



Form 17
Rule 8.05(1)(a)

Amended Statement of Claim

Amended pursuant to orders made by Moshinsky J on 12 December 2024

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

The parties

1. The Applicant (**Flow Power**) is and has been at all material times incorporated in Australia.
2. The First Respondent (**Flo Energy Australia**) is and has been at all material times incorporated in Australia.
3. The Second Respondent (**Flo Holding**) is and has been at all material times:
 - (a) the owner of 100% of the shares in Flo Energy Australia; and
 - (b) incorporated in the Republic of Singapore.

Flow Power's Trade Marks

4. Flow Power is, and has been with effect from the priority dates set out below, the registered owner of the following Australian registered trade marks (**Flow Power Marks**) in respect of the goods and services set out below:

AU TM No.	Date	Trade Mark	Classes
1828633	6 March 2017	FLOW POWER (word)	4

Filed on behalf of (name & role of party) Progressive Green Pty Ltd t/a Flow Power, the Applicant
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(include state and postcode)

AU TM No.	Date	Trade Mark	Classes
1895059	4 May 2017	FLOW POWER (word)	35

4A. Flow Power is, and has been with effect from the priority date set out below, the registered owner of the following Australian registered trade mark in respect of the services set out below:

<u>AU TM No.</u>	<u>Date</u>	<u>Trade Mark</u>	<u>Classes</u>
<u>1842461</u>	<u>4 May 2017</u>	<u>FLOW POWER (word)</u>	<u>35, 36, 37, 39, 40, 42</u>

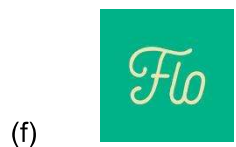
The Respondents' conduct – Flo Energy Marks

5. From a date unknown to Flow Power, and without its licence or authorisation, the Respondents have advertised and promoted and threatened to advertise, promote, provide, offer for sale and/or sell, to consumers, businesses and industry in Australia:

- (a) electricity; and/or
- (b) retail electricity services,

under and by reference to the following trade marks (collectively, the **Flo Energy Marks**):

- (c) FLO;
- (d) FLO ENERGY;
- (e) floenergy.com.au;



Particulars

- (i) On the dates below, Flo Energy Australia filed the following Australian Trade Mark Applications:

AU TM No.	Date	Trade Mark	Classes
2327794	13 January 2023	Flo Energy (word)	35
2363065	13 January 2023	Flo Energy (word)	4, 9, 37, 39, 40, 42
2362431	7 June 2023	FLO ENERGY (word)	35, 39, 40, 42

Each of these Applications was subsequently withdrawn by Flo Energy Australia on 13 December 2023.

- (ii) On the dates below, Flo Holding filed the following Australian Trade Mark Application (**Flo Logo Application**):

AU TM No.	Date	Trade Mark	Classes
2412950	11 December 2023		35

As at the date of the Application filed herein, the status of the Flo Logo Application is “*Published: Under examination – Deferred*”.

- (iii) On or about 2 November 2023, Flo Energy Australia applied to the Australian Energy Regulator (**AER**) for an electricity retailer authorisation under s 92 of the National Energy Retail Law. That application states, inter alia, that “*Flo Energy Australia intends to retail electricity to Residential, SME and C&I customers in Australia*”.
- (iv) On or about 29 November 2023, Flo Energy Australia submitted an application to the Essential Services Commission (**ESC**) for a retail licence for the sale of electricity in Australia.
- (v) A letter from Flo Energy Australia to ESC dated 12 April 2024 in response to the submission provided to ESC by Flow Power stated: “*Flo Energy Australia will be focused on providing business and residential customers with the opportunity to obtain renewable energy at an affordable price...*” and “*Our proposed electricity products are currently not available in the Australian / Victorian market*”.
- (vi) On 30 April 2024, the ESC issued an Electricity retail licence to Flo Energy Australia.
- (vii) On 16 May 2024, the AER approved Flo Energy Australia’s application for an electricity retailer authorisation under s 92 of the National Energy Retail Law.
- (viii) Flo Energy Australia is the owner of the following Australian domains: ‘floenergy.com.au’, ‘flowenergy.au’, ‘floenergy.au’, ‘flopower.com.au’ and ‘flo-infra.com.au’. As at the date of the application filed herein, the website at the ‘floenergy.com.au’ domain appears with the following content:



- (ix) On a date unknown to Flow Power, but prior to 13 February 2024, Flo Energy Australia created a Facebook page at www.facebook.com/floenergyau. The Flo Energy Australia Facebook page describes Flo Energy Australia as a “Public utility company” and includes the following content:



- (x) On a date unknown to Flow Power, but prior to the filing of this Application, Flo Holding created a LinkedIn account with the handle 'floenergyglobal'. The Flo Holding LinkedIn page includes the following content:



- (xi) On a date unknown to Flow Power, but prior to the filing of this Application, Flo Energy Australia created an Instagram account with the handle 'floenergyau'.
- (xii) On a date unknown to Flow Power, but in or around March 2024, Flo Energy Australia created an X account with the handle '@floenergyau'.
- (xiii) Further particulars may be provided prior to trial.

The Respondents' conduct – FlowSmart

5A. From a date unknown to Flow Power, and without its licence or authorisation, the Respondents have provided in Australia an online portal that allows customers to view, track and analyse their energy usage and payments, make payments and manage contracts, under and by reference to the trade mark FlowSmart.

Particulars

- (i) <https://floenergy.com.au/support/dashboard-guide>.
- (ii) Paragraphs [110] to [123] and Exhibit MJG-1 of the affidavit of Matthijs Jan Guichelaar affirmed on 4 December 2024.
- (iii) Further particulars may be provided prior to trial.

