



ADMINISTRATIVE PANEL DECISION

Domain Names: **find.com.au**
Name of Complainant: **Find Marketing Pty Ltd**
Name of Respondent: **Troy Holland and Taryn Green**
Provider: **LEADR**
Panel: **Anthony P. Alder**

1. THE PARTIES

- 1.1 The Complainant is **Find Marketing Pty Ltd** (“Complainant”).
- 1.2 The Respondent is **Troy Holland and Taryn Green** (“Respondents”).

2. THE DOMAIN NAMES AND PROVIDER

- 2.1 The current dispute is regarding the domain name “find.com.au” (“Domain Name”).
- 2.2 The provider in relation to this proceeding is LEADR (“Provider”).

3. PRELIMINARY MATTERS

- 3.1 Schedule A of the *.au Dispute Resolution Policy* (“auDRP”) applies to disputes which meet the requirements set out in Paragraph 4(a) of Schedule A of the auDRP. This subparagraph 4(a) requires that any party holding a domain name licence “...submit to a mandatory administrative proceeding in the event that a third party (a “Complainant”) asserts to the applicable Provider, in compliance with the Rules of Procedure that:

- (i) [their] domain name is identical or confusingly similar to a name, trademark or service mark in which the complainant has rights; and
 - (ii) [they] have no rights or legitimate interests in respect of the domain name; and
 - (iii) [their] domain name has been registered or subsequently used in bad faith.
- In an administrative proceeding, the complainant bears the onus of proof.”*

4. PROCEDURAL HISTORY

- 4.1 The Procedural History in this matter is set out in Annexure A.
- 4.2 LEADR has appointed this Panellist as the sole panellist in the matter. The Panellist has had no prior knowledge of or association with either party and has no conflict of interest.
- 4.3 All procedural requirements appear to have been satisfied. The Panel has been properly constituted.
- 4.4 Paragraph 15(a) of the auDRP Rules states:
“A Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy [the auDRP Policy], these Rules and any rules and principles of law that it deems applicable”.

5. FACTUAL BACKGROUND

- 5.1 The Complainant is an online marketing company providing marketing, searching and cataloguing services for clients.
- 5.2 The Complainant had registered the company name “Find Marketing Pty Ltd” on 12 February 2007. The Complainant is the owner of Australian Trade Mark 1211190 FIND with effect from 28 November 2007 and Australian Trade Mark 1298039 FIND & LOGO with effect from 14 May 2009.
- 5.3 The Complainant currently has an established presence on the internet at www.findtakeaway.com.au; and www.findbusinesscoach.com.au .
- 5.4 The Respondents have been trading under the SA Business Name of “Find.com.au Directories” since 28th August 1997 and the Respondents also own the Australian Trade Mark No. 1204131 13 FIND filed on 12 October 2007.
- 5.5 The Respondents are currently redirecting web traffic from the Domain Name to their primary business website at www.13find.com.au which appears to be offering similar goods and services as to that be offered by the Complainant.

6. DISCUSSION AND FINDINGS

Elements of a successful complaint

- 6.1 According to Paragraph 4(a) of the auDRP Policy, a person is entitled to complain about the registration or use of a domain name where:

- (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 respondent to the complaint has no rights or legitimate interests in respect of the domain name; and*
- (iii) *The respondent's domain name has been registered or subsequently used in bad faith.*

6.2 It is to be noted that the three elements of a complaint under Paragraph 4(a) of the auDRP Policy are cumulative; all of them must be proved if the complaint is to be upheld.

6.3 In these administrative proceedings, the Complainant bears the onus of proof regarding each of the separate components required by Paragraph 4(a) of the auDRP Policy.

Is the Domain Name identical or confusingly similar to a name, trademark or service mark in which the Complainant has rights?

6.4 The Panel must determine whether, on the basis of the facts set out in Paragraph 4 above, the Complainant has rights in a relevant name, trade mark or service mark.

6.5 The auDRP Policy states:

“For the purposes of this policy, auDA has determined that a “name...in which the complainant has rights” refers to

- (a) *The complainant's company, business or other legal or trading name, as registered with the relevant Australian government authority; or*
- (b) *The complainant's personal name.”*

6.6 The Complainant has based their assertions in relation to this Complaint on their rights associated with Australian Trade Marks No. 1211190 and No. 1298039. The Panel notes that, although the Complainant is the registered owner of these two trade marks, Australian Trade Mark No. 1211190 seems to lack any inherent distinctiveness in respect of the goods and services for which it has been registered.

6.7 The Complainant has supplied the Panel with extremely limited evidence relating to their usage of the “FIND” trade mark.

6.8 The Panel believes that the term “FIND” is a generic word available for use by all traders, people, and businesses in relation to search and/or marketing services on the internet. Although, the Complainant does have a right to use the term “FIND” in relation to the Domain Name. The Panel acknowledges that the term “FIND” should not be regarded as the sole property or right of the Complainant, because of the limited evidence showing

that the Complainant has a reputation with the trade mark “FIND” that would be required to otherwise overcome the generic aspects of the trade mark.

