

ADMINISTRATIVE PANEL DECISION

LEADR Case No: auDA_05_09

Domain Name: **allmedic.net.au**
Name of Complainant: **Allmedic Pty Ltd**
Name of Respondent: **A. J. Dixon Pty Ltd**
Provider: **LEADR**
Panellist: **John A. McGruther**
Date:

1. THE PARTIES

- 1.1 The Complainant is Allmedic Pty Ltd ACN 131 512 331 ('A').
- 1.2 The Respondent is A. J. Dixon Pty Ltd ACN 006 688 740 ('D').

2. THE DOMAIN NAME REGISTRAR AND PROVIDER

- 2.1 The Domain Name at issue is **allmedic.net.au** ('the Disputed Domain Name').
- 2.2 The Trade Mark, name or service mark upon which the Complaint is based is 'Allmedic'.
- 2.3 The provider in relation to this proceeding is LEADR ('Provider').

3. PRELIMINARY MATTERS

- 3.1 Schedule A of the *au Dispute Resolution Policy* ("auDRP") applies to disputes which meet the requirements set out in Paragraph 4a of Schedule A of the auDRP. This subparagraph 4a requires that any party holding a domain name licence "...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) [their] domain name is identical or confusingly similar to a name, trade mark or service mark in which the complainant has rights; and
- (ii) [they] have no rights or legitimate interests in respect of the domain name; and
- (iii) [their] domain name has been registered or subsequently used in bad faith.

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

4. PROCEDURAL HISTORY

- 4.1 The procedural history in this matter is set out in Annexure ‘A’ to this determination. As to some relevant persons involved, and to some of the structural history in the matter, I have attached also Annexure ‘B’ setting some of that out (taken from the written material before me).
- 4.2 LEADR has appointed this Panellist as the sole Panellist in the matter. The Panellist has had no prior knowledge of or association with either party and has no conflict of interest.
- 4.3 All procedural requirements appear to have been satisfied. The Panel has been properly constituted.
- 4.4 Certain written and related material has been submitted to the Panel as provided by the parties to the Provider. The observations in this determination arise singularly from the material so submitted and the submissions made. I have read all of the materials. There is no need that I traverse all of it in the reasons here given, but all of it has been noted and analysed.
- 4.5 Paragraph 15(a) of the auDRP Rules states:
“A Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy [the auDRP Policy], these Rules and any rules and principles of law that it deems applicable”.

- 4.6 The Disputed Domain Name was registered on or about 29 July 2008.
The Policy applies to the Disputed Domain Name.

5. FACTUAL BACKGROUND: The Complainant's (A's) case

- 5.1 In submissions made with its Complaint, A as Complainant essentially raised some of the following matters, namely that:

- (a) A was incorporated on 10 June 2008.
- (b) Since October 2008, A has been engaged in the development, marketing, promotion, and in education and training relative to skin care products and management (and in which the range of products is noted).
- (c) A has continued to engage in development of further skin care products, lines and training.
- (d) The idea for the development of medical skin care products was conceived in mid-2006 by Dr William Anseline who had arranged then for the registration of the 'Allmedic' Business Name in Queensland (registered 14 July 2006).
- (e) Dr Anseline drew together a group of professionals from the skin, medical and pharmaceutical disciplines to further develop matters (those persons listed at paragraph 6.2 of submissions and noted, and some listed in Annexure 'B').
- (f) Dr Anseline is the Managing Director of A (responsible for research and education), and that Dr Anthony Dixon (Director of the Respondent D and a Shareholder in the Complainant) was (with others) also involved in aspects of the formation of the Allmedic business.
- (g) A filed two (2) Trade Mark applications, 1289665 and 1289666 with IP Australia (Federal Government) on 16 March 2009 seeking registration of two (2) distinct 'Allmedic' Trade Marks. The registered Allmedic Trade Mark logo designations are in the

materials and closely noted. Each such application was made in respect of Trade Mark Classes 3, 5, 16, 41 and 44 (and the scope of product and service coverage for each such Class is also here noted).

- (h) Each such application for such Trade Marks has apparently currently passed the examination stage and is to the current stage of 'Early Notice of Acceptance' by IP Australia by confirmatory letters in respect of each application from IP Australia to the solicitors for A dated 2 June 2009.
- (i) By reference to the various range of A products (both continuing and new), that A is making extensive use of them and of the A name and depictions of the Allmedic name (reconciling with the Trade Mark applications for them).
- (j) The registration of the Domain Name the subject of this complaint '**allmedic.net.au**' (and of a similar domain name 'allmedic.net') was achieved after discussions between Dr Anseline, Dr Anthony Dixon (Director of the Respondent D) and Professor Peter Smith.
- (k) In consequence of those discussions, and by reference to certain communications, email and otherwise, between the parties (all of which, as relevant, I have closely studied) that Dr Dixon obtained the Disputed Domain Name registration on 29 July 2008 in the registrant name of the Respondent D (I turn to elements of this later).
- (l) Following such registration of the Disputed Domain Name, A set up its website at that address. A then itself arranged also for an alternative 'allmedic.org.au' domain name to be registered by A in circumstances emerging that D was ultimately resisting transfer of the Disputed Domain Name to A, and as to ensure the maintenance of a web presence of A pending dispute resolution concerning the Disputed Domain Name.
- (m) The securing of Disputed Domain Name registration by the Respondent (through Dr Dixon) was for the express purpose that

such initiative was undertaken by the Respondent D singularly for A and not for D otherwise to acquire any beneficial or other ownership or right, title or interest in the Disputed Domain Name registration so initiated.

- (n) In consequence (and in submissions' content I have fully noted) the Respondent D has no rights or legitimate interests in respect of the Disputed Domain Name, that the retention or use by D of the Disputed Domain Name is a use in bad faith, and (in effect) that the Disputed Domain Name is identical or confusingly similar to the Allmedic name generally in which A as Complainant has rights (I turn to all of these elements as pertinent in discussion later).

6. FACTUAL BACKGROUND: The Respondent's (D's) case

6.1 Within its submissions, the Respondent (D) essentially put:

- (a) Describes the history of the Disputed Domain Name from D's perspective.
- (b) Acknowledges A's request that Dr Dixon register the Disputed Domain Name and that A *'..asked me to purchase it under the ownership of AJ Dixon P/L..'*. D's expectation that this (registration) would be *'..very interim and expected that Allmedic intended to then purchase the domain name off me expeditiously'*, and in which regard D asserts a contended A prohibitive 'costs factor'.
- (c) That A has *'..made no attempt to reimburse'* D for the Disputed Domain Name registration.
- (d) Contending again as to (in effect) unilateral 'ownership' of the Disputed Domain Name (beyond merely registration), and thus as to an asserted right to 'sell same' (a reference to the open market, broadly).

7. DISCUSSION AND FINDINGS

Elements of a successful complaint

- 7.1 According to Paragraph 4a of the .auDRP Policy, a person is entitled to complain about the registration or use of a domain name where:
- (i) *The domain name is identical or confusingly similar to a name, trade mark or service mark in which the complainant has rights; and*
 - (ii) *The respondent to the complaint has no rights or legitimate interests in respect of the domain name; and*
 - (iii) *The respondent's domain name has been registered or subsequently used in bad faith.*
- 7.2 It is to be noted that the three elements of a complaint under Paragraph 4a of the auDRP Policy are cumulative; all of them must be proved if the Complaint is to be upheld.

