



Form 33 (adapted)
Rule 15.10(1); 16.32

Defence to Further Amended Cross-Claim

No. VID 659 of 2024

Federal Court of Australia
District Registry: Victoria
Division: General

Progressive Green Pty Ltd t/a Flow Power (ACN 130 175 343)

Applicant

Flo Energy Australia Pty Ltd (ACN 664 209 330) and another

Respondents

Flo Energy Australia Pty Ltd (ACN 664 209 330) and another

Cross-Claimants

Progressive Green Pty Ltd t/a Flow Power (ACN 130 175 343)

Cross-Respondent

In answer to the Further Amended Statement of Cross-Claim dated 31 January 2025~~13 December 2024~~ (FASOCC), the Applicant/Cross-Respondent says as follows. The Applicant/Cross-Respondent adopts the terms used in the FASOCC.

1. It admits paragraph 1.
2. It admits paragraph 2.

Cross-claimants' trade mark registration and alleged exclusive licences

3. It admits paragraph 3.
4. It ~~says that the EnergyAustralia Pty Ltd was the registered owner of the FlowSmart Registration from 30 April 2013 but otherwise~~ admits paragraph 4.
5. It does not know and cannot admit paragraph 5.
6. It admits paragraph 6.

Filed on behalf of: Progressive Green Pty Ltd t/a Flow Power, the Cross-Respondent

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7. It does not know and cannot admit paragraph 7.
8. It admits paragraph 8.
9. It does not know and cannot admit paragraph 9.
10. It admits paragraph 10.
11. It does not know and cannot admit paragraph 11.
12. It admits paragraph 12.

Cross-respondent's conduct

13. It admits paragraph 13.

Alleged trade mark infringement

14. In answer to paragraph 14, it:
 - (a) admits that it has used the Flow Power Marks as trade marks in respect of electricity storage; electricity supply services, and the supply of electricity,
 - (b) otherwise denies the allegations made in that paragraph.
15. In answer to paragraph 15, it:
 - (a) admits that each of the Flow Power Marks is deceptively similar to the FlowSmart Registration; and
 - (b) otherwise denies the allegations made in that paragraph.
16. It refers to paragraphs 16A to 16D below and denies paragraph 16.
- 16A. In further answer to paragraph 16, in respect of its impugned use of the trade mark FLOW POWER (including as part of the domain name flowpower.com.au and in the stylised form alleged), it:

- (a) relies upon the following trade mark registrations:

Registration	Priority Date	Mark	Class
1828 633	6 March 2017	FLOW POWER	4
1842 461	4 May 2017	FLOW POWER	35, 36, 37, 39, 40 and 42
1895 059	4 May 2017	FLOW POWER	35

- (b) says that its impugned use of the trade mark FLOW POWER (including as part of the domain name flowpower.com.au and in the stylised form alleged) constitutes the exercise of rights to use the FLOW POWER mark given to it under the *Trade Marks Act 1995* (Cth) (**TMA**);

(c) relies upon the defence set out under s 122(1)(e) of the TMA.

16B. In further answer to paragraph 16, and further or alternatively to paragraph 16A, it says that if, for whatever reason and contrary to its denials, the Court determines that ~~either~~ ~~or both~~ any or all of the 633 Mark, 461 Mark and the 059 Mark should be removed from the Register, it:

(a) says that it would obtain registration of the trade mark FLOW POWER in respect of electricity; retailing of electricity; wholesaling of electricity; electricity storage; electricity supply services, and the supply of electricity;

(b) relies upon the defence set out under s 122(1)(fa) of the TMA.

16C. In further answer to paragraph 16, it:

(a) says that it would obtain registration of the trade mark FLOW in respect of electricity; retailing of electricity; wholesaling of electricity; electricity storage; electricity supply services, and the supply of electricity;

(b) relies upon the defence set out under s 122(1)(fa) of the TMA.

