



Form 124
Rule 36.24

Notice of contention

Federal Court of Australia
District Registry: Victoria
Division: General

No. VID1701 of 2025

On appeal from the Federal Court

Progressive Green Pty Ltd (ACN 130 175 343)

Appellant

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

Respondents

To the Appellant

The Respondents contend that the judgment of the Court should be affirmed on grounds other than those relied on by the Court.

Grounds relied on

In this notice of contention, 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.

1. The primary judge correctly found the application to have the FlowSmart Mark removed for non-use pursuant to s 92 of the *Trade Marks Act 1995* (Cth) should be dismissed, however, the application should also have been dismissed by reason of the following additional matters:
 - (a) the primary judge ought to have found at J [257] to [259] that the FlowSmart Mark was used in the Non-Use Period by way of a course of trade including email correspondence with a prospective customer from 11 October 2024 to 11 November 2024: at J [109]-[112], [255];

Filed on behalf of	The Respondents
Prepared by	Siabon Seet
Law firm	Gilbert + Tobin
Tel	(02) 9263 4000
Email	sseet@gtlaw.com.au
Address for service	Level 35, Tower Two, International Towers Sydney, 200 Barangaroo Avenue, Barangaroo, NSW 2000
	Fax (02) 9263 4111

- (b) if, contrary to the primary judge's findings at J [318] the Licence Agreement did not confer control over the use of the FlowSmart Mark, there was nonetheless control by Bruutzak over the use of the FlowSmart Mark by Flo Energy Australia within the meaning of s 8 of the Act.

Particulars

- (i) Mr Guichelaar was the sole director of Bruutzak and director and CEO of Flo Energy Australia.
 - (ii) Mr Guichelaar was the person responsible for the use of the FlowSmart Mark by Flo Energy Australia.
 - (iii) There was a unity of purpose between Bruutzak and Flo Energy Australia.
2. If, contrary to the findings of the primary judge at J [338]-[339], the Court finds the Appellant can establish the use of the FlowSmart Mark is likely to deceive or cause confusion in the electricity market in Australia within the meaning of s 88(2)(c), the Court should nonetheless exercise its discretion under ss 88(1) and/or 89 not to grant the application for rectification as:
- (a) the grounds relied upon by the Appellant have not arisen through any act or fault of the Respondent or any previous owner of the FlowSmart registration within the meaning of s 89(1)(c);

Particulars

- (i) Each of the matters specified in the Amended Statement of Claim at [14]-[18] refer to acts by the Appellant itself and not any act or fault of any owner of the FlowSmart registration;
- (b) removing the FlowSmart registration would reward the assiduous efforts of a misappropriating user, and would place a premium on those efforts.

Particulars

- (i) The FlowSmart registration has been registered since 30 April 2013.
- (ii) The prior FlowSmart registration was brought to the Appellant's attention by its solicitor on 27 February 2017.
- (iii) Before the Appellant proceeded with the launch of its rebrand on 10 March 2017, it had received advice from its solicitor:

- a. that there was a risk of infringing the prior FlowSmart registration if it used FLOW POWER, and that risk would be increased if it used FLOW alone;
 - b. that it should avoid using FLOW alone as a trade mark.
- (iv) Despite receiving this advice, the Appellant proceeded in March 2017 to use FLOW alone as a brand for its electricity.
- (v) Even when the Appellant used the combined phrase FLOW POWER, it emphasised the word FLOW and de-emphasised the descriptive word POWER, for example in its logo, in which FLOW is rendered in fancy script while POWER is rendered in plain script in font many times smaller than FLOW:



- (vi) In such circumstances, the Appellant's adoption and use of FLOW, FLOW POWER and the FLOW POWER logo was not relevantly honest: cf J [124].
- (vii) The Appellant admits that the trade marks FLOW, FLOW POWER and the FLOW POWER Logo are deceptively similar to the FlowSmart registration.
- (viii) The First Respondent has used the FlowSmart registration since at least 31 October 2024.
- (ix) The Appellant took no step to challenge, remove or cancel the prior FlowSmart registration until it filed its application for removal under s 92 on 3 December 2024 and its Amended Originating Application and Amended Statement of Claim on 24 December 2024.
- (x) The public interest will not be adversely affected if the FlowSmart registration remains on the Register.
- (xi) A public interest that favours the exercise of the discretion not to cancel the FlowSmart registration is the interest of traders in protecting their valuable property rights against infringement and not rewarding infringers by allowing them to take advantage of their wrongdoing.
- (xii) The cancellation of the FlowSmart registration would not be in the interest of the Respondents and would greatly inconvenience them.