Is the Disputed Domain name identical or confusingly similar to a name, Trade Mark or service mark in which the Complainant has rights?

- 7.3 The Panel must determine whether the Complainant has rights in a relevant name, Trade Mark or service mark.
- 7.4 The auDRP Policy states:
- For the purposes of this policy, auDA has determined that a "name...in which the complainant has rights" refers to*
- (a) *The complainant's company, business or other legal or trading name, as registered with the relevant Australian government authority;*
 - (b) *The complainant's personal name."*
- 7.5 The auDRP Policy does not provide guidance as to the intended meaning of "identical" or "confusingly similar". However, "essential or virtual identity" is sufficient. (*BlueChip Info Tech Pty Limited v Roslyn Jan and another* [LEADR case 06/03]).
- 7.6 Although it may appear that there is no exactitude as to what is contemplated in the term "confusing", the test of "confusing similarity" could have reliable precedent in the trade mark infringement case

application of the expression, where the concept of “*deception*” contemplates consumers who may be deceived or “*caused to wonder*” about the source or origin of goods or services. (As, for example, noted in *Camper Trailers WA Pty Ltd v Off Road Equipment Pty Ltd* [LEADR 06/04]).

- 7.7 The Panel makes the following observations in no priority order.
- 7.8 Broadly, the submitted chronology on the material before me is accepted substantively as to evidence a very active commercial use and exposure by A of its ‘Allmedic’ trade name, business name and Trade Mark associations, all of which are referred to in earlier chronology and background recitation. Further, there is no agreement or dispute before me as to the integrity or accuracy of that background.
- 7.9 D has registered the Disputed Domain Name. No argument or dispute is put before me as to there being any relevant doubt about or contention upon the similarity of the Disputed Domain Name to the trade name, operating and business names and Trade Marks and other designations of A. No relevant dispute is put before the Panel here contesting as to that similarity.
- 7.10 Many of various Annexures to the Complainant A’s submissions attest to the corporate, trade, commercial, Trade Mark, business name and other representations of its business and conducted as an active and continuing business under and by reference to the primary title ‘Allmedic’. None of that is largely contested here.
- 7.11 Further, no dispute, argument or submission is put by the Respondent D contesting as to the Complainant A having rights in or to all of those ‘Allmedic’ designations other than for the issue emerging in this referral as to the Disputed Domain Name itself.
- 7.12 Nor is there any relevant dispute, by reference to entitlements of A to its business and ongoing trade usage of ‘Allmedic’ (other than for the Disputed Domain Name issue here) under and by reference to the designations under which, on a continuing and active basis, ‘Allmedic’ already operates and as referred to briefly earlier.

- 7.13 There is no dispute evident on the papers before me, or in any submissions from the Respondent D, that A does not have a relevant reputation residing in its various 'Allmedic' designations (previously referred to, again other than for the discrete Disputed Domain Name issue before this referral).
- 7.14 Further, and again in history which is not largely contested, it appears that A has ultimately initiated its own independent alternative domain name registration of 'allmedic.org.au' in an emerging, and more recent, chronological context of an anticipated likelihood of the Respondent D continuing to refuse to transfer the Disputed Domain Name, which anticipation has in fact remained the reality.
- 7.15 The onus of establishing the Complaint under this heading rests with A. That onus does not extend to a Complainant needing to establish any consumer association of a word (say, here, 'allmedic') singularly with the Complainant's business or reputation. Any name or term used (and whether 'generic' or otherwise) which 'primarily' has an association with a Complainant's business is enough, prima facie, to give rise to confusing similarity under this heading.
- 7.16 There is no relevant evidence before the Panel upon which it could safely conclude that the Complainant has not established the relevant onus here.
- 7.17 Broadly, the Panel is satisfied, including on that requisite onus, that there is a position of conviction to the A Complaint, under this heading, and in any event by reference to the undisputed account of matters on the papers before the Panel, that the Disputed Domain Name is identical with or confusingly similar to a name, Trade Mark or service mark in which A as Complainant has rights.
- 7.18 For these reasons, on the balance of material before the Panel, there is in its determination, the real potential for, and the actuality of, identity confusion in the terms which meet the foundation for the Complaint of A under this heading and where A, in the determination of the Panel, has established the requisite onus.

7.19 Accordingly, the Panel determines that the Complainant has satisfied the requirement of “*identical or confusingly similar*” in Paragraph 4a(i) of the auDRP Policy.

Does the Respondent have any rights or legitimate interests in respect of the Disputed Domain Name?

7.20 This is the second element for establishment within a Complaint under the UDRP. It involves deliberation upon the issue as to, whether or not, a Respondent has, in the circumstances of the presentation, no rights or legitimate interests in the Disputed Domain Name (as contended here). This is relative to considerations pursuant to Paragraph 4a(ii) of auDRP Policy.

7.21 Firstly, it is imperative to note, including here, that ‘rights or legitimate interests in respect of the Disputed Domain Name’ are not established merely by a Registrar’s determination that the Respondent satisfied any relevant registration criteria for the Disputed Domain Name at the time of its Respondent registration (and refer Note 2 of the Policy). There is accordingly no basis for any argument singularly put by reference to registration, or necessarily, as to later use since registration, on that basis.

7.22 The relevant burden of proof is to the extent that the Complainant need only make out a prima facie case that the Respondent has no legitimate interest, whereupon that burden then shifts to the Respondent to produce evidence of any relevant interest in the name in issue, as to satisfy the Panel (*Document Technologies, Inc v International Elec Communications Inc* (WIPO Case D2000-0270)).

7.23 The UDRP does not attempt to define forensically what is meant by a right or legitimate interest in a Domain Name. Paragraph 4c of UDRP lists three (3) (and importantly, non-exclusive) examples of what may comprise any contended ‘right or legitimate interest’, namely:

- (a) Use, or demonstrable preparations to use, the Domain Name in connection with a bona fide offering of goods or services;

- (b) The Respondent being commonly known by that Domain Name; or,
- (c) Making a legitimate non-commercial or fair use of the Domain Name, without intent for commercial gain to misleadingly divert consumers.

7.24 It is not necessary for the Panel to traverse in fullness the respective submissions content of the parties under this heading. The following observations are made on the material before the Panel, and in no priority order.

7.25 The Panel accepts the following:

- (a) That there were founding discussions in late July 2008 between Professor Peter Smith, Dr Dixon and Dr Anseline as to the logistics within then a common cause of attending to Allmedic internet matters.
- (b) That there were various written, including email, communications between the parties over a period, all of which I have studied closely in entirety.
- (c) That, amongst such communications, there was an email of 5.52am on 29 July 2008 from Dr Dixon to Dr Anseline and to Professor Smith which, as to relevant parts, reads:

'Subject: Web name

... I got nervous when Peter said some web names were available out there for others.

So I decided to secure allmedic.net and allmedic.net.au for us immediately.

See invoice below...

It will now need to be transferred from me to Allmedic.

Anthony'.

- (d) Thereafter, A then set up its website at that address and set up allmedic.net.au email addresses for people involved with its Allmedic business operations.
- (e) That there have been website enhancements subsequently including that now standing at allmedic.org.au as indicative of the website extent of establishment by A.
- (f) A subsequently initiated the alternative 'allmedic.org.au' domain name in the then anticipated likelihood that the Respondent D might refuse to transfer the Disputed Domain Name, notwithstanding the earlier communications between the parties, so that A might maintain a web presence pending any resolution of dispute relative to the Disputed Domain Name.
- (g) That the Respondent D appears not to dispute much of the above but asserts that, ultimately, A itself chose not to have the Disputed Domain Name transferred back to it on a D contended 'costs factor' basis, and on the basis of certain D contended (but disputed) acknowledgments to that effect from A.
- (h) That the Respondent D argues that there was no attempt by A to reimburse D for registration costs.
- (i) That the Respondent D asserts 'full ownership' now over the Disputed Domain Name.

