

LICENCE REVIEW PANEL

<australianaviation.com.au>

Domain Name

and



Applicant

DECISION

1. The Licence Review Panel (the **Panel**) affirms .au Domain Administration Limited's (**auDA**) internal review decision dated 6 February 2023 (the **Reviewable Decision**) and finds that:
 - a. The Registry database should remain updated to reflect the fact that the licence held for the domain name *australianaviation.com.au* (**Licence**) is held by Momentum Markets Pty Ltd (**Current Registrant**);
 - b. The Licence is validly held by the Current Registrant;
 - c. There is no basis to disturb the findings that;
 - i. entities that have held the Licence over the period from 2011 to 2023 (**Relevant Period**) have been eligible entities so hold the Licence; and
 - ii. there has been no deemed cancellation of the Licence and no transfer of a Licence that was deemed to be cancelled at the date of transfer;

hence those findings are affirmed.

 - d. auDA was not acting in breach of rule 2.11.3 in allowing the Current Registrant to update the Registry details.
2. The Panel sets out below the reasons for its decision in accordance with Rule 3.8.20.
3. References herein to;
 - a. "**Rule**" or "**Rules**" are references to the *.au Domain Administration Rules: Licensing* dated 17 August 2021; and
 - b. "**Registry**" has the meaning defined in the Rules.

REASONS FOR DECISION

Procedural Background

4. On 24 November 2022 the Applicant made a complaint by email to the registrar for the Licence at that date, Synergy Wholesale Accreditations Pty Ltd (**Synergy**). The substance of the complaint was that, in the Applicant's opinion, the Licence was registered to a deregistered company by the name of [REDACTED] (the **Deregistered Company**) and it ought to be cancelled by reason of Rule 2.11.1 (and hence Rule 2.11.2).
5. Following an early escalation of the Applicant's complaint to auDA, investigations were undertaken by Synergy and auDA into the substance of the Applicant's complaint and whether the licence was indeed held by an eligible entity as required by the Rules.
6. Upon completion of that investigation auDA concluded that the Licence was held in compliance with the Rules and the Registry had been updated.
7. The Applicant escalated his complaint through the internal process, where auDA maintained its position (which is reflected in the Reviewable Decision above), and now he has sought external review by the Panel. On 13 February 2023 the Applicant filed his application for external review made under Rule 3.8.5 (the **Application**).
8. On 28 February 2023 Andrew Sykes, a member appointed to the Panel under Rule 3.8.12, was assigned the Application for decision as sole panellist under Rule 3.8.17.
9. The Panel was provided with information and documents relevant to the Reviewable Decision by auDA on 28 February 2023, including the Application and auDA's submissions to the Panel. In accordance with Rule 3.8.18 the Panel has not taken into account any further external information or documents that were not provided to auDA at the time of making the Reviewable Decision.

The Application

10. By his Application, the Applicant seeks one remedy. Namely, he requests the Reviewable Decision be set aside and in substitution the Licence be cancelled (resulting in the deletion of the domain name from the Registry).
11. The Applicant's application asserts it is based on two interrelated grounds.
12. Firstly, he asserts that the registrant of the domain name, the Deregistered Company, ceased to meet the eligibility criteria under Rule 2.11.1 after being deregistered on 11 July 2021. Therefore he asserts the Licence was deemed cancelled within 30 days of such deregistration by reason of Rule 2.11.2.
13. Secondly, the Applicant asserts that in or about February 2023 the Deregistered Company transferred the Licence to the Current Registrant, which was in contravention of Rule 2.11.3.

14. In support of these grounds the Applicant made submissions on how auDA should apply the Rules, including adopting a policy of acting consistently and without favour to any particular person by allowing any special unpublished exceptions to the Rules.

auDA's Submissions in Response

15. By way of response to the Application, auDA provided written submissions dated 27 February 2023, which were prepared by [REDACTED], Manager Licensing Framework Compliance & Privacy Officer.
16. In those submissions auDA requested that the Panel affirm auDA's decision that:
- a. the Registry database should be updated to reflect the fact that the licence held for the domain name **australianaviation.com.au (Licence)** is held by the Current Registrant;*
 - b. the Licence is validly held by the Current Registrant;*
 - c. the registrants who have held the Licence over the period from 2011 to 2023 (**Relevant Period**), is and have been an eligible entity at all times, as required under the Rules;*
 - d. no transfer had taken place after the date of deemed cancellation, despite the assertion of the Complainant and the information available to the public in the WHOIS database; and*
 - e. auDA was not acting in breach of rule 2.11.3 in allowing the Current Registrant to update the Registry details.*
17. As can be seen by observing paragraph [1] above the Panel has so affirmed the substance of this decision. The reasons for the variation to wording between the preceding paragraph and paragraph [1] are explained below under the heading "Role of the Panel".
18. In summary, auDA submitted that its decision was correct and in accordance with the Rules. It submitted that as part of its investigations it had been provided with documents (including those which were commercial in confidence) which showed that the Licence had been validly transferred through a number of entities over a number of years and it was in accordance with the Rules to have the Registry updated to show the licence in the name of the Current Registrant.
19. The Panel was provided copies of the said documents.
20. auDA further submitted that in making its decision it had at all times acted in accordance with its published Compliance Posture, which emphasizes the need to apply the principles of natural justice in its decision making.

