



Form 33
Rule 16.32

Amended Defence

No. VID 659 of 2024

Federal Court of Australia
District Registry: Victoria
Division: General

Progressive Green Pty Ltd (ACN 130 175 343)

Applicant

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

Respondents

In response to the **Amended** Statement of Claim (**SOGASOC**) filed ~~10 July~~ **24 December** 2024, the Respondents say by way of defence:

1. The Respondents admit paragraph 1 of the **SOGASOC**.
2. The Respondents admit paragraph 2 of the **SOGASOC**.
3. The Respondents admit paragraph 3 of the **SOGASOC**.
4. In response to paragraph 4 of the **SOGASOC**, the Respondents:
 - (a) admit that the Applicant is currently recorded on the Register of Trade Marks as the owner of the Flow Power Marks (as defined in the **SOGASOC**);
 - (b) otherwise deny paragraph 4; and
 - (c) say further, the Flow Power Marks are liable to cancellation for the reasons set out in the Statement of Cross-claim.

4A. In response to paragraph 4A of the ASOC, the Respondents:

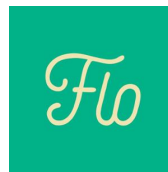
- (a) admit that the Applicant is currently recorded on the Register of Trade Marks (the Register) as the owner of the trade mark referred to in that paragraph;**
- (b) otherwise deny paragraph 4A; and**

Filed on behalf of (name & role of party)	The Respondents		
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(c) say further, the trade mark referred to in that paragraph is liable to cancellation on the grounds set out in the Statement of Cross-claim.

5. The Respondents deny paragraph 5 of the SOGASOC and say further that:

- (a) the First Respondent has offered and provided electricity services to commercial and industrial customers (**C&I customers**) in Victoria from 30 April 2024, and from 10 May 2024 in New South Wales, Queensland, South Australia, Tasmania and the Australian Capital Territory, under the FLO and FLO ENERGY word marks, and the FLO stylised script shown below (**Flo Device**) (together, the **Flo Marks**);



- (b) no licence or authorisation was required from the Applicant to use the Flo Marks;
- (c) the First Respondent engages C&I customers through third party brokers;
- (d) other than limited marketing to third party brokers and C&I customers, the First Respondent has not advertised, marketed and/or promoted, and does not advertise, market and/or promote its electricity offerings; and
- (e) the Second Respondent is the ultimate holding company of the global Flo Energy group and does not provide electricity or any other goods or services in Australia or otherwise trade in Australia.

Particulars

- (i) The First Respondent has not offered and does not offer electricity services to residential customers in Australia, and does not plan to offer electricity services to these customers until around July 2025.
- (ii) The website at the domain name floenergy.com.au which feature the Flo Marks was first made accessible to internet users on 29 July 2024.

5A. In response to paragraph 5A of the ASOC, the Respondents:

- (a) admit that since at least 31 October 2024 the First Respondent has offered and provided an online portal to 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; and
- (b) say further that no licence or authorisation was or is required from the Applicant to use the trade mark FlowSmart; and

(c) otherwise deny paragraph 5A.

6. In response to paragraph 6 of the SOGASOC, the Respondents:

- (a) admit that the First Respondent uses the Flo Marks as trade marks in Australia in respect of the goods and services described in sub-paragraphs 6(a) and (b); and
- (b) otherwise deny paragraph 6.

7. The Respondents deny paragraph 7 of the SOGASOC.

8. The Respondents deny paragraph 8 of the SOGASOC.

8A8A. In response to paragraph 8A of the ASOC, the Respondents:

- (a) admit that since at least 31 October 2024 the First Respondent has used the sign FlowSmart as a trade mark in respect of electricity supply services; and
- (b) otherwise deny paragraph 8A.

8B. The Respondents admit paragraph 8B of the ASOC.

8C. The Respondents deny paragraph 8C of the ASOC and say further that:

- (a) the Second Respondent is, and has been since 2 December 2024, the registered owner of Australian trade mark registration number 1553374 (the **374 Mark**) in class 39 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" (**FlowSmart Services**);
- (b) the First Respondent is, and has been since 31 October 2024, the exclusive licensee and an authorised user in Australia of the 374 Mark; and
- (c) in the premises, the Respondents are entitled to the defence under s 122(1)(e) of the *Trade Marks Act 1995* (Cth) (**TMA**).

8D. Further or alternatively, the First Respondent is entitled to the defence under s 122(1)(a) of the ~~*Trade Marks Act 1995* (Cth)~~ (**TMA**), on the basis that the First Respondent has used its own name in good faith.

