



ADMINISTRATIVE PANEL DECISION

Victorian Ambulance Union Inc
v.
United Workers' Union

[auDRP_20_1](#)

[<victorianambulanceunion.org.au >](mailto:victorianambulanceunion.org.au)
[<victorianambulanceunion.com.au >](mailto:victorianambulanceunion.com.au)
[<victorianambulanceunion.net.au >](mailto:victorianambulanceunion.net.au)

1 The Parties

The Complainant is Victorian Ambulance Union Inc of Melbourne, Victoria. It is represented in the proceedings by Mr James Naughton of Gordon Legal Pty Ltd in Melbourne.

The Respondent is the United Workers' Union (UWU), the Victorian Branch of which is based in Docklands, Victoria. It is represented by Mr Dale Blackmore of Hall Payne Lawyers in South Brisbane.

2 The Disputed Domain Names and Registrar

The three Disputed Domain Names are [<victorianambulanceunion.org.au>](mailto:victorianambulanceunion.org.au), [<victorianambulanceunion.com.au>](mailto:victorianambulanceunion.com.au) and [<victorianambulanceunion.net.au>](mailto:victorianambulanceunion.net.au).

The registrar of the Disputed Domain Names is GoDaddy LLC.

3 Procedural History

This is an administrative proceeding pursuant to the .au Dispute Resolution Policy originally adopted by auDA on 13 August 2001, and subsequently amended on 1 March 2008 and re-issued on 15 April 2016 ("auDRP" or "Policy"); the auDA Rules for .au Dispute Resolution Policy ("Rules") and the Resolution Institute Supplemental Rules for .au Domain Name Dispute Resolution Policy ("RI Supplemental Rules").

A Domain Name Dispute Complaint Form was originally filed with Resolution Institute (RI) on 15 January 2020. On 17 January RI notified the Complainant of certain administrative deficiencies and sought a rectified complaint. A rectified complaint (hereafter the “Complaint”) was received by RI on 20 January 2020. The following day RI forwarded a copy of the Complaint to the Registrar and on 22 January 2020 the Registrar confirmed the registration particulars and confirmed that the Disputed Domain Names had been server locked. auDA and the Respondent were also notified of the Complaint by RI on that day. Under Rule 5(a) a Response was due 20 calendar days after the proceeding commenced.

The Rules make no allowance for weekends or public holidays. Under Rule 4(c) the proceeding is taken to have commenced on the date on which RI completed its responsibilities under Rule 2(a) in forwarding the Complaint to the Respondent. Under Rule 2(g) times are calculated from the date a communication was first made under Rule 2(f). Accordingly, the due date for a Response was 11 February 2020. However, on 24 January 2020, Mr Blackmore notified RI that a copy of the Rectified Complaint had not been attached to RI’s email. After this was remedied the due date for the Response was extended until 13 February 2020 on which day the Response was lodged with RI. The Panel accepts the Response as having been filed within time.

The Panel was appointed on 19 February 2020 having verified the absence of any conflict with the parties and they were notified accordingly.

All other procedural requirements in relation to the proceedings appear to have been satisfied.

4 Factual Background

The background facts are somewhat complex but material to an understanding of the context in which the dispute surrounding the Disputed Domain Names has arisen. For the most part the following summary reflects matters which appear to be uncontentious:

Before 11 November 2019 there were two trade unions known as *United Voice* and the *National Union of Workers*. On that date they formally amalgamated pursuant to the *Fair Work (Registered Organisations) Act 2009* (the **FWRO Act**) and became a single trade union which is the current Respondent. As a result of the amalgamation *United Voice* changed its name to the *United Workers’ Union* and the *National Union of Workers* was de-registered. By Division 6 of Part 2 of Chapter 3 of the FWRO Act, all members, assets, liabilities, rights and obligations of the *National Union of Workers* prior to amalgamation were transferred to and assumed by the *UWU* upon amalgamation.

On 14 June 2019 Mr Naughton sought the consent of the Federal Treasurer to include the restricted word “Ambulance” in the business name *Victorian Ambulance Union* which he was seeking to register on behalf of the Complainant (yet to be incorporated). (The consent having been given, the Complainant subsequently became proprietor of the business name on 8 October 2019).

On 19 June 2019 Mr Danny Hill announced on a Facebook page that the name of a new trade union to be formed would be *Victorian Ambulance Union*. At least by 21 June 2019 this announcement had been promulgated to members of a cohort within *UWU* called *Ambulance Employees Australia - Victoria (AEAV)*. Mr Hill and others who had held positions on the Executive of the *AEAV* apparently resigned to establish the Complainant. The Panel infers that Mr Hill and the others who joined him feared that the *AEAV* would

be subsumed by the UWU in a way that would make it hard to maintain a separate identity and voice representative of what they apparently regarded as the special needs and circumstances of paramedics in Victoria. According to its website¹, the UWU “is a powerful new union built from two proud unions coming together: United Voice and the National Union of Workers. Our union is 150,000 workers across the country from more than 45 industries and all walks of life, standing together to make a difference”.

