No. VID 1701 of 2025

Federal Court of Australia
District Registry: Victoria
Division: General

On appeal from the Federal Court of Australia

Progressive Green Pty Ltd (ACN 130 175 343)

Appellant

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

Respondents

RESPONDENTS' OUTLINE OF SUBMISSIONS ON THE NOTICE OF APPEAL

These submissions respond to, and adopt the headings of and abbreviations in, the Outline of Submissions (**AS**) of the Appellant (**PG**).

They also adopt abbreviations used in the judgment (**J**).

Case references use short names, with the full citations in the Table of Cases.

A. Overview

1. Neither in its overview, nor elsewhere, does PG mention (or challenge) the findings of the primary judge (**PJ**) that, when PG adopted **FLOW POWER** in March 2017, it also adopted the trade mark **FLOW** and "*sought to deploy them both for branding purposes*" (J [127]), for example with taglines like "*Go With Flow*":[1] J [40]-[41]; or the finding that PG's use of **FLOW** infringed the 2013 registration of **FlowSmart**: J [468], [473], [476].

2. Her Honour held at J [73] that *"[t]he focus on FLOW instead of FLOW POWER … is also evident in the way in which the Flow Power Device emphasises the word FLOW in terms of size and prominence"* (as depicted at J [2(d)] and below):

3. Her Honour found (emphasis added) that PG "***sought to develop its reputation in its unregistered mark FLOW rather than its registered trade mark FLOW POWER***" and "*put energy into promoting FLOW as a prefix, rather than FLOW POWER as a trade mark*": J [71]-[72]. PG used FLOW by itself or in conjunction with other elements such as FLOW BUSINESS, FLOW HOME and FLOW KIT: J [72], and the PJ found that PG "***has increased its focus upon FLOW as the key branding concept****" and used FLOW "***as its primary branding tool***": J [74].

4. Her Honour found that (**1**), PG adopted and used FLOW in the face of legal advice it received between 27 February and 7 March 2017 which was "*clearly to the effect that FLOW might infringe the FlowSmart Mark and that there was a* ***higher risk involved*** *in using FLOW as a trade mark*" compared to the lower risk of using FLOW POWER (J [25]-[28], [128]-[129]) and (**2**), PG's risk, taken in the face of its solicitor's advice, meant that its adoption of FLOW was relevantly not honest: J [129]. This finding extends to the Flow Power Logo which has FLOW as its primary element. PG does not challenge **<u>any</u>** of the above findings. Thus, PG is correctly characterised as relying on its own "*assiduous*" infringement of the FlowSmart registration for the purposes of ss 88(2)(c) and 89 of the *Trade Marks Act 1995* (Cth) (**TMA**) (*Taylor*, [135]-[161]).

5. Moreover, PG's pleaded case under s 88(2)(c) relied upon an alleged reputation in **both** FLOW and FLOW POWER, which it argued was "*substantial*", "*significant*" and "*immense*"[2], despite which PG now contends that the PJ erred in considering and determining that very case (which it pleaded and argued: <u>AS</u> [12]-[13]). The PJ's decision that PG's evidence did not establish a sufficient reputation among the pleaded "*consumers of electricity*" involved no error and was consistent with binding authority (*Renaud Cointreau,* [74]-[75] upholding *Cordon Bleu* at [91]; *Tivo,* [324]; *Urban Alley*, [269]; *Enagic*, [254]; *Ragopika*, [22]).

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[1] Pt C tab 18, AB446-8 - [26]-[27]; Pt C tab 18.8.

[2] Pt C tab 82, AB3690 - [8], AB3707 - [75], AB3710 - [83(a)]; Pt C tab 73, AB3379-81 - T43.45-T44.8; T45.11-15.

