No. VID1701 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

Respondents

Appellant's outline of submissions in answer on the notice of contention

A. Overview

1. The respondents have abandoned Grounds 1, 3 and 5 of the notice of contention (**NOC**). This has significant consequences for the appeal. As a result of the abandonment of NOC Ground 1, the respondents' defence of the non-use claim against the FlowSmart Mark depends on this Court upholding (contrary to PG's submissions) the finding that the Licence Agreement alone amounted to control as a matter of substance. By abandoning NOC Ground 3, the respondents have abandoned their long-held assertion that the FLOW POWER mark is not *to any extent* inherently adapted to distinguish. The abandonment of NOC Ground 5 is particularly significant – it precludes the respondents from going behind the primary judge's finding that PG's adoption and use of the Registered Flow Power Marks was honest. Despite this, the respondents seek to do just that. The Court should reject their attempts to do so.

2. NOC Ground 2 should be rejected and the Court should not exercise its discretion under s 89 to save the FlowSmart registration. The confusion that would arise from the use of the FlowSmart Mark is a consequence of the long disuse of the FlowSmart Mark by EnergyAustralia (an act of the registered owner) and the "sharp" acquisition and deployment of the FlowSmart Mark by Bruutzak and the respondents (also, acts of the owner). Those matters fall to be assessed against the backdrop of PG's honestly acquired rights in the FLOW POWER mark.

3. The Court should also reject the further contention under NOC Ground 2 that cancellation of the FlowSmart Mark should be refused because it would reward the efforts of a "*misappropriating user*" / "*assiduous infringer*" and would thus be contrary to the public interest (RSC [10]-[15]). The respondents' submissions inaccurately characterise the parties, their respective positions and the relevant branding over time.

4. PG has operated in the Australian energy market since 2009 (J [1], [18]) and traded under FLOW POWER since March 2017 (J [1], [27], [40], [44]). PG honestly adopted and commenced use of FLOW POWER after obtaining legal advice endorsing that course of action (J [23]-[26], [30], [126]). That critical finding is now not challenged by the respondents. PG also obtained and exploited trade mark registrations for FLOW POWER with priority dates between 6 March and 4 May 2017. During the examination of those applications, the prior FlowSmart registration was not cited by IP Australia. PG's FLOW POWER applications were not opposed by EnergyAustralia (the former owner of the FlowSmart Mark) (J [33]) and PG used the FLOW POWER mark for years without objection from EnergyAustralia. The primary judge accepted that PG was not blameworthy in respect of its use of FLOW POWER (J [458]). That critical finding is not challenged by the respondents.

5. The respondents distort this narrative, suggesting that PG in fact adopted FLOW, *rather than* FLOW POWER, as its new brand. That assertion is incompatible with the substantial body of evidence showing PG's extensive use of the FLOW POWER mark, in contrast with its modest use of FLOW.

6. The respondents are in an entirely different position. They entered the Australian market in 2024 using FLO / FLO ENERGY (J [75]-[91]) knowing of PG's use of FLOW POWER, having been put on notice of PG's objection, having been informed by IP Australia that PG's registered marks stood in the way of their applications (which they later abandoned), and without having first obtained legal advice as to their proposed brand (J [81]-[88]).[1] The primary judge accepted that the respondents' conduct was "*sharp*", and that in many respects it demonstrated a "*cavalier disregard*" for PG's concerns (J [456]). The commercial reality is that the respondents are the usurper.

7. Further, prior to this litigation, the FlowSmart registration had not been used for close to a decade (J [96]). Any residual reputation in the FlowSmart Mark was negligible and was not relied upon by the respondents (J [325]). The respondents acquired the registration during the litigation and deployed it to defeat PG's infringement claim and nullify PG's registered rights.[2] The primary judge found that the acquisition of FlowSmart was motivated by the litigation (J [266], [277]) and that its incorporation into the respondents' business would not have occurred but for the litigation (J [277]).

8. The public interest is not served by permitting a later-in-time trader (the respondents), who knowingly entered a market under deceptively similar marks (FLO or FLO ENERGY), to acquire a dormant registration during litigation (FlowSmart) and then use that registration both as a shield to its own infringement and as a sword against the established trader's registrations (PG's registrations for FLOW POWER). The outcome is unjust and commercially incoherent.