- 6.9 The Complainant has demonstrated that they are entitled to use and register the Domain Name. However, the Complainant does not have the right to exclude other persons or traders from using the generic term “FIND”.
- 6.10 Accordingly, the Panel determines that the Complainant has not satisfied the requirement of Paragraph 4(a)(i) of the auDRP Policy.

Do the Respondents have any rights or legitimate interests in respect of the Domain Name?

- 6.11 Paragraph 4(c) of the auDRP Policy sets out particular circumstances (without limitation), which can demonstrate a Respondent’s *“rights or legitimate interests to the domain name for purposes of Paragraph 4(a) (ii).”*
- 6.12 The Domain Name includes the term “FIND”. This term has a common English meaning that would be available to all persons and traders. The term “FIND” is generic and lacks any inherent adapted capacity for distinctiveness when used in relation to directory or searching services on the internet.
- 6.13 Additionally, the Respondents began their use of their business name and trade mark on 28th August 1997 which was prior to any of the Complainant’s cited first use or application of their registered trade marks.
- 6.14 The Respondents have demonstrated that their activities fall within the scope of the specified activities enumerated in Paragraph 4(c) of the auDA Policy for providing a basis for bona fide intention to use of the domain name.
- 6.15 The Panel believes that the Respondents own the requisite rights or interests in the Domain Name.
- 6.16 Accordingly, the Panel finds that the Respondents have legitimate interest in regard to the domain name, and so Paragraph 4(a)(ii) of the auDRP Policy has not been satisfied by the Complainant.

Has the Domain Name been registered or subsequently used in bad faith?

- 6.17 Paragraph 4(b) of the auDRP Policy sets out circumstances of *“evidence of the registration and use of a domain name in bad faith”*. This Paragraph contains four sets of example circumstances, any one of which, if established, can constitute evidence of

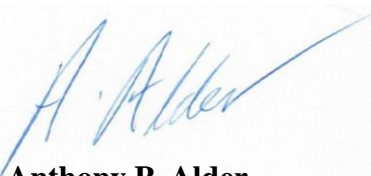
registration in bad faith. It is important to note also that it is a non-exhaustive list of circumstances such that, for example, the Panel is not necessarily constrained from a finding of bad faith should it arise (also by example) from not only any one or other of them, but from a combination of them, or indeed, upon the basis of other reliable material before the Panel inclusive of the illustrated list.

- 6.18 The Respondent has prior used and registered the Domain Name before any of the registrations or usages allegedly owned by the Complainant.
- 6.19 The Respondents were entitled to use and register the Domain Name and therefore the Panel cannot accept any finding that the Domain Name was registered or used in bad faith.
- 6.20 In the Panel's view, the onus of proof of this requirement rests with the Complainant and the Complainant has not established this requirement under the auDRP Policy.

7 DECISION

- 7.1 The Panel concludes for the reasons stated that:
- (a) the Domain Name is not identical with and confusingly similar to a name, or trade mark in which the Complainant has rights;
 - (b) the Respondents do have a legitimate interest in the Domain Name; and,
 - (c) the Complainant has not successfully demonstrated that the Respondent acted in bad faith by registering and using the Domain Name.
- 7.2 For the reasons outlined, the Complainant has not satisfied the elements of Paragraph 4(a) of the auDRP Policy.
- 7.3 Therefore, the Panel orders that the Complaint be dismissed.

Dated this 22nd of July 2011



Anthony P. Alder

Sole Panellist

Annexure A

Procedural History

[find.com.au]
[auDRP_11_09]

1. Complaint lodged to LEADR on **15/6/2011**.
2. LEADR sent non-compliance notification via email to Complainant on **17/6/2011**.
3. The complete application with rectifications made was received from the Complainant by LEADR on **17/6/2011**.
4. An acknowledgement of receipt of complaint was emailed to the Complainant on **20/6/2011**.
5. A copy of the complaint was submitted and a request to clarify Respondent details and lock the domain name during proceedings was emailed to the registrar **PlanetDomain** on **21/6/2011**.
6. On the **21/6/2011** the Registrar confirmed via email that the domain name in dispute has been locked.
7. LEADR advised auDA of the complaint on **28/6/2011** via e-mail.
8. On the **21/6/2011** LEADR sent the Respondent (**Troy Holland**) an email and written notification of the complaint lodged against them. The complainant was copied in on these notifications.
9. The due date for the response to the complaint was confirmed to be **11/7/2011**.
10. On the **22/6/2011**, the Respondent (**Troy Holland**) submitted an emailed response to the domain name complaint.
11. On the **7/7/2011**, Ranjini Acharya on behalf of the Respondent (**Troy Holland**) submitted a response to the domain name complaint via email.

12. On **8/7/2011** the provider approached the Panellist. The panellist confirmed their availability, informed LEADR that they had no conflict issues with the parties and accepted the matter on **8/7/2011**.
13. The Case file and relevant correspondence was forwarded onto the Panellist on **11/7/2011**.
14. The parties to the dispute were notified of the panellist's allocation on the **11/7/2011**.
15. The date on which the decision is due is **25/7/2011**.