Powers of Internet Domain Name Country Code administrator confirmed: *Capital Networks Pty Ltd v. auDomain Administration Limited**

The Hon Neil Brown QC

The Hon Neil Brown QC is the former Minister for Communications in the Australian Government. He has been a barrister since 1964, a Queen's Counsel since 1980 and now practises as an arbitrator and mediator. He is a Member of the Panel of Conciliators at the International Centre for the Settlement of Investment Disputes (ICSID) in Washington, USA, a Member of the World Intellectual Property Organisation (WIPO) Arbitration and Mediation Center's List of Neutrals and the Center's Domain Name Panel, a Member of the Panel of Arbitrators and Mediators, National Arbitration Forum (USA) and a Panellist for the Resolution of Domain Name Disputes at the Regional Centre for Arbitration, Kuala Lumpur, Malaysia.

The Internet has produced its own unique range of disputes and, correspondingly, its own unique way of resolving them. Domain names in particular have produced thousands of disputes that have been dealt with by panels of arbitrators which resolve arguments on ownership and then exercise the power to transfer the domain name to a claimant or cancel it altogether. This has become a quick, economical and generally supported method of resolving domain name disputes.

Just beneath the surface, however, are other disputes between the actual registrars of domain names, that is, the companies with which individuals register their domain names.

A recent decision of the Federal Court of Australia has unearthed yet another type of dispute, this time between a domain name registrar and a national administrator of domain space in its own country.

We do not know how these sort of disputes will work out in the future; they will often depend on their own facts and, of course, on the provisions of the local law. But at least we now know, as a result of this decision, something about the extent to which a national administrator can go to exert control over individual registrars.

The Facts

The Appellant (**Capital Networks**) was accredited by the Internet Corporation for Assigned Names and Numbers (**ICANN**) as a registrar to process domain name registrations for the public in certain generic Top Level Domains (**gTLDs**) used as internet addresses. These domain names are the valuable names with the suffixes .com, .net and .org. They are generic because they are world wide in their use and not confined to one country or another. They are 'top level' because they are the most popular and prestigious of domain name categories.

So prestigious are they that ICANN has now introduced some others, namely .biz, .info, .aero, .coop, museum, .name and .pro.

The Respondent, (**auDomain**), a non-profit company, was delegated by ICANN to manage the Australian local counterparts of the gTLDs, called country code top level domains (**ccTLDs**). In the case of Australia, they are .au ccTLDs, that is, top level domains with an Australian prefix, of which .com.au and .net.au are well known examples. Pursuant to that delegation, auDomain accredited 20 companies to act as registrars for these Australian ccTLDs and one of them was Capital Networks.

Capital Networks therefore had two roles, one under the umbrella of ICANN as a registrar of gTLD names like .com, a role not confined to Australia, and a second role under the umbrella of auDomain as a registrar of Australian ccTLD names like .com.au.

It is important and probably pivotal to the decision that auDomain also had a second role. We have already seen that it had been delegated the administration of the Australian ccTLDs and that it was this head of power that enabled it to accredit Capital Networks to register domain names in the Australian ccTLDs.

However, auDomain also had a wider role beyond being the administrator of Australian ccTLDs, namely a role drawn from its constitution. That role was generally to supervise the activities of gTLD name users in Australia, by definition being those domain names that were not Australian but which were worldwide.

The Complaints

Into this structure descended the following problems.

It appears there had been complaints by some individuals who had gTLD name registrations with Capital Networks. The complaints were to the effect that the customers were dissatisfied with the service received from Capital Networks and they therefore wanted to transfer their registrations to other registrars. The obligation to transfer registrations was one of the burdens accepted by Capital Networks when it entered into its Registrar Agreement with auDomain.

It will be seen at once that the customers' complaints were not (or were not confined to) complaints about the administration of purely Australian or .au domain names. They were complaints about gTLD names, like .com. As auDomain's evidence put it, the complaints were about Capital Networks' "activities in the gTLD domain space".[1]

The dissatisfied customers enlisted the help of auDomain, which started to investigate the matter and demanded that Capital Networks provide it with full details of the methods and systems that Capital Networks used to deal with requests to transfer gTLD names away from Capital Networks.

Capital Networks replied in effect that

this was none of auDomain's business. The reason it gave for this riposte was that auDomain's writ ran only as far as the boundaries of the Australian or .au domain and not into the wider international domain of gTLDs like .com, about which the information had been demanded.