9. NOC Ground 4 should be rejected. The honesty of PG's adoption and use of FLOW POWER was a central issue in the trial, dealt with both in affidavit and oral evidence and extensively in submissions, leading to the primary judge's findings on this issue. In any event, the issue is now foreclosed because the respondents do not challenge the finding of honesty in relation to FLOW POWER. The pleading point taken on appeal is arid and without merit. Further, when exercised in relation to s 44(3)(b), the discretion under s 89 permits regard to be had to post-priority matters, as they fall within the reach of s 44(3)(b) itself.

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[1] See also PG's submissions on the notice of appeal dated 23 June 2026 (**NOAS**) at [4].

[2] See NOAS, [5]-[6].

10. Finally, NOC Ground 6 should also be rejected. In connection with the s 44 challenge to the Registered Flow Power Marks, it was open to the primary judge to cancel in part, rather than remove the entire registration. The view to the contrary is unduly rigid and not mandated by authority.

B. NOC Ground 2 – discretion not to cancel the FlowSmart registration

11. This ground arises if PG succeeds on its appeal in relation to s 88(2)(c) on the basis that the use of the FlowSmart Mark is likely to deceive or cause confusion in light of the relevant circumstances as at 24 December 2024. In that eventuality, the respondents contend that the discretion under s 89 ought be exercised in favour of the second respondent to preserve the FlowSmart registration. The burden to persuade the Court that the discretion should be exercised in that manner falls to the respondents.

12. If s 88(2)(c) is made out, the statutory premise is that use of the FlowSmart Mark *is* likely to deceive or cause confusion in the circumstances applying as at 24 December 2024 (J [323]-[339]; NOAS, [7]-[15]).

13. It is important to bear in mind what s 89 provides in relation to the exercise of the discretion in that circumstance. *First*, the chausette to s 89(1) provides that the discretion may be exercised if the owner of the impugned mark (emphasis added) "... *satisfies the court that the ground relied on ... has not arisen through any* ***act or fault*** *of the registered owner*". *Secondly*, the words "*arisen through*" indicate a less direct or proximate causal relationship between the act or fault and the ground relied on than the words "caused by". The act or fault need not be the sole cause; it is sufficient if the relevant act or fault caused or substantially contributed to the ground relied on.[3] *Thirdly*, s 89(2) identifies the considerations that the Court may take into account in exercising the discretion, which include "*any other matter that the court considers relevant*". Taken together, the Court must be satisfied that the situation has not arisen through any *act* or *fault* of the registered owner, but may take account of such circumstances it considers appropriate in assessing that question.

14. **NOC 2(a)**: The respondents place much emphasis on their assertion that the relevant circumstances did not arise through any act or fault of the owner of the FlowSmart registration (at RSC [6]-[9]), at various relevant times EnergyAustralia, Bruutzak and then Flo Holding. That contention should be rejected. The respondents' submissions take an impermissibly, and conveniently, narrow view of the circumstances relevant to the application of s 88(2)(c).[4]

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3 *Taylor* at [100] (Gordon A-CJ and Beech-Jones J).

4 As to the manner in which the s 88(2)(c) case was advanced below by PG, and considered by the primary judge, see PG's submissions in reply on the NOA (**NOAR**) at [9]-[12].

15. The relevant circumstances include EnergyAustralia's long period of non-use of the FlowSmart Mark after April 2015 (J [96]). EnergyAustralia's disuse of the FlowSmart Mark formed part of the market reality in which PG honestly adopted, registered and used FLOW POWER (J [124]-[126]). It did nothing to create or maintain a reputation in the mark during the period when PG was establishing its own reputation (J [327]). To the contrary, EnergyAustralia effectively abandoned the mark well before PG adopted FLOW POWER (J [96]). This abandonment is properly characterised as an act or fault of the previous owner for the purposes of the discretion.

16. The relevant circumstances also include the respondents' acts. The respondents did not acquire and use the FlowSmart registration to continue an existing EnergyAustralia business or to capitalise on any existing goodwill. The acquisition was structured to conceal the purchaser's identity from EnergyAustralia, and the fact they were a direct competitor (J [276], [304]). Any residual reputation in FlowSmart was negligible and not relied upon by the respondents (J [325]). The respondents' acquired the dormant registration during this litigation, for the purpose of the litigation, and then sought to deploy it to defeat PG's claim and nullify PG's registrations (NOAS, [5]-[6], [24]-[27]). The respondents' "sharp" conduct (J [456]) is also properly seen as an act or fault of the owner of the FlowSmart registration and is central to the discretionary assessment.

