

IN THE FEDERAL COURT OF AUSTRALIA  
VICTORIA DISTRICT REGISTRY

No. V656 of 2003

BETWEEN

**.AU DOMAIN ADMINISTRATION LIMITED (ACN 079 009 340)**

Applicant

and

**DOMAIN NAMES AUSTRALIA PTY LTD (ACN 102 562 649) AND PAUL CHESLEY  
RAFFERTY**

Respondents

**AMENDED APPLICATION UNDER PART IVA OF THE FEDERAL COURT OF AUSTRALIA  
ACT 1976**

(Amended pursuant to Orders of the Honourable Justice Finkelstein made 31 October 2003)

1. This application is brought by the applicant as a representative party.
2. The group members to whom this proceeding relates are all persons and corporations:  
~~licensed to use a registered domain name in a generic top level domain (**gTLD**) or an  
open.au second level domain name (**open.au2LD**)~~
  - (a) to whom the First Respondent, Domain Names Australia Pty Ltd (**DNA**) sent or caused to be sent a notice as alleged in paragraphs 13 and 14 of the Amended Statement of Claim herein in the form of annexure A, B or C thereto ("the notice") ~~in the form annexed to this Application as Annexure A, by post in Australia in relation to registration of a corresponding domain name in an open.au2LD or gTLD; and~~
  - (b) who have paid the amount referred to in the notice to DNA on or before 26 September 2003.
  - (c) who paid the amount referred to in the notice in reliance upon one or some of the representations or matters referred to in paragraphs 16 of the Amended Statement of Claim, alternatively by reason of the mistake referred to in paragraph 30 thereof; and

Formatted: Double underline

Formatted: Underline

Formatted: Double underline

Formatted: Bullets and Numbering

Filed on behalf of: The Applicant  
Prepared by:  
**Maddocks**  
Lawyers  
140 William Street  
Melbourne VIC 3000  
Email: [suzanne.tinkler@maddocks.com.au](mailto:suzanne.tinkler@maddocks.com.au)

Solicitor's Code: 230  
DX 259 Melbourne  
Tel: (03) 9288 0555  
Fax: (03) 9288 0666  
Ref: MED:SXT:964859  
Attention: Suzanne Tinkler

Deleted: [964859/SXT/M0170268:1]

(d) who have suffered or are likely to suffer loss or damage by reason of the representations or matters referred to in paragraphs 16 and 20 to 26 inclusive of the Amended Statement of Claim, alternatively the matters referred to in paragraph 32 thereof.

("the group members").

3. The Applicant claims that:

(a) the First Respondents has made representations in trade or commerce that are misleading or deceptive or likely to mislead or deceive in contravention of Sections 51A, 52, and 64(2A) of the *Trade Practices Act 1974 (Cth)* (TPA).

**Deleted:** 53 (c), (d) and (f)

(b) The Second Respondent Paul Chesley Rafferty (**Rafferty**) has:

(i) aided, abetted, counseled or procured the above contraventions of the TPA by the First Respondent;

(ii) been directly or indirectly knowingly concerned in or a party to the above contraventions of the TPA,

**Deleted:** Further or alternatively, a declaration that by reason of the matters referred to in paragraphs 16(d), (e) and (f) to 19 of the Amended Statement of Claim the First Respondent has in trade or commerce in connection with the supply or possible supply of services or in connection with the promotion by any means of the supply or use of services represented that the services have a sponsorship, approval, performance characteristics, use or benefit they do not have in contravention of Section 53(c) of the TPA.

4. The Applicant claims relief as follows:

(a) A declaration that the ~~First Respondent's conduct~~ representations or matters referred to in paragraphs 16 to 19 of the Amended Statement of Claim constituted conduct of the First Respondent in trade or commerce which was misleading or deceptive or likely to mislead or deceive in contravention of Sections 51A and 52 of the ~~Trade Practices Act 1974 (Cth)~~ ("TPA").

**Inserted:** (d), (e) and (f)

(b) ~~.....~~

(c) ~~.....~~

(e) Further or alternatively, a declaration that by reason of the matters referred to in paragraphs 16(a), (b), (c), and (f) ~~to 19~~ of the Amended Statement of Claim the First Respondent has in trade or commerce asserted a right to payment from a person for unsolicited services when the corporation had no reasonable right to believe there was a right to payment in contravention of Section 64(2A) of the TPA.

**Deleted:** Further or alternatively, a declaration that by reason of the matters referred to in paragraphs 16(d), (e) and (f) to 19 of the Amended Statement of Claim the First Respondent has in trade or commerce in connection with the supply or possible supply of services or in connection with the promotion by any means of the supply or use of services represented that the corporation has a sponsorship, approval or affiliation it does not have in contravention of Section 53(d) of the TPA.¶  
(d) Further or alternatively, a declaration that by reason of the matters referred to in paragraphs 16(a), (b), (c), and (f) and 18(a) to 19 of the Amended Statement of Claim the First Respondent has in trade or commerce in connection with the supply or possible supply of services or in connection with the promotion by any means of the supply or use of services made a false or misleading representation concerning the need for any services in contravention of Section 53(f) of the TPA.

