



DOMAIN NAME DISPUTE ADMINISTRATIVE PANEL

auDRP_22_15

Single Panellist Decision

Airservices Australia ABN 56 698 720 886

v.

Reuben Studzinski ABN 24 051 664 459

1. The Parties

1.1 The Complainant is Airservices Australia ABN 66 698 720 886 of Canberra in the Australian Capital Territory, 2601 (“the Complainant”).

1.2 The Respondent is Reuben Studzinski ABN 24 051 664 459 of Lilydale in the State of Victoria, 3140 (“the Respondent”).

2. Domain Name, Registrar and Provider

2.1 The domain name upon which complaint is based is airservices.com.au (the Domain Name).

2.2 The Registrar of the Domain Name is Synergy Wholesale Accreditations Pty Ltd (“the Registrar”).

2.3 The Provider in this Proceeding is Resolution Institute of Suite 602, Level 6, Tower B, Zenith Centre, 821-843 Pacific Highway, Chatswood, NSW 2067 (“the Provider” or “Resolution Institute”).

3. Procedural History

3.1 This proceeding relates to the Complaint submitted by the Complainant in accordance with:

(i) the .au Dispute Resolution Policy No. 2016-01 published 15 April 2016 (“auDRP”) which includes Schedule A (Policy) and Schedule B (Rules); and

(ii) the Provider’s supplemental rules for the .au Domain Name Dispute Resolution Policy.

3.2 Paragraph 3.2 of the auDRP provides that a Complainant should ensure that they have read the entire auDRP and auDRP Rules at Schedules A and B of this document before filing their Complaint and that the Complaint must meet the requirements set out in Paragraph 3 of the auDRP Rules in

Schedule B of this document, as well as any requirements detailed in the Provider's Supplemental Rules (available from the Provider's website).

3.3 The Complainant initially lodged a complaint with the Provider on 16-12-2022. The Provider is required by Rule 4 of Schedule B to review the Complaint for administrative compliance with the Policy and Rules.

3.4 Rule 3 of Schedule B sets out the procedural requirements of the Complaint and requires, *inter alia*, that the Complainant describe, in accordance with the Policy, the grounds on which the complaint is made, including a discussion of any aspects of the Policy that are applicable (ix) and annex any documentary or other evidence, including a copy of the Policy applicable to the domain name(s) in dispute and any name, trademark or service mark registration upon which the complaint relies, together with a schedule indexing such evidence (xv).”

3.5 Following this review, the Complainant subsequently modified the Complaint to address various administrative deficiencies and the supplemented Complaint, with the submissions and the schedule of attachments relating to the Complaint were sent to the Provider on 26.11.22 and acknowledged by the Provider on 28.11.22.

3.6 The documents supplied by the Complainant comprise the complaint and attachments, namely:

- (1) IP Australia extract of the Complainant’s Trademark;
- (2) Screenshot /Google Search of aircservices.com.au;
- (3) Email correspondence between [an employee of] the Complainant and the Respondent.

3.7 On 28.11.2022 the Provider notified auDA of the Domain Name complaint.

3.8 On 28.11.2022 the Respondent was Notified by the Provider of the Domain Name Dispute Complaint, with a copy of that Notification also sent to the Complainant and the Registrar.

3.9 On 29.11.2022 the Registrar confirmed that the Domain Name in dispute had been locked.

3.10 Pursuant to 5(a) of Schedule B of the auDRP Rules, the Respondent was required to submit a response to the Provider no later than 18.12.2022, this being twenty (20) days after the date of commencement of the administrative proceeding.

3.11 The Respondent’s Response was received through his solicitors on 15.12.2022.

3.12 The Resolution Institute appointed Rowena McNally as the sole panellist in the matter on 19-12-2022. The Panellist has confirmed that she has no conflict of interest in relation to the matter. All procedural requirements appear to have been satisfied.

4. Jurisdiction

4.1 Paragraph 2.1 of the auDRP states:

“All Domain Name licences issued or renewed in the open 2LDs from 1 August 2002 are subject to a mandatory administrative proceeding under the auDRP.”

