovery of Mr Kibblewhite's deception Mr Liu, MT Solar, Mr Zhu and Green Master took a range of steps to ensure that the installations were properly checked and the corresponding RECs able to be validly created.

- 83.1. During January 2011 Mr Liu engaged a properly licensed and CEC accredited electrician, Tan Khoa Doan, to inspect the installations performed by Mr Kibblewhite on behalf of MT Solar. Mr Doan checked that the systems had been safely installed, corrected defects and issued new certificates of compliance for the electrical work, at a total cost to MT Solar of approximately \$10,000.
- 83.2. Mr Zhu engaged Mr Doan to perform the same work in relation to the two installations which Mr Kibblewhite had performed for Green Master, at a total cost to Green master of approximately \$1,000.
- 83.3. Mr Liu and Mr Zhu provided details of the properly certified installations to the REC traders so that (i) the RECs issued in respect of each system are valid, and (ii) MT Solar and Green Master were able to properly retain amounts paid to them in respect of those RECs.

PART IV HARMS AND RISKS ARISING FROM THE CONTRAVENTIONS

Harm to the regulatory framework

- 84. The provision of false information to a person who creates RECs in reliance upon that information, undermines the integrity of the REC scheme, the objectives of the REE Act and, ultimately, the Government's ability to meet the renewable energy target.
- 85. Firstly, it can undermine the confidence of consumers, or potential consumers, in the renewable energy sector. Consumers generally work on the assumption that installers claiming to be qualified for the purposes of a Commonwealth-managed scheme are subject to appropriate regulatory oversight. When such regulation is found to have been avoided, it can give rise to concerns about:
 - 85.1. the safety of installations - these are likely to be exacerbated by the widespread reporting of fires and other electrical safety concerns associated with installation of insulation and certain renewable energy installations;
 - 85.2. the effectiveness of the power generation able to be achieved by the systems - this is a matter of great significance to consumers as the value of the system, and the decision to acquire it, is usually directly linked to the financial benefits (whether through reduction in power bills or an increase in rebates) able to be achieved through a properly functioning system; and
 - 85.3. the legal entitlement to receive financial incentives under the applicable schemes - again, financial incentives (whether in the form of payment RECs, rebates or some other mechanism) are usually a significant factor in the decision to install a renewable energy system, such that uncertainty as to this may deter many consumers from doing so.
- 86. The undermining of consumer confidence in these ways, has at least two serious consequences:

- 86.1. The many genuine, conscientious and fully compliant businesses working in the renewable power industry will themselves experience the losses, costs and reduction in goodwill associated with an increased scepticism of the renewable industry. Even though the scepticism would be entirely unwarranted in relation to those people and businesses, the fact is that consumers respond to a perception of the industry as a whole, such that they would nonetheless bear the losses flowing from the conduct of non-compliant traders.
- 86.2. The reduction in uptake of renewable energy generation systems would significantly reduce the effectiveness of that part of the Government's renewable energy target which encourages additional generation of electricity from ecologically sustainable and renewable sources.
87. Secondly, the number of RECs that are able to be created for a solar energy generation system is calculated by the expected power output of the system. This assumes that the system has been properly installed and is operating effectively. One of the primary reasons for requiring that RECs only be created when installed by persons who are properly licensed and accredited is to ensure this effectiveness. Where these basic requirements are avoided, there is an increased risk that the system will not be correctly installed and will therefore generate significantly less electricity than expected. As a result, the number of RECs created for that system will not accurately reflect the amount of electricity actually generated, thus weakening the effective achievement of the Commonwealth Government's renewable energy objectives.
88. Thirdly, compliance with the REE Act necessarily involves cost to installers, REC traders and other participants in the REC trading market. If those costs are avoided by some persons not complying with the REE Act this will confer unfair advantages upon them as against other persons in the industry. This in turn may discourage presently compliant operators from incurring the costs necessary to ensure compliance with the regulatory scheme. Any reduction in voluntary compliance with the REE Act both reduces the effective operation of the REC scheme and increases the regulatory burden upon the CER.