According to the Australian Business Register², between 14 and 19 June 2019 the United Voice National Council as it then was (five months before the amalgamation took formal effect) registered the following 21 business names under its Australian Business Number 52 728 088 684:

AOAV
AOUV
AEA VIC
AEA VICTORIA
AEA-V
AOA-V
AOU-V
PARAMEDIC EMPLOYEES ASSOCIATION OF AUSTRALIA, VICTORIA
PARAMEDIC EMPLOYEES ASSOCIATION OF VICTORIA
PARAMEDIC EMPLOYEES AUSTRALIA
PARAMEDIC EMPLOYEES AUSTRALIA VICTORIA
PARAMEDIC EMPLOYEES UNION OF AUSTRALIA, VICTORIA
PARAMEDIC EMPLOYEES UNION OF VICTORIA
PARAMEDIC EMPLOYEES VICTORIA
PARAMEDIC OFFICERS ASSOCIATION OF AUSTRALIA, VICTORIA
PARAMEDIC OFFICERS ASSOCIATION OF VICTORIA
PARAMEDIC OFFICERS AUSTRALIA
PARAMEDIC OFFICERS AUSTRALIA VICTORIA
PARAMEDIC OFFICERS UNION OF AUSTRALIA, VICTORIA
PARAMEDIC OFFICERS UNION OF VICTORIA
PARAMEDIC OFFICERS VICTORIA

On 25 June 2019 the Respondent registered the Disputed Domain Names citing in support of its eligibility to do so the ABN 19 845 840 893. According to the Australian Business Register³ that ABN has been in the name of UNITED VOICE since March 2011, and the only two trading names in use by that unincorporated entity⁴ are stated to be UNITED VOICE - VICTORIA BRANCH and AUSTRALASIAN JOURNAL OF EMERGENCY CARE. For the purposes of this proceeding the Panel will assume that UNITED VOICE and UNITED VOICE NATIONAL COUNCIL are the same body, although it does not appear that anything material turns on this.

Notwithstanding the requirements of s.81(1) of the FWRO Act as well as the usual obligation on the holder of an ABN to maintain the currency of its information in the Australian Business Register, the Respondent submits that its ABN continues unaffected by the amalgamation. Fortunately reconciling the apparent concurrent holding of two

¹ www.unitedworkers.org.au/about-us/

² <https://abr.business.gov.au/ABN/View?abn=52728088684>

³ www.abr.gov.au

⁴ That being the entity type shown on the Australian Business Register for that ABN

ABNs by the Respondent post amalgamation and whether that has any particular legal consequences or ramifications is not something the Panel needs to resolve for the purposes of these proceedings.

The Complainant was formally incorporated under the *Associations Incorporation Reform Act 2012 (Vic)* on 4 July 2019. It currently has about 4,250 financial members.

On 3 October 2019 the Complainant applied to IP Australia to register the following two composite trademarks, the first of which embodies the words “Victorian Ambulance Union”:



The applications (2040125 and 2040128) were accepted by IP Australia on 19 October 2019 but, owing to the provisions of the Madrid Protocol, that acceptance cannot be advertised before six months have elapsed since the date on which the application was lodged. That period expires tomorrow, suggesting that IP Australia will soon be advertising its acceptance of the Complainant’s trade mark applications. The Respondent has foreshadowed lodging a formal Opposition to the applications once acceptance has been advertised.

As a result of the efforts of Mr Hill and others it appears that a significant proportion of AEAU members have transferred their membership to the Complainant. Whilst it seems that the AEAU still exists in some form within UWA, the evidence suggests that the Complainant now represents the vast majority of paramedics and ambulance personnel in Victoria.

As at the time of writing these reasons none of the Disputed Domain Names resolves to any website. There is no record in the Wayback Machine⁵ of any of the Disputed Domain Names ever resolving to any website. The Respondent has confirmed that it is yet to direct any of the Disputed Domain Names to a website.

5 Parties’ Contentions

A. Complainant

The Complaint contains the following submissions and evidence relevant to matters in contention:

1. The 14 June 2019 application to the Federal Treasurer is corroborative of the Complainant’s intention to use the name “Victorian Ambulance Union” at least as at that date. Although self-serving, the Panel notes that in paragraph 4 of that letter the Victorian Ambulance Union is described as “an unincorporated association of ambulance employees employed in the State of Victoria, established on 11 June 2019”.

