



Notice of appeal

No VID of 2025

Federal Court of Australia
District Registry: Victoria
Division: General

On appeal from the Federal Court

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

Appellant

Flo Energy Australia Pty Ltd (ACN 664 209 330) and another named in the schedule

Respondents

To the Respondents

The Appellant appeals from the judgment as set out in this notice of appeal.

1. The papers in the appeal will be settled and prepared in accordance with the Federal Court Rules Division 36.5.
2. The Court will make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence. You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing	
Place	Commonwealth Law Courts, 305 William Street, Melbourne VIC

Date:

.....
Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party)	Progressive Green Pty Ltd t/a Flow Power, Appellant		
Prepared by (name of person/lawyer)	Emma Lee-Anne Iles		
Law firm (if applicable)	Herbert Smith Freehills Kramer		
Tel	+61 3 9288 1625	Fax	+61 3 9288 1567
Email	emma.iles@hsfkramer.com		
Address for service (include state and postcode)	Level 24, 80 Collins St, Melbourne VIC 3000		



The Appellant appeals from orders 2 to 8 of the Federal Court of Australia (Bennett J) made on 24 November 2025 in Melbourne in Proceeding No. VID 659 of 2024 (the **Orders**).

Grounds of appeal

In this notice of appeal, the defined terms set out in *Progressive Green Pty Ltd v Flo Energy Pty Ltd* [2025] FCA 1315 (J) are adopted unless indicated to the contrary. Paragraph references to the J are not intended to be exhaustive.

Removal or cancellation of the FlowSmart Mark

1. The primary judge erred at J [14(1)(a)], [321], [342], [427] and [475] in dismissing the application to have the FlowSmart Mark removed for non-use pursuant to s 92 of the *Trade Marks Act* 1995 (Cth).

Particulars

- (a) The primary judge erred at J [274], [276], [278]-[282] in finding that the First Respondent had used the FlowSmart Mark in the Non-Use Period in *good faith* within the meaning of s 92(4)(b) of the Act. Any use that was undertaken by the First Respondent was for the ulterior purpose of advancing the Respondents' position in this litigation rather than for any ordinary or genuine commercial purpose.
- (b) The primary judge erred at J [318] and [319] in finding that any relevant use by the First Respondent of the FlowSmart Mark was *authorised* use by the registered owner of the FlowSmart Mark within the meaning of s 8 of the Act, including given that:
 - (i) during the relevant period of use, the registered owner of the FlowSmart Mark was a Dutch company named **Bruutzak** Holding B.V.;
 - (ii) Bruutzak did not exercise quality, financial or any other relevant form of control over the use of the FlowSmart Mark by the First Respondent (see J [309] and [311]);
 - (iii) there was no finding that any unity of purpose existed between Bruutzak and the First Respondent and there was no basis to make any such finding (see J [320]).
2. The primary judge erred at J [14(1)(b)] and [339]-[342] in dismissing the application for cancellation of the FlowSmart Mark pursuant to s 88(2)(c) of the Act.



Particulars

- (a) It was admitted by the Respondents that the FlowSmart Mark is deceptively similar to the relevant Registered Flow Power Mark (Registration No. 1842461).¹ That admission carried with it an admission that the use of the FlowSmart Mark is likely to deceive or cause confusion (see s 10 of the Act). The primary judge erred by failing to have any regard to this admission in her determination of the application for cancellation under s 88(2)(c) (see J [334]-[338]).
- (b) The primary judge correctly found at J [96] (and see also [222], [326(3)], [327] and [448]) that the FlowSmart mark was not in use between 2015 and 2024 and at J [325] (and see also [335]) that any reputation in the FlowSmart Mark was “negligible”.
- (c) The primary judge erred at J [14(1(b))], [326(1)], [338], [453] and [455] in finding that the Appellant’s use of the Flow Power Marks was insufficient to found its claim for cancellation under s 88(2)(c).
- (d) The primary judge erred at J [330] (and see also [326], [332], [333] and [336]) in requiring the Appellant to establish a “substantial reputation among a substantial section of the consumers of electricity and energy related products and services in the Australian electricity and energy market” in order to found its claim for cancellation under s 88(2)(c) (and see also J [38], [67], [133], [134], [137], [140]–[145] and [455]).

Cancellation of the Flow Power Marks

- 3. The primary judge erred at J [14(4)(a)] and [421] in finding that the Flow Power Marks are liable to be cancelled pursuant to ss 88(2)(a) and 41 of the Act.

Particulars

- (a) The primary judge should have found that, at the time they were applied for, the Registered Flow Power Marks were capable of distinguishing the services in respect of which they were registered, so that no ground of opposition under s 41 of the Act arose having regard to s 41(2) of the Act.
- (b) In particular, the primary judge erred in finding that, at the time they were applied for, the Registered Flow Power Marks were not sufficiently inherently adapted to distinguish the services in respect of which they were registered (see J [381]-[382], [384]-[389], [392]-[393]), and were only “faintly adapted to distinguish” (see J [404], [411]).

¹ Amended Statement of Claim dated 24 December 2024, [8B], Amended Defence dated 16 January 2025, [8B]



- (c) Further, to the extent that s 41(4) arose for consideration, the primary judge erred:
- (i) in finding that, at the time they were applied for, the Registered Flow Power Marks did not and would not distinguish the services in respect of which they were registered having regard to the extent to which the marks were inherently adapted to distinguish and the intended use of those marks by the Appellant in light of the evidence adduced at trial (see J [14(4)(a)], [382], [384] – [386], [388], [389], [393], [402], [404], [411], [415] and [421]);
 - (ii) in requiring the Appellant to have established a “substantial reputation among electricity consumers” in order to satisfy the requirement of s 41(4) (see J [415] – [416]).

