

THE
INSTITUTE *of*
ARBITRATORS & MEDIATORS
——
AUSTRALIA
.au Dispute Resolution Provider

ADMINISTRATIVE PANEL DECISION

**Domain Name Dispute:
toolingaustralia.com.au & australiantooling.com.au**

between

**Tooling Australia Incorporated
and
Austool Limited (In Liquidation)**

Reference: IAMA 3045

1 THE PARTIES

- 1.1 The Complainant is Tooling Australia Incorporated, Suite 8, 322 Mountain Highway, Wantirina, Victoria 3152 ('the Complainant').
- 1.2 The Respondent is Austool Limited (In Liquidation), c/- Rodgers Reidy, Chartered Accountants, Level 8 , 333 George Street, Sydney, New South Wales 2000 ('the Respondent').

2 DOMAIN NAME AND REGISTRAR

- 2.1 The domain names in dispute are www.toolingaustralia.com.au and www.australian tooling.com.au, currently registered by the Respondent. The Registrar is Melbourne IT Limited, Level 2, 120 King Street, Melbourne, Victoria 3000. There is evidence, which is undisputed, that the domain names were registered in the name of the Respondent on 16 May 2005.

3 DISPUTE RESOLUTION PROVIDER AND PANEL

- 3.1 Under cover of a letter dated 20 February 2007, the Complainant submitted its Complaint to the Institute of Arbitrators & Mediators Australia ('IAMA') for resolution under the rules of the *.au Dispute Resolution Policy* ('the Rules') in Schedule A of that Policy. IAMA is a Dispute Resolution Provider approved by auDA. The Complainant elected to have the dispute determined by a Panel comprising a single member.
- 3.2 On or about 13 March 2007, the Respondent submitted its Response to IAMA. The Respondent agreed to have the dispute determined by a Panel comprising a single member.
- 3.3 By instrument dated 15 March 2007, IAMA appointed Robert William Hunt as arbitrator, to comprise the Panel to determine the Dispute.
- 3.4 By instrument dated 16 March 2007, Robert William Hunt accepted appointment as Panelist in accordance with the Rules, and the IAMA Supplemental Rules to the *.au Dispute Resolution Policy*, and notified IAMA of further material to be provided by the parties before making his determination, including a copy of a signed statement relied upon by the Claimant. That further material was provided by the parties between 19 March and 30 March 2007.

4 RULES OF THE .AU DISPUTE RESOLUTION POLICY

- 4.1 Relevantly, the Rules provide as follows:

'4. Mandatory Administrative Proceeding. *This Paragraph sets forth the type of disputes for which you are required to submit to a mandatory administrative proceeding. These proceedings will be conducted before one of the administrative dispute resolution service providers listed on the auDA website at <http://www.auda.org.au/policy/audrp> (each, a "Provider").*

a. Applicable Disputes. *You are required to 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) your domain name is identical or confusingly similar to a name [Note 1], trademark or service mark in which the complainant has rights; and*
- (ii) you have no rights or legitimate interests in respect of the domain name [Note 2]; and*
- (iii) your domain name has been registered or subsequently used in bad faith.*

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

b. Evidence of Registration or Use in Bad Faith. For the purposes of Paragraph 4(a)(iii), the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

- (i) *circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to another person for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; or*
- (ii) *you have registered the domain name in order to prevent the owner of a name, trademark or service mark from reflecting that name or mark in a corresponding domain name; or*
- (iii) *you have registered the domain name primarily for the purpose of disrupting the business or activities of another person; or*
- (iv) *by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to a website or other online location, by creating a likelihood of confusion with the complainant's name or mark as to the source, sponsorship, affiliation, or endorsement of that website or location or of a product or service on that website or location.*

c. How to Demonstrate Your Rights to and Legitimate Interests in the Domain Name in Responding to a Complaint. When you receive a complaint, you should refer to Paragraph 5 of the auDRP Rules in determining how your response should be prepared. Any of the following circumstances, in particular but without limitation, if found by the Panel to be proved based on its evaluation of all evidence presented, is to be taken to demonstrate your rights or legitimate interests to the domain name for purposes of Paragraph 4(a)(ii):