4.2 The Domain Name, being “com.au” is an open 2LD within the scope of the paragraph. It is therefore subject to the mandatory administrative proceeding prescribed by the auDRP.

4.3 The purpose of the auDRP is to provide a cheaper, speedier alternative to litigation for the resolution of disputes between the registrant of a .au domain name and a party with competing rights in the domain name.

4.4 A successful Complaint is likely to result in an interference with the ownership of the disputed domain name, usually by the cancellation of the domain name, or the transfer of the disputed domain name to the complainant so a complainant is required to comply with the auDRP and satisfy three key criteria:

- The domain name must be identical with or confusingly similar to a name, trademark or service mark in which the complainant has rights;
- The domain name holder has no rights or legitimate interests in respect of the domain name; and
- The domain name has been registered or subsequently used in bad faith.

4.5 The onus is on the complainant in respect of each of these elements.

4.6 The auDRP requires that the Panel decide a complaint in accordance with the Policy, Rules and any rules and principles of law that it deems applicable, with the decision to be made based on the statements and documents submitted by the complainant and the respondent.

5. The Complaint

5.1 The Complainant is “Airservices Australia ABN 56 698 720 886”, which appears to be a business name and registered business number. The Panel notes that a business name is not a legal entity.

5.2 The Complaint comprises a short submission and the provided documents on which the Complainant relies to affect a transfer of the Domain Name.

5.3 Other than a reference to being an “Australian Federal Government-owned organisation” the Complainant has provided nothing to inform the Panel as to its legal status, its enabling legislation or the Complainant’s activities and/or services although the Respondent’s submission claims that the Complainant was still known by some people under its former name “Civil Aviation Authority”.

5.4 The Complainant says that it is “commonly known as ‘Airservices’ within the aviation community and industry” but has provided nothing to the Panel to verify or substantiate this claim.

5.5 The Complainant has provided search evidence of a Trademark 1993734 (“the Complainant’s Trademark”) lodged on 05.03.2019 for the word “airservices” together with an image, described in the trademark as a “star indents crescent”.

5.6 The search shows the Trademark to be registered to “Airservices Australia” and information can be gleaned from the Trademark registration regarding the classes for which the Trademark was registered, however none of these are referred to by the Complainant in its submissions, and the Complainant has provided no information about the Complainant’s use of the Trademark; who the Complainant is, or what the Complainant does.

5.7 The Complaint is silent on whether the Complainant has authorised or licensed the Respondent to use the Complainant’s Trademark, but this has not been asserted by the Respondent and the Panel infers that no such authorisation or license has been granted.

5.8 The Panel infers from the two references identified in 5.3 that Airservices Australia is either (a) or (the) successor organisation to what was previously the Commonwealth Civil Aviation Authority .

5.9 If this is correct, then it is possible that the Complainant was using the name “airservices” prior to the date of the registration or the Complainant’s Trademark, and possibly prior to registration by the Respondent of the Domain Name however there is nothing to support this in the submissions or material put forward by the Complainant.

5.10 Based on the Complainant’s submissions, the Panel accepts that the Complainant’s Trademark was registered and has had priority since 05.03.2019.

5.11 The Panel has been provided with no other information about the Complainant’s use of the name “Airservices”, how long it has been operating under that name or if the Complainant traded or had other rights to the use of that name prior to the date of registration of the Complainant’s Trademark or the registration of the Domain Name.

6. The Response

6.1. The Respondent disputes the Complainant’s Complaint and has responded through his solicitors.

6.2 In summary, the submission is that the Respondent:

- (i) has owned the domain name *airservices.com.au* since 28 January 2013, and has provided a copy of the auDA Domain Creation Date for *airservices.com.au* (Annexure 1) noting this pre-dated the Complainant’s Trademark;
- (ii) was “unaware of the Complainant’s alleged trademark rights when the Respondent registered the disputed domain name in 2013 and therefore “could not have registered the disputed domain name to trade off the Complainant’s reputation”.
- (iii) has operated a web site from the disputed domain name since about January 2013. The Respondent has provided various screen shots produced from the Way Back Time Machine and a recent shot of the website which (1) contains information about air services in the descriptive sense such as charter flights, domestic and international travel and more; and (2) as a lesser feature, has Google advertisements that generate advertising revenue for the Respondent.
- (iv) has simply used a generic and descriptive term to make legitimate use of the Domain Name and is continuing to use the Domain Name.

