



Form 17
Rule 15.06(1)(a)

Further Amended Statement of cross-claim

Amended on 31 January 2025 with leave from the Court by orders dated 31 January 2025

No. VID 659 of 2024

Federal Court of Australia
District Registry: Victoria
Division: General

Progressive Green Pty Ltd (ACN 130 175 343)

Applicant

Flo Energy Australia Pty Ltd (ACN 664 209 330) and Flo Holding Pte. Ltd. (UEN 202006024R)

Respondents

Flo Energy Australia Pty Ltd (ACN 664 209 330) and Flo Holding Pte. Ltd. (UEN 202006024R)

Cross-claimants

Progressive Green Pty Ltd (ACN 130 175 343)

Cross-respondent

1. The Cross-claimants are the First and Second Respondents.
2. The Cross-respondent is the Applicant.

Cross-claimants' trade mark registration and exclusive licences

3. The Second Cross-claimant has been since 52 December 2024 the registered owner of Australian Registered Trade Mark Number 1553374 for FlowSmart (the **FlowSmart Registration**) which has been registered with effect from 30 April 2013 in class 39 in respect of "Distribution of energy; Electricity distribution; Fuel distribution services; Electricity storage; Electricity supply services; Supply of electricity; Transmission of electricity; Storage; Storage of gas; Delivery of fuel" (**FlowSmart Services**).
4. From 30 April 20142013 to 31 October 2024, EnergyAustralia Pty Ltd was the registered owner of the FlowSmart Registration.

Filed on behalf of (name & role of party)	The Respondents/ Cross-claimants		
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5. On 31 October 2024, EnergyAustralia Pty Ltd assigned to Bruutzak Holding B.V. (**Bruutzak**) all rights in the FlowSmart Registration including the right to sue for past infringements and damages.
6. On 31 October 2024, Bruutzak applied to have the assignment entered on the Register.
7. On 31 October 2024, Bruutzak granted to the First Cross-claimant an exclusive licence to use the FlowSmart Registration in Australia.
8. On 6 November 2024, the Registrar of Trade Marks entered the particulars of the assignment on the Register, which by operation of s 110(2) of the *Trade Marks Act 1995* (Cth) (**TMA**), is taken to have effect from 31 October 2024.
9. On 2 December 2024, Bruutzak assigned to the Second Cross-claimant all rights in the FlowSmart Registration including the right to sue for past infringements and damages.
10. On 2 December 2024, the Second Cross-claimant applied to have the assignment entered on the Register.
11. On 2 December 2024, the Second Cross-claimant granted to the First Cross-claimant an exclusive licence to use the FlowSmart Registration in Australia, which superseded the licence referred to in paragraph 7 above.
12. On 5 December 2024, the Registrar of Trade Marks entered the particulars of the assignment on the Register, which by operation of s 110(2) of the TMA, is taken to have effect from 2 December 2024.

Cross-respondent's conduct

13. Since 10 March 2017, without any licence from the Second Cross-claimant or its predecessors in title of the FlowSmart Registration, the Cross-respondent has advertised, promoted, offered for sale and sold in Australia, electricity, and/or retail electricity services under and by reference to the following trade marks:
 - (a) FLOW;
 - (b) FLOW POWER;
 - (c) flowpower.com.au;



- (d)
- (collectively, the **Flow Power Marks**),

Particulars

- (i) Paragraphs [8], [22], [25]-[38], [58], [68]-[75] and [91] of the affidavit of Matthew van der Linden dated 11 October 2024 and the annexures referred to therein.
- (ii) The Cross-respondent's goods and services are promoted and available to purchase via the website <https://flowpower.com.au/> and the following social media accounts:
 - (A) <https://www.facebook.com/flowpower/>;
 - (B) <https://www.linkedin.com/company/flow-power/>;
 - (C) https://x.com/FlowPower_au; and
 - (D) https://www.instagram.com/flowpower_au/.
- (iii) The Cross-respondent filed Australian Trade Mark Number 1828633 for FLOW POWER in class 4 on 6 March 2017 ~~and~~, Australian Trade Mark Number 1842461 for FLOW POWER in classes 35, 36, 37, 39, 40, 42 on 4 May 2017; and Australian Trade Mark Number 1895059 for FLOW POWER in class 35 also on 4 May 2017.
- (iv) Further particulars may be provided after discovery and inspection.