- (i) *before any notice to you of the subject matter of the dispute, your 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 that you have acquired for the purpose of selling, renting or otherwise transferring); or*
- (ii) *you (as an individual, business, or other organisation) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or*
- (iii) *you are making a legitimate non-commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the name, trademark or service mark at issue.'*

4.2 At the outset, it is necessary to consider whether the sub-paragraphs of paragraph 4a of the Rules are to be read conjunctively or disjunctively. If they are to be read disjunctively, a complainant would only need to prove one of (i), (ii) and (iii) whereas, if they are to be read conjunctively a complainant would need to prove each of (i), (ii) and (iii).

- 4.3 Applying settled principles of construction of documents I consider that the better view is that the sub-paragraphs of paragraph 4a of the Rules are to be read conjunctively, more particularly because it would seem contrary to the Policy if a complainant could succeed if it established only that the domain name is *'identical or confusingly similar to a name, trademark or service mark in which the complainant has rights'*. I note that this interpretation of paragraph 4a of the Rules is consistent with other published decisions under the Rules and is also consistent with decisions published by the WIPO Arbitration and Mediation Centre for disputes under similar rules in the *ICANN Uniform Domain Name Dispute Resolution Policy* (see, for example, *Document Technologies Inc. v International Electronic Communications Inc.* Case No. D2000-0270).
- 4.4 A consistent approach is desirable so that parties using the Policy can have a high level of confidence that the Rules will be interpreted in a particular way regardless of the identity of the Panel appointed in a particular dispute.

5 THE COMPLAINT

- 5.1 The Complaint is set out in a letter from Hunt & Hunt dated 20 February 2007, which enclosed an 11 page document entitled *'Grounds Upon Which Complaint is Made'* and Annexures A to M to that document.
- 5.2 The Complaint includes the following:

'4 Domain names subject of the complaint

- 4.1 *The domain names that are the subject of the complaint are:*

toolingaustralia.com.au; and

australiatooling.com.au.

These domain names are registered with Melbourne IT Limited.

- 4.2 *We request that a separate finding for each domain name be made on in respect of each of the criteria listed in paragraph 4(a) of Schedule A of the .auDRP.*

5 The name on which the complaint is based

- 5.1 *The complaint is based on the registered incorporated association name "Tooling Australia Inc". This incorporated association is registered with Consumer Affairs Victoria by the Complainant.*

- 5.2 *The incorporated association name "Tooling Australia Inc" has been used by the Complainant since April 2006 in relation to its role as an industry body promoting the Australian tooling industry.*

6 Grounds on which the complaint is made

- 6.1 *The grounds upon which the complaint is made are set out in the enclosed document entitled "Grounds Upon Which The Complaint Is Made".*
- 6.2 *The "Grounds Upon Which The Complaint Is Made" refers to the witness statement of Mr Peter Jupe. Although Mr Jupe has read this statement and approved of its contents, he has not yet signed the statement as he is currently interstate. Will send you a copy of the signed statement shortly.*

7 Remedies sought by the complainant

- 7.1 *The remedies sought by the Complainant are that the Domain Names be transferred to it.'*

5.3 A copy of the signed statement of Mr Peter Jupe was provided by Hunt & Hunt by e-mail on 29 March 2007.

5.4 The 'Grounds Upon Which Complaint is Made' includes the following:

Introduction

- 1 *The Complainant is the peak industry body which represents and promotes the Australian tooling industry in Australia and overseas. The Complainant has approximately 130 members. The Complainant was incorporated in 1997 and is a not for profit incorporated association. The Complainant formerly operated under the name The Tooling Industry Forum of Australia Incorporated.*
- 2 *The Respondent is a not for profit public company, that until placed in liquidation, also represented the Australian tooling industry.*
- 3 *The Complainant and the Respondent (whilst it was trading), competed for membership.*
- 4 *On 1 November 2006 the Respondent was placed into administration and ceased trading....*
- 5 *On 18 January 2007 the Respondent was placed into liquidation and preparations are being made for the winding up of the Respondent. Attached and marked "A" is a company search of the Respondent.*

.....

