

Federal Court of Australia
District Registry: Victoria
Division: General

No. VID1701 of 2025

On appeal from the Federal Court of Australia

Progressive Green Pty Ltd (ACN 130 175 343)
Appellant

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

**RESPONDENTS' OUTLINE OF SUBMISSIONS IN REPLY
ON THE NOTICE OF CONTENTION**

These submissions adopt the definitions used in the Respondents' outline of submissions on the Notice of Contention dated 30 June 2026 and the Table of Cases.

The Table of Cases has been updated to include full citations of all cases referred to in the Respondents' submissions filed to date on 30 June 2026 and 13 July 2026.

A. Overview

1. PG's claim under s 88(2)(c) failed at the first hurdle because the evidence did not establish a substantial reputation for any of PG's marks across energy users in Australia: "*a very large cohort of individual and corporate customers in the millions*": J [130]-[145], [323]-[333]. This analysis conformed with binding authority: *Berlei*, 362; *Chateau Certan*, [590]; *Dunlop*, [180]-[181]; *Renaud Cointreau*, [74]-[75]; *Cordon Bleu*, [91]; *Fry Consulting*, [121]; *Tivo*, [324]; *Urban Alley*, [269]; *Ragopika*, [22]. The PJ thus concluded that PG's marks do not have a reputation sufficient to render the use of the FlowSmart Mark likely to deceive or cause confusion. Section 89 would only arise if this correct analysis and conclusion should be overturned. It should not.
2. In any event, the case now advanced by PG under ss 88(2)(c) and 89 impermissibly resiles from its pleaded case and relies on unpleaded contentions. The Respondents objected to, and did not acquiesce in that course: *Betfair*, [49]-[58]; *Banque Commerciale*, 284, 286-288.
3. PG pleaded at ASOC [14] that since 2017 it had carried on the business of the supply and sale of electricity under the following trade marks, defined together as the **Applicant's Marks**: (a) FLOW; (b) FLOW POWER; (c) flowpower.com.au; and (d) . ASOC [15] and [16] pleaded extensive promotion and use by PG of the Applicant's Marks, and ASOC [17] pleaded that, by reason of such promotion and use, PG has developed a "*valuable reputation and substantial goodwill*" in the Applicant's Marks (including FLOW); unsurprisingly, as the cases are replete with references to "substantial" and "significant" (*Renaud Cointreau*, [74]-[75]; *Cordon Bleu*, [91]; *Urban Alley*, [269]); *Fry Consulting*, [121]; *Monster*, [154]; *Ragopika*, [22]).
4. ASOC [18] identified the normal and fair use of the FlowSmart Mark as including use by Flo Holding and use on the floenergy.com.au website. ASOC [19] pleaded that, by reason of the matters in [14] to [18], because of the circumstances applying at the time of application for rectification, use of the FlowSmart Mark would be likely to cause confusion within the meaning of s 88(2)(c). PG did not plead any other circumstances to support this conclusion.
5. As such, PG's use of and claimed reputation in FLOW was central to its pleaded case under s 88(2)(c).¹ The Court must reject PG's complaint that "*reliance on FLOW is a distraction*".
6. Also, PG does not challenge the PJ's findings that (1) PG's adoption of FLOW was not honest; (2) PG adopted FLOW POWER and FLOW at roughly the same time, and sought to deploy them both for branding purposes; (3) PG sought to develop its reputation in FLOW rather than FLOW POWER and used FLOW as its "*primary branding tool*"; and (4) PG's use of FLOW infringed the FlowSmart Mark: J [71]-[74], [127]-[129], [468].

¹ See also Pt C tab 82, AB3690 - [8], AB3706 - [68], AB3707-8 - [75], [76], AB3710 - [83(a)].