6. As for **the alleged non-use** of FlowSmart, TMA ss 21 and 106 provide for registered trade marks to be bought and sold as personal property. There was nothing untoward in the Respondents purchasing the prior FlowSmart Registration, for good consideration of $50,000,[3] to improve their trade mark position in Australia. The assignor was entitled to "[*turn*] *this property to valuable account by licensing or assignment*" (*Campomar*, [42]). PG never sought to acquire that prior mark, and did not apply until 3 December 2024 to have it removed for non-use: problems of PG's own making. PG's own pleaded case was that FlowSmart was used as a trade mark on the Respondents' online portal (**Dashboard**) during the critical period 31 October to 3 November 2024 (J [226]-[230]) ie within the non-use period: cf <u>AS</u> [18] (see also PG's concession at T394.33-395.10). Her Honour correctly considered whether the trade mark owner **Bruutzak** Holdings BV (wholly controlled by the Respondents' CEO) exercised "*actual control*" over that use of the mark, including a detailed comparison to *Lodestar*: J [301]-[319]. <u>AS</u> [19]-[23] merely seek to reargue that factual debate without identifying any appellable error of principle. The same can be said of <u>AS</u> [24]-[27]. See [28]-[32] below.
7. As for **s 41**, PG ignores the PJ's application at J [156] of the (binding) High Court authority in *Muller* at 40-41 that the correct inquiry as to distinctiveness includes consideration of the words of the trade mark in question, along with the insertion of any link words where such words "*would have been necessary to make the meaning perfectly clear*". PG similarly ignores the authorities relied on at J [157]-[158] for the proposition that "*it is not just the trade mark that is relevant to the analysis, it is also marks that closely resemble it*" (*Moroccanoil*, [125]; *Kenman Kandy*, [87], [95], [161]; *Philmac*, [57]; *Nestlé*, [60]; *Guylian*, [82]). The PJ correctly considered not only FLOW POWER but also FLOW OF POWER and POWER FLOW, and the finding that FLOW POWER was "*faintly*" but not sufficiently inherently adapted to distinguish PG's electricity supply services discloses no error. See [33]-[36] below.
8. As to s 44(3)(b), the PJ made no error, and her discretion did not miscarry, by considering and rejecting PG's own contention that it had an "extensive reputation" in FLOW POWER: J [436], Defence to Cross-claim [23A]. Her Honour was entitled to give that factor the weight it deserved. Her Honour did not fail to consider any other factors relied upon by PG. PG seeks to reargue the substantive factual issues but does not come close to identifying any *House*-type error of principle. See paragraphs [39]-[44] below.
9. The well-settled principles relating to this Court's appellate jurisdiction require the identification of error as a threshold (*Branir*, [21]-[27]; *Jadwan*, [404]-[409]; *Moroccanoil*, [4]-[10]). As identified below, PG invites the Full Court to examine afresh the PJ's findings of fact

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[3] Pt C tab 72, AB3328 - T265.10-29.

without first establishing error or that the findings were "*glaringly improbable*" or "*contrary to compelling inferences*" (*Fox*, [28]-[29]; *Robinson Helicopter*, [43]; *Jadwan*, [411]).

B. NOA Ground 2 – Cancellation of the FlowSmart Registration under s 88(2)(c)

10. The case under s 88(2)(c) in AS [8]-[9] bears little resemblance to PG's pleaded case. At ASOC[4] [14]-[17] (J [132]), it pleaded that by carrying on business since 2017, supplying its services under the trade marks FLOW, FLOW POWER, flowpower.com.au and its Flow Power Device, it had developed (emphasis added):

> *.... 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.*

11. At ASOC [19] PG pleaded that, by reason of the matters in ASOC [14]-[18], the use of FlowSmart would be likely to deceive or cause confusion. AS [8]-[9], however, purports to rely on seven unpleaded, but said to be "*uncontested and uncontroversial*" circumstances. Contrary to AS [11], J [132] and [323]-[340] exhibit no error in deciding the case under s 88(2)(c) that PG pleaded, rather than the new case propounded at AS [8]-[9] (*Metwally*, 71; *Coulton*, 7-8; *Branir*, [33]-[39]).

12. Further, in the High Court's recent decision in *Taylor*, Steward J reviewed the consideration of "*assiduous infringers*" by the High Court in *Re Bali* and *Murray Goulburn*, and by the Full Court in *Riv-Oland,* and concluded that, properly construed, s 88(2)(c) "*does not include such deception or confusion which has occurred because of the infringing conduct of an applicant for rectification*" (*Taylor*, [157]; see also *HTX*, 643).