4. The primary judge erred at J [14(4)(b)] in finding that the Registered Flow Power Marks are liable to be cancelled pursuant to ss 88(2)(a) and 44 of the Act.

Particulars

The primary judge erred:

- (a) at J [452] in finding that in order to satisfy s 44(3)(b) of the Act, it was necessary for the Appellant to establish “a significant reputation in the market”;
- (b) in finding it not proper to accept the Registered Flow Power Marks for registration under s 44(3)(b) of the Act in light of the other circumstances relied upon by the Appellant, including:
 - (i) the honesty of the Appellant’s adoption of the Flow Power Marks (J [126] and [452]);
 - (ii) the extent and nature of the Appellant’s use of the Registered Flow Power Marks (J [446] – [447] and [452]);
 - (iii) the circumstances of the acquisition of the FlowSmart Mark by Bruutzak and its use by the First Respondent (J [442] – [445]);
 - (iv) the fact that the FlowSmart Mark was not in use between 2015 and 2024 (J [96] and see also [222], [326(3)], [327] and [448]) and that any reputation in the FlowSmart Mark was “negligible” (J [325] and see also [335]);
 - (v) the lack of opposition to the Registered Flow Power Marks (J [440]);
- (c) upholding any ground of cancellation based on the FlowSmart Mark in circumstances where the FlowSmart Mark should be removed or cancelled.



5. The primary judge erred at J [14(4)(c)], [422]–[424] and [453]–[460] in declining to exercise her discretion not to cancel the Registered Flow Power Marks.

Particulars

The primary judge erred in her exercise of discretion including by:

- (a) failing to give any, or sufficient, weight to the matters referred to in particulars 4(a) and (b) of ground 4 to this notice of appeal;
- (b) failing to give sufficient weight to the inconvenience that would be caused to the Appellant if its Registered Flow Power Marks are cancelled (see J [423]);
- (c) characterising the conduct of the Appellant as infringing conduct, when it was not (see J [457], but compare [465]);
- (d) failing to give any, or sufficient, weight to the fact that the Respondents had engaged in “sharp” conduct (see J [456]) in their adoption of the marks FLO ENERGY and FLO in Australia;
- (e) exercising the discretion on the basis that the FlowSmart Mark should remain on the Register (see J [422(4)]) when it ought to be cancelled or removed on the basis of grounds 1 or 2 above.

Defence of honest concurrent use (s 122(1)(fa))

6. The primary judge erred at J [14(4) and (6)] and [471]–[473] in finding that the Appellant had not established the defence of honest concurrent use under s 122(1)(fa) of the Act in respect of the mark FLOW POWER.

Particulars

- (a) The primary judge correctly found at J [126] that the Appellant acted honestly in adopting the FLOW POWER mark.
 - (b) The primary judge erred by failing to give any, or sufficient, weight to the extent and nature of the Appellant’s concurrent use of the Registered Flow Power Marks (J [472]).
 - (c) The primary judge otherwise erred by failing to consider the other factors relevant to honest concurrent use, including: the degree of confusion likely to ensue, the absence of any instances of actual confusion and the relevant inconvenience that would ensue to the parties if registration were to be permitted.
7. The primary judge erred at J [14(7)] in finding that the Appellant had not established the defence of honest concurrent use under s 122(1)(fa) of the Act in respect of any infringement of the FlowSmart Mark by the use of the mark FLOW.



Particulars

- (a) The primary judge erred at J [114] and [127]–[129] in assessing the Appellant's honesty *objectively* (relying on the Full Court's decision in ***Firstmac Limited v Zip Co Limited*** (2025) 184 IPR 458). The correct approach is to assess honesty *subjectively*. *Firstmac* is the subject of a grant of special leave to appeal to the High Court (proceeding S140/2025) and the appeal is expected to be heard in early 2026.

Injunctive relief

8. Further or in the alternative, in light the primary judge's findings that (at J [404]) the mark FLOW POWER is "... in many respects descriptive of what is sold by electricity companies ..." such that other traders may have a legitimate interest in "... identifying or describing their services or goods in those terms ...", the primary judge erred in granting a permanent injunction (Order 5 of the Orders) restraining the Appellant from engaging in that conduct.

Orders sought

1. The appeal be allowed.
2. Orders 2 to 8 made by the Federal Court on 24 November 2025 be set aside.
3. Declarations in accordance with the form sought in [1], [1A] and [4A] of the Amended Originating Application dated 24 December 2024 (**OA**).
4. An order that Australian registered trade mark 1553374 for FlowSmart in class 39 be cancelled or removed from the Register of Trade Marks.
5. Injunctions in accordance with the form sought in [2] and [2A] of the OA.
6. An order that the Respondents pay the Appellant's costs of the appeal and of the proceeding at first instance.
7. Such further or other orders or relief as the Court thinks fit.

Appellant's address

The Appellant's address for service is:

Place: Herbert Smith Freehills Kramer, Level 24, 80 Collins St, Melbourne VIC 3000

Email: emma.iles@hsfkramer.com

The Appellant's address is 109–113 Burwood Road, Hawthorn, Victoria, 3122.



Service on the Respondents

It is intended to serve this application on all Respondents.

Date: 22 December 2025

A handwritten signature in blue ink, appearing to read "E. Iles", is written above a horizontal line.

Signed by Emma Lee-Anne Iles
Lawyer for the Appellant

Schedule

No VID

of 2025



Federal Court of Australia
District Registry: Victoria
Division: General

Respondents

Second Respondent: Flo Holding Pte Ltd

Date: 22 December 2025