⁵ www.archive.org

2. As at 26 November 2019 a search of the Global Brand Database maintained by the World Intellectual Property Organisation reflected no claim to the trademark “Victorian Ambulance Union” other than by the Complainant.
3. Under the rules of the UWU post amalgamation the status of AEAU changed, in anticipation of which “a significant number of the members of the United Voice Ambulance Employees Section determined to establish or join the Victorian Ambulance Union”.
4. The use of the Disputed Domain Names by the Respondent “is likely to mislead the public into believing that they belong to or are related to the Complainant due to them being identical or confusingly similar to the name under which the Complainant has rights”.
5. The Disputed Domain Names were also registered with a view to “obtaining unjust benefits through selling or renting the Disputed Domain Names” and “attempting to attract, for commercial gain, by creating a likelihood of confusion as to an affiliation with the Complainant”.

The Complaint seeks a transfer order in favour of the Complainant for all three of the Disputed Domain Names.

B. Respondent

The Respondent says the following in reply to the contentious elements of the Complaint:

1. The Complainant has not discharged its onus of proof.
2. The Panel is bound to find that the Respondent “had” rights and legitimate interests in respect of the Disputed Domain Names and that it could not have registered, and has not used, the Disputed Domain Names in bad faith.
3. The registration of United Voice and “all Australian Business Numbers registered to the Respondent prior to amalgamation were unaffected” by the amalgamation.
4. It is incorrect for the Complainant to assert that the registrant of the Disputed Domain Names is “United Voice, Victorian Branch. The registrant of the Disputed Domain Names is the Respondent”.
5. The Respondent registered the Disputed Domain Names on 25 June 2019 which was before the Complainant’s 3 October 2019 trademark application for “Victorian Ambulance Union”, before the Complainant’s 4 July 2019 incorporation as “Victorian Ambulance Union Inc” and before the Complainant obtained registration of “Victorian Ambulance Union” as a business name on 8 October 2019.
6. The Complainant has not evidenced that it was established on 11 June 2019 either as an unincorporated association or as an incorporated association. In particular the Respondent submits in relation to the period before 25 June 2019 that:
 - a. the Complainant has not evidenced a group of ambulance employees coming together to pursue a common purpose by reference to the name Victorian Ambulance Union and nor has it provided a copy of minutes of a meeting of 11 June 2019 of the members of such an unincorporated association;

- b. there is no evidence of the Complainant incorporating on 11 June 2019;
 - c. there is no evidence that the Complainant had formed as either an unincorporated association or as an incorporated association on 11 June 2019;
 - d. the Complainant has not proven use of the phrase Victorian Ambulance Union as a trademark or demonstrated that an application for that phrase as a trademark was made prior to the registration date of the Disputed Domain Names;
 - e. the 14 June 2019 letter to the Federal Treasurer can only be taken to demonstrate that the Complainant asserted to the Treasurer that it was an unincorporated association, and the Panel cannot be satisfied that it was formed on 11 June 2019;
 - f. the 14 June 2019 letter to the Federal Treasurer merely evidences an intention to seek consent to use a word in a business name. If the Treasurer had rejected the request for permission to use the word “ambulance” the Complainant could not have registered the business name “and, consequently, no rights had crystallised”;
 - g. the Facebook announcements on 19 June 2019 did not demonstrate “adoption” of “Victorian Ambulance Union” but rather a future intention to do so, so that no rights crystallised on 19 June 2019;
 - h. the Complainant has not evidenced any rights to the name “Victorian Ambulance Union” prior to the date of registration of the Disputed Domain Names and “this is particularly relevant to any assertion that the Respondent registered the Disputed Domain Names in bad faith”.
7. The Respondent then refers to paragraph 1.7 of the *auDA Overview of Panel Views on Selected auDRP Questions First Edition*⁶ and asserts that the Complainant “needs to demonstrate that the mark “Victorian Ambulance Union” has acquired a secondary meaning and become a distinctive identifier associated with the Complainant to ground any assertion that it held common law trademark rights in that name”. The Complainant has failed to demonstrate any such secondary meaning and “has failed to demonstrate that the mark is distinctive prior to the date of registration” of the Disputed Domain Names.
8. The mark is wholly descriptive, and the Complainant has failed to evidence that the mark has become associated with the Complainant because:
- a. the Complainant has purportedly evidenced use of the mark in a closed Facebook group open only to its members;
 - b. the Complainant has purportedly evidenced use of the mark in a bulletin to Ambulance Victoria employees who comprise its intended membership;
 - c. the name Victorian Ambulance Union is wholly descriptive or generic; and
 - d. it cannot be correct that the words Victorian Ambulance Union acquired a secondary meaning associated with the Complainant because the Complainant

⁶ <https://www.ada.org.au/index.php/policies/audrp/audrp-overview/#1.7>

was not incorporated until 4 July 2019 and the words cannot have acquired an immediate secondary meaning, and the steps the Complainant relies upon to establish its use of the name occurred after the registration by the Respondent of the Disputed Domain Names.

