



## ADMINISTRATIVE PANEL DECISION

**ITC Pacific Pty Ltd**

**v**

**Ignite Travel Pty Ltd**

**auDRP\_21\_07**

**<mycruise.com.au>**

### **1 The Parties**

The Complainant is ITC Pacific Pty Ltd of Milton, Queensland. It is represented in the proceedings by Mr John Pandelakis of Rivercity Solutions Pty Ltd, the Complainant's IT service provider, of Herston, Queensland.

The Respondent is Ignite Travel Pty Ltd of Broadbeach, Queensland. It is represented in the proceedings by Mr Chris Gavras-Moffat, Legal Counsel for the Respondent's parent company, Flight Centre Travel Group Limited, of South Brisbane, Queensland.

### **2 The Disputed Domain Name and Registrar**

The Disputed Domain Name is <mycruise.com.au>. According to the WhoIs record the registrar of the Disputed Domain Name is "Domain Directors Pty Ltd trading as Instra". However, Instra Corporation Pty Ltd claims to be the registrar. The WhoIs record should show the correct registrar of record.

### **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 filed with Resolution Institute (**RI**) on 18 May 2021 and forwarded to the registrar of record on the same day with a request that the registration particulars be confirmed, and the Disputed Domain Name be locked. On

20 May 2021 RI received an email from Instra Corporation Pty Ltd purporting to be the registrar and confirming the accuracy of the named registrant and contact particulars and advising that the Disputed Domain Name had been server locked. auDA and the Respondent were also notified of the Complaint on the same day. For the purposes of this proceeding the Panel will refer to Instra Corporation as the Registrar.

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) – in this case, 13 May 2021. Accordingly, the last date for filing a Response was Thursday 9 June 2021, on which date a Response was duly received by RI.

RI approached the Panel on 10 June 2021 and, following the Panel's Declaration of Independence and Statement of Impartiality, the parties were notified of the Panel's appointment later that day.

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

#### 4 Factual Background

The Complainant registered the business name MY CRUISE (the **Business Name**) in 2009.

The Disputed Domain Name was initially registered in 2006 by an unknown registrant. It was acquired by the Complainant in 2009 following its registration of the Business Name. The Complainant's registration of the Disputed Domain Name lapsed in 2019.

The Disputed Domain Name has not resolved to any website, nor appeared in any MX record, since the lapsing of the Complainant's registration.

The Respondent became the registrant of <mycruises.com.au> (the **MyCruises Domain Name**) on 7 February 2006 and registered the Disputed Domain Name on 6 July 2019. It is also registrant of the following domain names (the **Related Domain Names**):

mycruiseholiday.com  
mycruisecentre.com  
mycruisecentre.com.au  
mycruiseholiday.com.au  
mycruisepackage.com.au  
mycruisedeal.com.au  
mycruisedeals.com.au  
mycruises.cruises  
mycruises.co.nz

The Respondent is also registered proprietor of the following Australian trademarks:



- a)
- b) MYCRUISES.COM.AU HANDCRAFTED TO INSPIRE

and the following New Zealand trademarks:



c)



d)

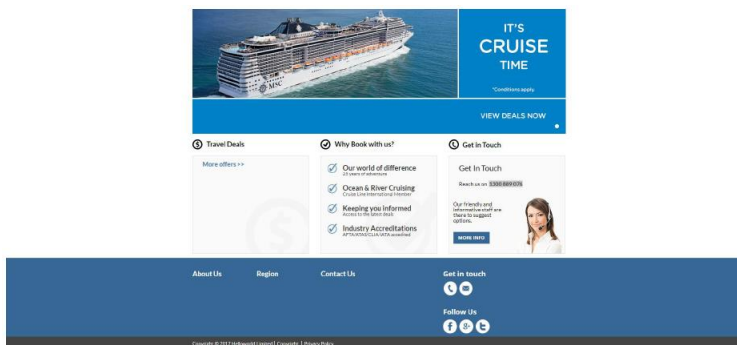
## 5 Parties' Contentions

### Complainant

The Complainant asserts that:

- a) It has and owns the Business Name;
- b) It has “evidence of leveraging” the Business Name “in recent years”;
- c) It has a wider organisational strategy of leveraging “this brand” in 2021;
- d) The Respondent has not demonstrated use of the Disputed Domain Name, with no website nor any MX or DNS records demonstrating E-mail use;
- e) The Respondent has sat on the Disputed Domain Name since purchase with no evidence of using the Disputed Domain Name or brand;
- f) The “dispute grounds look to focus on Section 4A paragraph 2 [sic] of” the Policy.