Trade Mark infringement

- 14. By reason of the matters in paragraph 13 above, the Cross-respondent has used each of the Flow Power Marks as a trade mark in Australia in respect of:
 - (a) the FlowSmart Services;
 - (b) services of the same description as the FlowSmart Services;
 - (c) goods that are closely related to the FlowSmart Services.
- 15. Each of the Flow Power Marks is substantially identical with, or deceptively similar to, the FlowSmart Registration.
- 16. By reason of the matters set out above, the Cross-respondent has infringed and is continuing to infringe the FlowSmart Registration pursuant to section 120(1) and/or 120(2) of the TMA.

Loss and damage

- 17. By reason of the Cross-respondent's infringements of the FlowSmart Registration:
 - (a) the Second Cross-claimant and its predecessors in title have suffered and the Second Cross-claimant will continue to suffer loss and damage; and

- (b) the Cross-respondent has made and will continue to make profits.

Particulars

- (i) The loss and damage suffered by the Second Cross-claimant and its predecessors in title includes:
- (A) diminution in and dilution of the commercial reputation and goodwill in the FlowSmart Registration; and
 - (B) diminution or destruction of the Second Cross-claimant's ability to turn its statutory rights to valuable account by licensing or assignment.
- (ii) Further particulars may be provided prior to trial.

Cross-respondent's trade mark registrations

18. The Cross-respondent is registered as the owner of the following trade marks:

- (a) Australian Registered Trade Mark No. 1828633 (the **'633 Mark'**) (since a filing date of 6 March 2017) for the word FLOW POWER in class 4 in respect of "Electricity (energy); electrical energy, including electrical energy generated using non-renewable energy sources such as coal and renewable energy sources such as solar, wind, wave and geothermal energy" (the **'633 Goods'**); [and](#)
- (b) Australian Registered Trade Mark No. 1895059 (the **'059 Mark'**) (since a filing date of 4 May 2017) for the word FLOW POWER in class 35 in respect of "Retailing of electricity" (the **'059 Services'**); [and](#)
- (c) [Australian Registered Trade Mark No. 1842461 \(the **'461 Mark'**\) \(since a filing date of 4 May 2017\) for the word FLOW POWER in classes 35, 36, 37, 39, 40 and 42 in respect of the following services \(the **'461 Services'**\):](#)
 - (i) [in class 35, "Wholesale services; wholesale services featuring electricity services of others; wholesale services featuring utility services of others; wholesaling of electricity; discount services \(being wholesale services associated with electricity\); procurement services for others, being purchasing goods and services for businesses; procurement of electricity services for businesses; procurement of green power services for businesses; organisation and management services \(for others\); organisation and management services for businesses; organisation and management of electricity services for businesses; assisting businesses to manage fluctuating electricity demand and supply; assisting businesses to](#)

manage fluctuating electricity requirements; contract management services, including electricity contract management services; business advisory services; business advisory services relating to the supply, acquisition and management of electricity; data collection services; collection of data regarding energy usage; data collection services associated with electricity usage; pricing analysis; pricing analysis of the electricity market; cost analysis; cost price analysis associated with electricity usage; analysis of energy usage for businesses; market reporting services; market reporting services, being reporting services on the prices in energy markets”;

(ii) in class 36, “Financial services, including the provision of financial derivatives such as hedges, swaps, options and forward contracts, designed to manage the risk associated with the sale and purchase of electricity; project finance services; arranging finance for construction projects; finance for electricity generation and other energy infrastructure projects; arranging finance for energy efficiency projects; brokerage services for financial derivatives such as hedges, swaps, options and forward contracts for the sale and purchase of electricity; brokerage services relating to environmental certificates and credits; brokerage of electricity on behalf of businesses with excess supply”;