Standing

21. Under Rule 3.8.1 only a person "affected by" a reviewable decision may apply for external review.

22. It is not readily apparent from the Application how the Applicant asserts he is “*affected by*” the Reviewable Decision any more than any other member of the public.
23. Nevertheless, the Panel does not consider it an appropriate course to rule against the Applicant on his right to apply for external review in circumstances where no complaint against his standing to so apply has been raised by auDA. To the contrary, on 10 February 2023 auDA invited the Applicant to make an application for external review if he wished to do so.
24. Therefore it appears both auDA and the Applicant agree that the Applicant in this particular case was a person entitled to apply for external review under Rule 3.8.1. The Panel will not interfere with this uncontested position. The Applicant therefore has standing in the present Application.

Role of the Panel

25. The Panel’s role in these proceedings is to provide an avenue for external review of the Reviewable Decision by addressing the matters raised in the Application.
26. It is not the Panel’s role to extend enquiries beyond the complaints particularised in the Application and the documents and information before it. For example, it is not the Panel’s role to investigate on its own initiative and review all eligibility requirements for the history of the Licence under various policies throughout its existence. The Panel is therefore expressly prohibited from taking into consideration “*any information, or document that was not provided to .au Domain Administration at the time of making the reviewable decision*” by reason of Rule 3.8.18.
27. It is for this reason that, despite affirming auDA’s decision in all substantive form, the Panel has adopted wording in paragraph [1] above that varies from the wording in auDA’s written submissions (which appears at paragraph [16] above).
28. More specifically, the slight difference in wording is due to the fact that the Panel finds, on the documents and information before it, that there is no basis to disturb auDA’s decision to allow the Licence to remain registered in the name of the Current Registrant. That is a finding in accordance with the role of the Panel. It is different to finding that all requirements on eligibility (even the ones the Applicant raises no issue over) have been met. That is not the role of the Panel, as it would require investigative power the Panel does not have. Naturally, the Panel would not overlook information or documents proving a lack of eligibility (even if not highlighted by the Applicant) however it will not, and ought not, conduct investigations looking for such.
29. The Panel therefore addresses the matters specified in Application below and arising from the information and documents before it.

Substantive Reasons to Affirm the Reviewable Decision

30. A critical issue in this proceeding is the difference between an entity holding a Licence and that entity being properly recorded on the Registry. One should not

confuse the act of assigning the right to hold a License and the act of updating the Registry in relation to such a right. They are two separate acts that are part of the process of transfer set out in the Rules. This is clearly recognised by Part 2.13 of the Rules which includes provisions that;

- a. Allow for the transfer of a licence to a person "*eligible to hold the licence at the date of transfer*" who otherwise meets the requirements set out therein (Rule 2.13.1); and
- b. Recognises that parties can agree to transfer their rights to hold a licence to another eligible entity provided they request a transfer with a Registrar within 28 calendar days (unless the agreement specifies otherwise) (Rule 2.13.4).

31. In the Application the Applicant has correctly asserted that in accordance with Rule 2.11.1 a "Registrant" must continue to be "a Person to hold a licence". The Rule states:

"A Registrant must continue to be a Person to hold a licence"

32. The Applicant is further correct that the Deregistered Company was, until the Registry was updated at auDA's request, a "Registrant". This is because the term "Registrant" is defined in the Rules by what appears on the Registry.

33. However, the Deregistered Company was not, at the time of the application, "a Person to hold" the Licence under Rule 2.11.1. Hence there was a period of time up until the correction of the Registry that Rule 2.11.1 was not complied with.

34. The term "hold" is not defined in the Rules. However, the very fact it exists in the context it does in Rule 2.11.1 demonstrates that it does not have a direct equivalent meaning to being '*registered as a "Registrant"*'. If it did, Rule 2.11.1 would be nonsensical as it would essentially read to mean as '*A Registrant must continue to be a Registrant*'.

35. Rather the term 'hold' should be given its ordinary meaning that it is reference to the 'holding' of an enforceable legal right to the Licence. That right is one to become or remain a "Registrant".

36. For the reasons set out below, the Deregistered Company has not been "a Person to hold" the Licence at anytime since the Rules came into effect on 12 April 2021 (see Rule 1.2.1).

37. On the other hand, the Current Registrant is a current correct "Person to hold" the Licence. The chain of title that has led to it being so is set out below.

The First Assignment of Rights

38. On 7 June 2018 by way of a Change of Ownership .AU Domain Name Licence agreement the Deregistered Company (which was, at that time, still registered) through its director assigned its rights to hold the Licence to another Australian company, which will be identified herein as Assignee A.