13. As noted above, PG's case under s 88(2)(c) relied on its use of and reputation in the trade marks FLOW, FLOW POWER, flowpower.com.au and its Flow Power Device. PG accepted that all those marks were deceptively similar to FlowSmart: J [2], [14(5)]. PG does not challenge the PJ's findings that its use of FLOW infringed the prior FlowSmart Registration, or that its adoption of FLOW (in the face of contrary legal advice[5]) was not relevantly honest: J [128]-[129], [468], [473], [476]. As an "assiduous infringer" of the FlowSmart Registration, PG cannot be assisted by s 88(2)(c). Even were PG permitted to limit its case under s 88(2)(c) to its claimed reputation in its then-registered FLOW POWER trade marks, there is authority for the approach that cancellation of those marks under ss 88(2)(a), read with 41 or 44, operates retrospectively (*Colorado*, [32], [35], [191]; *Yarra Valley*, [285]; *Anchorage*, [193]). Consequently, even its use of FLOW POWER was infringing, because FLOW POWER would be expunged and not available to PG for the purposes of s 122(1)(e).

14. In any event, even if its case is limited to only FLOW POWER, PG ignores the PJ's factual findings that (emphasis added) PG "***sought to develop its reputation in its unregistered mark***

4 Pt A tab 2.

5 Pt C tab 18.5; tab 23.1; tab 27; tab 42; tab 44.

FLOW rather than its registered trade mark FLOW POWER” and it “*put energy into promoting FLOW as a prefix, rather than FLOW POWER as a trade mark*”: J [71]-[72].

15. There is also no merit to the complaints at AS [10]-[14] that the PJ erred in not finding a reputation sufficient to make out PG’s claim under s 88(2)(c). Assessing PG’s evidence of its claimed reputation, her Honour correctly noted at J [68(2)] that:

> *[T]he authorities* ***caution against a segmented analysis*** *when the mark is (as here) registered across a broad scope, because the relevant inquiry when considering reputation is generally into the normal and fair use that can be made of the mark.*[6]

16. The FlowSmart Registration included services defined broadly as “*Distribution of energy*” and “*Electricity distribution*”. AS [10] wrongly suggests that a sufficient reputation should have been found in a narrow segment of that broad market, i.e. “*at least in the C&I market and among industry participants*” despite PG itself pleading at ASOC [17] that PG had a broad reputation “*in Australia amongst consumers of electricity and energy related products and services*”.

17. The PJ’s approach was consistent with established authority that “*reputation*” means the recognition of a mark by the public generally (*Austin Nichols*, [45]; *McCormick*, [81]), which must exist amongst “***a significant section of the public***” (*Fry Consulting*, [121]). As the Full Court held in *Renaud Cointreau* at [74],[7] the reputation must be one:

> *... of which* ***a significant number of people*** *would be aware” [and] “what is ‘significant’ or ‘substantial’ will depend on the nature of the goods or services in question. For some highly specialised products, awareness among a few thousand or even less, might be sufficient.*

18. Here, “*Distribution of electricity*” is the antithesis of a specialised product – it is ubiquitously supplied every day to the entire population of Australia. Indeed, PG itself had previously submitted (correctly) to the Registrar of Trade Marks (in an opposition against its ‘633 Mark) that:[8]

> *... actual electricity customers throughout Australia exceed 10 million” [and that] in light of Renaud Cointreau: “A reputation amongst “a few thousand persons” for a product such as electricity cannot be sufficient.*

19. Moreover, at trial below PG’s submissions on s 88(2)(c) referred to its alleged reputation as not only “*very substantial*”, but “*immense*”.[9] The PJ did not err in considering and rejecting PG’s pleaded case under s 88(2)(c), based on an alleged reputation amongst Australian consumers generally, which the evidence did not support: J [68], [323]-[340]. In any event, the PJ found that Progressive's "*customer base, even considered from the perspective of the C&I market, is not large*" (J [68(2)]) and “*the evidence falls short of establishing that in the C&I market where its presence is strongest it has established a reputation of a kind that demonstrates a capacity to distinguish the goods and services"* (J [415]).

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6 Emphasis added, citing *Chateau Certan* at [590]; *Berlei* at 362.
7 See also *Tivo*, [324]; *Urban Alley*, [269]; *Enagic*, [254]; *Ragopika*, [22].
8 Pt C tab 23.2, AB1983, in the context of an opposition under s 60.
9 Pt C tab 73, AB3379-81 - T43.45-T44.8, T45.11-15; Pt C tab 82, AB3690 - [8], AB3707 - [75], AB3710 - [83(a)].

