

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

ADMINISTRATIVE PANEL DECISION

**Australian Government Department of Education, Science and Training v. Blogger
Pty Limited**

Case No. 3058

1. The Parties

The Complainant is the Australian Government Department of Education, Science and Training, of Canberra, Australian Capital Territory, represented by Glenn Peisley. The Respondent is Blogger Pty Limited, of West Chatswood, New South Wales, represented by David Lye.

2. The Domain Name and Registrar

The disputed domain name is <questacon.com.au>, registered with IntaServe.com

3. Procedural History

The Complaint was filed with the Institute of Arbitrators and Mediators Australia ("IAMA") on April 27, 2007. IAMA considered that the Complaint satisfied the formal requirements of the .au Dispute Resolution Policy (the "Policy"), the Rules for .au Dispute Resolution Policy (the "Rules"), and the IAMA Supplemental Rules for .au Domain Name Dispute Resolution Policy (the "Supplemental Rules").

In accordance with the Rules, paragraphs 2(a) and 4(a), IAMA formally notified the Respondent of the Complaint, and the proceedings commenced on May 15, 2007. In accordance with the Rules, paragraph 5(a), the due date for Response was June 4, 2007. The Response was filed on May 29, 2007.

IAMA appointed Alan L. Limbury as sole panelist on May 31, 2007. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by IAMA to ensure compliance with the Rules, paragraph 7.

4. Factual background

Questacon is the name of The National Science and Technology Centre, an education institute within the Australian Department of Education, Science and Training ("DEST").

The disputed domain name leads to a website whose home page reads as follows:

"Welcome to Questacon!

Questacon – The National Science and Technology Centre, is a large facility with almost 200 interactive exhibits and programmes about Science and Technology. The project was a joint partnership of Australia and Japan that the latter then donated half of the construction cost (one billion Yen) as a major bicentennial gift to Australia. The centre aims to provide science experiences to all in a fun and easy way. It was officially opened in November 23, 1988 and was then a part of the Department of Arts, Sports, the Environment, Tourism and Territories (DASETT) which has Professor Mike Gore as its founding director. In the year 1999, after a decade of being a Director for the centre, Professor Gore retired and Dr Annie Ghisalberti was then appointed as his replacement. In July 1, 2003, Questacon was transferred from the Department of Communications, Information Technology and the Arts (DCITA) to the Department of Education, Science and Training (DEST) and Professor Graham Durant became the third and current director for Questacon.



Based in Lake Burley Griffin in Canberra, Australia's Capital, Questacon is the country's leading interactive science and technology centre. Since the centre has opened, millions of visitors from different places have had fun and meaningful experiences at Questacon. It also offers a variety of programmes for all visitors like Spectacular Science Shows in any of the three theatre spaces the centre has, science-themed birthday parties, after-dark visits and even overnight stays as well.

From the start, Questacon has always aimed to bring the wonder and fun in learning science to children throughout the nation. And since the centre is in Canberra, there are still a number of children who are not lucky enough to visit the place. With this, Questacon makes an effort to reach out to these kids and travel the whole of Australia through several outreach programmes which include The Shell Questacon Science Circus, Questacon Smart Moves, Tenix Questacon Maths Squad, Indigenous programmes as well as others. These programmes intend to develop greater understanding of science and technology to everyone even in the most distant areas of the country.

Questacon also has its own website where everyone from kids to teachers can take advantage of their services, have fun and learn at the same time. This is the centre's way to interact with everyone and make them love and appreciate science, technology and math in a different way. It provides free access to educational materials, online exhibitions and other interactive learning opportunities.

Please note: This site is not the official Questacon site, nor is it endorsed by Questacon. We are simply providing information on this subject.

Within these pages you'll find information on A Fun Science website for Kids, a science and technology centre for kids, Australia's educational science centre

This site is a work in progress. Updated regularly by our team of content writers check back soon for latest additions..."

A user who clicks on the various tabs displayed on the home page is taken to pages containing advertisements by Google and links to websites which offer goods and services for sale.