(iii) in class 37, “Installation, repair and maintenance of apparatus and instruments for reading data and transmitting data associated with electricity usage; information, consultancy and advisory services relating to the construction, installation, repair or maintenance of each and all of the following: power plants; renewable energy power plants; solar power plants; wind power plants; systems and apparatus for generating power; electricity generators; energy control devices; electricity control panels; instruments and apparatus for reading data and transmitting data associated with electricity usage; electricity distribution boards; electricity panel boards; electricity indicators; electricity meters; electricity storage apparatus; electricity transformers; solar cells for electricity generation; solar collectors for electricity generation; uninterruptible power supplies; with none of the foregoing services including the installation, repair, or maintenance of software”;

(iv) in class 39, “Information and advisory services relating to the storage, supply or distribution of electricity”;

(v) in class 40, “Information and advisory services relating to the generation of electricity by businesses, including the generation of electricity using renewable energy sources such as solar, wind and power, and the rental of electricity generators”; and

(vi) in class 42, “Consultancy and advisory services relating to the use of energy; consultancy and advisory services in the field of energy-saving; consultancy and advisory services relating to energy efficiency; energy auditing services; recording of data relating to energy consumption; recording of data relating to energy consumption in buildings; rental of measuring apparatus; testing and commissioning of instruments and apparatus for reading data and transmitting data associated with electricity; software as a service (SaaS); online provision of non-downloadable, provision of web-based software; provision of non-downloadable computer software for analysing market information; provision of non-downloadable software for managing the use of electricity”.

together, the **Cross-respondent’s Registrations**.

The Cross-claimants are aggrieved persons

19. The Cross-claimants are aggrieved persons in relation to the Cross-respondent’s Registrations, within the meaning of s 88 of the TMA, by reason of the fact that the Cross-respondent has commenced the present proceeding against the Cross-claimants alleging that the Cross-claimants have infringed the Cross-respondent’s Registrations and seeking injunctive and pecuniary relief.

Cancellation of the Cross-respondent’s Registrations – identical trade marks

20. The ‘633 Mark is substantially identical with, or deceptively similar to, the FlowSmart Registration.
21. The ‘633 Mark is registered in respect of goods which are closely related to the FlowSmart Services.
22. The priority date for the ‘633 Mark is later than the priority date for the FlowSmart Registration.
23. By reason of the matters set out in paragraphs 20 to 22 above, the registration of the ‘633 Mark could have been opposed under ss 44(1) and 57 of the TMA.
24. The ‘059 Mark is substantially identical with, or deceptively similar to, the FlowSmart Registration.

25. The '059 Mark is registered in respect of services which are the same as or similar to the FlowSmart Services.
26. The priority date for the '059 Mark is later than the priority date for the FlowSmart Registration.
27. By reason of the matters set out in paragraphs 24 to 26 above, the registration of the '059 Mark could have been opposed under ss 44(2) and 57 of the TMA.
- 27A. The '461 Mark is substantially identical with, or deceptively similar to, the FlowSmart Registration.
- 27B. The '461 Services are services which are the same as or similar to the FlowSmart Services.
- 27C. The priority date for the '461 Mark is later than the priority date for the FlowSmart Registration.
- 27D. By reason of the matters set out in paragraphs 27A to 27C above, the registration of the '461 Mark could have been opposed under ss 44(2) and 57 of the TMA.
28. By reason of the matters in paragraphs 19, 23, ~~and 27~~ and 27D above, each of the '633 Mark, ~~and~~ the '059 Mark and the '461 Mark ought to be cancelled pursuant to ss 88(1)(a) and 88(2)(a) of the TMA.

Cancellation of the Cross-respondent's Registrations – lack of distinctiveness

29. In the alternative to paragraphs 14 to 17, and 20 to 28 above, the '633 Mark was not, at its filing date, capable of distinguishing, and did not in fact distinguish, the '633 Goods from goods and services of other persons, within the meaning of s 41 of the TMA.