C. NOA Ground 1 – Alleged non-use of the FlowSmart Registration

20. If AS [18] is suggesting that the use of FlowSmart on the Dashboard was not a clear instance of trade mark use (cf AS [18] "*claim to have used*", "*no evidence*", "*desultory*" etc), that ignores the finding at J [226]-[230] that PG is bound to its pleaded assertions to the contrary and concession at trial (T394.33-395.10). At ASOC [5A], [8A]-[8C], PG pleaded that use as trade mark infringement, which is necessarily trade mark use: TMA s 120. In particulars to [5A], PG referred to parts of Mr Guichelaar's evidence including a screenshot of the Dashboard as at 1 November 2024.[10] The Respondents admitted such conduct from 31 October 2024: Amended Defence [5A]. As the PJ held at J [229], "*[T]he Applicant has deployed this pleading against the Respondents. It cannot simultaneously deny its impact*." Her Honour's subsequent findings as to use of FlowSmart on the Dashboard were expressly made "[*i*]*n the event that I am wrong in that conclusion*": J [232]. PG does not challenge that conclusion, and thus cannot challenge the PJ's subsequent findings of use of FlowSmart on the Dashboard at J [233]-[240], including that the Dashboard "*was online, available to customers, and operating in a commercial sense*" in that period: J [234]. In any event, there was evidence that 25 customers had access to the Dashboard by 1 November 2024[11] and PG accepted in closing oral submissions that offering a service on the Dashboard would be sufficient to establish trade mark use.[12]

21. A non-use case is negatived by even a single instance of use (*Firstmac FC*, [93]; *Woolly Bull*, [17]; *Unilever*, [64]; *Taxiprop*, [101]). Thus the use of FlowSmart on the Dashboard, even just on 1 November 2024, is sufficient. PG's case on appeal (cf NOA Ground 1) is that **(1),** the use was not *in good faith* within s 92(4)(b)(ii) (AS [19]-[23]) and **(2)**, the use was not *authorised use* within ss 7(3) and 8 (AS [24]-[27]: *viz*. only the PJ's issues 3 and 4 at J [225]). These submissions now address those 2 issues.

22. **Authorised use:** The cases concerning authorised use generally fall into two categories: where the trade mark owner and the user are unrelated parties and rely on a written contract to demonstrate control (eg *Lodestar*), or where the parties are related but do not have such a contract (eg *Trident FC*). Here, there was a written licence agreement and the parties were related;[13] that is the context in which her Honour found the written licence agreement containing quality control provisions was sufficient to establish control. In the critical period the owner of the FlowSmart registration was Bruutzak, which AS [16] simply refers to as "*a Dutch company*". That diverts attention from the important fact that the licensor's sole director and shareholder was the Respondents' director and CEO, Mr Guichelaar who thus had complete knowledge of how the licensee was using the mark (J [17], [99], [302], [310]).

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10 Pt C tab 20, AB1495 - [118]; tab 20.1, AB1580-9.

11 Pt C tab 33; tab 34 (Confidential); tab 25.3 (Confidential), AB2928; tab 72, AB3322 - T259.21-34.

12 Pt C tab 76, AB3549-50 - T394.33-395.10.

13 Pt C tab 20, AB1495 - [117]; tab 20.1, AB1567-79.

23. At J [287]-[291], the PJ correctly distilled two key propositions from *Lodestar*: **(1)** there must be actual control as a matter of substance, **a matter of fact and degree in each case**; and **(2)** to demonstrate control it is not necessary to show actual demands or instructions where the licensee is acting appropriately within the scope of the licence, "*i.e. because **obedience to the trade mark owner is 'so instinctive and complete that instruction was not necessary'***" (emphasis added).

24. The PJ had the advantage of viewing the cross-examination of Mr Guichelaar, and accepted his explanation that Bruutzak was interposed as owner of the mark so that it was "*not immediately super-obvious*" to EnergyAustralia that the mark was being sold to a direct competitor: J [273]-[276], [304], [312]; T264.23-43.