9. Turning to the period that postdates the Respondent's registration of the Disputed Domain Names the Respondent submits that:
 - a. registration as an incorporated association named "Victorian Ambulance Union" or registration of the business name "Victorian Ambulance Union" does not give the Complainant exclusive rights to those words as a trademark;
 - b. the Complainant registered these names after the date of registration of the Disputed Domain Names and the Respondent should not be adversely affected by transfer where the names that are held by the Complainant do not provide the exclusive rights to use the mark "Victorian Ambulance Union";
 - c. the Complainant's trademark applications have not yet been advertised as accepted and once advertised the Respondent intends to oppose their registration on at least the following grounds:
 - i. the trade mark is not capable of distinguishing the Complainant's goods and services from those of other traders (at least in respect of several of the classes for which registration is sought): s.41 of the *Trade Marks Act 1995 (Cth) (TMA)*;
 - ii. the Complainant's use of the mark is likely to cause confusion due to the reputation in the mark "Victorian Ambulance Union" or "ambulance union" in Victoria which the Respondent has built over 25 years: s.60 of the TMA; and
 - iii. the Complainant's use of the mark will be contrary to, at least, s.18 of the Australian Consumer Law: s. 42(b) of the TMA.
 - d. The Opposition will result in the rejection of the registration of the mark "Victorian Ambulance Union" and, consequently, the Panel cannot be satisfied that the Complainant has rights to a trademark until the trade mark is registered.
10. The Respondent "accepts that the Panel will consider the Complainant's rights at the time of the Complaint, and may find that the Complainant is an incorporated association with the name "Victorian Ambulance Union", which may be sufficient to support a finding that paragraph 4(a)(i) of the Policy is met". However, the Complainant's trademark application incorporating the words "Victorian Ambulance Union" is unlikely to survive the opposition process and the Panel ought not take this mark into account in determining the Complaint.
11. The Respondent also submits that the Complainant has not made out a *prima facie* case that the Respondent has no rights or legitimate interests in respect of the Disputed Domain Names.
12. The Respondent then submits that it **had** rights and legitimate interests in the Disputed Domain Names prior to registration because they were descriptive of the

Respondent, that it was commonly known by the Disputed Domain Names and/or that it was making a legitimate non-commercial or fair use of the Disputed Domain Names, without intent for commercial gain to misleadingly divert consumers or to tarnish the name, trademark or service mark at issue.

13. The Respondent notes that it is registered under the FWRO Act and then recites the following history in support of its contentions:
- a. Prior to 1994, the Ambulance Employees Association of Victoria was an employee organisation registered under the (then) Industrial Relations Act 1988 (Cth).
 - b. On 1 June 1994, an amalgamation took place between the Ambulance Employees Association of Victoria and the Australian Liquor, Hospitality and Miscellaneous Workers Union ('ALHMWU') being an organisation registered under the (then) Industrial Relations Act 1988 (Cth).
 - c. The Ambulance Employees Association of Victoria was subsequently de-registered, and the ALHMWU was the registered union who could enrol and represent members who worked in the ambulance industry in Victoria.
 - d. An agreement was reached between the two former organisations prior to the amalgamation, that would afford the former members of the Ambulance Employees Association of Victoria recognition in the amalgamated ALHMWU.
 - e. This recognition was given effect by the creation of a 'section' of the Victorian Branch of the ALHMWU called the 'Ambulance Employees Association of Victoria' or 'AEAV'.
 - f. On 12 March 2004, the Australian Liquor, Hospitality and Miscellaneous Workers Union changed its name to 'Liquor, Hospitality and Miscellaneous Union'. On 1 March 2011, the name was again changed from 'Liquor, Hospitality and Miscellaneous Union' to 'United Voice'.
 - g. From 1994 to 2019, the 'Ambulance Employees Association of Victoria' or 'AEAV' were afforded the special recognition as a section of the Respondent.
 - h. On 11 November 2019, United Voice and the National Union of Workers amalgamated. As a result of the amalgamation, United Voice changed its name to the United Workers' Union and the National Union of Workers was de-registered.
 - i. The 'section' of the Respondent known as the 'Ambulance Employees Association of Victoria' or 'AEAV' remains a part of the Respondent post-amalgamation.
 - j. Since 1 June 1994, the Respondent has been the only organisation registered under respectively the *Industrial Relations Act 1988* (Cth), the *Workplace Relations Act 1996* (Cth) and the *Fair Work (Registered Organisations) Act 2009* (Cth) who were, and are, enrolling as members those employees who work in, or in connection with, the provision of ambulance services in Victoria.

