

ADMINISTRATIVE PANEL DECISION
LEADR Case No. auDRP_11_11

Domain Name:	pq.net.au
Complainant:	Queensland Electricity Transmission Corporation Limited ACN 078 849 233 trading as Powerlink Queensland ("Powerlink")
Respondent:	The Trustee for GAMM FAMILY TRUST ("GAMM")
Provider:	LEADR
Registrar:	IntaServe
Panellist:	Natalie Jean Hickey
Date:	22 August 2011

1 Background

The Complainant, Powerlink, is a government owned corporation that owns, develops, operates and maintains Queensland's high-voltage electricity transmission network. It is said to be a world leader in cost efficiency and reliability in the electricity market. Based in Virginia, Queensland, Powerlink has approximately 1,100 employees, with an annual income in excess of \$183 million per year¹ with an after-tax profit of \$128.6 million.

The Respondent, GAMM, is the registrant of pq.net.au (Disputed Domain Name). It claims to operate a meat and smallgoods business from premises in Thomastown, Victoria, having been in the smallgoods business for many years. The Respondent says that it now intends to operate a factory outlet direct to public, rather than operate completely as a wholesale business.

The Respondent currently operates under several brands, it contends, including Mr Sausage, Olympic Smallgoods, Wilson's Meat & Poultry, and Edeli. It also contends it will launch its PQ Meats / Foods / Organic brand later in the year.

In the meantime, the Respondent says that it uses "PQ" on its shipped cartons to designate they are "Premium Quality".

The procedural history to this dispute is annexed and marked "A".

The Complainant seeks the transfer to it of the Disputed Domain Name, on the basis that the Disputed Domain Name is identical or confusingly similar to the Complainant's trade marks, the Respondent has no rights or legitimate interests in the Disputed Domain Name, and the Domain Name has been registered and is being used by the Respondent in bad faith. The Complainant must satisfy all three of these grounds for the Complaint to be upheld.

For the reasons set out below, the Complaint will be dismissed.

¹ 2009/2010 financial year

2 Whether Disputed Domain Name is identical or confusingly similar to a name², trade mark or service mark in which the Complainant has rights

The Complainant must first establish the identity of the name, trade mark or service mark in which it has rights.

The Complainant asserts that the Complainant has trade mark rights in the Disputed Domain Name.

Such asserted rights are not registered trade mark rights. The Complainant's registered trade marks concern device marks for Powerlink Queensland (Reg No. 651725; 651726; 651730), Powerlink Transmission Services (Reg No. 782167; 804886), Powercam by Powerlink (Reg No. 868386; 886848); the word GREENWORKS (Reg No. 1275481); and the device mark GREENWORKS PARTNERS IN YOUR ENVIRONMENT (Reg No. 1275485).

The basis for Complainant's asserted rights in "PQ" appear to lie in it being a short cut for "Powerlink Queensland". It claims to have extensive common law rights and goodwill in each of "Powerlink Queensland" and "PQ".

From the material before me, the Complainant is in a strong position to say that it has the requisite reputation in Powerlink Queensland. It has held a registered business name for this term since 1995, it uses the term on its website www.powerlink.com.au and on promotional materials, correspondence and documentation, it has been extensively promoted and used in newspaper publications, and many thousands of people, customers, clients and contractors have been exposed to the term Powerlink Queensland since 1995.

There certainly appears to be a sensible basis to contend that "Powerlink" (observing the Complainant's identified website) or "Powerlink Queensland" have developed a reputation in the relevant marketplace by reason of the use and promotion of these terms over at least 15 years, such that consumers recognise them as a badge of origin of the Complainant.

I am not convinced that "PQ" has developed a reputation sufficient for it to be a trade mark of the Complainant. This is the relevant trade mark in the present case, given it comprises the core of the Disputed Domain Name.

In this respect, the Complainant contends:

- it started using the PQ acronym 'some time ago' and has used the mark in relation to the services provided by Powerlink Queensland 'since that time';
- since 2008, it has used 'PQ' in connection with 'PQMaps' a geographical and information system and GIS mapping tool used for the location of transmission assets;
- it owns a range of domain names, none of which are simply 'PQ' but which contain variants of "PLQ".