25. At J [310], the PJ noted key features of the present licence agreement, which distinguished it from the agreement in *Lodestar*: **(1)** it was not perpetual; **(2)** the quality control provisions required use of the FlowSmart mark in a particular form, and the evidence was that it was used in that form; **(3)** the CEO of Flo Energy Australia was the sole director and shareholder of Bruutzak and so was in a position to know if the FlowSmart mark was being used in the manner required. While there was no evidence that Bruutzak gave any directions in relation to the FlowSmart mark, her Honour correctly observed (J [311]) that:

> *... given that the Licence Agreement was in place for only 33 days, the failure to see much activity around it does not lead to the conclusion that the owner did not exercise control.*

26. By contrast, in *Lodestar* the licensor failed for many years (almost a decade) "*to have even the most cursory interest in the goods being sold under the trade mark*": J [290].

27. Dealing with PG's criticisms of the licensing arrangement, the PJ noted at J [317] that "*the terms of the Licence Agreement were limited and prescriptive in the sense that they permit the use of the FlowSmart Mark in only the way in which it was being used*." Her Honour noted also that the true locus of control of the trade mark was not explored with Mr Guichelaar in cross-examination. Indeed, the question of authorised use was not addressed at all in that cross-examination: T234-271.

28. <u>AS</u> [19] misstates the PJ's decision at J [317]-[318]. Her Honour did not treat "*a contractual capacity to control*" as sufficient (of itself) to demonstrate actual control. Rather than relying merely on the terms of the licence agreement, her Honour's decision also took into account the evidence of actual compliance with the requirement that FlowSmart be used in a particular form, and the fact that the licensor's sole owner and director Mr Guichelaar was in a position to know if the mark was being used in the manner required: J [310].

29. <u>AS</u> [20]-[23] simply argue that the PJ ought to have come to the same conclusion as the Full Court in *Lodestar*. This ignores the careful distinctions drawn by the PJ between the present case and *Lodestar* at J [310] and is really just an attempt to reargue the factual question of

"control in substance", which is a matter of fact and degree, without identifying any error of principle. Taking into account the key facts identified by the PJ, but glossed over by PG, it is plain that there is no error in the PJ's reasoning. The use was authorised use.

30. **<u>Good faith</u>**: <u>AS</u> [25] accepts that the PJ correctly identified the relevant principles, and importantly that proving good faith in this context merely means proving real, commercial use (*E & J Gallo*, [62]; *Woolly Bull*, [16]; *Murray Goulburn*, 45; *Liquideng*, [52]-[53]; *Taxiprop*, [97]). Instead, PG challenges the PJ's application of the principles to the factual findings (<u>AS</u> [26]) and sets out four factual matters that, it says, should have led to a finding of lack of good faith. <u>AS</u> [27] continues in a similar vein.

31. The PJ's findings included that **(1)** FlowSmart was only added to the Dashboard *after* an in-principle agreement was reached (J [97]-[98]), **(2)** Bruutzak was interposed to "*ease the negotiations with EnergyAustralia*" as the mark was being sold to a "*direct competitor*" (J [273]-[276], [304], [312]) and **(3)**, there was a process of development of the mark for integration onto the Respondents' online offering (J [281]). At J [281] the PJ identified further "*strong evidence*" demonstrating real and genuine use, including that the FlowSmart mark **(4)**, was rolled out in both Australia and Singapore, **(5)**, was in actual use as part of the way the Respondents interacted with its customers and **(6)**, was deployed in correspondence with potential customers. None of these findings are challenged by PG.

32. PG, rather than identifying error, simply asks the Full Court to revisit the matter. What is ordinarily required for appellate intervention to be justified in respect of factual findings is "*incontrovertible facts*", or a conclusion that the decision at trial is "*glaringly improbable*" or "*contrary to compelling inferences*" (*Fox*, [28]-[29]; *Robinson Helicopter*, [43]; *Jadwan*, [411]).

D. NOA Ground 3 – Cancellation of Flow Power Marks – s 41

33. <u>AS</u> [29] asserts, without merit, that the PJ "*failed to identify the correct test then [failed to] apply that test*" for s 41. To the contrary, at J [149]-[161] her Honour precisely identified the correct approach, citing *Clark*, *Cantarella* and *Apple*. Moreover, <u>AS</u> [28]-[34] entirely ignore the PJ's consideration at J [156] of the High Court's (unanimous) decision in *Muller* at 41 in support of the proposition that the correct inquiry as to distinctiveness includes consideration of the words of the trade mark <u>along with</u> the insertion of any link words, where such words "*would have been necessary to make the meaning perfectly clear*". PG also ignores the PJ's consideration at J [157] of five authorities for the proposition that "*it is not just the trade mark that is relevant to the analysis, it is also marks that closely resemble it*", that is, marks which may be substantially identical or deceptively similar to FLOW POWER (*Moroccanoil, Kenman Kandy, Philmac*, *Nestlé* and *Guylian*).