- k. Additionally, because the Victorian Parliament has referred its power to legislate in relation to Industrial Relations to the Commonwealth Parliament, there is no organisation registered under Victorian industrial legislation. Consequently, there is no distinct state entity capable of providing industrial representation to the employees who work in, or in connection with, the provision of ambulance services in Victoria.
 - l. It is for these reasons that the Respondent was historically, and presently is, “the union” for those employees of employees [*sic*] who work in, or in connection with, the provision of ambulance services in Victoria.
14. The Respondent then contends in relation to the trademark “Victorian Ambulance Union” that it is wholly descriptive and is in fact a description of the business of the Respondent.
 15. It says that the phrase is “suggestive of a group of employees employed in the ambulance industry that delivers services of a trade union in the State of Victoria” and submits that the phrase is therefore descriptive of the Respondent.
 16. In Victoria, and in respect of employees of Ambulance Victoria, the Respondent claims that it was colloquially referred to as the “Ambulance Employees Association of Victoria” or “AEAV” which does not detract from those references being a reference to the Respondent.
 17. Importantly, the Respondent concedes in paragraph 58 of the Response that “in Victoria it is unlikely that the Respondent would be referred to as the “Victorian Ambulance Union” but says that in that context a reference to the “ambulance union” carries the same description.
 18. The Respondent then recites paragraph 2.1A of the auDA Overview:

If a respondent is using a descriptive word to describe its goods or services without intending to take advantage of the complainant’s rights in that word, then it has a right or legitimate interest in a domain name that contains that word. It is not necessary for the respondent to do business under the exact term incorporated in the domain name – it is sufficient if there is a “connection” between the domain name’s descriptive meaning and the respondent’s offering of goods or services. However, the respondent’s use of the domain name must not be a “sham”; panels have been alert to disregard a respondent’s use of the domain name to resolve to a website that is “spurious” or a “shell”. [Emphasis added by the Respondent]
 19. It disavows having any intention to take advantage of the Complainant’s rights, claiming that it registered the Disputed Domain Names “prior to the Complainant purportedly taking up any rights in the name”.
 20. On the basis of the foregoing the Respondent submits that it is open to the Panel to determine that it has a right or legitimate interest “in” all of the Disputed Domain Names.
 21. The Respondent then submits that it has been commonly known by the Disputed Domain Names despite not having acquired any registered trademark or service mark rights. It then asserts “consequently the Respondent has demonstrable rights and legitimate interests in respect of the domain name <victorianambulanceunion>” and submits that the Complaint must fail.
 22. The Respondent confirms that Mr Danny Hill and Ms Olga Bartasek - respectively the Secretary and Assistant Secretary of the Complainant - were former position holders

and staff of the Respondent and as such fully aware of the history of the Respondent as set out in the Complainant's submissions (and in its letter of 14 June 2019 to the Treasurer). The Respondent particularly draws attention to parts of its evidence showing that Mr Hill has in the past referred to the Respondent as the "ambulance union" in Victoria or to himself as the "Ambulance Union Secretary".

23. The Respondent submits that it is open to the Panel to find that by reason of Mr Hill and Ms Bartasek's knowledge of the Respondent and its history the Complaint was brought in bad faith and may amount to Reverse Domain Name Hijacking under the Policy. It implicitly invites the Panel to make a declaration to that effect.
24. The Respondent then submits that by registering a domain name associated with the trademark "Victorian ambulance union" in which it claims to have demonstrated its rights and legitimate interests the Respondent was doing no more than protecting those rights and interests.
25. According to the Respondent there is nothing to suggest that active use of a domain name is required to demonstrate legitimate non-commercial or fair use. In other words it says that merely by registering the Disputed Domain Names to protect the Respondent's rights and legitimate interests it was making a legitimate non-commercial or fair use of the Disputed Domain Names.
26. It denies any intent to achieve commercial gain by misleadingly diverting customers because the intended audience of the Disputed Domain Names have [sic] historically identified the Respondent by the trademark "Victorian Ambulance Union" or "ambulance union" in Victoria.
27. The Respondent goes on to submit that its use of the Disputed Domain Names is consistent with its registration of the Disputed Domain Names and its reputation in the trade mark "Victorian ambulance union". It says that its use of the Disputed Domain Names will not likely mislead the public "because they are descriptive of a trade union representing the interests of employees in the ambulance industry in Victoria and the Respondent in fact has [been] and continues to be such a union" with a reputation in the trade mark associated with the Disputed Domain Names.
28. The Respondent rejects the Complainant's submissions because "at the time of registration, [the Complainant] had no trading name or any demonstrable rights to the trademark "Victorian Ambulance Union". It draws the Panel's attention to the Complainant merely anticipating having rights in the trade mark and says that did not preclude assertion of the registration of the Disputed Domain Names by the Respondent "to protect its long, historical use of the names which aptly describes the services it provides. In fact, at the date of registration, the Complainant had no rights in the name Victorian Ambulance Union. It merely intended to announce that this would be the name of its new association".
29. The Respondent also denies any basis for the Complainant's assertion that the Respondent needed its consent to register the Disputed Domain Names.
30. Turning its attention to the third limb of the Policy the Respondent submits that no evidence has been provided to the Panel of its "use" of the Disputed Domain Names, leaving the only basis for this element of the Complaint to be that registration was done in bad faith.