But a bigger dispute emerged, for auDomain said that Capital Networks' refusal to answer its questions put auDomain's very accreditation as an .au registrar at risk.

Capital Networks moved quickly and launched a pre-emptive strike against auDomain by seeking an injunction to stop auDomain from cancelling Capital Networks' accreditation.

In this context, therefore, the significant question arose of whether a country administrator like auDomain could demand information from an ICANN registrar, not about the registrar's stewardship of names in the ccTLDs, but about its performance as an international registrar for gTLDs, and then whether it was reasonable for auDomain to ask for such information.

Wrapped up in this was of course another dispute or series of disputes. The Australian registrants of names in the Australian ccTLDs had complained to auDomain about Capital Networks. So by trying to resolve those disputes for the customers, auDomain was inevitably drawn into a debate about the extent of its own authority over Capital Networks.

Not the least important point in this regard was that, under its constitution, auDomain had jurisdiction to consider complaints over ownership of Australian ccTLD names but not complaints about gTLD names. Thus, an Australian company complaining that a cybersquatter had wrongly appropriated a .com.au domain name could complain to auDomain, but the same company could not complain to auDomain about the misappropriation of a .com domain; it would have to follow one of the accredited international dispute resolution mechanisms.

That and other issues got a good airing in the Federal Court of Australia. As the matter had three hearings, the preliminary hearing, the trial itself and an appeal to the Full Court, and as five judges of the Federal Court have now made their contributions, at least the Australian answers to these questions are clear. The answers emerged by the following process.

The Relationship Between auDomain and Capital Networks

The relationship between auDomain and Capital Networks was governed by a Registrar Agreement. This agreement required Capital Networks to provide auDomain with all information reasonably requested '... in relation to the Registrar [Capital Networks] and the operation of the registrar's [Capital Networks'] business...'.

Capital Networks claimed that this meant its business in the Australian ccTLDs and not in the universal gTLDs, but auDomain claimed that the application of the clause was not so limited. In the event, interpreting the agreement as a whole, the Full Court on appeal agreed with the trial judge and held that the clause was "...apt to include all the commercial activities of the other party to the agreement".[2]

Thus, auDomain was entitled to seek information from Capital Networks about the way it was handling its gTLD accounts and not just about its Australian ccTLD accounts.

This of course was a very significant ruling, for it meant that if the request was reasonable, ICANN's delegate, auDomain, appointed only to administer the Australian space, could demand answers from an ICANN registrar like Capital Networks on how it was administering gTLDs outside the Australian space and, indeed, on anything else of a commercial nature.

Was auDomain's Request for Information a Reasonable One?

The second issue was whether the information requested was reasonable and it is here that the real ambit of the decision emerges.

The Court held that if auDomain had "knowledge of alleged sharp practices or unethical behaviour on the part of one of its accredited registrars", then on "any objective standard" it was reasonable to ask Capital Networks to give an account of its conduct.[3] In that regard the Court had no difficulty in disposing of one reason advanced as to why such a request was unreasonable. It had been argued by Capital Networks that the jurisdiction of auDomain to hear and determine complaints did not extend to disputes over gTLD names but only to disputes over Australian ccTLD names. Thus, said Capital Networks, it could not be reasonable for auDomain to ask for information it could not use in dispute resolution proceedings as it did not run dispute resolution proceedings over gTLDs.

Not so, said the Court, for this fact did not matter in the slightest. Nor would it matter if the complaints from Capital Networks' customers were about its quite separate activities in webhosting or even about the boutique business it had apparently cornered as the registrar for the .hm (Heard and McDonald Islands) domain.

The reason why these objections carried no weight was that such complaints, if true, reflected on Capital Networks' performance as a domain name registrar of *any* sort.

Moreover, the Full Court expressly approved the trial judge's reliance firstly on information provided by Capital Networks when it applied to auDomain to become a registrar and secondly on auDomain's role "...in the self-regulatory structure for the Internet" to establish the reasonableness of the information being sought.[4]

With respect to the first of those two elements, the trial judge had noted that, when Capital Networks applied to auDomain for accreditation, it "had linked its auDA and gTLD activities".[5] In other words, when applying to be a .com.au registrar, Capital Networks had relied on its experience as a .com registrar, on the fact that its systems had "proven effective for registrations in gTLD" and on the fact that it had had a "'very low' level of complaints".[6]

Her Honour had therefore concluded that Capital Networks had itself, by the contents of its application form to

auDomain, made relevant the information on gTLDs that was now being sought.