34. At J [159], her Honour relied on this line of authorities to hold that the correct approach, in analysing whether the Registered Flow Power Marks are adapted to distinguish, is to consider the possibility of use by honest traders of terms such as "***flow of power***" or "***power flow***", as variations that would be captured by PG's registration. PG neither contends that these authorities are wrong, nor that her Honour erred in applying them. Rather, the closest PG comes to engaging with these authorities is at AS [31] where it contends that "*expressions which rearrange, grammatically complete or change the syntax of the words in the mark are [not] to be treated as if they are the mark itself (cf J [157]).*" This misunderstands the point of these authorities. Variations of the registered mark must be considered – not because they are "the mark itself" but because other traders might desire to use words nearly resembling the trade mark. That misunderstanding in AS [31] infects PG's further contentions in AS [32].

35. PG's complaint at AS [29] that the PJ "*did not identify any ordinary signification of FLOW POWER*" is without merit: Her Honour noted at J [372] (citing *Cantarella* at [44]):

> *The "ordinary signification" of a mark is to be examined from the point of view of the possible impairment of the rights of honest traders to do that which, apart from the grant of a monopoly, would be their natural mode of conducting business.*

36. Her Honour then proceeded to examine the ordinary signification from that point of view, and concluded at J [384]-[385] that the words "flow", "power", "power flow" and "flow of power" are used by regulators in various contexts related to the transmission of electricity, and "*show the way in which honest traders may seek to explain or describe the services they are providing*." Then, at J [388] the PJ accepted that:

> *... the syntactically unusual arrangement of words in FLOW POWER goes some way to render the phrase functionally meaningless ...*

but returned at J [389] to considering the desire of traders to use words nearly resembling those words, including FLOW OF POWER and POWER FLOW[14] Her Honour concluded that unusual word order operates to make the FLOW POWER mark "*to some extent, but not sufficiently, adapted to distinguish*": J [391]-[393]. This reasoning discloses no error.

37. AS [33]-[34] merely seek to reargue the factual question of inherent adaptation to distinguish. The PJ dealt with the question of factual distinctiveness under s 41(4) at J [402]-[421]. Her Honour held at J [404] and [411] that FLOW POWER was:

> *... only faintly adapted to distinguish…[such that] reasonably strong evidence of use or other circumstances will be required to establish that it was capable of registration at the priority date.*

38. Contrary to the suggestion in AS [35], at J [413] her Honour appropriately noted the different analysis applying under each of ss 41(4) and 88(2)(c). AS [36] misunderstands the relevance of s 41(4) by returning to a consideration of the "inherent capacity of FLOW POWER to distinguish", and AS [37] raises an entirely irrelevant consideration as to whether there was any

[14] See also Pt C tab 19; tab 19.1; tab 35; tab 48; tab 49.

evidence of confusion from PG's use of FLOW POWER. Indeed, in an unrelated proceeding, PG pleaded "*there has been extensive third party us* [sic] *of the word FLOW (and the variant "FLO") for its descriptive significance in connection with the supply of water, gas and electricity, and related goods and services.*"[15] Thus, PG has not identified any error, let alone appellable error, in the PJ's analysis and application of s 41.

E. NOA Grounds 4 and 5 – Cancellation of Flow Power Marks – s 44

39. **Section 44(3)(b):** As identified at AS [38], the issue under s 44 is whether "because of other circumstances" the Registered Flow Power Marks would be accepted for registration. AS [39] correctly accepts that PG is attacking an exercise of discretion. Relevantly, PG particularised several factors upon which it sought the discretion in s 44(3)(b) to be exercised in its favour, including an allegation that it "*had developed an **extensive reputation** in the FLOW POWER mark*": J [436], Defence to Cross-claim [23A]. It can hardly be said that the PJ took into account an irrelevant consideration of the type identified in *House* by considering and rejecting this factor. AS [40] seeks to conjure up *House*-type error by complaining that the PJ treated this factor as "*determinative*". That is not a fair characterisation of the PJ's reasoning at J [452]. In any event it was entirely within her Honour's discretion to consider that factor and give it the weight she considered appropriate.