Relevant Facts

- 7 *On 16 May 2005 the Respondent registered the following domain names with Melbourne IT Limited:*
 - (a) *toolingaustralia.com.au; and*
 - (b) *australiantooling.com.au,*

("Domain Names").

- 8 Attached and marked "B" are copies of "whois.com.au" domain searches for the Domain Names.
- 9 Attached and marked "C" is a statement of Peter Jupe, a former employee of the Respondent, which in substance, sets out the following:
- (a) in May 2005 an employee of the Respondent was informed that the President of the Complainant intended to change the name of the Complainant to either "Tooling Australia" or "Australian Tooling";
 - (b) the following day Mr Jupe heard a telephone conversation between an employee of the Respondent and a director of the Respondent during which a plan was devised to register various companies with the words "Australia", "Australian" or "Tool making" in them to stop the Complainant having the opportunity of changing its name to one that would make it look like the main body for the tool making industry in Australia;
 - (c) the next day the Respondent registered the Domain Names.
- 10 The Complainant asserts that:
- (a) the Domain Names are identical or confusingly similar to a name, trademark or service mark in which the Complainant has rights; and
 - (b) the Respondent has no rights or legitimate interests in respect of the Domain Names; and
 - (c) the Domain Names have been registered or subsequently used in bad faith.
- 11 The Complainant is incorporated under the name "Tooling Australia Inc". The complainant has been incorporated under this name since 4 April 2006. Attached and marked "D" is an Incorporated Association Extract for the Complainant dated 16 February 2007.
- 12 The Complainant originally intended to register the name "Tooling Australia" as a business name. Attached and marked "E" is an application for the business name registration of "Tooling Australia" lodged by the Complainant with Consumer Affairs Victoria on 22 March 2005 ("**Application**"). This date pre-dates the date the Respondent registered the Domain Names.
- 13 The Application sets out that the proposed business name was "Tooling Australia" and the intended internet address was "toolingaustralia.com.au". The proposed date of the commencement of trading using the name "Tooling Australia" disclosed in the Application was 1 July 2005.
- 14 In response to the Application, Consumer Affairs Victoria notified the Complainant by letter dated 22 March 2005 that it could not accept that

Application without the Complainant first passing a Special Resolution that addressed the requirements set out in the letter. A copy of the letter from Consumer Affairs Victoria is attached and marked "F".

- 15 *Rather than continue with the business name registration application, in April 2006 the Complainant pass a resolution changing its name to Tooling Australia Inc. The Complainant has been operating under the name Tooling Australia since this date.*
- 16 *At no material time has the Respondent traded under the name "Tooling Australia".*
- 17 *The Complainant seeks to have the Domain Names transferred to it.'*

5.4 Two statements are relied upon by the Claimant, being those of Mr Peter Jupe and Mr Carlos Broens. Mr Jupe describes himself as 'contracted to work full time' for the Respondent between about March 2003 and about October 2005. In that statement, he recounts a conversation with Mr Bob Lundie-Jenkins of the Respondent in May 2005 and events which took place after that conversation. Mr Broens describes himself as 'the president of Tooling Australia Incorporated'.

5.5 I will refer further to the statements of Mr Jupe and Mr Broens in Part 7 below.

5.5 I note that, as at 6 April 2007, one is redirected from both www.toolingaustralia.com.au and www.australiantooling.com.au to the Respondent's site at www.austool.com.au, as alleged in paragraph 48 of the 'Grounds Upon Which Complaint is Made'.

6 THE RESPONSE

6.1 The Response is set out in a 9 page document entitled 'Response to Complaint auDRP' and Annexures A to R to that document.