7.26 The Panel observes that the potential for confusion as to the source of the Disputed Domain Name is a relevant and appropriate consideration in analysis of any claim for legitimacy of interest under this heading. Some of the Panel's commentary following is in that context, additional to other commentary made.

7.27 It is noted here that D does not assert that A has not demonstrated any rights in the name or description of 'Allmedic'. In fact, in many respects, on the papers before the Panel, at various stages of the chronology, D has, in commercial terms, sought to 'disown itself' from any 'Allmedic' commercial or other association, at the same time however as

maintaining the contention now put before this Disputed Domain Name referral, that is, D's holding out for continued 'ownership' of it.

- 7.28 The Panel has already indicated the principles as to the relative evidentiary burdens, but here immediately notes, and determines, that A as Complainant has made out a prima facie case that D, as registrant of the Disputed Domain Name, has no legitimate interest in it (including as arising from observations which further follow). It is for D then, to satisfy the Panel, the onus resting upon D, that it has a relevant interest in that Name.
- 7.29 As already stated, the mere fact of Disputed Domain Name registration by D as Respondent does not connote a legitimacy of interest or right in it. Equally, by reference to matters recited within Paragraph 4c of UDRP (abbreviated references above), mere assertions of preparations to use the Disputed Domain Name, without further reliable evidence from a Respondent, is insufficient to establish that a Respondent has undertaken any relevant demonstrable preparations to use the name in terms of Paragraph 4c for example.
- 7.30 In particular, and specifically in part pertinent to this presentation in the view of the Panel, an offering of goods or services is not bona fide if use of the Disputed Domain Name is likely to cause consumer confusion including, such as and by one illustration only, that it may infringe a Complainant's trade name rights or acquired reputation (*Universal City Studios Inc v GAB Enterprises* (WIPO Case D2000-0416)).
- 7.31 Here, several matters are noteworthy. Firstly, including in terms of paragraph 4c(a) of UDRP, it is apparent on the material before the Panel that D has not used the Disputed Domain Name in any real connection with a bona fide offering of goods or services. If anything, the use by D of the Disputed Domain Name has, respectfully, been in the limited context of such matters as diverting email traffic away from it, making (on other websites controlled by D, for example) adverse and other commentary about the trade or business (and other matters) of Allmedic and the like. In terms of the illustrated example within paragraph 4c(a) of UDRP this does not amount to a qualifying 'bona fide' use of the Disputed Domain Name.

- 7.32 The Respondent D, further, is not commonly known (nor is that argued here) by any reference, actively or otherwise, to the Disputed Domain Name, including by reference to paragraph 4c(b) of UDRP.
- 7.33 Further, there is no reliable evidence before this referral that any use by the Respondent D of the Disputed Domain Name is a legitimate non-commercial or fair use of it. Further, specifically, that use thus far by the Respondent D, on the material before the Panel, is illustrative of such usage being retained for purposes of a contended registration ownership only, and not as to use, and that any use has substantively been in part for ultimate diversionary purposes, as stated briefly above.
- 7.34 In all of these respects, and generally, and again it is largely undisputed here, D is, and has at all relevant times been, aware or reasonably aware of the reputational interest maintained by A in the Disputed Domain Name, including as part of its Allmedic overall corporate, trade name and Trade Mark designations equivalently.
- 7.35 That there is such awareness resident in D, in the view of the Panel, is evidenced by the measures taken by D in a number of respects including (but not limited to) ultimate diversionary measures taken by D to, in effect, redirect domain inquiry away from 'Allmedic' designations to web designations controlled by D (as, for example, 'skincanceronly.com.au') containing material (publicly available) by way of adverse commentary on the activities of 'Allmedic' (for example). Some of this is discussed further later.
- 7.36 None of the above is illustrative, in the view and determination of the Panel, of the Respondent D maintaining a foundation for rights or legitimate interests in the Disputed Domain Name, or to be acting reasonably or bona fide in adhering to a position of maintaining to itself such registration.
- 7.37 To the extent, under this heading, that there is a contest between the parties as to Disputed Domain Name 'entitlement', the Panel discusses this further following and in no priority order as to the observations made.

7.38 The Panel has earlier at paragraph 7.25(c) set out some of the relevant content of the email of Dr Dixon to Dr Anseline and to Professor Smith on 29 July 2008. Relative to it the following observations are made:

- (a) It does reliably reflect that the discussions in late July 2008, including relative to domain name registration, were in a 'common cause' exercise, and where (then) the parties were then in relative harmony.
- (b) It contains the acknowledgments of the Disputed Domain Name registration being secured then (by Dr Dixon in the name of D) '*for us immediately..*' (emphasis added) and further in terms, equally contemporaneously, by the email author Dr Dixon: '*It will now need to be transferred from me to Allmedic ..*' (emphasis added).

7.39 D has asserted that the Disputed Domain Name registration was effected by D because (as contended by D) Allmedic '*..asked me to purchase it under the ownership of A J Dixon P/L..*' (Respondent submissions page 4). This, however, does not reconcile with the contemporaneous email wording above as at 29 July 2009 where the rationale for Disputed Domain Name registration, was expressed decidedly differently by Dr Dixon then, namely then in terms: '*So I decided to secure allmedic.net and allmedic.net.au for us immediately.*' In other words, here, the emphasis is on a unilateral decision (not an antecedent request) by D/Dr Dixon to take that initiative for reasons of potential exposure against the interests of A were registration not effected, but with the contemporaneous acknowledgment, and directly in that context, that '*..it will now need to be transferred from me to Allmedic..*' (as above)

7.40 Dr Dixon for D submits in this further context that he had an expectation that this (registration) '*..would be very interim and expected that Allmedic intended to then purchase the domain name off me expeditiously*' (D submissions page 4). Here, D turns to another element of contention relative to an asserted refusal by A to have the name

transferred back to A because of 'costs factors', an assertion I will deal with separately later.

- 7.41 Relative to events as at late-July or on or about 29 July 2008, including with reference to the aforesaid 29 July 2008 email discussed above, the Panel makes these additional observations.
- 7.42 The quite unqualified and contemporaneous expressions used by the email author Dr Dixon do not appear to reconcile with a number of other contentions now put by the Respondent D to this referral. For example, there is no written material before the Panel illustrative of any 'time limit' then put by D to A to ensure the transfer back to A, or for the registration cost rebate to D. As previously stated, further, the email evidences a unilateral and unconditional initiative chosen to be taken by D/Dr Dixon on 29 July 2008 or thereabouts to obtain the Disputed Domain Name registration.
- 7.43 The Panel makes these further observations.
- 7.44 The registration cost to D across the two (2) domain name registrations to which the said email refers is respectively \$56 and \$69 (each including GST) in the total for them of \$125.
- 7.45 Leaving aside the separate assertion made by D to this referral, namely that A refused for 'costs' reasons to take the Disputed Domain Name registration transfer back, at the point of this email exchange of 29 July 2008, and from its content and generally, and on the written material before the Panel, the Panel arrives at the following conclusions on the balance of reliable material before the Panel:
- (a) That the exercise of initial registration was intended to be a 'common cause' and to which Professor Smith, Dr Dixon and Dr Anseline (then all globally in the interests of A) set about their attendance to the internet interests of A including through the logistics of A initiating that registration albeit through the functionaries of the persons (above) who committed to that cause.