6.3 The Respondent says that he was contacted by the Complainant asking the sales price of the Domain Name. He had indicated that the Domain Name was not up for sale but if the Complainant had a proposal for him they were free to make one.

6.4 The Respondent says that not having secured the acquisition, the Complainant has resorted to the auDRP process “as a cudgel.”

6.5 The Respondent submits that the bringing of this proceeding is an abuse of process and the Panel ought to make a finding of Reverse Domain Name Hijacking. The Panel will address this issue later.

7. Complaint Elements and the Onus of Proof

7.1 Schedule A of the auDRP applies to disputes which meet the requirements set out in paragraph 4(a) of Schedule A of the auDRP. Subparagraph 4(a) requires that any party holding a

domain name licence issued in the 2LDs “...submit to a mandatory administrative proceeding in the event that a third party (complainant) asserts to the applicable Provider, in compliance with the Rules of Procedure that:

- (i) [the] domain name is identical or confusingly similar to a name, trademark or service mark in which the complainant has rights; and
- (ii) [the] have no rights or legitimate interests in respect of the domain name, and
- (iii) [the] domain name has been registered or subsequently used in bad faith.

In an administrative proceeding, the complainant bears the onus of proof.”

7.2 I will turn now to consider the Complaint in relation to each of these elements.

8. Is the Domain name identical to or confusingly similar to a name, trade name or service mark in which the Complainant has rights?

8.1 As to this element, the Complainant says:

“The disputed domain name (airservices.com.au) is a direct representation of the trade mark (1993734) registered by Airservices Australia with IP Australia. Airservices is also commonly known as ‘Airservices’ within the aviation community and industry.”

8.2 The Complainant has not provided information concerning the establishment of the Complainant’s organisation, but the Panel accepts that the Trademark was registered to Airservices Australia with IP Australia ASIC on 5.3.2019 and the Complainant’s Trademark is deemed to have accrued to the Complainant as of the priority date.

8.3 The Respondent says, correctly, that the burden of proof is on the Complainant.

8.4 The Respondent submits that the Complaint does not include sufficient information to prove this element of the Policy and says that the Complainant's trademark is not:

- (1) identical to the disputed domain name, as the words Air Services are “part of a composite mark that includes a fancy logo”; nor
- (2) confusingly similar to the disputed domain name as it is a composite mark in which the words “Air” and “Services” appear as part of a logo.

8.5 The Respondent says that the Complainant has not been able to register any word mark (without the logo) similar to the disputed domain name because the words are ordinary descriptive words.

8.6 Furthermore, says the Respondent, and the Panel accepts, the Complainant has provided no evidence that Australian consumers associate the words "Air Services" with the Complainant outside the Complainant's logos. As such, says the Respondent, the disputed domain name is not confusingly similar.

8.7 Notwithstanding the Respondent’s submissions, the Panel accepts that the Domain Name is identical to or confusingly similar to the Complainant’s Trademark and notes that “Airservices” also forms part of the Complainant’s business or organisation name “Airservices Australia” such that individuals are likely to the Domain Name “airservices.com.au” to be confusingly similar.

8.8 The Panel finds there is sufficient before the Panel to indicate that the Domain Name is “identical to or confusingly similar to” a name, trade name or service mark in which the Complainant has rights.

9. Does the Respondent have a right or legitimate interest in the Domain name (4(a)(ii))?

9.1 The Complainant also bears the onus of proving the second element, namely that the Respondent does not have a right or legitimate interest in the Domain Name.