40. AS [41] strays even further from the principles in *House* by identifying several factors to which PG says the PJ gave "*insufficient weight*". It is not put that her Honour failed to take these factors into account; on the contrary AS [41] identifies all the parts of the judgment where her Honour considered each factor. AS [42] contends that the cancellation of the FlowSmart registration, if upheld by the Full Court, would be a "*compelling circumstance*" which the PJ ought to have taken into account. Having determined that the FlowSmart registration should not be cancelled, no such "*compelling circumstance*" existed.

41. *Finally,* for the reasons set out in the accompanying submissions on ground 4 of the NOC, PG did not plead honest adoption in respect of s 44(3)(b) and should be held to its pleaded case.

42. No error, let alone *House*-type error, is found in the PJ's exercise of the s 44(3)(b) discretion.

43. In the alternative, if error is established and the discretion is to be re-exercised, s 44(3)(b) is to be applied at the priority date (*Firstmac FC* [61], [87]-[88]) and circumstances (2), (3), (4), (5) and (7) in AS [41] are irrelevant (ground 4 of the NOC).

44. **Discretion:** The discretion under s 89 arising in respect of s 44 (via s 88(2)(a)) is to be exercised at the priority date (*Taylor*, [101], [299]). For that reason, the matters at AS [46]-[47] are irrelevant. In any event, contrary to AS [45], the s 44 ground did arise "*through any act or fault of the registered owner*". The s 44 ground arises from PG's *act* of applying for FLOW POWER

[15] Pt C tab 48; tab 49.

with knowledge of the prior FlowSmart registration and the intention of using FLOW as the primary branding tool (*Taylor,* [248]). In light of that knowledge and intention, PG is at *fault* for the s 44 ground arising.

F. NOA Ground 6 – defence of honest and concurrent use – s 122(1)(fa), 44(3)(a)

45. PG has abandoned NOA Ground 7 and no longer challenges the PJ's finding that its adoption of FLOW was not honest: J [129].

46. Contrary to <u>AS</u> [50], PG's first infringement of the FlowSmart registration was when it first used FLOW and FLOW POWER in March 2017. *Colorado* at [32], [191] and [35], *Yarra Valley* at [285] and *Anchorage* at [193] are authority for the approach that cancellation under ss 88(2)(a) read with 41 or 44 operates retrospectively, such that the registration was invalid at all times. Indeed, as Rofe J held in *FanFirm*:

> *From a policy perspective, it is a strange result that the owner of a trade mark registration that was not validly made could obtain the benefit of a defence for trade mark infringement against an applicant who has established that the owner was never entitled to the registration, and that the applicant was the first user, and therefore the owner, of the mark.*

47. While Rofe J deferred to Nicholas J's analysis in *Dunlop*, that analysis was *obiter* as his Honour found the Applicant lacked standing to bring infringement proceedings by reason of the Applicant's registration being liable to cancellation. To the extent there is any conflict of principle, this Court should prefer the approach of the Full Court in *Colorado* and *Anchorage* that cancellation under s 88(2)(a) has the effect that the registration was invalid at all times: that supports a consistent construction of the TMA as a whole: a registration, invalid at all times, ought provide no enforceable monopoly under s 120 and no defence under s 122(1)(e).

48. In any event, a defence of honest concurrent use is not to be assessed "*once and for all*", rather it applies separately to every occasion of the use of a mark: *Firstmac HC* [56], [64]. As noted above, PG "*put energy into promoting FLOW as a prefix, rather than FLOW POWER as a trade mark*", "*increased its focus upon FLOW as the key branding concept"* and used FLOW *"as its primary branding tool"* (J [71]-[74])–not steps that an objectively honest trader would take in the face of legal advice such as that PG received in February-March 2017: J [25]-[28], [128]-[129]. This ongoing and increasing use of the FLOW element of FLOW POWER precludes a finding of honest concurrent use.

49. Apart from the extent of use of FLOW POWER, the matters set out in <u>AS</u> [51] are irrelevant to consideration of s 44(3)(a) which is concerned with honesty and concurrency of use. The evidence of use of FLOW POWER (cf FLOW or the Flow Power Logo) was insufficient.

50. Finally, as a discretionary ground, no error, let alone *House*-type error, is disclosed in the PJ's exercise of her discretion under s 44(3)(a).

Date: 20 July 2026

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