- (b) That 'common cause' was voluntarily and unilaterally then taken by D/Dr Dixon in history already explored above.
- (c) That, at that point, in effect, that that group were jointly trustees to act in good faith including, further in effect, to obtain and hold the Disputed Domain Name registration on trust for A.
- (d) That it would not be inaccurate to describe part of that exercise as a trusteeship in the interests of A.
- (e) That, additionally, for the same reasons, the group, including Dr Dixon (and ultimately, the registrant D) were in true terms acting as agents for and on behalf of A to secure such registration, and to secure it singularly in the interests of A and not otherwise.
- (f) That the contemporaneous acknowledgments by Dr Dixon within the aforesaid 29 July 2008 email, including as earlier exactly set out, are entirely consistent with the above conclusions, including, in particular here, the acknowledgment of the 'need' then for the Disputed Domain Name registration 'to be transferred', and which, in events as have since passed, has not occurred.
- (g) That there were also representations, in effect, by Dr Dixon and D, or which could so reasonably be interpreted, upon which A and its officers placed, including on a continuing basis, reasonable reliance for the event of that registration reversionary transfer to occur. That such registration has not in reality occurred does not reconcile with the unqualified and contemporaneous email commitment of 29 July 2008 on behalf of D that it would be transferred, in essence, upon request, the registration cost, as to cost 'factors' being relatively minimal (\$125 as above described across two (2) domain names).
- (h) As an exhibition of its reliance on such representation (one only, illustratively), A did apparently set about developing its public internet face at the allmedic.net.au website including for intended use of that domain as the primary basis for internet promotion and communication, and expended monies in that context.

- (i) That there is substance to the Complainant A's submission that the Respondent D, in the circumstances and findings above, is estopped from denying that it held the Disputed Domain Name registration singularly for and on behalf of A or to hold out, contrary to that interests of A, for the registration to be maintained on some other 'ownership' basis now argued by D.
- (j) That, contrasted to any other interpretation that might be given to relevant communications, not exclusively but including that of 29 July 2008 as above, regard needs to be had in context to the fact, in the view of the Panel, that (for instance) the said 29 July 2008 email was volunteered and expressed and sent in terms of its author then Dr Dixon, and that it was compiled and despatched then when the parties were then in a relationship of relative harmony (contrasted to an apparent disharmony emerging later). The Panel mentions this as it invites the likelihood of accuracy of interpretation of that email on its face (and of surrounding communications), in that context and atmosphere then, as distinct from later, or of later asserted interpretations to matters.
- (k) One usual consequence, in such circumstances as the findings and observations above, is that the beneficial ownership of any right, title or interest so acquired (here, specifically and discretely only by reference to the Disputed Domain Name registration) is vested in the party for whom the registration was held out and for whom the act or acts under such agency and trusteeship were initiated, here A.
- (l) Further, the test on such matters is more reliably measurable at the time of their undertaking or being initiated, not by reference to later commercial events, or asserted different constructions or arguments put on those events, particularly against contemporaneous record.
- (m) Further, this (in part) is at the essence, in the view of the Panel, of some of the commentary within the A letter to Dr Dixon of 22 May

2009, and which, for accuracy and completeness, as to the relevant part, the Panel troubles to fully set out here:

'Your email of 13th May indicates a misconception on your part as to the matter which Allmedic regarded as urgent. Our principal concern was not with the transfer of your shares: it was with the transfer of the Allmedic domain name.

You became involved in the registration of the Allmedic domain when you offered to attend to it to take the load from Bill and because you said that you had some experience in that sort of thing. In registering the name you were acting as the agent of the company, and there is no basis upon which you can assert otherwise. Allmedic Pty Ltd is the beneficial owner of the intellectual property in the name, and to the extent that the domain stands in your name, you hold your interest as trustee for the company. In the circumstances your claim to be entitled to sell the name is dishonourable.

Allmedic has already offered to reimburse you for costs reasonably incurred in securing the registration of the domain name and it will do that when it has details of the amounts involved and in exchange for transfer documentation.

Allmedic is not prepared to be held to ransom by you in relation to the domain name and because of your refusal to transfer it to the company as you were asked to do, a new domain has been registered, and it will be promoted and used by the company as an alternative. In taking that step the company does not abandon its rights in relation to the allmedic.net.au name.

Allmedic forbids you to make any use of the allmedic.net.au domain and the Allmedic name, whether purportedly on its behalf or otherwise...

...as a result of your refusal to recognise the trust upon which you hold the allmedic.net.au domain name, and to transfer it when you were asked to do so...'

- (n) Further, the 'ownership' contention held out with respect to the Disputed Domain Name by Dr Dixon on behalf of D, or the commands from D to A to 'rent' the registration, or as to the purported right of D to 'on-sell' the registration, or to disable it (as, for example, by 'parking' it), are not properly founded or sustainable for reasons discussed following. These contentions, for example, emerged within the 1 June 2009 email from Dr Dixon to Dr Anseline (without need to set out all of that content here). The same contentions are persisted with and repeated by Dr Dixon in effect for D in a further email of 4 June 2009 to Dr Anseline (the full content also of which the Panel has closely noted and, as to that content, it not being necessary to set it fully out here).
- (o) In that these latter contentions, shortly prior to this referral, emerge from D, but can only arise from any validity to the D assertions of full legal and beneficial ownership of the Disputed Domain Name registration, none of those assertions has foundation or is sustainable for the reasons in part already given.
- (p) In effect, leaving aside other issues or matters, such as for example medical or product efficacy or 'trial' or 'test' disagreements, as singularly relative to the Disputed Domain Name registration 'ownership' and singularly as to that registration transfer, the resistance of D to do so, and the asserted, but respectfully misconstrued 'right' to so refrain, is without foundation. It is inconsistent with the right of an entitlement of A to the Disputed Domain Name registration and ownership.
- (q) Further, the fact of 'registration' and in which title or name such registration currently resides, avoids this central issue and, in many respects, is the very rationale for the auDRP Policy itself in respect of such matters and presentations as this.
- (r) Neither Dr Dixon nor the Respondent D carries on any active business, trade or profession under or by any active reference to 'Allmedic' (nor is any submission put to me otherwise). The Panel has discussed that earlier. Rather the Respondent D usage of such registration to now has, in a commercial sense as to trade, been

entirely passive, its use limited to ultimate diversionary internet measures, and then only (it would reliably appear) for substantive negative public commentary on the business and operations broadly of Allmedic. That also has been discussed earlier.

7.46 For these reasons, accordingly, the Panel is not of the view that D has discharged the onus as to establishing, in the circumstances of this presentation, a right or legitimate interest in respect of the Disputed Domain Name in issue here.

7.47 Accordingly, the Panel finds that the Respondent D has no right or legitimate interest in the Disputed Domain Name. Paragraph 4a(ii) of the auDRP Policy has been satisfied by the Complainant.

8. Has the Disputed Domain Name been registered or subsequently used in bad faith (paragraphs 4a(iii) and 4b of auDRP policy)?