From the material I have reviewed, other than "PQMaps", there is no evidence of a concerted attempt by the Complainant to use "PQ" in any way. Unfortunately for the Complainant, I have felt it necessary to discount the use of "PQMaps" given the relatively short period of its dissemination, and that this tool has been directed primarily - if not wholly - to staff and

² For the purpose of the auDA Published Policy, a "name...in which the complainant has rights" refers to (a) the complainant's company, business or other legal trading name, as registered with the relevant Australian government authority; or (b) the complainant's personal name.

contractors. There is no evidence that PQMaps has been targeted to the general public in a wider promotional sense.

Further supporting evidence put forward by the Complainant only went to the frequent abbreviation of Powerlink to “PQ”. Examples of such use included:

- a report in which various students summarised their vacation placements, including a student from UQ who defined Powerlink Queensland in his report as “PQ” (of the three students placed there, he was the only one who used the acronym); and
- a “Network Management Plan Part B” produced by Ergon Energy which used the term “Powerlink” and then referred to it as “PQ” thereafter, in a similar manner to its abbreviation of Far North Queensland as “FNQ”.

Almost all of these abbreviations had in common the need to identify “Powerlink” prior to doing so. The need to refer to Powerlink in full, before using the “PQ” acronym, indicates that the reader would not recognise “PQ” **unless** it was introduced as Powerlink. Such use indicates only that the term is an abbreviated ‘short cut’ for readers’ ease of reference, as distinct from an independently recognised badge of origin of the business.

It is a serious step to cause a domain name to be transferred from the Respondent to the Complainant, and so the need to show genuine rights (even if they are at common law) in the trade mark is important.

Here, the Disputed Domain Name concerns the initials of a company. The Complainant has obtained registered rights in a range of names and trade marks, including domain names with the initials “PLQ”, but has not chosen to do so in relation to “PQ”.

This does not prevent the Complainant, of course, from seeking to establish it has common law rights in “PQ”, but it must discharge an onus in so doing. Otherwise, it would be relatively easy for any company to extend its ‘rights’ beyond its actual name by claiming it should be entitled to the corresponding domain name which contains its initials as well. Clear and convincing evidence of a reputation in the initials as a badge of origin is therefore necessary.

Further, in assessing whether a sign is capable of being regarded as a “trade mark” or badge of origin, its broader promotion to the general public is the key, as distinct from how one might affectionately describe a business or its elements internally.

From the material before me, it appears that “PQ” may be used within the business as a common abbreviation, and may also be frequently abbreviated in papers and the like. However, I do not consider there to be sufficient evidence to show that this term has been promoted in the marketplace, nor that consumers correspondingly recognise “PQ” as a trade mark of “Powerlink” or “Powerlink Queensland”.

It follows that this first limb of the auDRP has not been established, and so the Complaint cannot succeed.

Whilst it is not necessary to consider the following grounds, they will be referred to briefly for completion.

3 Complainant must show the Respondent has no rights or legitimate interests in the Disputed Domain Name

The Complainant's allegations about the Respondent's use of the Disputed Domain Name largely depend on the Complainant being able to establish its rights to "PQ", which it has failed to do. For instance, the Complainant stated that it had not authorised or consented to the Respondent's registration. Of course, such permission is unnecessary if the Complainant does not have rights to the asserted trade mark. Likewise, without such rights or established goodwill, it is fallacious to argue that the Respondent is seeking to trade off the Complainant's rights in the asserted trade marks.

To succeed under this ground, the Complainant must show that the Respondent has **no** rights or legitimate interests in the Disputed Domain Name. This is not a question of establishing who has the "better" claim.

Whilst the Respondent's claim to "PQ" is not based on strong evidence, and I am not persuaded that use of the initials "PQ" on the side of a cardboard box are sufficient to denote some form of existing trade mark, more is needed to conclude that the Respondent has no rights or legitimate interests in the Disputed Domain Name, particularly in light of its stated intentions.

Finally, the Complainant asserts that the Disputed Domain Name has not met the eligibility requirements of certain auDA Policies. It is not necessary to reach a conclusion about this, other than to say that this may be a matter which should be taken up with the relevant registrar. In any event, having regard, for instance, to the Eligibility and Allocation Rules for NET.AU (Schedule E to Domain Name Eligibility and Allocation Policy Rules for Open 2LDS), it is not immediately clear on the information before me that the registrant (ie the Respondent) manifestly fails to meet the criteria. More information in this respect would be needed.