17. Conformably with s 89(2), the matters referred to above fell to be considered against other relevant circumstances, including the honest adoption by PG of FLOW POWER and its development of a reputation and goodwill in that name during the period of disuse of the FlowSmart Mark.

18. **NOC 2(b)**: The contention that cancellation of the FlowSmart Mark would reward the assiduous efforts of a misappropriating user and thus be contrary to the public interest (RSC [10]-[14]) should also be rejected.

19. The respondents' submissions reverse the true position. PG adopted FLOW POWER honestly and on legal advice, obtained registrations, used the mark for years, and built a business under it (J [1], [23]-[27], [30], [33]-[66], [124]-[126], [130]-[144]). Having abandoned NOC Ground 5, the respondents do not challenge any of those findings. They cannot therefore be heard to characterise PG's adoption or use of FLOW POWER as dishonest or culpable, or suggest that, through use of FLOW POWER, PG was a "deliberate" infringer of the FlowSmart Mark (cf RSC [10]).

20. The respondents try to skirt around the findings of honesty with respect to FLOW POWER by conflating three things: FLOW POWER, the Flow Power Device and FLOW. That approach should be rejected.

21. *First*, as to the Flow Power Device, the primary judge correctly held, in the context of addressing the defence under s 122(1)(e) of the Act, that the Flow Power Device (and the web address that uses the words "flowpower") were "*variations within the scope*" of the registrations for the Registered Flow Power Marks (J [467]).[5] The effect of that unchallenged finding is that PG's use of the Flow Power Device is not, and has never been, infringing.

22. *Secondly*, as to FLOW, the 2017 advice treated FLOW alone differently from FLOW POWER (J [23]-[26]), and the respondents' attempt to use advice about the possible use of FLOW alone to impugn PG's adoption of FLOW POWER should be rejected. The primary judge found that Mr van der Linden, and therefore PG, subjectively believed that use of FLOW would not be infringing (J [129]). Again, there is no challenge to that finding.

23. The primary judge's findings about the unregistered mark FLOW at J [71]-[73] do not bear the weight or meaning that the respondents place on them (cf RSC [13]). Those findings appear under the heading "*Intended future use*". The primary judge accepted that PG had "*increased its focus upon FLOW as the key branding concept*" (J [74]). That finding was consistent with limited evidence of use of FLOW alone and Mr van der Linden's evidence was that PG's use of FLOW had "evolved" or increased over time, reflecting the situation in the market (J [72]).[6] In the context of s 88(2)(c), the primary judge found that **(1)** although the pleading referred to FLOW, FLOW POWER, flowpower.com.au and the Flow Power Device, the focus in argument was largely upon FLOW POWER (J [329]);[7] **(2)** FLOW, the Flow Power Device and flowpower.com.au were "*effectively methods of deploying FLOW POWER, which was the primary mark*", (J [331(1)]); **(3)** there was "*no separate development or emphasis upon the other marks*", and **(4)** there was no evidence that FLOW had a more substantial reputation than FLOW POWER (J [331(2)]).

24. The submission at RSC [15] that PG's use of FLOW POWER was "*inextricably tied up with its infringing and extensive use of FLOW*" thus mischaracterises the evidence at trial, the submissions below and the findings of the primary judge. Further, it ignores a fundamental flaw in the respondents' argument – PG sought and obtained registrations for FLOW POWER, which it then used extensively and without any relevant use of

5 See also s 7(1) of the Act: a person uses a mark if "*the person has used the trade mark with additions or alterations that do not substantially affect the identity of the trade mark*".

6 Pt C tab 71, AB-3279 – AB-3281; AB-3288 – AB-3289.

7 This is consistent with the evidence upon which PG relied: Pt C tab 18, AB-443 – [1]; AB-445 – AB-452 – [16]-[38]; AB-458 – AB-461 – [67]-[72] Pt C tabs 18.5-18.13; Pt C tabs 18.20-18.32; Pt C tab 23, AB-1844 – [8]-[11]; AB-1848 – AB-1851– [28]-[32]; AB-1852 – AB-1882 – [38]-[78]; Pt C tabs 23.9-23.18; Pt C tabs 23.22-23.27; Pt C tab 23.31.