- (xiii) Any adverse effect on the Appellant in the application of the discretion in favour of the FlowSmart registration remaining on the Register would be as a result of the Appellant's own conduct.

3. The primary judge correctly found at J [14(4)(a)] and [421] that the Registered Flow Power Marks should be cancelled pursuant to s 88(1)(a) on the grounds set out in ss 88(2)(a) and 41, however, the primary judge ought to have found that the Registered Flow Power Marks were not to any extent inherently adapted to distinguish: cf J [391].

Particulars

- (i) Having found that other traders, actuated only by proper motives, would desire to, and did in fact, use the words in similar formulations to FLOW POWER 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, the primary judge ought to have found the Registered Flow Power Marks were not to any extent inherently adapted to distinguish the goods and services of the Appellant.
4. The primary judge correctly found at J [14(4)(b)] and [452] that it was not appropriate to exercise her discretion to retain the Registered Flow Power Marks under s 44(3)(b) in the context of an application for cancellation under ss 88(1) and (2)(a), however:
 - (a) the primary judge ought to have found the Appellant did not plead or particularise that its adoption and use of the Flow Power Marks was honest in relation to its defence to the claim for cancellation under s 88(1)(a) pursuant to ss 88(2)(a) and 44 (see J [450]-[452]);
 - (b) in any event, the correct date for determining s 44(3)(b) in the context of an application for cancellation under ss 88(1) and (2)(a) is the priority date of the Registered Flow Power Marks rather than the date on which the discretion is exercised, such that the Appellant could not rely on events that occurred after the priority date including its subsequent use of the Flow Power Marks, the fact that no opposition was lodged, the Respondents' acquisition of the FlowSmart Mark or any lack of use of the FlowSmart Mark (cf J [181], [439]).
 5. The primary judge correctly found at J [460] that it was not appropriate to exercise her discretion under s 88(1) to retain the Registered Flow Power Marks, however the primary judge ought to have found the Appellant could not rely on its use of the Registered Flow Power Marks as that use was not honest (cf J [124]-[126], [458]).

Particulars

- (i) The Respondents refer to and repeat the particulars to ground 2 (b) above.
6. If the Court upholds the appeal in relation to the cancellation of the '461 Mark pursuant to s 88(1)(a) on the grounds set out in ss 88(2)(a) and 41, the '461 Mark should nonetheless be cancelled in its entirety pursuant to s 88(1)(a) on the grounds set out in ss 88(2)(a) and 44.

Particulars

- (i) The primary judge correctly found the '461 Mark should be cancelled pursuant to s 88(1)(a) on the grounds set out in ss 88(2)(a) and 44 in respect of classes 35, 37 and 39.
- (ii) The primary judge erred at J [433]-[434] and [459] in finding, in obiter, that classes 36, 40 and 42 of the '461 Mark should not be cancelled pursuant to s 88(1)(a) on the grounds set out in ss 88(2)(a) and 44 on the basis that the registration in those classes were not sufficiently related to the services for which the FlowSmart Mark was registered.
- (iii) In the alternative, the primary judge ought to have found that the '461 Mark should have been cancelled in its entirety once a ground of opposition under s 44 having been made out in respect of classes 35, 37 and 39.

Date: 3 February 2026



.....
Signed by Siabon Seet
Lawyer for the Respondents

Schedule

Federal Court of Australia
District Registry: Victoria
Division: General

No. VID1701 of 2025

Respondents

Second Respondent: Flo Holding Pte. Ltd. (UEN 202006024R)

Date: 3 February 2026