Particulars

- (i) At the filing date, the words FLOW POWER were descriptive of the '633 Goods and were not distinctive of the Cross-respondent.
- (ii) The words FLOW POWER describe the '633 Goods because:
 - (A) the word FLOW is a verb which refers to the movement and/or supply of the '633 Goods;
 - (B) the word POWER is a noun which describes the '633 Goods; and/or
 - (C) the words FLOW POWER are a simple combination of two known words that describe the movement and/or supply of the '633 Goods.
- (iii) Other traders, actuated only by proper motives, would desire to, and did in fact, use the words FLOW POWER, and/or other similar formulations including FLOW OF POWER, POWER FLOW and POWERFLOW for the

sake of the signification which those words ordinarily possess, namely to describe the movement and/or supply of energy including electricity.

30. In the alternative to paragraphs 14 to 17, and 20 to 28 above, the '059 Mark was not, at its filing date, capable of distinguishing, and did not in fact distinguish, the '059 Services from goods and services of other persons, within the meaning of s 41 of the TMA.

Particulars

- (i) At the filing date, the words FLOW POWER were descriptive of the '059 Services and were not distinctive of the Cross-respondent.
- (ii) The words FLOW POWER describe the '059 Services because:
 - (A) the word FLOW is a verb which refers to the movement and/or supply of electricity;
 - (B) the word POWER is a noun which describes energy, including electrical power; and/or
 - (C) the words FLOW POWER are a simple combination of two known words that describe the movement and/or supply of electricity.
- (iii) Other traders, actuated only by proper motives, would desire to, and did in fact, use the words FLOW POWER, and/or other similar formulations including FLOW OF POWER, POWER FLOW and POWERFLOW for the sake of the signification which those words ordinarily possess, namely to describe the movement and/or supply of energy including electricity.

30A. In the alternative to paragraphs 14 to 17, and 20 to 28 above, the '461 Mark was not, at its filing date, capable of distinguishing, and did not in fact distinguish, the '461 Services from goods and services of other persons, within the meaning of s 41 of the TMA.

Particulars

- (i) At the filing date, the words FLOW POWER were descriptive of the '461 Services and were not distinctive of the Cross-respondent.
- (ii) The words FLOW POWER describe the '461 Services because:
 - (A) the word FLOW is a verb which refers to the movement and/or supply of electricity;
 - (B) the word POWER is a noun which describes energy, including electrical power;

(C) the words FLOW POWER are a simple combination of two known words that describe the movement and/or supply of electricity; and/or

(D) the '461 Services are all ancillary services of and closely related to the supply of electricity.

(iii) Other traders, actuated only by proper motives, would desire to, and did in fact, use the words FLOW POWER, and/or other similar formulations including FLOW OF POWER, POWER FLOW and POWERFLOW for the sake of the signification which those words ordinarily possess, namely to describe the movement and/or supply of energy including electricity, and related services.

31. By reason of the matters set out in paragraphs 29 and 30 and 30A above, the registration of each of the Cross-respondent's Registrations could have been opposed under ss 41 and 57 of the TMA.
32. By reason of the matters alleged in paragraphs 19 and 31 above, each of the Cross-respondent's Registrations ought to be cancelled pursuant to ss 88(1)(a) and 88(2)(a) of the TMA.
33. The Cross-claimants claim the relief set out in the Further Amended Notice of Cross-claim.

Date: ~~13 December 2024~~ 31 January 2025



Signed by Siabon Seet
Lawyer for the Respondents/ Cross-claimants

This amended pleading was prepared by Siabon Seet and Peter Carstairs, lawyers and settled by Edward Heerey KC and Tim Burn-Francis of counsel.

Certificate of lawyer

I Siabon Seet certify to the Court that, in relation to the [Further](#) Amended Statement of Cross-claim filed on behalf of the Cross-claimants, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: ~~13 December 2024~~ [31 January 2025](#)



Signed by Siabon Seet
Lawyer for the Respondents/ Cross-claimants