FLOW alone. The attempt to blend PG's branding activities into a single, undifferentiated whole is a convenient and necessary trope for the respondents, but incompatible with the evidence and PG's conduct.

25. *Thirdly*, the primary judge's finding that PG's use of FLOW "*was relevantly not honest*" was made by reference to the Full Court decision in *Firstmac Limited v Zip Co Limited* [2025] FCAFC 30; (2025) 184 IPR 458, about which the High Court expressed caution: ***Zip Co*** *Limited v Firstmac Limited* [2026] HCA 16 at [71]-[73]. The mere knowledge of a potentially competing mark did not preclude a finding of honesty (*Zip Co* at [62]). As the High Court explained (at [71]), honesty "*is concerned with the state of mind of the relevant person*", and is not to be assessed in a manner "*abstracted from a particular person, such as by reference to the intention or purpose of a reasonable person in the position of the relevant party*". To the extent PG's use of FLOW is taken into account, it was subjectively honest (as the primary judge found – J [129]) and is not capable of displacing the finding that PG's adoption and use of the FLOW POWER mark was honest.

26. *Fourthly*, the public interest does not support preservation of the FlowSmart registration. The public interest is not advanced by preserving a disused mark with negligible reputation where its notional use is likely to deceive or cause confusion. Still less is the public interest advanced by allowing a party that has engaged in "sharp" conduct, in "cavalier disregard" of another trader's rights (J [456]), to acquire a dormant registration during litigation and use it as both a shield and a sword. There is no public interest in a dormant trade mark with no residual reputation being exploited to defeat the legitimately acquired rights of an honest trader.

27. *Fifthly*, the submission at RSC [16] that the prior state of non-use of FlowSmart had ceased to exist as a relevant circumstance should also be rejected.[8] The use relied upon by the respondents was contrived, litigation-motivated and, as PG submits, not use in good faith or authorised use within the meaning of the Act. In any event, the existence of some asserted later use does not erase the market reality created by EnergyAustralia's long non-use and negligible reputation. Similarly, the respondents' reliance on correspondence with potential customers which referenced the FlowSmart Mark does not assist the respondents. They have abandoned NOC Ground 1(a) as to that conduct constituting relevant trade mark use.

28. *Sixthly*, as to RSC [17], the "*commercial value*" in the FlowSmart Mark rises no higher than its utility as a tool in this litigation, in circumstances where the mark had no

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[8] As should the submission that the matters at NOAS [9] are "newly advanced": see NOAR [9].

ongoing goodwill or reputation and the respondents eschewed any reliance upon any historical goodwill or reputation. PG's case under s 88(2)(c) does not rest on the fact of the assignment, but rather the circumstances and purpose of the assignment. Relatedly, the attempt to rely upon the respondents' "*investment and goodwill in that mark*" (RSC [19]) must also be viewed in light of the artificial circumstances of the acquisition of the FlowSmart registration, undeniably motivated by the instant litigation.

29. *Finally*, contrary to RSC [18], any distinctive quality that the FlowSmart Mark has does not offset the obvious likelihood that its use would be productive of confusion. The FlowSmart Mark is not so obviously distinctive or unusual that this would be a determinative or even significant factor.

C. NOC Ground 4 – s 44(3)(b), TM Act – pleading and timing

30. **NOC 4(a)**: The respondents' pleading point (RSC [24]-[25]) is unmeritorious and should be rejected.

31. That honesty of adoption and honesty of use were in issue was obviously understood by the respondents. The evidence in Mr van der Linden's second affidavit included legal advice received by PG at the time it adopted the mark FLOW POWER in early 2017.[9] That affidavit was filed on the same day that PG filed its Defence to the Further Amended Cross-claim. No relevance objection was raised. In fact, it precipitated a request for a subpoena issued to PG's former solicitors, Epiphany Law, which included a category seeking "*documents recording advice given by Epiphany Law to Progressive Green Pty Ltd regarding the trade mark FLOWSMART*".[10] Manifestly, the respondents thought the issue to be live and worth pursuing.

