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 reply on the notice of appeal

A. Overview

1. The respondents impugn PG's honesty and defend their own "sharp" conduct. The primary judge found that PG's adoption and use of FLOW POWER was honest and not blameworthy. PG legitimately obtained and used the Registered Flow Power Marks. Those findings are unchallenged. In contrast, the respondents entered the market over PG's objection and untroubled by infringement. Confronted by infringement proceedings, the respondents' answer was to acquire a long-dormant mark and contrive use to save it, thus providing a basis to attack the Registered Flow Power Marks. The primary judge ought to have cancelled the FlowSmart Mark. There was an overwhelming risk that the respondents' use of FlowSmart would cause confusion. Further, the primary judge ought to have rejected the attack on the Registered Flow Power Marks. The primary judge's s 41 analysis erred because FLOW POWER does not have the signification contended for and is not a mark that other traders have a legitimate interest in using. Likewise, the s 44 attack on the Registered Flow Power Marks ought to have been rejected, both because of the cancellation of that registration and because the registrations ought be maintained under s 44(3)(b).

B. The respondents' undue reliance on FLOW is a distraction

2. RSA [1]-[5] place heavy emphasis on findings concerning PG's use of FLOW. That does not answer the appeal. The Registered Flow Power Marks are for FLOW POWER. The advice received by PG treated FLOW alone differently from FLOW POWER (J [23]-[30]). The primary judge accepted that distinction (J [30]).

3. RSA [4] overstates the primary judge's findings. The finding at J [129] was directed to FLOW. It was not a finding that PG's adoption or use of FLOW POWER was dishonest. To the contrary, the primary judge found that PG adopted and used FLOW POWER honestly (J [124]-[126]), and that PG's use was not blameworthy (J [458]). The primary judge also found that use of the Flow Power Device was a use of the Registered Flow Power Marks (J [467]), and thus was not infringing. Those findings are not challenged. Further, even in relation to FLOW, the primary judge accepted that PG subjectively believed that its use would not infringe (J [129]).

4. The respondents' reliance on J [71]-[74] is also overstated (cf RSA [3]). Those findings concern "intended future use" and do not alter the statutory character of the Registered Flow Power Marks, whether the FlowSmart Mark should be cancelled or removed, whether the s 44(3)(b) discretion miscarried, or whether PG could rely upon honest concurrent use in relation to FLOW POWER. The evidence of PG's use of FLOW was scant and showed that it changed and increased over time, as PG's presence in the market developed.

5. The same error appears at RSA [14] (NOA Ground 2), [44] (NOA Ground 5) and [48] (NOA Ground 6). If the respondents wished to support the judgment on the basis that PG's adoption of FLOW POWER was dishonest, they needed to press NOC Ground 5, but they have expressly abandoned that ground.

C. Cancellation does not operate retrospectively

6. The submission at RSA [13] (NOA Ground 2), and repeated at [46]-[47] (NOA Ground 6), that cancellation of the Registered Flow Power Marks operates retrospectively so as to render PG's use of FLOW POWER infringing from March 2017 is wrong. There is no statutory language which permits such cancellation with retrospective effect.[1]

7. The primary judge expressly rejected the contention of retrospective effect, finding that there was no infringement for the period until the date of the cancellation order (J [465]) and that cancellation does not have a retrospective effect so as to remove the defence under s 122(1)(e) during the period in which the mark was registered (J [466]). That conclusion applied to the '633, '461 and '059 Marks for FLOW POWER and variations within the scope of those registrations, including the Flow Power Device (J [467]).

8. Those findings are not challenged by the respondents. The consequence is that, whatever *prospective* effect cancellation may have, it does not convert PG's past use of FLOW POWER into infringing conduct. The respondents' “assiduous infringer” narrative depends upon the opposite proposition and should be rejected accordingly.

D. The s 88(2)(c) TM Act case is not a new case (NOA Ground 2)

9. The respondents' “new case” complaint at RSA [10]-[11] is unmeritorious. PG's pleaded case was that, by carrying on business since 2017 under the relevant marks, it had developed a reputation.[2] That reputation does not exist in a vacuum. It was pleaded as part of the circumstances the Court is required to assess under s 88(2)(c). PG's pleading, opening and closing submissions asked the statutory question: whether, because of the circumstances applying at the relevant date, use of FlowSmart would be likely to deceive or cause confusion.