31. The Respondent goes on to reject any basis for the application of the deeming provisions in paragraph 4(b) of the Policy, in essence because “the Complainant had no rights at the time of registration that the Respondent was aware of”.
32. Importantly the Respondent goes on to assert that the mere fact that it has not determined to use the Disputed Domain Names is not evidence of bad faith. It submits that the “Complainant incorrectly asserts that, by the Respondent not redirecting any of the Disputed Domain Names to its website, the Respondent has engaged in conduct [that] does not demonstrate *bona fide* use”.
33. The Respondent concludes its submissions with the following summary:
 - a. the Respondent acknowledges that the name of the Complainant is the “Victorian Ambulance Union” and that the Panel may find that the Disputed Domain Names are identical to this name;
 - b. if the Panel is satisfied that the Complainant has made out a *prima facie* case that the Respondent has no rights or legitimate interests in respect of the Disputed Domain Names the Panel should nevertheless be satisfied that the Respondent is using descriptive words to describe its business without intending to take advantage of the Complainant’s rights, and/or has been commonly known by the Disputed Domain Names despite not having acquired any registered trade mark or service mark rights, thereby establishing that the Respondent in fact has a right or legitimate interest “in” the Disputed Domain Names. Such a finding would prevent the Complainant from succeeding because all three grounds of the Policy have to be proven.

6 Discussion and Findings

Paragraph 4(a) of the auDRP requires the Complainant to prove that:

- (i) each of the Disputed Domain Names is identical or confusingly similar to a name, trade mark or service mark in which it **has** rights; and
- (ii) the Respondent **has** no rights or legitimate interests in respect of the Disputed Domain Names; and
- (iii) each of the Disputed Domain Names **has been** registered *or* subsequently used in bad faith.

The onus of proof is on the Complainant in relation to all three of these elements and the standard of proof is the balance of probabilities. Where a finding of bad faith is sought and opposed, this Panel takes the view that the principles set out in *Briginshaw*⁷ ought to be taken into account.

The Panel has to decide the case based on the evidence before it, but is also entitled to take into consideration publicly available information⁸. The Complainant must prove all of the elements of the Policy. It is important to note that limbs 1 and 2 are in the present tense. Only limb 3 requires the Panel to consider an earlier point in time, such as the date on which the Disputed Domain Names were registered, being 25 June 2019. Much of the Respondent’s submissions were directed at historical positions not germane to the more

⁷ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361–362

⁸ See auDA Overview section 4.5 and the cases cited therein

focused issues that are before the Panel for determination under limbs 1 and 2. Whether this reflects an inadequate understanding of the Policy by the Respondent's advisors or reflected a strategy of swamping the Panel with so much material that the Panel might end up equivocal in relation to any of the limbs of the policy is beyond the remit of the Panel to determine. Suffice it to say that the need to wade through a large amount of irrelevant evidence and submissions has taken up a lot of the Panel's time.

Identical or confusingly similar to a name or trademark in which the Complainant has rights

The Complainant is both incorporated and trading as *Victorian Ambulance Union*. Furthermore, it is the applicant for the two trademarks referred to in the Factual Background above the first of which includes "Victorian Ambulance Union". Although the Respondent has foreshadowed filing an Opposition to the Complainant's trademark application, the Panel is satisfied that the Complainant owns that trademark at common law whether or not it achieves formal registration.

Ignoring the second level domain elements, all three of the Disputed Domain Names are identical to the Complainant's name and first trademark.

The Panel is comfortably satisfied that the Complainant has made out the first limb of the Policy and the Respondent's ultimate concession to that effect was appropriate.