Risks of harm to the REC trading market

89. The creation, trading and surrender of RECs is a market-based scheme. The market is a significant one, even when focussing only on that part of the market dealing with small-scale technology certificates (STCs). As noted in paragraph 7 above, the single REC commodity has now been divided into two types of certificate. STCs are the certificates which are now created and traded in respect of small-scale installations (such as those with which the present case is concerned). In 2011, 28 million STCs were purchased for surrender purposes, to a total cost of approximately \$842 million. Nearly \$500 million of this trade was conducted through brokered trades in the open market (with the remainder through negotiated contracts). In 2012 the total number of STCs required to be purchased and surrendered is 44 million. At a price of \$30 per certificate (which was the average market price in 2011) this equates to certificate purchases of approximately \$1.3 billion.

90. Major banks and investment companies play a key role in this market, both trading them as well as holding them as collateral for financing arrangements. For example, at any time the major domestic banks may hold 4 million STCs directly. As a result, these major investors take great care to constantly monitor the day-to-day risk of any change in the REC scheme, adjusting their REC prices accordingly.
91. Participants in the scheme, particularly the major investors, have consistently communicated to the regulator that they are highly alert to the risk of the scheme being disrupted or undermined through compliance failings. Were it to be perceived by the market that compliance levels were weakening, or that the regulatory response to non-compliance was inadequate, this could have a substantial effect upon REC pricing and consequent participation in the scheme. As a result, contraventions of the kind now before the Court could, if not met with an appropriate regulatory response, seriously impact upon the REC market and the effectiveness of the scheme.

Loss and damage associated with the contraventions

92. The contraventions caused concern, inconvenience and costs to the homeowners with whom MT Solar and Green Master had been dealing. In particular:
- 92.1. As a consequence of Mr Kibblewhite not holding a CEC accreditation, homeowners were initially advised by NSW energy authorities that they were not eligible to obtain the rebate under the NSW Solar Bonus Scheme. As this was an important consideration in the decision to install a solar system, this was a matter of serious concern to those homeowners. Upon recertification of the system, the homeowners became eligible to receive the rebate. As a result of the systems used to 'backdate' any rebate eligibility a number of homeowners may have missed out on receiving a small amount (in the order of hundreds of dollars) of the rebates which they would have received had the system been validly installed initially.
- 92.2. Upon learning that the systems had not been installed by a properly licensed electrician and accredited installer, a number of homeowners were initially concerned about the safety of their systems and the possible impact of the installation on the expected performance of the systems. These concerns were addressed through the re-certification process.
- 92.3. Homeowners experienced the inconvenience of the additional dealings with MT Solar and the further visit from an electrician associated with the re-certification process.
93. Beyond these matters, the parties are not aware of any evidence of significant harm to any particular homeowner as a result of the contraventions. In particular:
- 93.1. No significant safety issues were ever identified in relation to any of the systems.
- 93.2. As the benefit of the RECs to the homeowners was provided in advance through a point of sale discount, there was at no time a loss to the homeowners associated with payment for RECs.

- 93.3. As the systems were all properly re-certified, the homeowners were able to properly claim the rebate available under the NSW Solar Bonus Scheme and did not suffer any significant loss of that kind (although, as noted above, some homeowners may have missed out on a small amount of rebate through the backdating process).