32. The issue of honesty was extensively explored at trial (both in submissions and in the evidence of Mr van der Linden). Evidence was led about PG's adoption of FLOW POWER, the advice it received, the registration process, the absence of objection by EnergyAustralia, and PG's subsequent use (J [21]-[33], [114]-[126], [440]-[452]). The respondents cross-examined on those matters and addressed them in submissions.[11] The primary judge made findings about them (J [124]-[126], [450]-[452], [458]).

33. The submissions at RSC [28]-[33] proceed as if the question of PG's honesty remains open on this appeal. It does not. The primary judge found that PG honestly adopted

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[9] Pt C tab 23, AB-1845 – AB-1847– [12]-[22]; Pt C tab 23.1. See further evidence regarding the legal advice sought at this time at Pt C tab 27; Pt C tabs 41 – 45; Pt C tab 50.

[10] See also the respondents' submission on the Applicant's claim for privilege dated 27 March 2025, [10]. See also the respondents' oral submissions on the application at P-39.7-29; P-40.8-18 (incorrectly attributed to PG's counsel) and P-42.28-39.

[11] Pt C tab 71, AB-3237 – AB-3290; Pt C tab 83, AB-3773 – AB-3778 – [260]-[287].

FLOW POWER (J [124]-[126]). There is no longer any contention challenging those findings. The respondents cannot submit that PG failed to prove honesty.

34. In any event:

(a) The submission at RSC [27] that PG did not establish honest adoption by way of a positive case would be rejected. PG did establish honest adoption on its positive case; that is what the primary judge found at J [124]-[126].

(b) It is incorrect to say that there was no evidence sufficient to support a finding that PG considered that consumer confusion would not arise (cf RSC [28]-[30]). Mr van der Linden deposed, amongst other things:[12]

> "*When Progressive Green decided to rebrand to 'Flow Power', my intention (which I believe was shared by the executive team of the business) was to develop a clear and independent new brand for the business. I did not want that new brand to be aligned with or to evoke any of our competitors. I certainly did not want to create a situation where Progressive Green's business or products would be confused with another business or its products.*"

He was not challenged on that evidence.

(c) Mr van der Linden was cross-examined about risk. The primary judge accepted (at J [123]) that his acceptance of "*a risk*" went no higher than acknowledging that nothing carries zero risk, recording Mr van der Linden's evidence that if there "*had been a hint of*" infringement, or a "*strong chance*" of that, he "*would definitely have acted without hesitation*".

(d) The submission at RSC [31] is semantic at best. Evidence about the perceived risk of infringement *is* evidence about the perceived risk of consumer deception or confusion as infringement cannot arise unless use of the impugned sign would be likely to deceive or cause confusion. Mr van der Linden's evidence that he did not think there would be infringement was evidence directed to the very matter the respondents now say was absent.

35. **NOC 4(b)**: The respondents' contention as to the time at which the discretion under s 44(3)(b) is exercised in the context of an application under s 88(1) (RSC [21]-[23]) is contrary to the language and purpose of s 44(3)(b). The provision asks whether, because of "other circumstances", it is proper for the application to be accepted. In the

[12] See Pt C tab 23, AB-1844 – AB-1845 – [11]. See also Pt C tab 23, AB-1846 – AB-1847 – [22]; Pt C tab 71, AB-3250 – AB-3251.

cancellation context, that inquiry is undertaken at the time the discretion is exercised.[13] The primary judge properly accepted that approach (J [176]-[181], [439]).

36. That conclusion is consistent with the breadth of the expression "other circumstances".[14] It permits consideration of matters arising after the priority date, including long use of the mark, absence of opposition, absence of confusion, the conduct of the parties, the use or non-use of the cited mark, and the status of the cited registration at the time the discretion is exercised (NOAS, [39]-[42]).

37. The submissions made at RSC [21]-[23] would lead to an incoherent outcome. As noted above, s 44(3)(b) contemplates that the Registrar or the Court may take account of post-priority matters in permitting an application to proceed to registration. Obvious examples are a letter of consent from the owner of the anterior mark or the anterior mark ceasing to be registered.[15] The respondents appear to suggest that where s 44(3)(b) arises in the context of a cancellation application under s 88, by virtue of s 89 the discretion under s 44(3)(b) is limited to matters as they stood at the priority date. However, the discretion ought not be construed in that manner because to do so would be incompatible with the very operation of s 44(3)(b), which reaches to post-priority matters. The discretion should not be construed in a manner inimical to the section to which is it being applied. This conclusion is not undone by *Taylor*, where s 89 was being considered in relation to s 60, which is limited in its operation to matters as they stood at the priority date.