8.1 The Panel has noted and studied the full context and content of all requisite material under this heading.

8.2 Paragraph 4b of the auDRP Policy sets out circumstances of “*evidence of the registration and use of a domain name in bad faith*”. This Paragraph contains four sets of circumstances, any one of which, if established, can constitute evidence of registration in bad faith. It is important to note also that it is a non-exhaustive list of circumstances such that, for example, the Panel is not necessarily constrained from a finding of bad faith should it arise (also by example) from not only any one or other of them, but from a combination of them, or indeed, upon the basis of other reliable material before the Panel inclusive of the illustrated list.

8.3 The essence of each of the subparagraph illustrations in Paragraph 4b of the Policy as non-exclusive examples of evidence of bad faith are:

- (i) Circumstances indicating that the subject registration is primarily for the purpose of selling, renting or otherwise transferring it including for valuable consideration in excess of documented out-of-pocket costs directly related to it;

- (ii) A registration to prevent the owner of a name, trademark or service mark from reflecting those same names or marks in a corresponding domain name;
- (iii) Registration primarily to disrupt business;
- (iv) Use of the domain name as to intentionally attempt to attract, for commercial gain, Internet users to a website by creating a likelihood of confusion.

8.4 As indicated, these are non-exclusive illustrations. Also, as previously stated, the establishment of any one of them can be enough as to a finding of relevant bad faith. Other factors may also demonstrate bad faith.

8.5 It would appear here that, essentially, the Respondent D's position before this referral is an adherence to an argument of Disputed Domain Name registration 'ownership' upon which all else rests. No discrete Respondent submission or argument is put by reference to this specific heading of 'bad faith', for example. However, some of the history of the matter attracts discussion under this heading. The Panel, in addition to observations already made, and without need to recite all of the observations the Panel might make from its study of the full material before it, discusses further certain matters regarded as pertinent as following, and again in no priority order.

8.6 Some of the immediate discussion centres upon paragraph 4b(i) as set out in the abbreviated reference to it above. Although the Respondent D did not put the submission or argument to this referral in terms that (for example) there cannot be 'bad faith' if (as D asserts) it holds properly the Disputed Domain Name registration, the Panel is prepared to regard that (in effect) blanket submission of D as amounting to such a contention under this heading, again for abundant completeness of analysis by the Panel.

8.7 On 13 May 2009, Dr Dixon emailed Dr Anseline in terms which in part are exactly set out here:

‘.Fourthly, It (sic) is agreed that I own and have fully paid for the domain name allmedic.net.au and that Allmedic have at no stage prior to recently have (sic) offered to pay for this domain name despite using same. In the last seven days I have sought and obtained two quotes of the value of this domain name. I am also aware of the estimates previously presented by Peter Smith regarding this domain.

Before I offer Allmedic the cheaper of the 2 obtained quotes for this name and its transfer, I invite you to offer on behalf of Allmedic a suitable commercial price for ownership transfer of same. I will be happy to discharge ownership of the domain for something less than its full commercial value. I will be in a position to sign any required documents upon my return to Australia.

Anthony’.

8.8 The observations the Panel, in no priority order, makes about this communication and generally are:

- (a) It runs totally counter to the email from Dr Dixon to Dr Anseline and Professor Smith of 29 July 2008 already discussed. The 29 July 2008 volunteered representation then by Dr Dixon was that the achieved Disputed Domain Name registration as from 29 July 2008 was done by Dr Dixon / D *‘.for **us** immediately’* (emphasis added).
- (b) To reiterate matters, the 29 July 2008 email contains unqualified representations and acknowledgments including then that *‘it will now need to be transferred from me to Allmedic’*.
- (c) The 13 May 2009 email content recited exactly above converts those earlier 29 July 2008 subsisting representations by D, over nine (9) months later, to a distinctly 13 May 2009 commercial position, by reference to a distinct holding out then by D for ‘commercial prices’ for the subject registration. The Panel notes, illustratively, that the ‘commercial’ prices specifically held out by D at this later point were as to \$6000 for ‘www.allmedic.net’ and \$8000 for ‘www.allmedic.net.au’ (reference Dr Dixon letter on A & M Dixon Investments Pty Ltd letterhead of 19 May 2009 to Dr Anseline, Managing Director of A).

- (d) That the originally unqualified representation and holding out as at 29 July 2008 by D for the Disputed Domain Name registration transfer to be, in unqualified terms, effected, and upon which A had (on the reliable balance of material before the Panel) then relied had, by reference to this 13 May 2009 email, by then become a substantively different position put forth by D.
- (e) The above circumstances, on the balance of reliable material before the Panel, and in the view and determination of the Panel, comprise in essence a breach of the trusteeship, agency, and of the representations previously made in effect by D to A.
- (f) The above in the view and determination of the Panel is the reliable position on this dispute element of matters, quite irrespective of intervening events, differences or other elements of emerging disharmony over the interim period from July 2008 to May 2009, apparently more seemingly to do with what became medical, marketing or related product or service matters.

8.9 Further, the Panel notes that it has earlier made reference to, and quoted exactly and substantively from the A email of 22 May 2009 to Dr Dixon without reciting that content further here. However, under this heading, it is noted that A there has stridently emphasised its principal concern not being with any '*transfer of shares*' (an unrelated issue to this referral) but in terms that D holds a misconception as to the emphasis of A not primarily being '*..with the transfer of the Allmedic domain name*'. The other content of this A communication of 22 May 2009 to Dr Dixon is in this same context, and would appear largely to be consistent with the position of A throughout.

8.10 In terms of any 'bad faith' heading analysis that might be said to relate to the umbrella assertion before this referral of the Respondent D that, in essence, its position in full springs from asserted 'valid' Disputed Domain Name ownership, the Respondent D points to contended communications with a Dr William Ardrey, a consultant to A. This D assertion is to the effect (although not argued by D in submissions in these terms) that A had resiled from its position of a transfer reverting

to it of the Disputed Domain Name on the now D contended footing of 'costs factors' (arguably, as contended by D, coming from Dr Ardrey). The Panel deals with this in discussion following. Briefly, A refutes this contention.

- 8.11 There is an email of 4 June 2009 at 9.16am from Dr Dixon to Dr Anseline which, as to this element of matters, raises a contention by D as to a 'request' from Dr Ardrey for A that A might '*..use those names despite same being owned by me..*' (the latter 'me' reference being apparently to Dr Dixon). This Dr Dixon email further contends '*..at the time I accepted Allmedic using the names.. They remain mine..*'.
- 8.12 Here, A argues that Dr Ardrey had no other discussions with Dr Dixon, other than '*discussions with Dr Dixon about his investment in the complainant, and as to the protection of the complainant's intellectual property, including as to the need for domain names to support the complainant's brand..*' (A submissions page 8). A further submitted in this context: '*..in particular that he (Dr Ardrey) did not acknowledge that the names were owned, as distinct from registered, by the respondent or request that the complainant be allowed to use the domain names as property of the respondent..*' (A submissions also page 8).
- 8.13 The Panel returns to some discussion on this 4 June 2009 communication later.
- 8.14 At around this point in time, A engaged Bernard Ponting & Co Solicitors of Queensland to represent its interests in pertinent matters here. By facsimiles of 3 and 4 June 2009 from Bernard Ponting & Co to Dr Dixon, in effect, the asserted rights of A including relative to the Disputed Domain Name were restated (without detailing the fuller content of those communications).
- 8.15 It appears that Dr Dixon 'shredded' the 4 June 2009 demand letter of Bernard Ponting & Co (which apparently enclosed Domain Name transfer forms). In this context, the Panel notes part of separate email content then from Dr Dixon to Dr Anseline of 10.01am on 4 June 2009, part of which states:

'Ironically the correspondence confirmed my ownership of Allmedic.net and Allmedic.net.au. I shredded this correspondence'.