16D. In further answer to paragraph 16, it:

(a) says that the FlowSmart Registration is liable to be removed from the Register or cancelled on the bases set out in the Amended Statement of Claim filed concurrently with this defence and/or the application for removal for non-use;

(b) accordingly, there would be no basis to grant any relief in respect of any conduct which (contrary to the denials of the Applicant/Cross-respondent) the Court finds to be an infringement of the FlowSmart Registration.

Alleged loss and damage

17. It denies paragraph 17.

Cross-respondent's trade mark registrations

18. It admits paragraph 18.

Aggrieved person

19. It admits paragraph 19.

Claim for cancellation – identical trade marks

20. In answer to paragraph 20, it:

(a) admits that the '633 Mark is deceptively similar to the FlowSmart Registration; and

(b) otherwise denies the allegations made in that paragraph.

21. In answer to paragraph 21, it:
- (a) admits that the 633 Goods are closely related to the services of distribution of energy, electricity distribution, electricity storage; electricity supply services, the supply of electricity, and transmission of electricity;
 - (b) otherwise denies that paragraph.
22. It admits paragraph 22.
23. It refers to paragraph 23A below and denies paragraph 23.
- 23A. In further answer to paragraph 23, it says that the putative opposition under s 44 should be rejected under s 44(3)(b) on the basis that it is proper in the circumstances for the 633 Mark to be registered.

Particulars

- (a) The 633 Mark was advertised for acceptance on 27 July 2017. No opposition was lodged to the 633 Mark by the then owner of the FlowSmart Registration, EnergyAustralia Pty Ltd (or any other party based on the FlowSmart Registration).
 - (b) Since on or about 10 March 2017, the Applicant / Cross-respondent has used and promoted the FLOW POWER mark extensively in respect of the goods and services provided by it and, by reason of that conduct, has developed an extensive reputation in the FLOW POWER mark.
 - (c) The Respondents / Cross-claimants claim to have first acquired rights in respect of the FlowSmart Registration on 31 October 2024, during the currency of this proceeding.
 - (d) At no point prior to the claims made by the Respondents / Cross-claimants in this proceeding did the owner of the FlowSmart Registration raise any objection in respect of the conduct of the Applicant / Cross Respondent.
 - (e) The FlowSmart Registration is liable to be removed from the Register or cancelled on the bases set out in the Amended Statement of Claim filed concurrently with this defence and/or the application for removal for non-use.
 - (f) The Applicant/Cross-Respondent reserves the right to provide further particulars prior to trial.
24. In answer to paragraph 24, it:
- (a) admits that the '059 Mark is deceptively similar to the FlowSmart Registration; and

(b) otherwise denies the allegations made in that paragraph.

25. In answer to paragraph 25, it:

(a) admits that the 059 Services are services of the same description as distribution of energy, electricity distribution, electricity storage; electricity supply services, the supply of electricity, and transmission of electricity;

(b) otherwise denies that paragraph.

26. It admits paragraph 26.

27. It refers to paragraph 27A below and denies paragraph 27.

27A. In further answer to paragraph 27, it says that the putative opposition under s 44 should be rejected under s 44(3)(b) on the basis that it is proper in the circumstances for the 059 Mark to be registered.

Particulars

(a) The 059 Mark was advertised for acceptance on 1 February 2018. No opposition was lodged to the 059 Mark by the then owner of the FlowSmart Registration, EnergyAustralia Pty Ltd (or any other party based on the FlowSmart Registration).

(b) The Applicant/Cross-respondent refers to and repeats particulars (b) to (e) to paragraph 23A above.

(c) The Applicant/Cross-Respondent reserves the right to provide further particulars prior to trial.

27A. In answer to paragraph 27A, it:

(a) admits that the '461 Mark is deceptively similar to the FlowSmart Registration; and

(b) otherwise denies the allegations made in that paragraph.

27B. In answer to paragraph 27B, it:

(a) admits that the following services are services of the same description as distribution of energy, electricity distribution, electricity storage; electricity supply services, the supply of electricity, and transmission of electricity:

(i) in class 35, "wholesaling of electricity";

(b) otherwise denies that paragraph.