The Complainant’s registration of the Disputed Domain Name dates back to 2009, although evidence of use does not pre-date January 2017. Using the Wayback Machine<sup>1</sup> the Complainant can demonstrate website operation from January 2017 through to the lapsing of the Disputed Domain Name in 2019. In the later years the Disputed Domain Name was pointing to ITC Pacific Pty Ltd as the Complainant focused on “their other brands”. In support of this submission the Complainant annexes the following page from the Wayback Machine:



The Complainant can also demonstrate email usage and consumer/business communication from August 2016. Evidence of work completed by Rivercity Solutions

<sup>1</sup> [www.archive.org](http://www.archive.org)

on behalf of the Complainant is provided relating to the setup and configuration of the MX records for the Disputed Domain Name.

The Complainant stresses the Respondent's failure to make any use at all of the Disputed Domain Name after it became registrant in 2019.

The Complainant is said to be "willing to provide additional evidence to the Provider. This evidence will be requested not to be shared to the Respondent".

The Complainant seeks transfer of the Disputed Domain Name to itself.

## **6 Respondent's Response**

### **Respondent**

The Respondent asserts that it has a substantial cruise business and brand operating under the MyCruises Domain Name. Furthermore, it submits:

- a) the Complainant's Business Name registration does not evidence its intellectual property rights in the particular name or brand;
- b) neither party holds the trade mark in the words "My Cruise" despite both the Complainant and the Respondent having applied for those words as a registered trademark and been unsuccessful;
- c) the Respondent's "Ignite business subsidiary", Corprewards Pty Ltd, holds numerous Australian and New Zealand trademarks for stylised versions of the MyCruises Domain Name;
- d) The apparent non-use referred to by the Complainant is simply the result of a domain forwarding error. The Respondent says that it always intended that the Disputed Domain Name be forwarded to the MyCruises Domain and that once the server locks are removed it will be in a position to remedy that error;
- e) It acquired the Disputed Domain Name as it considers it to be complementary to its MyCruises Domain Name and the Related Domain Names;
- f) the Respondent has a long history selling cruise products and marketing them through the MyCruises Domain and the Related Domain Names;
- g) since November 2015 the Respondent has increased its marketing spend on cruises across print, digital and direct mail including over 380 print advertisements in over 500 E-mail direct marketing campaigns to a dedicated cruising database – it provides extensive evidence to support its submissions;
- h) the Respondent has an estimated 2021-2022 advertising budget for the MyCruises brand but, having secured the Disputed Domain Name, it is the Respondent's intention to transition its branding from My Cruises to My Cruise during 2022;
- i) the Respondent has an ongoing strategy to leverage and grow cruise sales generally post-Covid and the utilisation of the Disputed Domain Name is an integral part of this strategy;

- j) the Respondent denies having acquired the Disputed Domain Name in bad faith and says it is not squatting on the domain and has a genuine strategy to leverage it for its legitimate business purposes.

The Respondent reserves the right to respond to any additional evidence the Complainant might file, as it had foreshadowed.

## 7 Discussion and Findings

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

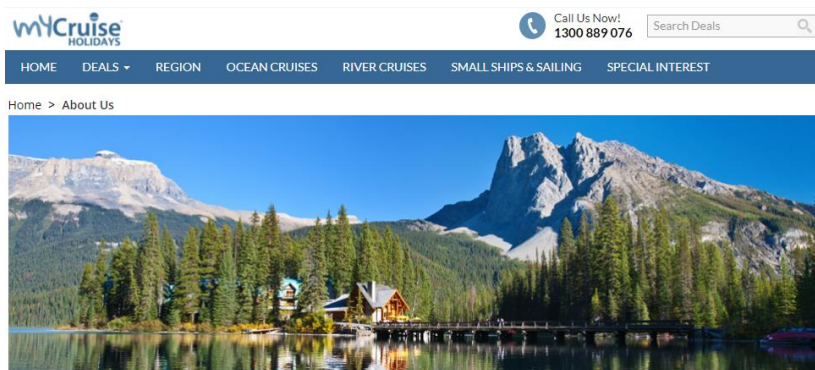
- (i) the Disputed Domain Name is identical or confusingly similar to a name, trade mark or service mark in which it has rights; and
- (ii) the Respondent has no rights or legitimate interests in respect of the Disputed Domain; and
- (iii) the Disputed Domain has been registered *or* subsequently used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

The Panel has to decide the case based on the available evidence, and the Complainant must prove all of the elements of the Policy at least on the balance of probabilities.