D. NOC Ground 6 – cancellation of the '461 Mark in its entirety – s 44, TM Act

38. Ground 6 arises only if the Court upholds PG's appeal in relation to cancellation of the '461 Mark under s 41 but nevertheless considers whether the mark should be cancelled in its entirety under s 44. If the Court reaches this issue, PG submits that the ground should be rejected.

39. Section 44 requires attention to the particular goods and services for which registration is held, and to whether those goods or services are the same as, similar to, or closely related to the goods or services covered by the cited registration (J [425]-[432]). It does not follow that, because s 44 is made out in respect of some goods or services, an entire multi-class registration must be cancelled.

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13 *Trident Seafoods Corporation v Trident Foods Pty Ltd [2019] FCAFC 100; (2019) 369 ALR 367* at [83] (Reeves, Jagot and Rangiah JJ); *Bendigo and Adelaide Bank Ltd v Community First Credit Union Ltd* [2021] FCAFC 31; (2021) 389 ALR 196 at [228] (Middleton and Burley JJ).

14 *Dunlop Aircraft Tyres Limited v The Goodyear Tire & Rubber Company* [2018] FCA 1014; (2018) 262 FCR 76 at [268]. See also "*Don't Hold Back – When Do 'Other Circumstances' Under s 44(3)(b) of the Trade Marks Act Apply?*" by E Heerey and G Tsang, (2022) 35(6&7) IPLB 98.

15 For other examples, see Burrell & Handler, *Australian Trade Mark Law*, 3rd ed, [8.16].

40. The respondents' reliance (RSC [34]) on ***Apple** Inc v Registrar of Trade Marks* [2014] FCA 1304; (2014) 227 FCR 511 is misplaced. *First*, in *Apple* Yates J was considering an appeal from a decision of the Registrar to reject an application under s 41 and not an appeal from an opposition (let alone a putative opposition under s 88 of the Act). It involved an appeal against a decision to reject an application under s 33 of the Act. That section provides, *inter alia*, that the Registrar *must* reject the application if satisfied "*there are grounds under the Act for rejecting it*".

41. In the context of an opposition, s 55(1) of the Act provides that the Registrar must decide to either (a) refuse to register the trade mark or (b) register the trade mark (with or without conditions or limitations) in respect of the goods and/or services then specified in the application, having regard to the extent (if any) to which any ground on which the application was opposed has been established. The Act contemplates that, in the opposition context (whether notional or otherwise), the Registrar (and thus the Court) has a discretion to accept an application for registration for a subset of goods or services.

42. *Secondly*, in *Apple*, in addition to finding the mark "APP STORE" was not inherently adapted to distinguish services in class 35 (at [231]), Yates J also found that the mark was not to any extent inherently adapted to distinguish *any* services in the other nominated classes (at [239]). The entire mark was bad and thus rejected.

43. *Thirdly*, there are several other authorities, both pre-dating and post-dating *Apple*, where the Court has either confirmed or did not dispute the proposition that it has the power to amend a specification where a ground of opposition is made out in part, rather than rejecting an application in its entirety. These include *Lomas v Winton Shire Council* [2002] FCAFC 413 at [46]-[47] per Cooper, Kiefel & Emmett JJ (s 58), *Phone Directories Co Australia Pty Ltd v Telstra Corp Ltd* [2014] FCA 373; (2014) 106 IPR 281 at [231] per Murphy J (s 41), *Frucor Beverages Ltd v Coca-Cola Company* [2018] FCA 993; (2018) 358 ALR 336 at [195]-[205] per Yates J (s 41), *Primary Health Care Limited v Commonwealth of Australia* [2017] FCAFC 17; (2017) 260 FCR 359 at [61]-[67] per Greenwood J and [185] and [258]-[268] per Rangiah J (s 41, albeit that the power was not exercised), *Goodman Fielder Pte Ltd v Conga Foods Pty Ltd* [2020] FCA 1808; (2020) 158 IPR 9, [155], [172] and [198] per Burley J (s 59), and *Marquis Macadamias Ltd v Mars Australia Pty Ltd* [2022] FCA 207 at [13]-[14] (s 44).

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