6.2 The Response includes the following:

'2.2 The Respondent is Austool Limited (In Liquidation) ACN 090 994 808 and ABN 84 090 994 808.

- (a) At the time of being placed into administration the Respondent had 395 members which the majority are Australian companies.*
- (b) The Respondent was incorporated on 21 December 1999. Annexed and marked "A" is a copy of an ASIC company search on the Respondent confirming the date of registration.*
- (c) Whilst trading the Respondent was a not-for-profit organisation which promoted and facilitated its members in the tooling industry.*

.....

4.1 *On 19 May 2005 the Domains were registered in the name of Austool Limited ABN 84 090 994 808...*

4.2 *On 28 October 2005 at the Complainant's Annual Dinner 2005 the Complainant announced that it intended to change its name to "Tooling Australia". Annexed and marked "B" is a copy of a letter to Mr Carlos Broens from Austool Limited dated 14 July 2006 noting the Complainant's announcement to change its name at the Annual Dinner referred to above.*

4.3 *On 14 July 2006 the Respondent responded to the Complainant denying the Complainant's request to transfer the domain name to the Complainant. The letter is the annexure referred to in paragraph 4.2 above.*

.....

4.5 *On 19 December 2006 the Respondent sent a letter to the Complainant's solicitors, Hunt and Hunt Lawyers, noting that the Respondent disputed the facts alleged in the letter from the Complainant dated 12 December 2006 and was disputed by the parties named in the allegations and further noted that the Domains had been registered in excess of 12 months prior to the Complainant's name change. Annexed and marked "C" is a copy of this letter.'*

6.3 There is one statement relied upon by the Respondent, namely that of Mr Bob Lundie-Jenkins, who says that '*all material times*' he was the Chief Executive Officer of the Respondent. Mr Lundie-Jenkins says that Mr Carlos Broens was the Chairman of the Respondent in about 2002 to 2003, and that, after he was not re-elected as Chairman, Mr Broens '*thereafter joined the Tooling Industry Forum of Australia ("TIFA"), a potential trade competitor of Austool, and was elected to that organisation's board*'. I note that no mention is made of this in Mr Broens' statement.

6.4 I will refer further to the statement of Mr Lundie-Jenkins in Part 7 below.

6.5 By letter dated 4 April 2007, some 3 weeks after receiving the Response, Hunt & Hunt wrote to IAMA saying:

'Our client is reviewing Austool's response dated 13 March 2007 and considering whether to file additional evidence in support of the complaint. We will let you know shortly whether our client intends to file additional evidence.'

By e-mail dated 5 April 2007, I indicated to the parties that, in the exercise of my discretion under clause 12 of the Rules for the *.au Dispute Resolution Policy*, I declined to permit further statements or documents by the Complainant. Given the short time frame for the determination of disputes under the Policy, any application should have been made within a short number of days after 13 March 2007.

7 DETERMINATION

7.1 Having regard to:

- (a) the submissions by the parties, and the evidentiary material (statements and documents) in the Annexures to those submissions;
- (b) the matters referred to in Parts 4, 5 and 6 above,

I find that the Complainant is not entitled to the relief which it seeks, more particularly for the reasons referred to in paragraphs 7.2 to 7.18 below.

7.2 From the statements and documents annexed to the submissions by the parties, I find the relevant facts are as follows:

