

## Article Information

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## Progressive Green v Flo Energy: The (F)lowdown on trade mark infringement

**The recent Federal Court decision of Progressive Green Pty Ltd v Flo Energy Pty Ltd serves as a reminder that trade mark litigation can be a double-edged sword. Trade mark owners should take care that their trade mark is not susceptible to cancellation before bringing proceedings against another party. This requires proper due diligence about the history of the trade mark.**

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### Background Facts

The Applicant, Progressive Green Pty Ltd (**Progressive Green**), has carried on the business of the supply and sale of electricity and energy related products since early 2017 under the name Flow Power.<sup>[1]</sup> Relevantly, Progressive Green is the owner of three registered trade marks for the words “FLOW POWER”, with priority dates between 6 March 2017 and 4 May 2017 (**Registered Flow Power Trade Marks**).<sup>[2]</sup>

The First Respondent, Flo Energy Australia Pty Ltd, commenced the provision of electricity services in Australia in early April 2024 by reference to the following unregistered trade marks:

- FLO;
- FLO ENERGY;



;

- floenergy.com.au<sup>[3]</sup>

### (Flo Energy Marks)

The Second Respondent, Flo Holding Pte Ltd, is the sole shareholder of the First Respondent.<sup>[4]</sup>

The Applicant commenced proceedings against the Respondents (**Flo Energy**) on 10 June 2024, alleging that the use of the Flo Energy Marks infringed the Registered Flow Power Marks. By way of cross-claim, Flo Energy sought to cancel the Registered Flow Power Marks on the basis that, as at their priority dates, the marks lacked distinctiveness.<sup>[5]</sup>

Importantly, during the course of the proceedings, Flo Energy sought to rely upon an Australian trade mark registration for the words “FlowSmart”, which had a priority date of 30 April 2013 and was registered in class 39 for a number of electricity-related services (**FlowSmart Mark**).<sup>[6]</sup>

This was because Flo Energy had approached the owner of the FlowSmart Mark and enquired whether it would consider an assignment of the FlowSmart Mark.<sup>[7]</sup> On 31 October 2024, the FlowSmart Mark was assigned to Bruutzak Holding B.V., which was owned by a director of Flo Energy.<sup>[8]</sup> Subsequently, on 2 December 2024, the FlowSmart Mark was assigned to the Second Respondent who granted the First Respondent an exclusive licence to use the mark.<sup>[9]</sup>

As a result, Flo Energy further alleged that:

- the Registered Flow Power Marks should be cancelled due to their deceptive similarity to the FlowSmart Mark, which had an earlier priority date; and
- the FlowSmart Mark had been infringed by the Registered Flow Power Marks.[\[10\]](#)

In response, Progressive Green alleged that:

- one of the Registered Flow Power Marks had been infringed by the use of the FlowSmart Mark;
- the FlowSmart Mark should be removed from the Register of Trade Marks on the basis that it had not been used in good faith in the relevant period;[\[11\]](#) and
- the FlowSmart Mark should be cancelled on the basis that, because of the reputation of the Registered Flow Power Marks, the use of the FlowSmart Mark would be likely to deceive or cause confusion.[\[12\]](#)

## Findings

### Infringement of the Registered Flow Power Marks

Because the FlowSmart Mark had an earlier priority date than the relevant Registered Flow Power Mark, the infringement claim was only relevant to future relief if Progressive Green were successful in removing the FlowSmart Mark for non-use, or cancelling it due to a likelihood to deceive or cause confusion.[\[13\]](#)

### *Lack of Good Faith Use*

Given that Progressive Green did not make its removal application for non-use until 3 December 2024, the relevant period for assessing use was between 3 November 2021 and 3 November 2024.[\[14\]](#) Further, as the FlowSmart Mark was not used until it was purchased by Bruutzak Holding B.V. on 31 October 2024, actual use could only be assessed over a four-day window.[\[15\]](#)

Unfortunately, Progressive Green had included in its evidence an example of use of the FlowSmart Mark in this window when alleging trade mark infringement in its pleadings, and the only question that remained was whether that use was in good faith.[\[16\]](#) Her Honour considered that Flo Energy's purchase of the FlowSmart Mark was clearly motivated by the proceedings brought by Progressive Green but that this of its own did not constitute bad faith.[\[17\]](#) Reasons which influenced her Honour's decision in this regard included the breadth of the FlowSmart Mark's roll out, which was consistent with the conclusion that the use was commercial and not merely contrived to defeat litigation.[\[18\]](#)

Further, her Honour rejected Progressive Green's argument that the acquisition of the mark through Bruutzak Holding B.V. instead of through Flo Energy directly demonstrated a lack of good faith.[\[19\]](#)

### *Likely to Deceive or Cause Confusion*

Progressive Green filed substantial evidence of use of the Registered Flow Power Trade Marks as well as other unregistered trade marks such as the word "FLOW" and the logo (together, **Flow Power Marks**) to argue that, because of Progressive Green's reputation in those marks, the use of the FlowSmart Mark would be likely to deceive or cause confusion.[\[20\]](#) This evidence included use of the Flow Power Marks:

- on Progressive Green's website and social media;
- in a number of newspaper advertisements, including the *Australian Financial Review*, *The Sydney Morning Herald* and *The Age*;
- in the promotion and sale of electricity plans; and
- in radio and television interviews.[\[21\]](#)

Further, Progressive Green filed evidence of its revenue figures and of a report from the Australian Energy Regulator which identified Progressive Green as the seventh largest Australian electricity retailer by market share to its commercial and industrial customers.[\[22\]](#)