- 8.16 The Panel has looked closely at the correspondence of Bernard Ponting & Co as referred to. Nowhere there does the Panel observe any 'confirmation' of 'ownership' of D, as appears to be so interpreted at this point by Dr Dixon in the email reference above. What the Bernard Ponting & Co letters do recite, and refer to, is as to 'registration', which is a distinctly different matter, and is indeed at the essence of this referral.
- 8.17 D as Respondent submits that the relevant discussions in late July 2008 were that Dr Dixon was 'asked' to *'..purchase it under the ownership of AJ Dixon P/L'*. Apart from observations already made on this communication and generally, this contention does not reconcile with other reliable material before the Panel and which, illustratively only, includes the Dr Dixon email of 8.07pm on 28 July 2008 stating: *'Let me know and I will leave name/logo in or out as you see fit'*.
- 8.18 The Panel is of the view on the balance of reliable material before it that several further observations can safely be made about these communications and contentions, including in the further context of the 29 July 2008 Dr Dixon email to Dr Anseline and Professor Smith, earlier already closely analysed, but again including as follows and in no priority order:
- (a) The 29 July 2008 5.52am Dr Dixon email (as latterly referred to) was unilaterally authored and volunteered by Dr Dixon and is in his own terms and expressions.
 - (b) It is quite unqualified in every relevant respect.
 - (c) It is contemporaneous as to events and understandings at the time, as distinct from submissions now put (including in a context where it is obvious that the parties have in the interim become disharmonious on a range of quite unrelated matters).

- (d) It does not reconcile with an interpretation argued by D now as to contended acknowledgments by Dr Ardrey (for A) that the Respondent D now has some vested 'ownership' and the like.
- (e) That D does not put any relevant material to this referral to satisfactorily explain away why this contemporaneous communication (amongst other factors) should not be taken on its face, and for what it says, and as stated then by the author himself/itself, and in expressions and in a context at that relevant and immediate time.
- (f) D contentions now put appear to be contrary, respectfully to the very submission acknowledgment by D that indeed it had initiated the Disputed Domain Name registration, including in the context exactly as A argues for that history. The D acknowledgment, now submitted to this referral, is relevantly phrased: *'I expected this would be very interim and expected that Allmedic intended to then purchase the domain name off me expeditiously'* (D submissions page 4). Leaving aside other argument about interpretation of relevant communications, at the least, this is an acknowledgment of a trusteeship registration in the first instance by D on behalf of A, and not otherwise.
- (g) In essence, the only residual assertion of D counter to this is the now argued contention that A allegedly cited 'costs factors' in A purportedly choosing not to implement the D transfer of the Disputed Domain Name back to A. So far as this assertion might relate to contended 'acknowledgments' from Dr Ardrey suggested firstly, as to the fact, and secondly that such contained 'ownership' acknowledgments to D, the Panel does not prefer this interpretation of matters now given to this referral for the following further reasons:
- (1) The Disputed Domain Name registration cost (in total) was \$125, earlier described. Respectfully, it could not seriously or sensibly be suggested or put that it was then (July/August 2008) such an amount as singularly might be regarded as a prohibitive 'costs factor' for A.

- (2) The latter point is more especially so when seen against the other A commercial expenditures including, by illustration only, that A had itself apparently deliberately troubled with and set about parallel registration steps, including expense, to set up the alternative 'allmedic.org.au' domain name.
- (3) The latter alternative protection measure was undertaken by A in a concern emerging that D, as has become the reality, might persistently refuse the originally intended reversionary transfer of the Disputed Domain Name registration back to A.
- (4) Dr Ardrey was not a party nor privy to the discussions at first instance directly had in late-July 2008, singularly then between Professor Peter Smith, Dr Anseline and Dr Dixon, as to the registration logistics and arrangements those persons (globally then but singularly on behalf of A, and not in any context in the interests of D, as this Panel has already found) entered upon then in the common cause of their obtaining that registration for A.
- (5) A specifically refutes the D version of the contended Dr Ardrey exchange, including in terms as has already been exactly recited from page 8 of the A submissions.
- (6) In all the circumstances, the Panel does not prefer the D account or interpretation in this discrete context of matters on the balance of reliable material before it.

8.19 The Panel additionally notes the following here. Even if Dr Ardrey had used the term 'ownership' in these asserted discussions with Dr Dixon, these observations in that context are additionally pertinent:

- (a) It may well be considered that a layperson, in a discussion on such a matter, may (theoretically only, because it is in any case refuted by A here) use in day-to-day commercial parlance the term 'ownership'. The Panel may take some judicial or administrative notice of the commonality and daily commercial reality that many

lay or commercial persons indeed do so. Equally, judicial and administrative notice may be had to the reality that many legal professionals, themselves, in fact equally do so. 'Ownership' is an expression which can connote a host of interpretations depending upon circumstances and context. For example, 'ownership' might be used conversationally with an intent to singularly describe 'registration', no more. That indeed is in part A's position here.

- (b) 'Ownership' might be used conversationally to theoretically connote full legal right title and interest in and full equitable and beneficial ownership of a registered item of intellectual property, namely here, for example only, a domain name. Conversationally, especially as between lay parties, this however would, in the view of the Panel, be a less likely usage or interpretation than the former example. This particular usage would usually fall at a more formal level, as for example between legal or Trade Mark, or patent professionals (for instance).

- (c) The circumstances and context of the conversational exchange are equally examinable. The Panel has already indicated that Dr Ardrey was not at first instance directly himself privy or as a party to the very arrangement now given a somewhat different urged version submitted for D. For example, it may well be that, relative to a contended discussion with Dr Ardrey, arguably, Dr Dixon had a quite different and distinct emphasis in his mind in any such discussion for a host of potential or possible reasons. For example, by June 2009, Dr Dixon was taking a quite different view on matters. He was then reliably conceivably more highly alert to the potential significant differences between domain name 'registration' per se and the much broader question of legal 'ownership'. This would be especially so having regard to Dr Dixon being one of the three individuals at the consensual registration arrangement discussions and concurrence in late-July 2008. Also, Dr Ardrey does not feature in any of the later email or other communications largely between singularly Dr Dixon with Dr Anseline on the papers before the Panel. Against that, Dr Ardrey was, firstly, as stated, not privy to those initial July 2008 discussions, was removed from their content, at least as to any

firsthand knowledge of such exchange then, and may not have been attuned to the significance of any points which Dr Dixon may have had in his mind as to emphasis, including as to any differentials in terms of expressions such as 'ownership' including as being quite distinct from 'registration'.

(d) Illustratively, it would in those circumstances be the natural lay-usage and expression of 'ownership' which could well be used by a party, here Dr Ardrey, and indeed reliably more so than any 'ownership' expression addressing the otherwise fine and finite, but not insignificant, distinction from 'registration'.

(e) While Dr Dixon (in his 4 June 2009 email to Dr Anseline) asserts a 'request' from Dr Ardrey to the effect of an 'allowance' by D so that A might 'use' the Disputed Domain Name, in a contended context that A '*declined to accept transfer of the names .. due to costs..*' (etc), what in this context, in the view of the Panel, is significantly missing includes:

(1) Dr Dixon does not recite or submit anything as to the purported exact conversational content of this exchange. There is only the asserted said 4 June 2009 email content which, in effect, comprised a unilateral assertion by D alone.