9.2 The totality of the Complainant’s submission is that:

“It appears the respondent does not hold any Trade marks relevant to the domain name. There is also no mention of the name “airservices” or “air services” in part of [sic] in full, in the list of Business Names associated with the respondents ABN.

The current use of aircservices.com.au serves no purpose other than providing static information supposedly related to Air charter services and providing links to other advertisements by Google. See attached file “Annex_B_aircservices.com.au_20221116.png”.

9.3 The Respondents submits the Complainant carries the burden of proof to make out a *prima facie* case that the Respondent does not have rights and legitimate interests in respect of the disputed domain name and that the Claimant has failed to do this, and to the contrary, confirms the Respondent’s use of the Domain Name.

9.4 The Respondent submits that where the domain name is highly descriptive, the Complainant must make a strong case to establish, *prima facie*, that the Respondent does not have rights or legitimate interests in it. As a general principle, submits the Respondent, the less distinctive the Complainant’s trademark/name is, the more likely it is the Respondent will have rights or legitimate interests in a corresponding domain name. Here, submits the Respondent, “Air Services” is not in any way distinctive....”

9.5 The Respondent says, and the Panel accepts, that there is:

“... no evidence before the Panel that shows that the Respondent’s website at any time tried to confuse consumers as to its relationship with the Complainant’s services, or has anything to do with the Complainant. The term “air services” is highly descriptive. Even the Australian Government uses “air services” in a descriptive sense. See, for example, the webpage titled “Australia’s air services agreements & arrangements” from The Department of Infrastructure, Transport, Regional Development, Communications and the Arts, which states, for example, “Australia currently has air services agreements/arrangements with more than 100 countries/economies.” (Annexure 3 contains a copy of the screen shot).

9.6 The Respondent submits that he has he has rights in due to its use on its website and that the Respondent can demonstrate “...a *bona fide* “ use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with an offering of goods or services (not being the offering of domain names... acquired for the purpose of selling, renting or otherwise transferring) ”.

9.7 The Respondent has provided screen shots of the Respondent’s website from “as far back as January 2013” to demonstrate that the Respondent has been making *bona fide* use of the disputed domain to run an information website about charter and air services for some six years prior to the Complainant’s trademark registration.

9.8 The Respondent says, and the Panel accepts, that the Respondent was using the Domain Name before the earliest date referred to by the Complainant, being the date of priority of the Trademark.

9.9 The Respondent submits that his use of the Domain Name also falls within the domain monetisation provisions of the auDA policy both under the current policy and the policy that applied prior to the auDA Licensing Rules and says that examples of domain monetisation specifically resolving the domain name to a website or landing page containing pay per click advertising links (also known as ‘parked pages’).

9.10 The Respondent has referred the Panel to the auDA website which states: “As long the eligibility and allocation rules are met, registrants can monetise a domain name, or transfer a com.au/net.au domain name licence to another eligible registrant.” <https://www.auda.org.au/au-domain-names/new-au-licensing> rules/monetisation-and-new-au-licensing-rules.

9.11 The Respondent submits that it has an Australian Presence being an Australian ABN holder, and eligibility to hold the domain name under the clause 2.4.4 (2)(f)(i) of the auDA Licensing Rules as a service it provides.

9.12 The Respondent submits, and the Panel accepts that the Complainant was required to and has not discharged the onus upon it to demonstrate that the Respondent did not meet the eligibility and allocation rules and does not have rights and legitimate interests in respect of the Domain Name.

9.13 The Panel finds that the Complainant has not satisfied its onus in relation to this element of the Complaint and the Complainant therefore must fail.

10. Has the Domain Name been registered or subsequently used in bad faith: (4(a)(iii))?

10.1 The third limb of sub-paragraph 4(a) is whether the Domain Name has been registered or subsequently used by the Respondent in bad faith (4(a)(iii)) and again, the Complainant bears the onus to show that the Domain Name was registered by the Respondent or has subsequently been used in bad faith.