- (a) At the relevant times, both the Complainant and the Respondent were not for profit organisations, which acted as industry associations to service the needs and interests of their respective members in the Australian tool making industry, including *'tooling and product designers, toolmakers, suppliers, educators, technology developers and customers'* as described on the Respondent's website at www.austool.com.au.
- (b) Prior to the Respondent being placed into administration and ceasing trading in late 2006:
 - (i) The Respondent was the larger of the two organisations, with about 395 members compared with about 120 members of the Complainant.
 - (ii) The Complainant and the Respondent competed for membership.
- (c) In March 2005, the Complainant (then named *The Tooling Industry Forum of Australia Inc.*) lodged an application for registration of the business name *'Tooling Australia'* in Victoria. That application was effectively discontinued after receipt of a letter from the Victorian Department of Justice dated 22 March 2005, advising certain requirements.
- (d) At an Austech Exhibition in Melbourne on or about 12 May 2005, Mr Lundie-Jenkins was informed by an un-named person that Mr Carlos Broens, who was a former Chairman of the Respondent, had been elected as the new President of the Claimant, and *'was intent on "reinvigorating" TIFA (as the Complainant was then named) by changing TIFA's name'*. According to Mr Jupe's statement, he overheard Mr Lundie-Jenkins being informed that Mr Broens intended to change TIFA's name to *'Tooling Australia'* or *'Australian Tooling'*. According to Mr Lundie-Jenkins' statement, he was informed that *'TIFA intended to change its name to a name similar to Austool'*. I accept what is said in the statement of Mr Lundie-Jenkins, in preference to what is said in Mr Jupe's statement. I infer, from the fact that the copy of that statement in the Complaint was unsigned, that it was prepared by the

Complainant's lawyers, and the wording represents the lawyers' words rather than words volunteered by Mr Jupe. It seems to me highly unlikely that Mr Jupe would in fact recall (or have any reason to recall) the actual words used almost 2 years earlier in a conversation which he overheard but did not take part in.

- (e) On 16 May 2005, the Respondent registered the domain names www.toolingaustralia.com.au and www.australiantooling.com.au.
- (f) In relation to the Respondent's motivation for registering the domain names, I accept as credible what is said by Mr Lundie-Jenkins at paragraphs 8 to 12 of his statement, namely:

- '8. *Carlos thereafter joined the Tooling Industry Forum of Australia ("TIFA"), a potential trade competitor of Austool, and was elected to that organisation's board. Carlos is currently president of TIFA.*
- 9. *Under the control of TIFA, Carlos has engaged in activities such as declaring to industry and government representatives that Austool is not a representative industry association and other activities that go beyond normal and healthy competition between competing organisations. As a result of these actions, from about the beginning of 2005, I became concerned that he would use his position at TIFA to damage the reputation of Austool. As the Chief Executive Officer of Austool, it was clearly my duty to Austool to act in a manner that prevented any such harm.*
- 10. *As with any organisation, particularly an organisation representing the best interests of a significant membership of over 380, reputation and goodwill are important assets and influence Austool's ability to function in its capacity as a tooling industry association. Consequently, I was ever alert to the need to take protective measures against other organisations which either directly sought to tarnish Austool's reputation or, more indirectly, to inappropriately associate themselves by whatever means with Austool's name, branding and other such intangible assets.*
- 11. *Other organisations have sort to adversely affect the name of Austool in the past by adopting Austool's name as their name in a way that could mislead Austool's present and potential membership. By way of example, in or about 2001, an organisation with completely commercial objectives based in South Australia with ties to TIFA registered the domain name austool.com as a deliberate attempt to trade off the good name and reputation of Austool.*
- 12. *In early May 2005, while attending the Austech Exhibition in Melbourne, concerns were brought to my attention by attendees at the exhibition that TIFA intended to change its name to a name similar to Austool. This was alarming but, given the conduct of Carlos referred to above, not surprising.*

13. *At some time in the days after hearing of TIFA's proposed name change, I instructed Frank Bulluss, Treasurer of the Board of Austool Limited, to register the business name and company "Australian Toolmakers Association" and also the domain names australiantooling.com.au and toolingaustralia.com.au. The purpose of asking Mr Bulluss to carry out those instructions was completely consistent with my duties as the CEO of Austool to protect Austool's name and reputation, to protect Austool from what was a blatant attempt by TIFA to damage Austool by passing themselves off as Austool.'*

That frank statement by Mr Lundie-Jenkins stands in stark contrast to the lack of frankness shown by Mr Broens in his statement, in failing to disclose anything about his own past involvement with the Respondent, and the relationship between the Complainant and the Respondent after Mr Broens became a director of the Complainant.