PART V OTHER RELEVANT MATTERS

Action taken by NSW Fair Trading

94. Action has already been taken by NSW Fair Trading in relation to Mr Kibblewhite's activities. Following an investigation NSW Fair Trading brought a proceedings against Mr Kibblewhite for various NSW criminal offences. Mr Kibblewhite did not appear to oppose the prosecution and in September 2011 he was convicted of offences under s 192E of the *Crimes Act 1900* (NSW), s 12 of the *Home Building Act 1989* (NSW), s 31 of the *Electricity (Consumer Safety) Act 2004* (NSW), Clause 35 of the *Electricity (Consumer Safety) Regulation 2006* (NSW), and s 4(1) of the *Business Names Act 2002* (NSW).
95. The majority of those offences related to the actual performance of electrical work by Mr Kibblewhite in circumstances where he did not hold a licence issued by NSW authorities. An offence of obtaining a financial advantage by deception related to Mr Kibblewhite having told MT Solar that he was a licensed electrician and a CEC accredited installer. The criminal proceedings related to the 4 installations described in rows 4, 6, 8 and 12 in Table A. As a result, the CER does not seek civil penalties against Mr Kibblewhite in relation to those installations.
96. Additionally, an infringement notice was issued to MT Solar in the sum of \$1,500 for a breach of s 4(1)(a) of the *Home Building Act 1989* (NSW). The infringement related to contracting to perform residential building work on 1 September 2010 (namely, installing a solar system) when it was not the holder of the relevant NSW licence.
97. No other action has been taken against any of the respondents in respect of the activities which are the subject of the present proceedings.

Business activities of corporate respondents

98. MT Solar operated from 1 July 2010 to 30 June 2011. During that period, MT Solar engaged a total of 4 different electricians, including Mr Kibblewhite, to perform installations, and installed a total of 61 solar energy generation systems in 60 homes in NSW. During the period of time MT Solar operated its business, its gross revenue was \$837,228 and MT Solar made a net loss of \$32,939.00, after the payment of expenses for recertification of the systems (as referred to in paragraph 83.1), other business expenses, and commissions.
99. Green Master operated from 27 September 2010 to approximately June 2011. During that period, Green Master engaged a total of 3 different electricians, including Mr Kibblewhite, to perform installations, and installed a total of 13 solar energy generation systems in 13 homes in NSW. In the 9 months to 30 June 2011, Green

Master's gross revenue was \$107,587, however it reported expenses of essentially the same amount, such that it did not make any profit.

Financial benefits to companies from the installations

100. MT Solar's financial benefits from the installations which are the subject of these proceedings can be summarised briefly as follows:
 - 100.1. It received a total of \$181,050 in payments from homeowners in relation to the installations.
 - 100.2. It received a total of \$122,963.40 in payments from the REC traders in relation to the RECs created from those installations.
 - 100.3. It made a net loss from the installations as the price of RECs fell and it also subsequently paid approximately \$10,000 in electrician's expenses for recertification of the systems.
101. Green Master's financial benefits from the installations which are the subject of these proceedings can be summarised briefly as follows:
 - 101.1. It received a total of \$15,900 in payments from homeowners in relation to the installations.
 - 101.2. It received a total of \$12,169.69 in payments from Renewable Energy Traders in relation to the RECs created from those installations.
 - 101.3. It made a profit of \$2,859 from the installations (from which it subsequently paid \$1,000 in electrician's expenses for recertification of the systems).

Co-operation with the CER's investigation

102. Mr Liu and MT Solar have been co-operative at all stages in relation to the investigations of the contraventions and the bringing of these proceedings. This co-operation has included the following:
 - 102.1. Mr Liu assisted NSW Fair Trading in its investigation and prosecution of Mr Kibblewhite for NSW criminal offences, including making 2 written statements to assist the prosecution. These statements included a number of admissions and were of assistance to the CER in the investigation of the present contraventions.
 - 102.2. Mr Liu participated in an interview with investigators from the CER on 20 January 2011, and make full and frank admissions as to a range of factual matters.
 - 102.3. MT Solar voluntarily provided documents at the request of CER investigators, including copies of the invoices, REC Assignment Forms and Certificates of Compliance and other business records which related to the MT Solar installations.