10.2 In support of this contention, the Complainant offers the following submissions/examples:

10.3 Firstly, says the Complainant:

“The respondent is known for registering domain names and then seeking out [sic] legitimate businesses that may be interested in purchasing them, most likely at a substantial profit to the respondent. Examples of this can be found by searching the respondent’s telephone number online.”

10.4 Secondly, the Complainant says that when it contacted the Respondent

“...upon realising that [the Respondent] had also lodged interest in registering the newly available domain name “airservices.au”... the respondent refused to participate in an MS Teams call... When a call was established using Mobile Phones the respondent continuously attempted to coerce [the Complainant] to respond to his questions in a certain way...”

The Complainant says that the “only assumption” that can be drawn from this, is that [the Complainant was] *“...being recorded without our knowledge for purpose of the response to be either used against us, or in the favour of the respondent. During the conversation, the respondent stated that he believed he was operating a legitimate business because of the advertising revenue he was receiving via the Google advertisements impressions.”*

10.5 Thirdly, the Complainant submits that “the only reasonable assumption” to be drawn is that the respondent was –

“...relying on the browsing public to visit the current site by mistake when they are actually seeking the Airservices Australia website, and is attempting to legitimize the existence of a .com.au site for no other purpose other than generating an amount of advertising revenue from Google, and/or operating in the hope that an organisation [like the Complainant] may wish to purchase the domain at some point in time for a considerable amount of money. Considering that Airservices Australia (Airservices) is an Australian Federal Government-owned organisation¹ it is very reasonable to assume that the respondent believes that this ‘hope’ may one day eventuate.”

10.6 The Respondent’s solicitors have made comprehensive submissions disputing that the Respondent has acted in bad faith.

10.7 In summary, the Respondent’s position is that -

- the Trademark relied upon by the Complainant was not registered until over 6 years after the Respondent started using the Domain Name.
- the website which resolves from the Domain Name makes no reference to the Complainant, but is directed to advertisements that generally relate to the generic characteristics of the Domain Name which cannot be confused with the Complainant, for example, the website logo specifically says ‘Book your next chartered flight online!’ and features a video promoting corporate chartered jets Light Jets Australia,
- there are numerous other websites and organisations (cited by the Respondent) that use the word/s air services, which the Respondent submits are generic words;
- the Respondent did not approach the Complainant to sell the Domain Name – rather, the Complainant approached the Respondent, who did not express a desire to sell the Domain Name; and that
- the Respondent is not a cybersquatter and has never been the subject of any prior auDRP or UDRP complaint.

10.8 The Respondent says, and the Panellist accepts, that the Complainant has not satisfied its onus in respect of any of the bad faith grounds set out under clause 4(b) of Schedule A of the auDRP and submits that the Complaint should be dismissed.

10.9 The Panellist agrees.

10.10 All three components of paragraph 4(a) are required to be satisfied for the Complaint to be upheld. As the Panel has found that the Complainant has not discharged its onus of proof in relation to two of the three elements of paragraph 4(a) it follows that the Complaint must be dismissed.

11. Reverse Domain Name Hijacking

11.1 The Respondent has submitted that the bringing of this proceeding is an abuse of process and that the Panel ought to make a finding of Reverse Domain Name Hijacking, that is, that the Panel should find that the auDRP has been used by the Complainant in bad faith in an attempt to deprive a registered domain name holder of a domain name.

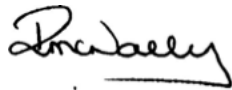
11.2 While it might have been expected that a Federal Government-owned organisation would demonstrate a better understanding of the procedural and evidentiary requirements of the auDRP than has been demonstrated in this procedure, there is a significant difference between a poorly prepared complaint and acting in bad faith.

11.3 The Panellist has found for the Respondent in this matter. That outcome reflects in no small way the quality of the Complaint and supporting material however the Panellist is not persuaded that the Complainant acted in bad faith.

12. Decision

The Panellist finds that the Complaint should be dismissed.

DATE: 28 December 2022

A handwritten signature in black ink, appearing to read 'Rowena McNally', with a horizontal line underneath the name.

Rowena McNally
Panellist