39. This agreement was in writing and signed by the said director. It included the following term:

*“The current registrant **hereby** transfers the domain name licence to the proposed new registrant”* (emphasis added).

40. It is clear on this language that the parties to this agreement intended that rights to hold the Licence were thereby assigned on 7 June 2018. Hence that right was then held by Company A.

41. What occurred next is unusual and unfortunate. The agreement was filed with an accredited registrar,¹ who accepted and approved its form. However that registrar failed to update the Registry due to administrative oversight. As a result the Deregistered Company remained recorded as the Registrant of the Licence even though it had assigned its rights to hold the same.

The Second Assignment of Rights

42. On 22 January 2020 Company A entered into an asset sale agreement with another Australian company (**Company B**).

43. This agreement was also in writing and signed by directors of both Company A and Company B.

44. Under term 5.2(c) of that agreement Company A was required to deliver to Company B at settlement a “duly executed” transfer of the Licence and “all documents and other information required” to facilitate the transfer.

45. Despite settlement occurring, through administrative oversight by Company A and Company B, a duly executed transfer was not completed and filed with an authorised registrar. Hence the Registry remained to erroneously record the Deregistered Company as the Registrant.

46. Despite this failure on the part of Company A and Company B, it is clear from the language of the sale agreement that as at settlement the rights to hold the Licence previously held by Company A were assigned to Company B.

Current Registrant

47. As a result of auDA’s investigation into the Applicant’s complaint on the validity of the Licence, Company B and the Current Registrant were alerted to the erroneous recordal on the Registry.

48. Having been made aware of the erroneous recordal on the Registry, on 1 February 2023 the Current Registrant requested that it be recorded as the Registrant of the Licence.

¹ The Panel has chosen not to identify the registrar. However it is noted that it is not the current registrar for the Licence (i.e. it is not Synergy)

49. It provided evidence of the chain of title in relation to the above-mentioned rights to hold the Licence. It also provided evidence that Company B was its “*wholly owned subsidiary*”.
50. Under Rule 2.2.8 the Current Registrant is permitted to apply for a Licence on behalf of a related body corporate. The Current Registrant is an eligible registrant under the Rules in the present circumstances where Company B (who has acquired a right to hold the Licence) is its wholly owned subsidiary.

Correction to the Register

51. Having established that the Current Registrant is the correct Person to hold the domain name under Rule 2.11.1 the outstanding question is whether the past error in the Deregistered Company remaining listed as the Registrant on the Registry until 2023, and the subsequent correction of the Registry by auDA, ought to result in cancellation.
52. The answer to this question is clearly in the negative.
53. Firstly, as the Deregistered Company never held the Licence at the time it was deregistered neither Rule 2.11.2 or Rule 2.11.3 have been breached. Further, whilst there was a non-compliance with Rule 2.11.1 there is no provision in the Rules which indicates that in circumstances of non-compliance with that rule as a result of genuine error auDA must cancel the licence (as opposed to correcting the Registry).
54. Secondly, the failure to correct details in Registry data has arisen through genuine error made in good faith. auDA had clear authority to correct the Registry at the Current Registrant’s request under Rule 2.18.3.²
55. It was not only permissible for auDA to engage in such correction, it is a responsible and proper use of its administrative authority to do so for two reasons:
- a. It is in the public interest that the Registry accurately records the correct entity that holds the licence. That entity controls the licence and may be actively using it to direct members of the public to a website or for email services. Members of the public ought to be able to correctly identify who such entities are.³ It is incumbent on auDA to correct errors in accordance with the proper application of the Rules as soon as it is notified of them. That is exactly what auDA did in the present matter; and
 - b. Unless auDA was satisfied that it had a clear and unambiguous reason under the Rules indicating the Licence should be cancelled then the proper course of action is for auDA to not cancel the Licence. It is consistent with the principles of natural justice for an administrative body to only take such action that is adverse to the Current Registrant’s interests if there is unambiguous grounds to do so.

² As an aside it is noted that as there was no erroneous entry prior to 12 April 2021 the time limit referred to in Rule 2.18.4 does not apply to the correction (see Rule 1.2.1)

³ It is noted that privacy services hiding a registrant’s identity on the Registry (which are utilised for many gTLDs) are not permitted under the Rules.

This proper course of action is also in line with the Compliance Posture that auDA represent to members of the public at large.

56. As an aside, whilst there is now provision for the cancellation of a licence in circumstances where an assignment of rights to hold the licence is not requested in time (see Rule 2.13.4 and 2.13.6) such provision applies to assignments made after 12 April 2021 (see Rule 1.2.1). Hence there is no basis for cancellation on such a basis.
57. On the information and documents before it the Panel is not aware of any basis to question the eligibility of the Current Registrant under the Rules. In making this finding, the Panel further finds that it is not aware of any basis to question the eligibility of any entity that held the Licence before the Current Registrant at the time it so held.
58. The Panel affirms the Reviewable Decision as set out in paragraph 1 above.

ANDREW SYKES, SOLE PANELLIST

9 March 2023