While accepting that Progressive Green had invested a significant amount of money and effort in the Flow Power Marks, her Honour did not accept that this was sufficient to demonstrate "a substantial reputation among a substantial section of the consumer of electricity and energy related products and services in the Australian electricity and energy market."[\[23\]](#) This was because most of the use was directed towards a specific portion of the electricity market, being the commercial and industrial market, and, when considering the mass electricity market as a whole, it was not sufficient to establish a substantial reputation.[\[24\]](#)

Her Honour therefore concluded that there was insufficient reputation of the Flow Power Marks to render the use of the

FlowSmart Mark likely to deceive or cause confusion.<sup>[25]</sup> As a result, the FlowSmart Mark remained registered and did not infringe the Registered Flow Power Marks.<sup>[26]</sup>

### Cancellation of the Registered Flow Power Marks

Under section 88(2)(a) of the *Trade Marks Act 1995* (Cth) (**TMA**), an application for cancellation of a trade mark can be made on any of the grounds on which the original registration of the trade mark could have been opposed. Such grounds include that the trade mark was not capable of distinguishing the applicant's goods or services, or that it was substantially identical with, or deceptively similar to, an earlier registered trade mark.<sup>[27]</sup>

#### *Distinctiveness*

In considering whether the Registered Flow Power Marks were distinctive of Progressive Green's electricity-related goods and services, her Honour felt that there was a "*real discomfort in permitting the registration of the words FLOW POWER in relation to electricity in circumstances where 'electricity' and 'power' are close to being synonyms of each other, and the word 'flow' is a common description of the way in which electricity moves.*"<sup>[28]</sup> However, her Honour held that, while the phrase "power flow" would be purely descriptive, the reversal of the words meant that the Registered Flow Power Marks were to some extent, but not sufficiently, inherently adapted to distinguish.<sup>[29]</sup>

As such, her Honour considered Progressive Green's use of the Registered Flow Power Marks to determine whether the marks had acquired distinctiveness. For the same reasons concluded earlier, her Honour held that the evidence fell short of establishing enough of a reputation to demonstrate a capacity to distinguish the goods and services.<sup>[30]</sup>

#### *Deceptive Similarity*

Given Progressive Green's allegations that the FlowSmart Mark infringed the Registered Flow Power Marks, there was no dispute that the Registered Flow Power Marks and the FlowSmart Mark were deceptively similar.<sup>[31]</sup> As the FlowSmart Mark had an earlier priority date than the Registered Flow Power Marks, the Registered Flow Power Marks could have been opposed at the time of registration.

Her Honour therefore held that it was appropriate to cancel the Registered Flow Power Marks. Her Honour also concluded that, going forward, these marks would infringe the FlowSmart Mark.<sup>[32]</sup> This is because Progressive Green would no longer be able to rely upon section 122(1)(e) of the TMA, which protects a person from trade mark infringement where they are using a registered trade mark within the rights given to them under the TMA.

### **Takeaways**

This case highlights the importance of using trade marks that are distinctive and in a manner which demonstrates clear market presence. When considering whether to enforce a trade mark, caution should be exercised to ensure that the trade mark is not susceptible to removal or cancellation.

Piper Alderman has a nationally recognised practice in intellectual property enforcement and protections, with experience in all jurisdictions. Please contact Tim O'Callaghan and his team if you require intellectual property advice.

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<sup>[1]</sup> *Progressive Green Pty Ltd v Flo Energy Pty Ltd* [2025] FCA 1315 [2].

<sup>[2]</sup> *Ibid* [1]; Australian Trade Mark Nos. 1828633, 1895059 and 184261.

<sup>[3]</sup> *Ibid* [4].

<sup>[4]</sup> *Ibid* [5].

<sup>[5]</sup> *Ibid* [94].

<sup>[6]</sup> *Ibid* [95].

<sup>[7]</sup> *Ibid* [97].

<sup>[8]</sup> *Ibid* [99].

<sup>[9]</sup> *Ibid* [101].

[\[10\]](#) Ibid [10].

[\[11\]](#) *Trade Marks Act 1995* (Cth) s 92(4)(b).

[\[12\]](#) *Progressive Green v Flo Energy* (n 1) [13].

[\[13\]](#) Ibid [215].

[\[14\]](#) Ibid [219].

[\[15\]](#) Ibid [222].

[\[16\]](#) Ibid [233] – [240].

[\[17\]](#) Ibid [277]; see *Electrolux Ltd v Electrix Ltd* [1954] 71 RPC 23, 41 (Lloyd-Jacob J).

[\[18\]](#) Ibid [281]; *Re Concord Trade Mark* [1987] FSR 209, cited with approval in *E & J Gallo Winery v Lion Nathan Australia Pty Ltd* (2010) 241 CLR 144 [62].

[\[19\]](#) Ibid [282].

[\[20\]](#) Ibid [323].

[\[21\]](#) Ibid [133] – [140].

[\[22\]](#) Ibid [34].

[\[23\]](#) Ibid [330].

[\[24\]](#) Ibid [145].

[\[25\]](#) Ibid [338].

[\[26\]](#) Ibid [341].

[\[27\]](#) *Trade Marks Act 1995* (Cth) ss 41, 44.

[\[28\]](#) *Progressive Green v Flo Energy* (n 1) [382].

[\[29\]](#) Ibid [391].

[\[30\]](#) Ibid [415].

[\[31\]](#) Ibid [426].

[\[32\]](#) Ibid [465].