(2) It is unclear when this exchange took place. By reference only to the said email of 4 June 2009 and to the expressions of Dr Dixon therein such include:

(a) '*..reviewed again the email traffic regarding the registration of the ... domain name in July and august (sic) 2008*'.

(b) The contention that '*at the time..*' and '*.. that request .. from William Ardrey.. who at that **time**..*' (emphasis added).

(c) These references chronologically seem to suggest an assertion of this '*immediate transfer*' request discussion at or in the period July-August 2008.

(d) But there is significant imprecision in these respects on a material contention now put by D to this referral which, respectfully, attracts only evidentiary caution as to any safe reliance on any of it.

8.20 Although 'costs' factors are alleged by D as the reason here for the contended A declining of the Disputed Domain Name transfer back, there is no reference at all as to what were the specific 'costs' factors discussed or raised. If this exchange took place in July-August 2008, then the Disputed Domain Name registration itself occurred on or about 29 July 2008, then the only 'costs' which could sensibly have been on the table from A at that point were the Dr Dixon or D then out-of-pocket registration expenses of \$125. That interpretation of any such exchange would only be entirely consistent with the three-party discussion already had to that effect. It would also be entirely consistent with the fact that it speedily followed registration itself, such that it would reconcile with a concern resident then in A that the Disputed Domain Name transfer occur (as arranged), but not with a contended 'costs' prohibitive factor so early emerging.

8.21 The question of any 'authority' or otherwise of Dr Ardrey for A is not material either way in the context of the observations already made above.

8.22 Further, the Panel notes that this 4 June 2009 email, which raises these specific D assertions, emerges only after the receipt by D from Bernard Ponting & Co of that Firm's faxes (on behalf of A) of 3 and 4 June 2009. The assertion now put to this referral on behalf of D of this element of events, on the material at least before the Panel, does not emerge in any of the interim ten-or-eleven-month period between July 2008 and August 2009. It emerges, on the material before the Panel, only in the said 4 June 2009 email from Dr Dixon to Dr Anseline when, on its face, that email illustrates that Dr Dixon: *'..had taken the then opportunity to "review again the email traffic" on registration going back to July/August 2008'*.

8.23 These assertions in these terms did not, on the material before the Panel, emerge in any interim period from July 2008 to June 2009,

despite the relatively constant series of communications (and thus possible opportunities for the Respondent D to do so) on other matters of disharmony between the parties.

8.24 Although there remains a potential divergence in interpretations given to some of these matters, the Panel prefers on balance the account of A submitted relative to them, not only for the reasons stated, but because the chronology before the Panel reconciles with the actions of A not being inconsistent in any sense with having given up any of its rights, whether as to registration or ownership, relative to the Disputed Domain Name. Equally, there was no material before the Panel which evidences that A had at any stage recognised any other proprietorship, whether as to Disputed Domain Name registration, or as to ownership generally.

8.25 Further, again for completeness, the Panel reverts to an additional element of the relevant history. As previously stated, D, by mid-2009, had reverted to a position of, in effect, commanding a Disputed Domain Name registration transfer only in consideration for a commercial price or commercial sale. Indeed, the Respondent D before this referral does not deny this. To the contrary, D stridently and repeatedly reasserts it, including as a matter of contended right. The history needs to be briefly restated here.

8.26 As at 28 July 2008 or thereabouts, three relevant persons, acting globally then in the common cause interests of A, had entered upon a process of mutual consensus to address internet matters for A, including as to domain name registration, singularly in the interests then of A. Only later has it translated into the contended interpretation now submitted for D that the Respondent retains 'ownership', and that the Disputed Domain Name was, in effect, by events of the intervening ten-or-eleven-month period, to become only for sale on a commercial basis and available to the public at large. This is a major shift and does not reconcile with the analysis which the Panel has devoted to this matter already comprehensively outlined.

8.27 Further, respectfully, there appear to be some inconsistencies within certain elements of the submissions to this referral from D. The Panel

deals with some elements (only) of this, including under this heading of bad faith.

8.28 On 15 June 2009, apparently D caused the redirection of calls to the Disputed Domain Name's site to the website controlled by D of 'skincanceronly.com.au'. It appears (and it is not denied) that subsequently, and in relatively quick succession in a period from 15 June 2009 to 1 July 2009, the Respondent D placed on the 'skincanceronly.com.au' site a range of considerably adverse commentary about the business and operations of A (to describe it briefly). That commentary was not brief, nor isolated, but was indeed quite extensive and continuous, and publicly available and accessible. Certain comments on it, and only as pertinent briefly, follow. However, A contended that the rationale for D in doing this was for D to exert pressure on A to 'pay a substantial sum of money' for the transfer of the two (2) domain names. The Panel has read all of this material.

8.29 Although, by inference, D refutes this contention at one point in its submissions (page 6), there is the apparent D inconsistency which immediately follows in terms that: *'..the information regarding Allmedic.. was only placed on that site AFTER Allmedic had indicated that it was not prepared to purchase the domain name from me at any offered price'*. If anything, that would appear to affirm something of the essence of the contention on this aspect of matters as raised by A.

8.30 The Panel is of the view and determination that this element of history is illustrative of bad faith by D to the extent that it is a significant commercial change, on the discrete issue only relevant here as to Disputed Domain Name registration and rights, and comprised a significant removal and departure from the integral registration arrangement pursuant to the trusteeship (in effect) originally entered upon, and already comprehensively discussed.

8.31 As stated, the Panel has troubled with the closest examination of the information placements D unilaterally implemented on its 'skincanceronly.com.au' site in that period of 15 June 2009 to 1 July 2009 (as is contained illustratively within Annexure pages 65-76 of the A submissions here). Most of that content is not pertinent to Disputed

Domain Name history as such, dealing largely with the D representations to the public at large of its view of the A operations, business, trial testing, medical issues and the like. To the extent, however, that there is some relevance, including pertinently under the bad faith heading here, the Panel makes further observations.

8.32 These unilaterally undertaken D placements are curious, respectfully, in that the commentary within them asserts that neither D nor Dr Dixon endorses the A skin products. The reasons are not material to the considerations here. But, in that the adverse commentaries here contained by Dr Dixon are made at the same time as his company, bearing his name, is the recorded registrant of the Disputed Domain Name, does not appear to reconcile with a mutuality of interests that, at arms length, one might normally regard the Respondent D or Dr Dixon as having in the Disputed Domain Name, as distinct from disowning it, but at the same time maintaining a registration right.

8.33 To the extent of these matters, the Panel has given the closest deliberation to the requisite elements of bad faith as exhibited within paragraph 4b of the Policy. It is reiterated that the paragraph 4b circumstances in paragraphs (i) to (iv) thereof are not exclusive, are illustrative only, but that one only of any of them can connote a reliable finding of bad faith. Other circumstances, other than those illustrated at paragraph 4b, can equally do so. In this regard the Panel concludes and finds, for the reasons comprehensively already outlined that:

(a) The registration obtained by D now converted to a holding out now for sale or renting, or 'parking', or otherwise treatment unilaterally by D of the Disputed Domain Name is contrary to the representations originally made in relation to that registration in late July 2008 and is a registration and use by D in bad faith.

(b) Other interim matters of contended disharmony between the parties with reference to matters, other than relative to the Disputed Domain Name, are not material and if they have comprised any rationale for such D treatment now given to the resistance to the transfer back to A of such registration, is registration or use in bad faith.