102.4. MT Solar and Mr Liu have filed defences admitting all of the contraventions alleged against them.

102.5. MT Solar and Mr Liu have joined with the CER in presenting evidence by way of agreed facts.

103. Mr Zhu and Green Master have been co-operative in relation to certain investigative steps and to the bringing of these proceedings. This co-operation has included the following:

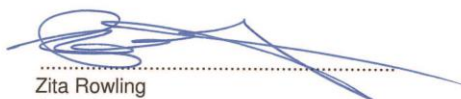
103.1. Green Master voluntarily provided documents at the request of CER investigators, including copies of the invoices, REC Assignment Forms and Certificates of Compliance and other business records which related to the Green Master installations.

103.2. Mr Zhu and Green Master have filed defences admitting all of the contraventions alleged against them.

103.3. Mr Zhu and Green Master have joined with the CER in presenting evidence by way of agreed facts.

No previous similar conduct

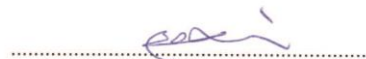
104. Neither MT Solar, Mr Liu, Green Master or Mr Zhu have previously been found by a court to have contravened the REE Act.



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Bo Liu
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For and behalf of the First Respondent



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TABLE A: MT SOLAR INSTALLATIONS

No	Installed	Location of installation (all NSW)	No of RECs	\$ paid to MT Solar by owner	\$ paid to MT Solar by REC trader	REC trader
1	2/08/10	4 Currawong Ave Lane Cove West	170	\$5,300	\$5,700.35	RET
2	12/08/10	11 Artillery Crescent Holsworthy	189	\$8,300	\$6,342.36	RET
3	17/08/10	55 Statham Avenue North Rocks	153	\$2,900	\$5125.92	RET
4	18/08/10	6 Windhover Court Bella Vista	189	\$9,300	\$6342.36	RET
5	21/08/10	50 Casaurina Road Alford's Point	166	\$5,500	\$5,623.29	RET
6	2/09/10	23 Karowa Street Bomaderry	189	\$9,600	\$6,408.51	RET
7	6/09/10	10 Bay Road Russell Lea	166	\$5,200	\$5,581.79	RET
8	7/09/10	20 Malory Avenue West Pymble	185	\$8,100	\$6,231.55	RET
9	9/09/10	36 Willunga Road Berowra	153	\$4,000	\$5,141.22	RET
10	13/09/10	86 Railway Parade Canley Vale	339	\$38,150	\$11,444.76	RET
11	14/09/10	4 Blythe Avenue Glenwood	153	\$8,500	\$5,141.22	RET
12	16/09/10	28 Prospect Road Summer Hill	153	\$3,200	\$5,141.22	RET
13	17/09/10	83 Brown Street Penrith	228	\$17,500	\$7,689.40	RET
14	20/09/10	13 Farrier Way Kellyville Ridge	185	\$9,400	\$6,250.05	RET
15	30/09/10	3 Flemington Street St Johns Park	185	\$8,500	\$6,259.30	RET
16	6/10/10	77 Woolcott Street Earlwood	166	\$5,700	\$5,604.05	RET
17	6/10/10	100 Northcote Street Canterbury	166	\$5,700	\$5,604.05	RET
18	13/10/10	Unit 1/188 Cressy Road Ryde	166	\$5,700	\$5,478.00	GBE
19	22/10/10	62 Valentia Avenue Lugarno	166	\$3,000	\$4,590.00	GBE
20	24/10/10	8 Ruby Street Hurstville	228	\$17,500	\$7,264.00	GBE

TABLE B: GREEN MASTER INSTALLATIONS

No	Installed	Location of installation (all NSW)	No of RECs	\$ paid to G Master by owner	\$ paid to G. Master by REC trader	REC trader
1.	28/09/10	134 Lugarno Parade Lugarno	165	\$5,500	\$5,578.30	RET
2.	12/10/10	Lot 16 Cross Street Kemp's Creek	191	\$10,400	\$6,591.39	RET