Trade mark infringement – Flo Energy Marks

6. By reason of the matters in the above paragraph, the Respondents have used, and further or alternatively threaten and intend to use, each of the Flo Energy Marks as a trade mark in Australia in respect of:

- (a) *"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”, as specified in class 4 of Flow Power’s trade mark no. 1828633; and

(b) “Retailing of electricity”, as specified in class 35 of Flow Power’s trade mark no. 1895059.

7. Each of the Flo Energy Marks is ~~substantially identical with or~~ deceptively similar to the Flow Power Marks.
8. By reason of the matters set out above, the Respondents have infringed, and further or alternatively threaten to infringe, the Flow Power Marks pursuant to s 120(1) of the *Trade Marks Act 1995* (Cth).

Trade mark infringement – FlowSmart

8A. By reason of the matters in the above paragraph 5A, the Respondents have used, and further or alternatively threaten and intend to use, the sign FlowSmart as a trade mark in Australia in respect of:

- (a) “business advisory services relating to the supply, acquisition and management of electricity; collection of data regarding energy usage; pricing analysis; cost price analysis associated with electricity usage; analysis of energy usage for businesses”, as specified in class 35 of Flow Power’s trade mark no. 1842461;
- (b) “information services relating to the supply of electricity”, as specified in class 39 of Flow Power’s trade mark no. 1842461;
- (c) “recording of data relating to energy consumption; provision of non-downloadable software for managing the use of electricity”, as specified in class 42 of Flow Power’s trade mark no. 1842461;

8B. The sign FlowSmart is deceptively similar to Flow Power’s trade mark no. 1842461.

8C. By reason of the matters set out above, the Respondents have infringed, and further or alternatively threaten to infringe, Flow Power’s trade mark no. 1842461 pursuant to s 120(1) of the *Trade Marks Act 1995* (Cth).

Request to cease, loss and damage, profits

9. Flow Power has demanded that the Respondents cease engaging in the ~~above~~ conduct referred to in paragraph 5, but the Respondents have refused to do so, and will continue to engage in that conduct unless restrained by this Court.

Particulars

Correspondence between Flow Power’s solicitors, Allens, and the Respondents’ attorneys, FB Rice, between 4 June 2024 and 21 June 2024.

10. By reason of the Respondents' actual and threatened infringements ~~of the Flow Power Marks as~~ referred to above:
- (a) Flow Power has suffered, and further or alternatively will suffer, loss and damage; and
 - (b) the Respondents have made, and further or alternatively will make or are likely to make, profits.

Particulars

- (i) Loss and damage includes or is likely to include:
 - (A) confusion between Flow Power and Flo Energy branded products and services amongst actual and potential consumers and business customers;
 - (B) derogation, erosion or dilution of Flow Power's exclusive statutory right duly granted under s 20 of the *Trade Marks Act 1995* (Cth) to use and authorise other persons to use its marks ~~the Flow Power Marks~~ in respect of the goods and/or services for which they are ~~it is~~ registered; and
 - (C) diminution or destruction of Flow Power's ability to turn its statutory property rights in its marks ~~the Flow Power Marks~~ to valuable account by licensing or assignment.
- (ii) Further particulars may be provided prior to trial.

Rectification

- 11. Flo Holding is, and has since 5 December 2024 been, the registered owner of Australian Trade Mark No. 1553374 (the 374 Mark) for FlowSmart 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" services in class 39.
- 12. Flo Holding alleges in the Cross-claim that Flow Power has infringed the 374 Mark.
- 13. By reason of the matters set out in paragraphs 11 and 12 above, Flow Power is an aggrieved person within the meaning of section 88(1) of the *Trade Marks Act 1995* (Cth).
- 14. Commencing in or about 2017, Flow Power has carried on the business of the supply and sale of electricity and energy related products and services to commercial, industrial and now residential customers in Australia (the **Flow Power Business**) under and by reference to the following trade marks:

- (a) FLOW;
- (b) FLOW POWER;
- (c) flowpower.com.au; and



- (d) _____,

(the **Applicant's Marks**).

- 15. Since 2017, the Flow Power Business has been promoted extensively throughout Australia under and by reference to the Applicant's Marks.
- 16. The Applicant's Marks have been used extensively throughout Australia by and on behalf of Flow Power in connection with the Flow Power Business.
- 17. By reason of the matters set out in paragraphs 14 to 16 above, Flow Power has developed a valuable reputation and substantial goodwill in Australia amongst consumers of electricity and energy related products and services and other traders in the Australian electricity and energy market in respect of the Applicant's Marks.
- 18. The normal and fair use of the 374 Mark includes or would include:
 - (a) use by Flo Holding, as the owner of the 374 Mark, which operates its business under and by reference to the Flo Energy Marks; and
 - (b) use on the website located at floenergy.com.au.

Particulars

- (iv) <https://floenergy.com.au/support/dashboard-guide>.
- (v) Further particulars may be provided prior to trial.
- 19. By reason of the matters in paragraphs 14 to 18 above, because of the circumstances applying at the time when the application for rectification is filed, the use of the 374 Mark would be likely to deceive or cause confusion within the meaning of section 88(2)(c) of the Trade Marks Act 1995 (Cth).
- 20. By reason of the matters set out in paragraphs 14 to 19 above, the Register of Trade Marks ought to be rectified by cancelling or removing the 374 Mark pursuant to s 88(1) of the Trade Marks Act 1995 (Cth).

AND THE APPLICANT CLAIMS THE RELIEF SPECIFIED IN THE AMENDED ORIGINATING APPLICATION

Date: 24 December ~~10 July~~ 2024



Signed by Caroline Ryan
Lawyer for the Applicant

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 Amended Statement of Claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 24 December ~~10 July~~ 2024



Signed by Caroline Ryan
Lawyer for the Applicant