(c) That the continuance of resistance to such transfer back from D to A, as has become more recently illustrated within the diversionary measures unilaterally undertaken by D including of adverse commentary, including relative to the interests of A, on the D website of 'skincanceronly.com.au', as has become intermeshed with the resistance by D to such transfer back, is registration and use in bad faith.

8.34 Further, there is no material before the Panel indicative of any initiative of D towards any clear website disclaimer as to attempt to diffuse or remove any potential confusion or to identify that D is a qualified registrant only of the Disputed Domain Name (*AGDEST v Blogger Pty Ltd*, IAMA-3058 (2007)).

8.35 In the Panel's view and determination, each of these considerations, and all such matters taken together, reliably establish that the registration by D of the Disputed Domain Name has been and become evidenced by registration and continuing use in bad faith.

8.36 For the reasons outlined, the Panel determines that A as Complainant has satisfied the requirements of Paragraph 4a(iii) of the auDRP Policy as to Disputed Domain Name registration in bad faith.

Some additional observations

8.37 The Panel makes these further observations for completeness.

8.38 The Respondent D appears to have placed predominant emphasis including in submissions on matters of medical and related background, for example, to product or service trials and questions of contended integrity of product , marketing and trial and related matters undertaken by A.

8.39 While these may be issues of divergence of the parties, they are issues, commercial, medical or otherwise, quite separable and distinct from the discrete Disputed Domain Name issue singularly central to this referral.

8.40 Each party has had opportunity for submissions to this referral and consequently has provided the referral with its respective submissions. It is noted in this regard that the Respondent in part asserts that it is *'..not in a position to release any emails.. because.. been.. threatened by Allmedic with breach of my shareholder agreement.. in the event that I released to any third party emails that Allmedic regards as confidential to its business..'* Respectfully, this does not appear to reconcile with other material before this referral not exclusively including:

- (a) Dr Dixon's email to Dr Anseline of 16 June 2009 reserving a contended right in terms *'I reserve the right to publish on my web site as I see fit..'*
- (b) The commentary about A (much of it adverse) appearing on the calls redirection to the D website 'skincanceronly.com.au' where much of the Respondent's commentary and content there would appear to be on a continuing basis on matters reasonably sensitive to the A business.
- (c) The Dr Dixon email of 4 June 2009 to Dr Anseline in part stating *'..If you thought at any moment that I did not carefully categorize and file every single email to and from Allmedic then you were mistaken. I also have the email trail showing such things as..'*
- (d) The Respondent acknowledgment in this context at page 3 of its submissions in terms *'..TMC acknowledged that the material on the web site may cause Allmedic to be upset..'*

8.41 In any event, the Panel has troubled to forensically study the entire content of all of the written material each of the parties has chosen to submit in this referral without exception, and in the singular context of matters pertinent to this Disputed Domain Name referral.

8.42 For certainty and completeness, the Panel also notes that, on the material before it, the Panel cannot reliably accept the D contention that A made *'no attempt to reimburse'* the Disputed Domain Name registration cost. The record and material before the Panel does not

give it any safe foundation reliably to arrive at such a conclusion. Illustratively, for example, at page 6 of the D submissions, D acknowledges that an A offer was made although expressed in the terms of a D interpretation of *'..made the disingenuous offer..'*. What the Respondent D asserts here is that the registration cost was *'one of many costs'* with reference to (presumably the registration cost being) *'..this inadequate and isolated cost'*.

8.43 The unilateral later D addendum of additional costs, fees, charges or imposts to be latterly held out and added to original registration cost, on the written material before the Panel, is in the view and determination of the Panel contrary to the agency and trusteeship which resided in the original arrangement relative to registration as at end-July 2008.

9. DECISION

9.1 The Panel concludes for the reasons stated:

- (a) That the Disputed Domain Name is confusingly similar to a name, trade mark, or service mark in which the Complainant A has rights;
- (b) That the Respondent D has no rights or legitimate interests in the Disputed Domain Name; and,
- (c) That the Respondent D registered and used the Disputed Domain Name in bad faith.

9.2 For the reasons outlined, the Complainant has satisfied the elements of Paragraph 4a of the auDRP Policy.

10. RELIEF

10.1 The Panel orders that the Disputed Domain Name 'allmedic.net.au' be transferred to the Complainant A.

10.2 The Panel notes that the Complainant A is eligible to hold the Disputed Domain Name under Schedule A, Paragraph 4a(i) of the auDA Policy as the owner of a 'name, trademark or service mark' in which the Complainant A has rights.

Dated this 12th day of August 2009

.....
JOHN A. McGRUTHER
SOLE PANELLIST

ANNEXURE 'A'

PROCEDURAL HISTORY

(allmedic.net.au)

- 1.1 The complaint was submitted for decision in accordance with the .au Dispute Resolution Policy and Rules (auDRP), which was approved by auDA in 2001 and commenced operation on 1 August 2002 and LEADR's Supplementary Rules (LEADR is the Provider).
- 1.2 The complete Application was received from the Complainant by LEADR on 14 July 2009.
- 1.3 On **14 July 2009** LEADR **express posted** to the Respondent a dispute notification letter and a copy of the Application.
- 1.4 On 17 July 2009 LEADR contacted the Respondent via phone and confirmed that the Application had been received after 16 July 2009 by post.
- 1.5 A copy of the application and a copy of the dispute notification letter were also posted to the Registrar **Aust Domains** on **14 July 2009**.
- 1.6 LEADR advised auDA of the complaint on **14 July 2009** via email.
- 1.7 On **31 July 2009** the provider approached the Panellist. The Panellist confirmed **his** availability, informed LEADR that he had no conflict issues with the parties and accepted the matter on **31 July 2009**.
- 1.8 The response was due on 5 August 2009. A response was received by 31 July 2009.
- 1.9 The Panellist was informed on 3 August 2009 that the package was being sent for Adjudication.

ANNEXURE B

.au DISPUTE RESOLUTION POLICY NO. 2008.01

COMPLAINANT: Allmedic Pty Ltd
RESPONDENT: A. J. Dixon Pty Ltd
REGISTRAR Aust Domains

PERSONS INVOLVED: Allmedic Pty Ltd (Complainant)

A.J. Dixon Pty Ltd (Respondent)

Dr Anthony Dixon - Associate Professor Anthony Dixon MB BS FACRRM FACSCM PhD, shareholder, Director and Company Secretary of the Respondent and of A & M Dixon Investments Pty Ltd.

A & M Dixon Investments Pty Ltd - a company associated with Dr Anthony Dixon, and a shareholder in the Complainant.

Professor Peter Smith - Dr Peter Smith RFD BMedSci, MBBS, FRACP, PhD, MAAAAI, MEAACI, Associate Professor in Clinical Medicine, Griffith University Queensland, a Director and indirectly a shareholder of the Complainant.

Dr William Anseline BSc (Hons) B.Med (Newcastle), ACSCM Member, Managing Director of the Complainant.

Dr William Ardrey a consultant engaged to provide strategic advice to the Complainant. He is not a director, direct or indirect shareholder or an employee of the Complainant.

Mr Wayne Cattach - Chairman of the Complainant.

Dr Graeme Langsford - now the Complainant's Clinical Director.

Dr Martin Braun - the Complainant's laser and photodynamic therapy director,

Dr James S Rowe - Scientific Director of the Complainant.

Daryll Knowles - Director of Pharmaceuticals of the Complainant.