7. Given that PG's pleaded case to cancel the FlowSmart Mark included reliance on its infringing use of FLOW, there is nothing inaccurate in characterising PG as a "*misappropriating user*" or "*assiduous infringer*": cf PG's outline of submissions in answer on the Notice of Contention (ASNC) [3]. It is precisely that type of conduct by an applicant for rectification which was criticised in *Re Bali* at 133, *Riv-Oland* at 574, 598-9, *Murray Goulburn* at 384, 388-9, 401 and recently by the High Court in *Taylor* at [135]-[164].
 8. ASNC [4]-[5] propound a false case that PG's use of FLOW POWER was "*extensive . . . in contrast with its modest use of FLOW*". This is untenable in light of the PJ's unchallenged findings that PG sought to develop its reputation in FLOW rather than FLOW POWER and used FLOW as its "*key branding concept*" and "*primary branding tool*": J [74].
 9. ASNC [6]-[8] wrongly seek to cast the Respondents as the "*usurper*". That ignores the fact that PG itself entered the market in March 2017 with not only FLOW POWER but also FLOW, less than 2 years after the FlowSmart Mark was still in use by EnergyAustralia, in the face of legal advice that FLOW might infringe that prior registered mark: J [128]-[129]. In truth, PG was the "*usurper*" by infringing EnergyAustralia's prior rights in the FlowSmart Mark. Those prior rights were lawfully assigned to the Respondents pursuant to s 106 of the TMA. Whatever "*cavalier disregard*" the Respondents may have had for PG's concerns, those concerns were trumped by lawfully acquiring, for good consideration, a registered trade mark with superior priority. See *E & J Gallo*, [60]-[65] and *Electrolux CA* as cited there.
 10. At ASNC [8], [16], [26] PG seeks to delegitimise the FlowSmart Mark as a "*dormant*" registration. The legislation does not recognise any such category of registered trade marks. They are either registered or not. Parliament has provided a detailed and orderly procedure in Part 9 of the TMA whereby any person may apply to the Registrar for removal of a mark not used for 3 years. That course was wide open to PG from at least **April 2018**, but not taken until **3 December 2024**. Even that was over **4 months** after it was put on notice on 19 July 2024 that the Respondents would rely on the FlowSmart Mark in their cross-claim: J [95], [267], [276].
 11. ASNC [1], [9] and [19] wrongly contend that the honesty of PG's adoption and use of FLOW POWER is no longer challenged – it is explicitly challenged in NOC [2(b)(vi)]. NOC [5] referred to discretion under s 88 and was abandoned in light of the High Court's subsequent ruling in *Taylor* at [219], [6] and [114] that the discretion not to cancel a trade mark arises only under s 89, not s 88. The Respondents maintain their case under s 89 in NOC [2].
- B. NOC Ground 2 - discretion not to cancel the FlowSmart Registration**
12. **NOC 2(a) grounds relied upon by PG:** The discretion in s 89 only arises "*if the registered owner of the trade mark satisfies the court that **the ground relied on by the applicant** has not arisen through any act or fault of the registered owner.*" As noted above, ASOC [14]-

[18] set out all the circumstances relied on by PG for its ground of cancellation under s 88(2)(c). The only acts of the Respondents referred to therein that related to the registered owner were that the normal and fair use of the registered FlowSmart Mark included use by Flo Holding and use on the floenergy.com.au website. PG did not plead any of the circumstances it seeks to rely on in ASNC [15]-[16]. The Respondents objected to and did not acquiesce in this departure from PG’s pleaded case in oral and written submissions:² cf *Betfair*, [51]; *Ingot*, [424].