27C. It admits paragraph 27C.

27D. It refers to paragraph 27E below and denies paragraph 27D.

27E. In further answer to paragraph 27D, it says that the putative opposition under s 44 should be rejected under s 44(3)(b) on the basis that it is proper in the circumstances for the '461 Mark to be registered.

Particulars

- (a) The '461 Mark was advertised for acceptance on 15 April 2020. No opposition was lodged to the '461 Mark by the then owner of the FlowSmart Registration, EnergyAustralia Pty Ltd (or any other party based on the FlowSmart Registration).
- (b) The Applicant/Cross-respondent refers to and repeats particulars (b) to (e) to paragraph 23A above.
- (c) The Applicant/Cross-Respondent reserves the right to provide further particulars prior to trial.

28. It denies paragraph 28.

28A. In further answer to paragraph 28, to the extent it is determined the ground of cancellation is made out in respect of either of the Cross-Respondent's Registrations, the Court ought exercise its discretion, under s 88(1) and/or s 89 of the TMA, and not cancel or remove the Cross-Respondent's Registrations, having regard to, *inter alia*, the following matters:

- (a) the Applicant's/Cross-Respondent's longstanding use of, and substantial reputation in, the mark FLOW POWER in connection with its business and the goods and services provided by the Applicant/Cross-Respondent;
- (b) the fact that prior to its alleged first use of the Flo Marks (as that term is defined in paragraph 5 of the Respondents'/Cross-Claimants' Defence dated 23 August 2024) and/or any use by it of the FlowSmart Registration, the Respondents/Cross-Claimants knew or ought to have known of the Applicant/Cross-Respondent and its use of the mark FLOW POWER in connection with its business and the goods and services provided by the Applicant/Cross-Respondent;

Particulars

- (A) The Applicant / Cross-respondent refers to and repeats the particulars to sub-paragraph (b) of paragraph 32A below.
- (B) Paragraph [75], [104] to [123] of the of the affidavit of Matthijs Jan Guichelaar affirmed on 4 December 2024 and Exhibit MJG-1 referred to therein.

- (C) The Applicant/Cross-Respondent reserves the right to provide further particulars prior to trial.
- (c) the likelihood of deception or confusion if an unauthorised person, such as the Respondents/Cross-Claimants, was now permitted to use a trade mark which is substantially identical with or deceptively similar to the Cross-Respondent's Registrations in Australia in relation to the '633 Goods or the '059 Services;
 - (d) the failure of any third party, including the Respondents/Cross-Claimants, to oppose the registration of the Cross-Respondent's Registrations;
 - (e) the fact that the Respondents / Cross-claimants claim to have first acquired rights in respect of the FlowSmart Registration on 31 October 2024, during the currency of this proceeding;
 - (f) the FlowSmart Registration is liable to be removed from the Register or cancelled on the bases set out in the Amended Statement of Claim filed concurrently with this defence and/or the application for removal for non-use.

Claim for cancellation – lack of distinctiveness

29. It denies paragraph 29.

30. It denies paragraph 30.

30A. It denies paragraph 30A.

31. It denies paragraph 31.

32. It denies paragraph 32.

32A. Further or in the alternative, to the extent it is determined the ground of cancellation is made out in respect of either of the Cross-Respondent's Registrations, the Court ought exercise its discretion, under s 88(1) of the TMA, and not cancel or remove the Cross-Respondent's Registrations, having regard to, *inter alia*, the following matters:

- (a) the Applicant's/Cross-Respondent's longstanding use of, and substantial reputation in, the mark FLOW POWER in connection with its business and the goods and services provided by the Applicant/Cross-Respondent;
- (b) the fact that prior to its alleged first use of the Flo Marks (as that term is defined in paragraph 5 of the Defence), the Respondents/Cross-Claimant knew or ought to have known of the Applicant/Cross-Respondent and its use of the mark FLOW POWER in connection with its business and the goods and services provided by the Applicant/Cross-Respondent;