- (g) In April 2006, 11 months after registration of the domain names by the Respondent, the Complainant changed its name from *'The Tooling Industry Forum of Australia Incorporated'* to *'Tooling Australia Inc'*. I note from Annexure D to the *'Grounds Upon Which Complaint is Made'* that the date of registration of the change of name to *'Tooling Australia Inc'* appears shown to be 4 April 2006.

7(a) Paragraph 4a(i) of the Rules - Whether the domain names are identical or confusingly similar to a name etc in which the Complainant has rights

- 7.3 I accept that the Complainant has had rights in the name *'Tooling Australia Inc'* from registration of that changed name in Victoria on or about 4 April 2006.
- 7.4 I accept the Complainant's submission (paragraph 24) that, in respect of paragraph 4(a)(i) of the Rules *'(it is of no consequence that the Complainant had not registered the name "Tooling Australia Inc" at the time the Domain Names were registered... (and that)... the Complainant clearly had rights in the name "Tooling Australia Inc" at the time of the complaint.'*
- 7.5 I do not accept that the domain name www.australian tooling.com.au is identical or confusingly to the name *'Tooling Australia Inc'* in which the Complainant had rights from its registration on or about 4 April 2006. The words *'tooling'* and *'australia'* are in a sense descriptive words, in use by both the Complainant and the Respondent from about 1999. Given the relatively small number of persons involved in the industry, it seems to me highly unlikely that anyone dealing with the Respondent from the time of registration of this domain name would be confused into thinking that the Respondent was in any way associated with the Complainant, either before or after its change of name in April 2006.
- 7.6 The issue of whether the domain name www.toolingaustralia.com.au is identical or confusingly similar to the name *'Tooling Australia Inc'* is one which is more finely balanced. It appears

unlikely to me that a reasonable person in the market for services of the type offered by the Complainant and the Respondent would be confused. Given the relatively small number of persons involved in the industry, it seems to me highly unlikely that anyone dealing with the Respondent from the time of registration of this domain name would be confused into thinking that the Respondent was in any way associated with the Complainant, either before or after its change of name in April 2006. However, I note that paragraph 6.1 of its Response to the Complaint, the Respondent says:

'The Respondent does not dispute that the toolingaustralia.com.au domain is identical to the name that Complainant registered subsequently but submits that the Complainant has no greater right to register the domain name than the Respondent.'

7.7 Accordingly:

- (a) I am not persuaded that the Complainant has satisfied the requirements of sub-paragraph (i) of paragraph 4a of the Rules in respect of the domain name www.australiantooling.com.au.
- (b) Because of the admission made by the Respondent, I should find that the Complainant has satisfied the requirements of sub-paragraph (i) of paragraph 4a of the Rules in respect of the domain name www.toolingaustralia.com.au.

7.8 Except as noted above, I reject the submissions by the Complainant in paragraphs 18 to 24 of the *'Grounds Upon Which Complaint is Made'*.

7(b) Paragraph 4a(ii) of the Rules - Whether the Respondent has no rights or legitimate interests in respect of the domain names

7.9 I note what is said in paragraph 4c of the Rules regarding a respondent demonstrating rights to, or legitimate interests in, the domain name in dispute. While paragraph 4a of the Rules provides that a complainant bears the probative onus of establishing its case, it is reasonable to proceed on the basis that a respondent which relies on paragraph 4c of the Rules bears some evidentiary onus in respect of matters it seeks to demonstrate under sub-paragraphs (i), (ii) or (iii) of paragraph 4c.

7.10 I am satisfied from the evidentiary material that the Respondent has demonstrated its rights or legitimate interest in the domain names www.australiantooling.com.au and www.toolingaustralia.com.au, by establishing the matters in sub-paragraph (i) of paragraph 4c, namely:

'before any notice to you of the subject matter of the dispute, your 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 that you have acquired for the purpose of selling, renting or otherwise transferring)'

7.11 In particular, I refer to the evidence in Annexures G, H, I, J, K, L and M of the Response. I accept the submissions in paragraph 8.4 of the Response.