With respect to the second element, the trial judge had relied on the fact that Capital Networks had used auDomain's logo, that it was entitled to do so under the Registrar Agreement, that it stated on its website that it was 'an auDA accredited registrar' and that the public were invited on that website to register through Capital Networks either an .au domain name or a gTLD name. Her Honour then concluded from those facts as follows:

"In my opinion that has at least two consequences. First, it is reasonable for [auDomain] to inquire into gTLD activities insofar as they may reflect on [auDomain]. Secondly, it is reasonable for [auDomain] to seek information as to the extent to which its accreditation is being used by [Capital Networks] with respect to non [auDomain] activities."[7]

The Full Court accepted this line of argument as linking the two areas of Capital Networks' activities and hence justifying auDomain's seeking information from Capital Networks on its gTLD stewardship.

That link was further cemented, as the trial judge had pointed out, by the fact that auDomain's constitution, the Sponsorship Agreement under which ICANN had appointed auDomain as a registrar, the principles under which auDomain had to administer the ccTLDs and auDomain's endorsement by the Australian Government, all contributed to auDomain's pivotal role as the stabilising, responsible self-regulator of the domain name system in Australia.

In turn, these factors strengthened the notion of the reasonableness of the disputed information that was being sought.

Conclusion

Thus it was held and confirmed that auDomain as a ccTLD administrator was entitled to seek information from Capital Networks on its stewardship as an ICANN – accredited registrar of gTLDs as such a request was within auDomain's powers and the request was reasonable.

Moreover, there was no breach of the Trade Practices Act and there was no protection for Capital Networks to be found in the Franchise Code.

With respect to the claims under the Trade Practices Act (**Act**), Capital Networks had argued that when auDomain demanded information about its conduct as an ICANN accredited registrar and about its gTLD registrations, the demand was both unconscionable under section 51AC and misleading and deceptive under section 52 of the Act.

The trial judge rejected both of these claims. She held that even if the demand were beyond power, which it was not, it would not be unconscionable, as auDomain was only requesting information.

Likewise, as auDomain was entitled under the Registrar Agreement both to ask Capital Networks for the information and to suspend Capital Networks' accreditation and as there was no evidence that it had acted otherwise than in good faith in carrying out those functions, its demands were neither misleading nor deceptive.

On appeal, neither of the claims was pursued and the Full Court's decision makes no criticism of the trial judge's analysis of these issues.

Capital Networks had also claimed that auDomain's conduct had contravened the Franchise Code of Conduct (**Code**), an industry code within the meaning of section 51 AD of the Act that would have given Capital Networks some relief. This was so, Capital Networks said, because the Registrar Agreement was a 'franchise agreement' under the Code.

If the Registrar Agreement was to be so regarded, Capital Networks had to show that it was, within the meaning of the Code, a 'system or marketing plan substantially determined, controlled or suggested' by auDomain.

The trial judge held that this meant that Capital Networks' business had to be carried on substantially under such a plan, which it was not, for there were many aspects of Capital Networks' business that had nothing to do with the Registrar Agreement.

The Full Court did not disagree with this approach, but adopted a more immediately fatal objection to Capital Networks' case on this point. The Code gave relief, the Full Court held, only if a franchisor proposed to terminate a franchise agreement. That had not been established in this case, for, on the evidence, auDomain had proposed only to suspend Capital Networks, not to terminate the Registrar Agreement, which would remain on foot. Accordingly, there was no comfort to be found under the Code for Capital Networks.

Clearly, the applicability of this decision in other countries will depend on the wording of legislation and circumstances. But at the very least the decision strengthens the authority of ICANN'S country code administrators in carrying out their proper role and hence contributing to a domain name system that promotes public confidence.

The issue has certainly gone as far as it can in the Australian courts, for although the unsuccessful Capital Networks lodged an application for special leave to appeal to the High Court of Australia, it was announced on 29 April 2005 that the application had been withdrawn. The withdrawal came as part of a package deal; auDomain withdrew its application to wind up Capital Networks and Capital Networks' registrar accreditation was terminated by consent.

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* (2004) FCAFC 324 (9 December 2004).

1 Capital Networks Ltd v .auDomain Administration Limited (2004) FCA 808 (24 June 2004) at [62].

2 (2004) FCAFC 324 at [22].

3 id at [23].

4 ibid.

5 (2004) FCA 808 at [69].

6 id at [49]-[50].

7 id at [69].