10. PG identified as relevant circumstances: **(1)** PG's reputation in FLOW POWER, **(2)** the absence of any reputation in FlowSmart, **(3)** EnergyAustralia's effective abandonment of that mark, **(4)** the assignment history of FlowSmart, **(5)** the absence of any real transfer of goodwill for FlowSmart, **(6)** the different nature of the respondents’ proposed

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1 Where the Act contemplates the retrospective effect of removal, it does so expressly and only in tightly constrained circumstances – see ss 84A and 84C in the context of revocation of registration. See also *National Cancer Foundation v Registrar of Trade Marks* [2025] FCA 711; (2025) 185 IPR 1 at [20]-[27]. The Act expressly distinguishes between “revocation” (ss 84A-84D) and “cancellation” (ss 84, 87, 88).

2 Pt A tab 2, [14]-[17]. [14] expressly referred to PG’s focus on commercial and industrial customers.

use of FlowSmart (when compared with that of EnergyAustralia), **(7)** the normal and fair use of FlowSmart by the respondents' in connection with the FLO ENERGY business,[3] and **(8)** the admitted deceptive similarity between FlowSmart and FLOW POWER.[4]

11. The respondents cannot say that the circumstances relied upon were not advanced, were not the subject of evidence, or were not part of the statutory inquiry.

12. The point raised by NOA Ground 2 is that the primary judge wrongly reduced the s 88(2)(c) inquiry to whether PG had established a sufficiently substantial reputation measured against an unduly broad market, rather than evaluating all relevant circumstances bearing upon the likelihood of deception or confusion, which included PG's reputation in the segment of the energy market in which it had historically traded.

13. RSA [15] – [18] make a similar error. The breadth of PG's asserted reputation did not alter the statutory inquiry under s 88(2)(c). The respondents' approach reflects the primary judge's error (see NOAS [13]; *Taylor* [78]).

E. Dashboard use, authorised use and good faith (NOA Ground 1)

14. The reliance at RSA [20] on PG's pleading concerning Dashboard use rises no higher than the finding at J [230] that the use in question was *use as a trade mark*. Correctly, the primary judge held that PG's pleading did not bind it on the separate questions of whether any use was *authorised* or in *good faith* (ie NOA Ground 1).

15. The respondents seek to characterise the authorised use and good faith issues as factual findings insulated from appellate review, but they misstate the correct approach: RSA [32]. PG's appeal proceeds on the primary judge's findings but raises error in the primary judge's assessment of whether those findings satisfy the statutory standards of authorised use and good faith use. The correctness standard applies to those inquiries: there is only one legally permissible answer.[5]

16. **As to authorised use**, the question is whether the facts found establish actual control *as a matter of substance*. The respondents' submissions stray into issues of "unity of purpose" by relying on Mr Guichelaar's roles and asserting that Bruutzak and the respondents were "related" (RSA [22], [25], [28]). They cannot do so because the "unity of purpose" issue has been abandoned by not pressing NOC Ground 1(b). They must

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3 Pt A tab 2, [18].

4 Pt C tab 78, AB-3596 – [59]-[67]. The respondents addressed these submissions, see Pt C tab 80, AB-3646 – AB-3647 – [25]-[29]. See also Pt C tab 82, AB-3707 – AB-3711 – [75]-[84].

5 See the discussion of the approach to appellate review in *Caporaso Pty Ltd v Mercato Centrale Australia Pty Ltd* [2024] FCAFC 156; (2024) 306 FCR 549 at [134]-[141].

therefore support the primary judge's conclusion by reference to the Licence Agreement alone, but that cannot be done.

17. The unchallenged findings show that Bruutzak had no involvement in the decision to add FlowSmart to the Dashboard (J [305]), the mark was already being used in that way before Bruutzak acquired it (J [236], [305]), Bruutzak's ownership did nothing to change the manner of use (J [309]), and there was no evidence that Bruutzak gave any directions about use or had any connection with electricity supply beyond Mr Guichelaar's role (J [311]). A paper licence did not establish actual control. Once the facts of this case are seen in this light, the purported distinctions (RS [25], [26]) between this case and *Lodestar* are of no moment. Further, contrary to RS [27], it did not fall to PG to cross-examine on the question of control. It was the respondents' burden to establish it.