8B8E. Further or alternatively, each of the Applicant's Flow Power Marks and trade mark registration number 1842461 ought to be cancelled on the grounds alleged in the Statement of Cross-claim ~~filed together with this Defence~~.

9. In response to paragraph 9 of the ASOC, the Respondents:

- (a) admit the Applicant's solicitors sent letters to the Respondents' trade mark attorneys between 4 June 2024 and 21 June 2024;

- (b) say the Respondents have not engaged in any wrongful conduct as alleged;
 - (c) say further the Respondents were not required to comply with the demands made by the Applicant;
 - (d) repeat paragraph 5 above; and
 - (e) otherwise deny paragraph 9.
10. The Respondents deny paragraph 10 of the ASOC.
11. In response to paragraph 11 of the ASOC, the Respondents:
- (a) admit the Second Respondent has been the registered owner in Australia since 2 December 2024 of the 374 Mark; and
 - (b) otherwise deny paragraph 11.
12. The Respondents admit paragraph 12 of the ASOC.
13. The Respondents admit paragraph 13 of the ASOC.
14. In answer to paragraph 14 of the ASOC, the Respondents:
- (a) say the Applicant has advertised, promoted, offered for sale and sold in Australia, electricity, and/or retail electricity services under and by reference to the Applicant's Marks (as defined in paragraph 14 of the ASOC) since 10 March 2017; and
 - (b) otherwise deny paragraph 14.
15. The Respondents deny paragraph 15 of the ASOC.
16. The Respondents deny paragraph 16 of the ASOC.
17. The Respondents deny paragraph 17 of the ASOC.
18. In response to paragraph 18 of the ASOC, the Respondents:
- (a) admit that the normal and fair use of the 374 Mark includes or would include use by the Second Respondent of the sign FlowSmart in respect of the supply of electricity; and
 - (b) otherwise deny paragraph 18.
19. The Respondents deny paragraph 19 of the ASOC.
20. The Respondents deny paragraph 20 of the ASOC and say further or alternatively that if the ground for cancellation of the 374 Mark set out at paragraphs 11 to 19 of the ASOC is successful (which is denied), the Court should exercise its discretion under ss 88(1) and/or 89 of the TMA not to cancel the 374 Mark.

Particulars

The Respondents rely on at least the following matters:

- (i) The 374 Mark has been registered since 30 April 2013.
- (ii) The Applicant adopted the Flow Power Marks in paragraphs 4 and 4A of the ASOC despite the prior registration and use of the 374 Mark.
- (iii) Any deception or confusion relied upon by the Applicant was or would be caused by the infringing conduct of the Applicant.
- (iv) Until the ASOC, there has been no challenge to the 374 Mark in Australia by the Applicant.
- (v) The public interest will not be adversely affected if the 374 Mark remains on the Register.
- (vi) The public interest will be adversely affected if the 374 Mark is removed from the Register because it would invite the Applicant or other third party traders to use the mark in respect of the FlowSmart Services and/or to seek to obtain registration for such a mark, and such conduct would lead to consumer confusion.
- (vii) The Respondents have acquired the reputation and goodwill associated with the 374 Mark through assignments of the 374 Mark from EnergyAustralia Pty Ltd and Bruutzak Holding B.V.
- (viii) The First Respondent has used the 374 Mark since at least 31 October 2024, before the Applicant's application for rectification arose and the 374 Mark as a result has come to distinguish the FlowSmart Services as those of the Respondents.
- (ix) The cancellation of the 374 Mark would not be in the interests of the Respondents and would greatly inconvenience them.
- (x) Any adverse effect on the Applicant in the application of the discretion in favour of the 374 Mark remaining on the Register would be as a result of the Applicant's own conduct.
- (xi) The Respondents reserve the right to provide further particulars.

11-21. The Respondents deny that the Applicant is entitled to claim the relief claimed in the Amended Originating Application filed 10-July24 December 2024 or to any relief.

12-22. In further answer to the whole of the Amended Statement of Claim, the Respondents rely upon the Cross-claim filed together with this Defence.

Date: ~~23 August 2024~~ 16 January 2025



Signed by Siabon Seet
Lawyer for the Respondents

This amended pleading was prepared by Siabon Seet and Peter Carstairs, lawyers and settled by Edward Heerey KC and Tim Burn-Francis of counsel.

Certificate of lawyer

I Siabon Seet certify to the Court that, in relation to the amended defence filed on behalf of the 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: ~~23 August 2024~~ 16 January 2025



Signed by Siabon Seet
Lawyer for the Respondents