**Inserted:** (d), (e) and (f)

**Inserted:** (a), (b), (c), and (f) and 18(a)

**Deleted:** [964859/SXT/M0170268:1]

(f) A declaration that the Second Respondent is a person who:

- (i) has aided, abetted, counselled or procured;
- (ii) has been directly or indirectly, knowingly concerned in, or party to;

the contraventions of Part V of the TPA ~~by the First Respondent~~ referred to in paragraphs ~~0 to 5~~ 4 (a) ~~and (b)~~ above.

Deleted: to  
Deleted: e

(g) Further or alternatively, pursuant to Section 163A of the TPA, ~~alternatively Section 21 of the Federal Court of Australia Act 1976,~~ a declaration in terms of each of the declarations referred to in paragraphs ~~1 to 6~~ 4 (a) ~~and (b)~~ above.

Deleted: to  
Deleted: e

(h) An injunction pursuant to Section 80 of the TPA restraining the Respondents, whether by themselves, their servants or agents or otherwise howsoever from:

- (i) engaging in the conduct referred to in paragraphs ~~0 to 5~~ 4 (a) ~~and (b)~~ above;
- (ii) sending or causing to be sent to any person any notice in the form of, or substantially in the form of, the notice Annexure A, ~~B and C~~ to the Amended Statement of Claim;

Deleted: to  
Deleted: e

(iii) making any of the representations referred to in paragraph 16, ~~of the~~ Amended Statement of Claim.

Deleted: alternatively engaging in the conduct or doing any of the matters referred to in paragraph 18.

~~(i) An injunction pursuant to Section 80 of the TPA requiring the Respondents to pay into Court, alternatively into a separate interest bearing account to be established with a financial institution and upon such terms as may be required by the Court:~~

- ~~(i) an amount equivalent to all of the money received by it prior to the date of the Order from recipients of the notice referred to in paragraph 13 of the Statement of Claim within 7 days of making the Orders sought in this application;~~
- ~~(ii) all money received by it from recipients of the notice referred to in paragraph 13 of the Statement of Claim after the date of the Order, within 48 hours of receipt of the money.~~

Deleted: [964859/SXT/M0170268:1]

(i) An order that the Respondents ~~at their own expense forward by email or pre paid post to each person or entity to whom the notice referred to in paragraphs 13 of the Statement of Claim was sent a notice pursuant to s33X of the Federal Court of Australia Act 1976 (Cth) in a form approved by the Court.~~

Deleted: within 7 days of the making of the orders sought in this application

Deleted: letter in the following terms:

~~"The Federal Court has determined that by a notice sent to you in about July 2003 by Domain Names Australia Pty. Ltd (DNA), DNA engaged in misleading and deceptive conduct and acted in contravention of various provisions of Part V of the Trade Practices Act 1974 (Cth) in that DNA made statements or representations which were not true including the following:~~

- ~~(a) — DNA was or is a registrar accredited with .au Domain Administration Ltd ("auDA") or otherwise carries the approval or sponsorship, direct or indirect, of auDA;~~
- ~~(b) — that a specific domain name was available for registration when it was not or might not have been so available;~~
- ~~(c) — the recipient of the notice was the licensee of the domain name to which it purported to relate;~~
- ~~(d) — the recipient of the notice had a pre-existing commercial relationship with DNA;~~
- ~~(e) — DNA was the auDA registrar or appointed reseller of the registrar of the domain name to which the notice purported to relate;~~
- ~~(f) — the recipient of the notice risked losing its domain name unless it returned the payment portion of the Notice together with the payment specified in the notice to DNA by the closing date specified upon the notice;~~
- ~~(g) — DNA had the ability itself to register, or is the agent of a registrar or supplier that has the ability to register, the domain name to which the notice purported to relate; and~~
- ~~(h) — all of the terms and conditions of the registration of the domain name to which the notice purported to relate were available at the internet web site [www.domainsaustralia.com.au/terms.html](http://www.domainsaustralia.com.au/terms.html).~~

~~In fact, DNA was not and is not authorised or approved by auDA and has no ability to register a domain name on your behalf. Instead, by paying DNA you would have been appointing DNA to be your agent to enter into a contract with~~

Deleted: [964859/SXT/M0170268:1]

~~a registrar of its choice on terms which you were not able to ascertain or agree to prior to paying DNA.~~

~~At the time of receipt of the notice you may not have been the licensed registrant of the domain name to which the notice purported to relate, but the registrant of a similar domain in a different top level domain such as .com or .net in which case there was not necessarily any requirement to register the domain name to which the notice purported to relate at all.~~

~~The Federal Court has ordered that DNA pay all of the money received by it as a result of the notices into a separate account to be refunded to recipients of the notice who were misled by the notice.~~

~~If you believe that you were misled by the notice and have made payment to DNA, please contact auDA by email at DNArefunds@auda.org.au or by mail to:~~

~~DNA Fund  
[Post office box number]  
[Post office name, State, Post Code]~~

~~You must provide auDA with a copy of the notice you received and/or full details of the domain name, date and method of payment, together with proof of payment satisfactory to auDA. All applications for refunds must be received within 120 days of the date of this letter or you will not be entitled to a refund out of the fund. You may however claim a refund directly from DNA after this time.~~