18. **As to good faith**, RSA [30]-[32] mischaracterises the appeal as an attack on factual findings. The error lies in the application of the statutory standard to the facts found. PG relies upon the factual findings at J [266], [277] and [280], but says that the primary judge erred in failing to find that the respondents' use during the Non-Use Period was contrived use for a strategic litigation purpose, not genuine commercial use.

19. As to RSA [31]: (1) the reliance on an "in principle" agreement goes nowhere because it cannot alter the fundamental quality and purpose of the use, (2) the interposition of Bruutzak does not establish good faith use, and (3)-(6) the existence of a compressed development process and *post hoc* asserted commercial purpose do not convert the litigation motivated deployment of a dormant third party registration into good faith commercial use. These are all factors (in addition to the fact that FLOW with a "W" had not been used in the branding) that go to show this was not good faith use. [6]

F. Section 41, TM Act (NOA Ground 3)

20. The respondents erroneously suggest that the primary judge applied *Muller* at J [156] (RSA [7], [33]). The primary judge expressly rejected its application (J [390]). In any event, *Muller* does not permit a court to give a mark a meaning it does not otherwise have. It permits consideration of link words where the ordinary signification of the mark is "*already apparent*" and the link words merely make that meaning clear (J [156], [390]). Here, the primary judge correctly rejected the applicability of *Muller*, because the "*syntactically unusual arrangement of words in FLOW POWER goes some way to render the phrase functionally meaningless*" (J [388]).

21. The submissions at RSA [35]-[36] highlight the failure of the primary judge to identify the ordinary signification of FLOW POWER. As is noted at RSA [36], the primary

[6] Pt C Tab 20.1, AB-1501 – AB-1545; Pt C Tab 18.40.

judge considered (J [384]-[385]) the words “flow”, “power”, “power flow” and “flow of power” (by “regulators” and in the context of the “transmission of electricity”), and not the composite expression FLOW POWER itself.

22. As to s 41(4), the submissions at RSA [37]-[38] misunderstand PG's reliance on evidence of post-priority use. Such evidence of use may illuminate whether *at the priority date* the mark had the *capacity* to distinguish.[7] In the present case, the evidence plainly supported the conclusion that the mark was *capable* of distinguishing.[8]

23. The balance of RSA [38] can be put to the side. It refers to material from an unrelated proceeding in an entirely different context and no contention is pressed in relation to it.

G. Section 44 TM Act and discretion (NOA Ground 4)

24. RSA [39]-[44] mischaracterise NOA Ground 4 as a complaint about weight. PG's complaint is anterior – the primary judge approached s 44(3)(b) on the basis that the absence of a “*significant reputation in the market*” counted decisively against the exercise of the discretion (J [452]). Section 44(3)(b) imposes no such requirement. Once that erroneous premise is removed, it is necessary to re-exercise the discretion by reference to the circumstances as a whole. Those circumstances include the matters identified at NOAS [40]-[41]. The pleading point at RSA [39], [41] and the timing argument at RSA [43] are addressed in PG’s submissions on NOC Ground 4.

H. Honest concurrent use (NOA Ground 6)

25. The respondents' answer at RSA [46]-[49] again depends on two propositions that should be rejected: (1) that cancellation operates retrospectively so as to make PG's use of FLOW POWER infringing from the outset; and (2) that findings concerning FLOW infect the honesty of PG's use of FLOW POWER. The first proposition is wrong: see paragraphs 6 to 8 above. The second is inconsistent with the primary judge's unchallenged findings that PG adopted FLOW POWER honestly and that its use of the Registered Flow Power Marks was not blameworthy (J [124]-[126], [458]). See also PG’s submissions on NOC Ground 2(b) [18]-[25].

26. The primary judge's analysis of s 122(1)(fa) also miscarried because it did not separately address honest concurrent use at the relevant point in time (ie post-cancellation). By that time PG had used FLOW POWER honestly for years, built substantial business recognition in it, and would face serious prejudice if restrained.

Originally filed: 7 July 2026 **Tony Bannon** **Luke Merrick** **Marcus Fleming**
Amended to include Pt C references: 21 July 2026 **Herbert Smith Freehills Kramer**

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7 ***Flexopack*** *SA Plastics Industry v Flexopack Australia P/L* [2016] FCA 235; (2016) 118 IPR 239 at [252].

8 *Flexopack* at [249].