13. In any event, contrary to ASNC [15], at the date of application for rectification, the FlowSmart Mark was not abandoned; rather, it was being used by its registered owner. PG’s allegation that EnergyAustralia abandoned the FlowSmart Mark was explicitly rejected by the PJ and that finding has not been challenged: J [449].³ To the extent any “*abandonment*” gave rise to the application, that circumstance had ceased to exist: TMR reg 8.2(b).
14. Contrary to ASNC [16], the PJ did not find the Respondents’ acquisition of the FlowSmart Mark was “*sharp*”. That comment referred to their adoption of FLO ENERGY and FLO in Australia (indeed, PG accepts as much in particular (d) to ground 5 of the NOA). Rather, in the very same paragraph (J [456]), her Honour found “*There was **nothing improper** about the acquisition and deployment of the FlowSmart Mark*” (emphasis added): see also *Electrolux*, 132-133; *Electrolux CA*, 36-37, 41-42. PG does not challenge that finding.
15. ASNC [16] continues the delegitimisation of the FlowSmart Registration as “*dormant*”. In essence, PG seeks to invoke ss 88 and 89 to cover its failure to apply earlier for removal for non-use under s 92. Applying the reasoning of Dawson and Toohey JJ in *Murray Goulburn* at 412 to the current legislation, “*the presence of [s 92] would, upon the ordinary canons of construction, exclude non-use as ground of disqualification under [ss 88-89].*”
16. **NOC 2(b) PG’s assiduous infringement:** As set out in [6]-[7] above, PG is appropriately characterised as an assiduous infringer. ASNC [18]-[24] perpetuate PG’s attempt to airbrush out the PJ’s findings that it used the infringing mark FLOW as its “*primary branding tool*”.
17. ASNC [22] relies on the comment at J [129] that Mr van der Linden and therefore PG “*may have **subjectively** believed the use of FLOW would not be infringing*”, yet that sentence proceeded to consider “*the risk that it **objectively** took in proceeding in the face of the solicitor’s advice meant that the adoption of FLOW was relevantly not honest in the sense explained in Firstmac FC.*” (emphasis added).
18. ASNC [23] seeks to downplay the findings at J [71]-[73] as appearing under a heading “*Intended future use*”, but the key findings relied upon by the Respondents relate to what PG “*has*” done prior to the litigation – the time relevant to ss 88 and 89. PG also ignores that the

² Pt C tab 79, AB3624 - [76]; tab 73, AB3436-7 - T100.27-T101.42; tab 83 (**RCSXC**), AB3771-3 - [252]-[259].

³ See also Pt C tab 22.2, AB1690.

PJ rejected PG’s contention that its use of FLOW POWER has “*evolved*” over time to become FLOW, and found “[t]hat contention stands in contrast to the use of FLOW alone as a tagline on its website from 2017” (J [127]). Recourse to J [323]-[331] does not assist PG; that was where the PJ found no sufficient reputation in *any* of PG’s marks: J [332]. It does not detract from her Honour’s findings that PG’s use of FLOW was infringing.

19. It follows that it is no mischaracterisation of the PJ’s findings to say that PG’s use of FLOW POWER was indeed “*inextricably tied up*” with its infringing use of FLOW: cf ASNC [24]. ASNC [24] also ignores PG’s own admission that each of the Applicant’s Marks is deceptively similar to FlowSmart.⁴
20. ASNC [25] wrongly characterises the PJ’s decision that PG’s adoption of FLOW was dishonest as being based on “*mere knowledge*” of the prior FlowSmart Mark. In addition to such “*mere knowledge*”, the PJ’s decision was based on PG’s legal advice which was “*clearly to the effect that FLOW might infringe the FlowSmart Mark and that there was a higher risk involved in using FLOW as a trade mark.*”: J [128]. *Firstmac HC* does not undermine that finding. The High Court did not rule that dishonesty is only assessed subjectively. On the contrary, at [57] it stated that “[t]he standard of dishonesty is assessed by ‘the standards of ordinary, decent people’ and not, as a ‘Robin Hood test’, by reference to the subjective standard of honesty held by the person alleged to have been dishonest.” (See also [5]).
21. ASNC [26] refers to the FlowSmart Mark as a “*disused mark*”. By the time of PG’s application under s 88(2)(c) it was not disused; PG’s own pleading on infringement was that the Respondents had been using the FlowSmart Mark: ASOC [5A]. Again, this is an attempt to invoke ss 88 and 89 to cover PG’s persistent failure to apply earlier for removal for non-use under s 92. PG’s submission ignores the public interest reflected in ss 20 and 106 that registered trade marks ought be protected as personal property which may be assigned for value (see also *Campomar*, [42]). PG’s submission also ignores the public interest in preserving the orderly and detailed process for removing unused marks as provided by Part 9: *Murray Goulburn*, 412.
22. ASNC [27]-[28] ignores the PJ’s findings that the Respondents’ use of the FlowSmart Mark was not only related to this litigation: J [281].
23. Even were PG’s pleaded ground under s 88(2)(c) made out, which it is not, none of the matters in ASNC [11]-[29] would justify cancellation of the FlowSmart Mark under ss 88 and 89.