~~Please allow up to 60 days for auDA to process your application for a refund."~~

~~(k)(i) The Respondents file and serve on the Applicant by a date specified by the Court an affidavit verifying that it has carried out their obligations under paragraphs 4(i) hereof.~~

Deleted: 9 and 10

~~(+)(k) Damages pursuant to s 82 and 87 of the TPA for each group member, other than the Applicant, who have suffered, or is likely to suffer, loss or damage by~~

Deleted: [964859/SXT/M0170268:1]

[964859/SXT/M0181806:2]

the conduct of the Respondents that was done in contravention of the TPA as referred to above.

(l) Further or alternatively, pursuant to paragraphs 30 to 32 of the Amended Statement of Claim:

- (i) a declaration that the First Respondent holds the amount paid to it by each of group member on constructive trust for each group member;
- (ii) an order that the First Respondent repay each group member any amount paid by them to the First Respondent;
- (iii) such further or other orders for tracing of the said amounts paid to the First Respondent, alternatively equitable compensation for each group member.

(m) Costs.

(n) Such further or other orders, directions and relief pursuant to s87 of the TPA or otherwise as to the Court shall seem fit.

5. The questions of law or fact common to the claims of the group members are as follows:

(a) Whether or not the ~~conduct of the First Respondent in distributing the Notice annexed to this Application as Annexure A~~ sent or caused to be sent by the First Respondent to each of the group members contravened sections 51A, 52, and 64 (2A) of the TPA.

Deleted: 53 (a), (d), (f)

(b) Whether the Second Respondent aided, abetted, counseled or procured the alleged contraventions of the TPA by the First Respondent.

(c) Whether the Second Respondent was directly or indirectly knowingly concerned in or a party to all or any of the alleged contraventions of the TPA by the First Respondent.

(d) Whether the Applicant is entitled to declarations and injunctions against the Respondents on its own behalf and on behalf of the group members as sought in the Amended Application.

[964859/SXT/M0181806:2]

Deleted: [964859/SXT/M0170268:1]

6. And the Applicant claims by way of interlocutory relief:

(a) ~~An order that, until further order and save as provided for by the order referred to in sub-paragraph (b) below, the Respondents by themselves, their servants and agents be restrained from using, disposing of, encumbering or otherwise dealing with any of the payments made to the First Respondent to the date of this Application and sub-paragraph (a) in the future by any recipient of the notice referred to in paragraph 13 of the Statement of Claim or any notice in substantially similar form.~~

(b) ~~In furtherance of the order referred to in sub-paragraph (a) above, the Respondents deposit any such payments into Court, alternatively into a separate interest bearing trust account to be established with a financial institution and upon such terms as may be required by the Court.~~

(a) An injunction in the terms referred to in paragraph 4(h) above.

~~(e)~~(b) An order directing that the First Respondent within 7 days file and serve an affidavit that lists:

(i) the names of all those persons, whether in Australia or elsewhere, and their contact details (including addresses, phone numbers, facsimile numbers and email addresses) to whom it has sent the notice referred to in paragraph 13 of the Statement of Claim ("Notice") or any similar document;

~~(ii) the names of all recipients of such Notices with whom the First Respondent does not have a pre-existing relationship.~~

(iii) the identity of all bank and other accounts in the name of the First Respondent or jointly held or held by nominees or otherwise on its behalf into which money received by it from recipients of the notice referred to in paragraph 13 of the Statement of Claim has been paid, and the sums standing to its credit in those accounts.

(d) All accounts and enquiries in aid thereof as are necessary within 7 days including an affidavit sworn by the proper officer of the First Respondent listing the names of all persons in Australia or elsewhere who were sent the notice and, after 1 June 2003 have paid the First Respondent for or in relation to the following services:

[964859/SXT/M0181806:2]

Deleted: [964859/SXT/M0170268:1]

- (i) registration of a domain name;
- (ii) renewal of the registration of a domain name,

setting out:

- (a) how much each ~~customer~~ person paid;
- (b) in relation to which service; and
- (c) specifying the bank or other account in the name of the First Respondent or jointly held or held by nominees or otherwise to which the amount paid was credited.

Date: ~~18 August~~ October 2003

---

Maddocks  
Solicitors for the Applicant  
Signed by Michelle Dixon, Partner

To: The Respondents:

Domain Names Australia Pty Ltd of Level 8, 167-171 Collins Street, Melbourne, Victoria, 3000; and

Paul Chesley Rafferty of Unit 9, 28 York Street, Inglewood, Western Australia, 6052.

A directions hearing in this application will be heard by the Court at the time and place specified below.

If there is not attendance before the Court by you or by your counsel or solicitor, the application may be dealt with and judgment may be given or an order made in your absence. Before any attendance at that time, you must file an appearance in the Registry.

Time:

Place: 305 William Street, Melbourne, Victoria

[964859/SXT/M0181806:2]

Deleted: [964859/SXT/M0170268:1]