The Panel particularly draws the Complainant's attention to paragraph 2(h)(iii) of the Rules which require all communications from a party to the Panel to be shared with the other party – there is thus no scope for the Complainant to make a confidential submission to the Panel and, in any event, the Panel would decline to receive such material.

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

The Complainant has owned the Business Name since 2009 but the sole evidence of its use that has been furnished with the Complaint is on a webpage extracted from the Wayback Machine the footer of which is “Copyright © 2017 Helloworld Limited”. There is no explanation of the relationship between Helloworld Limited and the Complainant. Nevertheless, the Panel has obtained from the same Wayback Machine archive the About Us page of the same website, which relevantly includes a logo and other information corroborative of the Complaint's historical use of the Business Name as well as a myCruise Holidays device trade mark:



#### **About Us**

My Cruise is a division of ITC Pacific Pty Ltd, a travel company providing travel solutions in wholesale, retail and tour management. We provide a full spectrum of travel-related products and services. The company was formed in May 1992 by David & Elizabeth Walker who are the sole shareholders. Since commencing in 1992 with 3 consultants, the company has grown to a team of 28. My Cruise specialises in premium ocean and river cruising, special interest cruises and charters.

Under this limb of the Policy the exercise is essentially one of comparing character strings and no account is taken of the content of any website nor of the dates on which the rights relied upon by the Complainant accrued. Also, the “www” and the “.com.au” are ignored for the purposes of this comparison unless they are demonstrably relevant.

It seems clear enough that the Disputed Domain Name is identical to the Business Name<sup>2</sup> as well as to the myCruise trade mark historically used by the Complainant, and the Panel so finds.

### **No Right or Legitimate Interests in respect of the Disputed Domain Name**

The Complainant makes no reference to the second limb of the Policy other than the peculiar statement noted in section 5(f) above that the “dispute grounds look to focus on Section 4A paragraph 2 of” the Policy. The only provision of the Policy that might meet that description is paragraph 4(a)(ii) which requires the Complainant to prove that the Respondent has no right or legitimate interests in respect of the Disputed Domain Name. That is something that the Complainant has failed to do - either by submission or evidence.

Of course the words MY and CRUISE are ordinary English words. To the extent to which the Respondent is selling goods and services in respect of which those words might be apposite, as appears to be the case from its evidence, it is all but impossible for the Panel to find in favour of the Complainant on this limb of the Policy.

### **Registered or subsequently used in bad faith**

The Complaint is silent on the circumstances in which the Disputed Domain Name ceased to be held by the Complainant in 2019 after some 10 years of use, but there is no evidence from which the Panel could conclude that the Respondent registered the Disputed Domain Name in bad faith or has subsequently used it in bad faith. The Panel could speculate that the Respondent became registrant of the Disputed Domain Name through use of a drop catching service after the Complainant’s registration lapsed, but absent evidence from either party cannot make any findings nor proceed on the basis that that is in fact what happened.

It is abundantly clear that both the Complainant and the Respondent are in the business of supplying cruise travel services - the former under the Business Name and myCruise brand and the latter under the MyCruises brand complemented by use of the MyCruises Domain Name and the Related Domain Names. These activities have been occurring concurrently for many years and the Panel is certainly in no position to determine which party has the better rights. As noted above, the Panel cannot conclude that the Respondent has no right or legitimate interests in respect of the Disputed Domain Name. In those circumstances it is hard to see how the Panel could come to the view that the Disputed Domain Name was registered in bad faith or subsequently used in bad faith.

The Complainant may have an argument that the Respondent’s adoption of the Disputed Domain Name and any transitioning of the Respondent’s brand-name to MyCruise would in all the circumstances be misleading or deceptive to consumers, but that case is well beyond the remit of the Policy and would best be the subject of litigation in the Federal Court of Australia.

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<sup>2</sup> See footnote 1 to paragraph 4(a)(i) of the Policy

The Panel finds that there is no evidence to support any finding of bad faith registration or subsequent use of the Disputed Domain Name on the part of the Respondent.

**8 Order**

The Complainant has failed to prove two out of the three limbs of the Policy which it is required to prove under paragraph 4(a) of the Policy. Accordingly the Panel orders, pursuant to paragraphs 4(i) of the Policy and 15(a) of the Rules, that the Complaint be dismissed and that the Registry lock on the Disputed Domain Name be removed.

Dated this 14<sup>th</sup> day of June 2021

***P Argy***

Philip N Argy  
Panellist