No Right or Legitimate Interest in respect of the Disputed Domain Names

The evidence filed by the Respondent shows numerous historical examples of the AEAV being described as "the ambulance union" and often as "the Ambulance Union". Prior to Mr Hill's announcement on 19 June 2019 that could have been a possible lay description of the AEAV cohort of the Respondent but not of the Respondent as a whole union. However, despite the frequency with which those words were used to *describe* the AEAV, even by Mr Hill, **they were never its name**. Nor were those words ever used in any trade mark sense by or in respect of the AEAV, let alone of the whole union. The 21 business names that the Respondent registered in the week before registering the Disputed Domain Names is a powerful contemporaneous confirmation of this.

In the current "About" section of its Facebook page the AEAV states "Ambulance Employees Australia - Victoria is Victoria's ambulance union. Our members fight for fair pay, professional standards and a better ambulance service for all Victorians". The "About" section of its website⁹ is to the same effect, albeit in somewhat more expansive language. Again, that language is confined to a cohort of the Respondent's members – not to the Respondent as a body. This is an important distinction because the AEAV has no existence independent of the Respondent. The AEAV is not an entity nor any other recognised body. That makes it easy to understand why the Complainant, now established as a trade union focussed entirely on paramedic and ambulance personnel within Victoria, would be more attractive to that cohort than the Respondent, even with a national 'virtual' paramedic/ambulance 'section'.

There is no evidence whatsoever that the Respondent was ever *known* by the name Victorian Ambulance Union or associated with that phrase as a trade mark. Given that, and the context referred to in the Factual Background above, the Respondent's claim that

⁹ <https://www.aeavic.org.au/aboutaeav>

it *has* (as distinct from may once have had) any right or legitimate interest in respect of the Disputed Domain Names must be approached with some scepticism.

The Panel has additionally had regard to the Respondent's failure to point the Disputed Domain Names to any websites. It has had plenty of time to do so in the last eight months. It is difficult to reconcile that failure with the apparent passion evinced by the simultaneous registration of all three Disputed Domain Names. Its assertion that registration of all three Disputed Domain Names was an attempt to protect its rights in a name by which the Respondent as a whole was known is rejected as having no evidentiary foundation as well as being entirely implausible in the circumstances.

Had the Respondent registered just one of the Disputed Domain Names its submissions may have had some credibility. However, by registering all three of the Disputed Domain Names simultaneously within a week of Mr Hill's announcement of the name to be used by the Complainant, and not having them resolve to its website (nor indeed to any website), makes its submissions on this aspect of the Policy quite disingenuous. Putting to one side for the moment the serious doubt that exists as to the Respondent's eligibility under auDA policies to register the two commercial domain names, a registered trade union is ostensibly eligible to register a domain name under the .org second level domain¹⁰. However, it is still required both by its agreement with the Registrar and by paragraph 2 of the Policy to warrant, *inter alia*, that the statements made in its application for the domain names were complete and accurate, including those as to its eligibility in the relevant second level domain, that use of the domain name would not be unlawful, and that in registering a domain name it is not aware of anyone else who might have rights that would be violated by the registration. As noted below, the Panel has come to the view that the Respondent had no reasonable grounds for giving those warranties. In particular the Panel rejects the submission that the Respondent had no knowledge of the course that Mr Hill and his colleagues were taking, and of the name they proposed to adopt for the Complainant, at the time it registered the Disputed Domain Names.

Even allowing for the fact that the AEAU cohort of the Respondent's membership continues to comprise some paramedics and ambulance personnel operating in Victoria, in the Panel's view the events that have occurred since the establishment of the Complainant in June last year would make the historical position even less effective to establish any current right or legitimate interest in any of the Disputed Domain Names on the part of the Respondent. In any event, as the Panel has found, that historical position did not confer any relevant right or interest on the Respondent in "Victorian Ambulance Union". And now, representing as it does "150,000 workers across the country from more than 45 industries and all walks of life", compared to the Complainant's representation solely of paramedic and ambulance workers in Victoria, there is even less foundation for the Respondent to claim any legitimate right or interest in respect of any of the Disputed Domain Names.

Furthermore, absent a formal consent from the Federal Treasurer under section 9(1) of Part 1 of Schedule 2 of the *Business Names Registration (Availability of Names) Determination 2015* it may be unlawful for the Respondent to register a business name containing the word "ambulance". Whilst the Respondent appears to reject the availability of that conclusion on the basis of the evidence before the Panel, the Panel notes that none of the 23 names registered by the Respondent contain the word

¹⁰ See paragraph 1(c) in Schedule F to auDA's 2012-04 - *Domain Name Eligibility and Allocation Policy Rules for the Open 2LDs*

“ambulance”. That fortifies the Panel in coming to the view that the Respondent *has* no right or legitimate interest in respect of any of the Disputed Domain Names.

Paragraph 4(c) of the Policy sets out three circumstances in which a respondent will be found to have a legitimate right or interest in respect of a domain name. Although the Respondent, in terms, has not sought to rely upon any of those provisions, the Panel formally finds that there is no factual basis for it to do so.