4 Complainant must show the Disputed Domain Name has been registered or subsequently used in bad faith

The bad faith test requires the Complainant to demonstrate that the Disputed Domain Name has been registered or used in bad faith. For the most part, such bad faith tends to require an element of malicious motive, which is illustrated by points (ii), (iii) and (iv) under 'Evidence of registration or use in bad faith' (see Schedule A, 4b of auDRP).

Here, the Complainant's evidence of bad faith is thin. I do not accept that the "notoriety" of the Complainant's trade marks (which it has failed to establish in relation to "PQ") "creates a prima facie presumption" as the Complainant argues, that the Respondent registered the pq.net.au domain name for the purpose of selling it to the Complainant or one of its competitors. There is no evidence of any attempted sale, and the Respondent asserts that the Complaint was the first notice received of the Complainant's concerns.

4 Conclusion

The Respondent's use of the Disputed Domain Name prior to the Complaint, or lack thereof, does leave some cause for concern. The Respondent's arguments for its intended use of the site are not supported by strong evidence. As the Complainant points out, the relevant website appeared to contain sponsored links prior to the making of the Complaint.

That said, the Complainant's claim to trade mark rights in "PQ" was also not supported by strong evidence, and it has failed to make out this ground. To succeed in its claim, the Complainant would have had to make out every ground of the Complaint.

I decide for the Respondent. The Complaint is dismissed.

A handwritten signature in black ink, appearing to read "N. Hickey", written over a horizontal line.

Natalie Jean Hickey

Sole Panellist

22 August 2011

ANNEXURE A

Procedural History

[pq.net.au]
[auDRP_11_11]

1. Complaint lodged to LEADR on **13/7/2011**.
2. An acknowledgement of receipt of complaint was emailed to the Complainant on **14/7/2011**.
3. LEADR sent non-compliance notification via email to Complainant on **14/7/2011**.
4. The complete application with rectifications made was received from the Complainant by LEADR via email on **15/7/2011**.
5. A copy of the complaint was submitted and a request to clarify Respondent details and lock the domain name during proceedings was emailed to the registrar **IntaServe** on **15/7/2011**.
6. On the **19/7/2011** the Registrar confirmed via email that the domain name in dispute has been locked.
7. LEADR advised auDA of the complaint on **19/7/2011** via e-mail.
8. On the **18/7/2011**, LEADR spoke with the Respondent (**The Trustee for GAMM FAMILY TRUST**) over the phone and confirmed that the domain name complaint had been received. Address details were also communicated.
9. On the **19/7/2011** LEADR sent the Respondent (**The Trustee for GAMM FAMILY TRUST**) an email and written notification of the complaint lodged against them. The complainant was copied in on these notifications.
10. The due date for the response to the complaint was confirmed to be **8/8/2011**.

11. On the **2/8/2011**, in response to an enquiry from the representative of the Complainant regarding the possible suspension of the administrative proceedings pending further notice, LEADR contacted auDA via phone to clarify. auDA provided an email to clarify this issue and this was communicated to the representative of the Complainant via telephone.
12. On **2/8/2011**, in response to an enquiry from the Respondent (**The Trustee for GAMM FAMILY TRUST**) regarding the definition of 'fair use' as per the auDA policy, a clarification email as sent.
13. On **3/8/2011**, the Respondent (**The Trustee for GAMM FAMILY TRUST**) confirmed via a telephone conversation that they still intend to submit a response to LEADR by the due date, being 8/8/2011.
14. On **4/8/2011**, the Respondent (**The Trustee for GAMM FAMILY TRUST**) reiterated this telephone conversation with LEADR via email.
15. On the **8/8/2011**, the Respondent (**The trustee for The Penrose & Godfrey Family Trust**) submitted a response to the domain name complaint.
16. On **9/8/2011** the provider approached the Panellist. The panellist confirmed their availability, informed LEADR that they had no conflict issues with the parties and accepted the matter on **9/8/2011**.
17. The Case file and relevant correspondence was forwarded onto the Panellist on **9/8/2011**.
18. The parties to the dispute were notified of the panellist's allocation on the **9/8/2011**.
19. The date on which the decision is due is **23/8/2011**.