5. Parties contentions

A. Complainant

The Complainant contends that Questacon is the name of the educational institute, which has registered the domain names <questacon.net.au> and <questacon.edu.au>; that the Respondent is not eligible to register nor otherwise entitled to the domain name and is using it intentionally to attract, for commercial gain, Internet users to its website by creating a likelihood of confusion with the Complainant's name as to the affiliation or endorsement of that website.

B. Respondent

The Respondent contends that it is eligible to register the domain name under paragraph 2 of Schedule C of the auDA Domain Name Eligibility and Allocation Rules for Open 2LDs (Policy No 2005-01) ("the Eligibility Rules"), which reads:

"Domain names in the com.au 2LD must:

a) exactly match, acronym or abbreviation of the registrant's company or trading name, organization or association name or trademark; or:

b) be otherwise closely and substantially connected to the registrant".

The Respondent says the website is *entirely* about the educational institute Questacon so there can be no doubt that a close and substantial connection exists. It contends that, as a website publisher, it is entitled under Australian law to publish websites on a host of different subjects and will not be in breach of the eligibility policy if the content maintains this close relation to the domain name. By way of comparison, there are numerous unofficial “Disney” websites, some of which incorporate the name Disney, which complement the official Walt Disney website in providing useful information about Disney topics. The Respondent contends its site is no different and says it has plans to make its site even more useful in providing information about the National Science and Technology Centre

The Respondent agrees there are advertisements and links on the website but points to the disclaimer on the home page “for all to see” as negating any confusion.

Further, the Respondent says ‘com.au’ domains are reserved for commercial entities, hence the Complainant itself is ineligible to register the disputed domain name.

6. Discussion and findings

Paragraph 4(a) of the Policy requires a Complainant to establish three elements:

1. The Complainant has rights in a name, trademark or service mark, with which Respondent’s domain name is identical or confusingly similar (Paragraph 4(a)(i)); and
2. The Respondent has no rights or legitimate interests in respect of the domain name (Paragraph 4(a)(ii)); and
3. The Respondent registered or is subsequently using the domain name in bad faith (Paragraph 4(a)(iii)).

A. Rights

The Complainant has rights in the name Questacon, being the name of the education institute within DEST.

B. Identity or confusing similarity

The domain name <questacon.com.au> is identical to the Complainant’s Questacon name. The ‘com.au’ 2LD is inconsequential.

The Complainant has established this element.

C. Legitimacy

Apart from the assertion that the Respondent is not eligible and not entitled to hold the domain name, the Complainant has provided no evidence under this heading. As is the case under the UDRP however, that assertion is sufficient to shift the burden of proof to the Respondent to demonstrate legitimacy. See for example *Cassava Enterprises Limited, Cassava Enterprises (Gibraltar) Limited v. Victor Chandler International Limited*, WIPO Case No. D2004-0753.

Paragraph 4(c) of the Policy provides that any of the following circumstances, without limitation, if found by the Panel to be proved based on its evaluation of all evidence presented, is to be taken to demonstrate the Respondent's 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.

There is no evidence that the Respondent has been commonly known by the disputed domain name. The website to which the domain name resolves provides information but, far from being *entirely* about the educational institute Questacon, as claimed by the Respondent, it also contains advertisements and links to commercial websites, from which the Panel infers that the Respondent derives commercial benefit. Accordingly sub-paragraphs (ii) and (iii) do not apply.

As to sub-paragraph (i), the Respondent received notice of this dispute when it received the Complaint. The Respondent was by then operating the website already described, through which offerings of goods and services may be found.

The Panel finds that Internet users familiar with the name Questacon would expect the disputed domain name to lead to a website operated by the Complainant. The home page beginning with the words "Welcome to Questacon" and providing information about Questacon, the National Science and Technology Centre, misleadingly represents that it is operated by the Complainant. The disclaimer appearing near the foot of the home page comes too late to dispel this misrepresentation, since many users will click a link to another page before

reaching the disclaimer and will be led to believe, incorrectly, that the advertisements and links to commercial websites have the endorsement and approval of the Complainant. Such use of the domain name is not bona fide use for the purposes of sub-paragraph (i).