The Complainant has made out the second limb of the Policy.

Registered or subsequently used in bad faith

The Respondent registered all three Disputed Domain Names just days after the Complainant announced its new name to relevant members of the Respondent. Paragraph 4(a)(iii) of the auDRP requires the Complainant to demonstrate that each of the Disputed Domain Names was registered *or* subsequently used in bad faith.

Under paragraph 4(b)(ii) of the Policy registration for the purpose of preventing a complainant from reflecting its name or trademark in a corresponding domain name is taken to be evidence of the registration **and use** of a domain name in bad faith. Here the Panel is comfortably satisfied that the Respondent’s conduct in registering all three Disputed Domain Names was a deliberate attempt to prevent the Complainant from reflecting “Victorian Ambulance Union” in a suitable domain name. The Respondent overplayed its hand by registering all three Disputed Domain Names and then pointing none of them to its website or indeed to any website. The Panel cannot accept that it was necessary for the Respondent to register all three Disputed Domain Names to achieve the objectives it claims to have had, even if the Panel were to accept that the Respondent indeed had those objectives, which it does not. The evidence points to the irrefutable conclusion that the Respondent thought it could thwart or at least disrupt the Complainant’s establishment by registering as domain names the name that it by then well knew the Complainant proposed to use, and which the Respondent itself had never used.

Subparagraph 4(b)(iii) of the Policy similarly deems bad faith where any of the Disputed Domain Names has been registered “primarily for the purpose of disrupting the business activities of another person”. Here the Panel is of the view that the simultaneous registration of all three Disputed Domain Names evidences the Respondent’s primary purpose being to disrupt the Complainant’s attempts to meet the wishes of its ambulance and paramedic members in the State of Victoria by forming a trade union which would meet their specific needs, the Respondent having given that cohort the impression that it was not planning to do so¹¹.

Although a trade union has an explicit right to hold a domain name under the .org.au second level domain if it is otherwise eligible¹², in the Panel’s view that eligibility is inconsistent with a *concurrent* eligibility to hold identical registrations in both the .com.au and .net.au commercial second level domains. In the Panel’s view it was impossible for

¹¹ Indeed the Respondent’s website, under the heading “**How AEAV fits into the United Workers Union**” records its intention that AEAV be subsumed within a *national* voice for paramedics rather than being represented as a Victorian-specific cohort. On that basis the description of the AEAV section of the Respondent as *a* (let alone “the”) Victorian ambulance union has become even less apt than it was before the amalgamation. *A fortiori* in respect of the Respondent as a whole.

¹² See fn 7, *supra*

the Respondent to warrant on 25 June 2019 that it was concurrently eligible to register all three of the Disputed Domain Names. This remains the position as at today.

It defies credibility for the Respondent to suggest that its conduct was *bona fide* when the preponderance of evidence points in the opposite direction. There was nothing to stop the Respondent from seeking to register a domain name reflecting any of the 21 trading names it had just registered in addition to the two primary names associated with its two ABNs¹³. That it instead chose the name announced for the Complainant is regarded by the Panel as compelling evidence of bad faith and the Panel is unable to accept the Respondent's emphatic assertions to the contrary because those assertions not only have no evidentiary foundation but are contradicted by the evidence before the Panel, especially in the absence of oral testimony which can be tested by cross-examination.

The Complainant has very clearly made out the third limb of the Policy. In those circumstances, the Panel declines to declare that the Complaint constitutes Reverse Domain Name Hijacking by the Complainant.

7 Decision

The Complainant has made out to the Panel's comfortable satisfaction all of the three grounds on which it needed to succeed. However, according to paragraph 6.1(b) of the chapeau to the Policy, the Registrar also needs to be satisfied before actioning a transfer order that the Complainant is eligible to hold the transferred domain name. As noted above, a trade union has an explicit right to hold a domain name under the .org.au second level domain if it is otherwise eligible. In the Panel's view the Complainant is so eligible. However, that eligibility is inconsistent with a concurrent eligibility to hold a corresponding registration in the .com.au and .net.au commercial second level domains.

Accordingly, the Panel orders pursuant to Paragraphs 4(i) of the Policy and 15 of the Rules, that the domain name <**victorianambulanceunion.org.au**> be transferred to the Complainant and that the Registry lock on that domain name be removed. In addition, the Panel formally orders that the domain names <**victorianambulanceunion.com.au**> and <**victorianambulanceunion.net.au**> be cancelled.

Dated this 2nd day of March 2020

P Argy

Philip N Argy
Sole Panellist

¹³ As noted in fn 6 above, it appears to have done so in respect of AEVIC at some stage, although the Panel is unaware of precisely when this occurred.