C. NOC Ground 4 – Section 44(3)(b)

24. **NOC 4(a) PG’s failure to plead honest adoption:** PG’s Defence to the FACC at [23A] included extensive particulars to support its case under s 44(3)(b) including (a) no opposition

⁴ Pt A tab 9 (PG’s Defence to the FACC), AB46 – [15].

was lodged, (b) it has used and developed an “*extensive reputation*” in the FLOW POWER mark, (c) Flo acquired the FlowSmart registration during the currency of the proceeding, (d) EnergyAustralia did not raise any objection to PG’s use of FLOW POWER and (e) the FlowSmart Registration is liable to be removed or cancelled. Honesty of adoption was a fact that PG was required to affirmatively establish: *Firstmac HC*, [5], [55], [62].

25. Such a positive assertion must be pleaded. It was not for the Respondents to guess that PG might try to deploy alleged honesty of use in addition to its pleaded grounds. As submitted above, the Respondents objected to and did not acquiesce in this unpleaded point in written and oral opening and closing submissions.⁵ Under cover of those objections, the Respondents addressed this issue in cross-examination and submissions, as a precaution against the risk that PG would not be held to its pleaded case (cf ASNC [32]) and to test the credibility of Mr van der Linden (see *RCSXC*, [260]).
26. Contrary to ASNC [33], as set out in [11] above, the Respondents challenge the PJ’s finding that PG’s adoption and use of FLOW POWER was honest in NOC [2(b)(vi)]. For the reasons set out in the Respondents’ outline of submissions in relation to the Notice of Contention at [26]-[33] and the Respondents’ outline of submissions in relation to the Notice of Appeal [1]-[4], [12]-[14], PG’s adoption and use of FLOW, FLOW POWER and FLOW POWER Logo was not relevantly honest.
27. **NOC 4(b) correct date for determining s 44(3)(b):** The High Court has long held that the rights of the parties to an opposition are to be determined as at the date of the application for registration: *Southern Cross*, 595; *Campomar*, [83]-[86]. This is consistent with the statutory scheme whereby registration is deemed to backdate to the application date: TMA s 72(1); *Shell v Rohm*, 620. *Firstmac HC* held at [56] (citing *McCormick*, [31]) that “*the time of the application for registration determines the time for the operation of s 44(3)*”. To the extent *Trident FC* and *Bendigo FC* contradict these High Court authorities, they ought not be followed.
28. *McCormick*, [31] established that s 44(3)(a) is to be considered at the priority date. Contrary to ASNC [35], there is nothing in the text of s 44(3)(b) that suggests it should be applied at a different point in time to s 44(3)(a). Both subsections refer to the satisfaction of the Registrar at the same time. It follows that it is PG, not the Respondents, that contends for a construction of s 44(3)(b) that is contrary to the language and purpose of the section.

Date: 20 July 2026

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⁵ Pt C tab 79, AB3624 - [76]-[77]; tab 83, AB3771-3 - [252]-[259]; tab 73, AB3436-7 - T100.44-101.33; T119.19-47.