As to whether the Respondent satisfied the eligibility requirements, auDA has determined that "rights or legitimate interests in respect of the domain name" are not established merely by a registrar's determination that the respondent satisfied the relevant eligibility criteria for the domain name at the time of registration. See footnote 2 to paragraph 4(c)(ii) of the Policy. If this is to be a ground for a finding of rights or legitimacy, the issue must be determined by this Panel *de novo*.

The Respondent contends that because the website is *entirely* about Questacon, that provides a sufficiently close connection for the purposes of the eligibility policy. However, the close association that needs to be established is between the domain name and the registrant. This is not shown by establishing a close association between the domain name and the content of the website. The Respondent has failed to show a sufficiently close association between the domain name and the registrant to be eligible to register the domain name and has thus failed to establish this as a basis for a finding of rights or legitimate interests in the domain name on its part.

The Panel therefore finds that the Respondent has no rights to or legitimate interests in the domain name.

The Complainant has established this element

D. Bad faith registration or use

Paragraph 4(b) of the Policy provides that, for the purposes of Paragraph 4(a)(iii), the following circumstance, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

- (iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to a web site 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 web site or location or of a product or service on that web site or location.

For the same reason that the Panel has found the use of the domain name not to be *bona fide* use, the Panel finds that, despite the disclaimer on its website, which cannot dispel 'initial interest confusion', the Respondent has used the domain name in bad faith under paragraph 4(b)(iv).

The Complainant has established this element.

E. Remedy

Having established all three elements, the Complainant is entitled to some relief. It seeks transfer to it of the domain name. The Panel is satisfied that the Respondent is not entitled to remain the registrant. Should the domain name be cancelled or transferred to the Complainant?

Paragraph 6.1 of the Policy provides:

“A complainant may seek to have the domain name licence:
a) cancelled, in which case the domain name will become available for registration in the normal way; or
b) transferred to themselves, but only if the registrar determines that they are eligible to hold the domain name under the relevant policy rules.”

Paragraph 4 i of the Policy provides:

“Remedies. The remedies available to a complainant pursuant to any proceeding before an Administrative Panel shall be limited to requiring the cancellation of your domain name or the transfer of your domain name registration to the complainant (provided that the complainant is otherwise eligible to hold that domain name).”

The Respondent has questioned the eligibility of the Complainant itself to register the domain name, since Rule 3.2 of the Eligibility Rules provides:

“Each 2LD has a purpose. For example, com au is for commercial entities, gov au is for government bodies and org au is for non-commercial organisations. The purpose of each 2LD dictates the eligibility and allocation rules applicable in that 2LD.”

Schedule C to the Eligibility Rules provides:

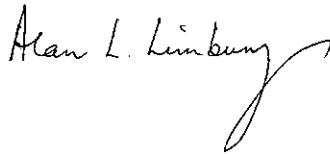
“1. To be eligible for a domain name in the com au 2LD, registrants must be:
a) an Australian registered company; or
b) trading under a registered business name in any Australian State or Territory; or
c) an Australian partnership or sole trader;
d) a foreign company licensed to trade in Australia; or
e) an owner of an Australian Registered Trade Mark; or
f) an applicant for an Australian Registered Trade Mark; or
g) an association incorporated in any Australian State or Territory;
or
h) an Australian commercial statutory body.”

It is not apparent to the Panel, on the material before it, that the Complainant, an Australian Government Department, in relation to which the gov.au domain is clearly appropriate, also comes within any of sub-paragraphs (a) to (h) above.

Accordingly, the question of the Complainant's eligibility should be determined by the registrar, as contemplated by paragraph 6.1 of the Policy.

7. Decision

For all the foregoing reasons, in accordance with Paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the domain name <questacon.com.au>, be cancelled unless, within 28 days of being notified of this decision, the Complainant satisfies the registrar that it is eligible to register the domain name itself, in which case the domain name <questacon.com.au> shall be transferred to the Complainant.

A handwritten signature in black ink that reads "Alan L. Limbury". The signature is written in a cursive style with a long, sweeping tail on the letter 'y'.

Alan L. Limbury
Sole Panelist

Dated: June 2, 2007