7.12 Accordingly, I am not persuaded that the Complainant has satisfied the requirements of subparagraph (ii) of paragraph 4a of the Rules in respect of either the domain name www.australiantooling.com.au or the domain name www.toolingaustralia.com.au.

7.13 I reject the submissions to the contrary made by the Complainant in paragraphs 25 to 37 of the 'Grounds Upon Which Complaint is Made'.

7(c) Paragraph 4a(iii) of the Rules - Whether the domain names have been registered or subsequently used in bad faith

7.14 Contrary to what is put in paragraphs 38 and 40 of the 'Grounds Upon Which Complaint is Made', I am not satisfied from the Complainant's submissions and the evidentiary material that:

'38 *The Respondent registered and used the Domain Names in bad faith.*'

OR

'40 *The Respondent registered the Domain Names in order to:*

- (a) *prevent the Complainant from reflecting its proposed business name in a corresponding domain name;*
- (b) *disrupt the business or activities of the Complainant; and/or*
- (c) *attract internet users to its website by creating a likelihood of confusion with the Complainant's name.'*

7.15 There is simply no evidence which satisfies the onus of proof which the Claimant bears to establish that the Respondent registered or subsequently used the domain names in bad faith. There is also no inference reasonably available from the evidentiary material submitted to me which would satisfy that onus of proof, wholly or in part. In fact, from the evidence to which I have referred in paragraph 7.2 above, an inference which is more readily available is that, if anything, it was the Complainant which may have acted in bad faith in its registration and subsequent use of the name 'Tooling Australia Inc' in an attempt to pass itself off as in some way associated with the Respondent. I note what is said on that issue in the statement of Mr Lundie-Jenkins, which I accept (see paragraph 7.2(g) above).

7.16 The auDA 'Guidelines for Accredited Registrars on the Interpretation of Policy Rules for Open 2LDs (2002-17)' were in force when the domain names were registered on or about 16 May 2005. Having considered those Guidelines, more particularly the provisions of paragraphs 9.1 to 9.7 and

the examples of close and substantial connection set out in Table C, I am satisfied that the Respondent satisfied the criteria for ‘*close and substantial connection*’ in registering the domain names www.australiantooling.com.au and www.toolingaustralia.com.au. I particularly note that no submission to the contrary is made by the Complainant.

- 7.17 Accordingly, I am not persuaded that the Complainant has satisfied the requirements of sub-paragraph (iii) of paragraph 4a of the Rules in respect of either the domain name www.australiantooling.com.au or the domain name www.toolingaustralia.com.au.
- 7.18 I reject the submissions to the contrary made by the Complainant in paragraphs 38 to 49 of the ‘*Grounds Upon Which Complaint is Made*’.

8 DECISION

www.australiantooling.com.au

- 8.1 As indicated in paragraphs 7.1 to 7.18 above, the Panel finds that the Complainant has not established any of the three elements which it must satisfy pursuant to sub-paragraphs (i), (ii) and (iii) of paragraph 4a of the Rules in respect of the domain name www.australiantooling.com.au.

- 8.2 Accordingly, the Complainant’s claim for relief is denied and the license for the domain name www.australiantooling.com.au should remain with the Respondent.

www.toolingaustralia.com.au

- 8.3 As indicated in paragraphs 7.1 to 7.18 above, the Panel finds that the Complainant has established only one of the three elements which it must satisfy pursuant to sub-paragraphs (i), (ii) and (iii) of paragraph 4a of the Rules in respect of the domain name www.toolingaustralia.com.au.

- 8.4 Accordingly, the Complainant’s claim for relief is denied and the license for the domain name www.toolingaustralia.com.au should remain with the Respondent.

Robert Hunt

Sole Panelist

6 April 2007