Particulars

- (A) The First Respondent/Cross-Claimant filed Australian trade mark applications for the mark “Flo Energy” on 13 January 2023 (Australian Trade Mark Application Nos. 2327794 (in class 35) and 2363065 (in classes 4, 9, 37, 39, 40 and 42)) (the latter application being a divisional application of the former).
- (B) On 22 June 2023, IP Australia issued an: (i) Adverse Examination Further Report in relation to Australian Trade Mark Application No. 2327794; and (ii) an Adverse Examination Report in relation to Australian Trade Mark Application No. 2363065. Those reports cited the Applicant’s/Cross-Respondent’s Australian Trade Mark Registration Nos. 1828633 and 1895059 as impediments to registration of the First Respondent’s/Cross-Claimant’s applications under s 44 of the TMA.
- (C) The First Respondent/Cross-Claimant filed an Australian trade mark application for the mark “FLO ENERGY” on 7 June 2023 (Australian Trade Mark Application No. 2362431 in classes 35, 39, 40 and 42).
- (D) IP Australia issued an Adverse Examination Report in relation to Australian Trade Mark Application No. 2362431 on 27 July 2023. That adverse report cited the Applicant’s/Cross-Respondent’s Australian Trade Mark Registration Nos. 1828633 and 1895059 as impediments to registration under s 44 of the TMA.
- (E) On 13 December 2023, the First Respondent/Cross-Claimant caused Australian Trade Mark Application Nos. 2327794, 2363065 and 2362431 to be withdrawn.
- (F) On 27 March 2024, the Applicant/Cross-Respondent wrote to the Essential Services Commission (**ESC**) stating:
 - (i) *“Progressive Green Pty Ltd adopted the trade mark Flow Power in 2017 and the business name Flow Power was registered to Progressive Green Pty Ltd in 2020.”;*
 - (ii) *“... the presence of a retailer named Flo Energy may cause significant confusion to customers and potential customers ... given the similarity of the names Flow Power and Flo Energy.”;*

(iii) “Flow Power is a registered trade mark in Australia owned by Progressive Green Pty Ltd.”.

- (G) On 12 April 2024, the First Respondent/Cross-Claimant sent a response to the ESC acknowledging the submission made by the Applicant/Cross-Respondent to the ESC.
- (H) In the Defence, the First Respondent/Cross-Claimant alleges that it first used the Flo Marks from 30 April 2024.
- (I) Paragraph [75], [104] to [123] of the of the affidavit of Matthijs Jan Guichelaar affirmed on 4 December 2024 and Exhibit MJG-1 referred to therein.
- (J) The Applicant/Cross-Respondent reserves the right to provide further particulars prior to trial.

- (c) the likelihood of deception or confusion if an unauthorised person, such as the Respondents/Cross-Claimant, was now permitted to use a trade mark which is substantially identical with or deceptively similar to the Cross-Respondent’s Registrations in Australia in relation to the ‘633 Goods or the ‘059 Services; and
- (d) the failure of any third party, including the Respondents/Cross-Claimant, to oppose the registration of the Cross-Respondent’s Registrations.

33. It says that the First Respondent/Cross-Claimant is not entitled to the relief in the [Further Amended](#) Notice of Cross-Claim or any relief.

Date: [3 February 2025](#)~~24 December 2024~~



Signed by Caroline Ryan
Lawyer for the Applicant/Cross-Respondent

This amended pleading was prepared by Luke Merrick and Marcus Fleming.

Certificate of lawyer

I, Caroline Ryan, certify to the Court that, in relation to the Defence to Amended Cross-Claim filed on behalf of the Applicant/Cross-Respondent, 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: 3 February 2025~~24 December 2024~~



Signed by Caroline Ryan
Lawyer for the Applicant/Cross-
Respondent