



WIPO Arbitration and Mediation Center

ADMINISTRATIVE PANEL DECISION

**The Crown in Right of the State of Tasmania trading as "Tourism Tasmania" v.
Gordon James Craven**

Case No. DAU2003 -0001

1. The Parties

The Complainant is The Crown in Right of the State of Tasmania trading as "Tourism Tasmania" of Tasmania, Australia, represented by Mr. Malcolm Wells, Acting Chief Executive Officer of Tourism Tasmania.

The Respondent is Mr. Gordon James Craven of Tasmania, Australia.

2. The Domain Name and Registrar

The disputed domain name is <discover-tasmania.com.au>, registered with NetRegistry Pty Ltd.

3. Procedural History

This Complaint was submitted for decision in accordance with the .au Dispute Resolution Policy ("the Policy"), approved by the Board of .au Domain Administration ("auDA") on August 13, 2001, the Dispute Resolution Rules for .au Dispute Resolution Policy ("the Rules") and the WIPO Supplemental Rules for .au Domain Name Dispute Resolution Policy (the "Supplemental Rules").

The Complaint was filed with the WIPO Arbitration and Mediation Center ("the Center") on February 14, 2003. That day the Center transmitted by email to NetRegistry Pty Ltd. a request for registrar verification in connection with the domain name at issue. On February 25, 2003, NetRegistry Pty Ltd. transmitted by email to the Center its verification response confirming that the Respondent is listed as the registrant, providing the contact details for the administrative, billing, and technical contact and confirming that the Policy applies. The Center verified that the Complaint complies with the Policy, the Rules and the Supplemental Rules.

In accordance with the Rules, paragraphs 2(a) and 4(a), the Center formally notified the Respondent of the Complaint and the proceedings commenced on February 25, 2003. In accordance with the Rules, paragraph 5(a), the due date for the Response was March 17, 2003. The Response was filed with the Center on March 17, 2003.

The Center appointed Alan Limbury, Staniforth Ricketson and Keith Gymer as panelists in this matter on April 3, 2003. The Panel finds that it was properly constituted. Each member of the Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

On March 28, 2003, the Respondent filed by email an unsolicited supplementary submission. The Complainant commented upon it the same day. On March 30, 2003, the Respondent filed a request to file a further supplementary submission, together with that submission and its attachments. Upon its appointment the Panel decided to receive the supplementary submissions from the Center without at that stage deciding whether to admit them.

Many UDRP panels have held that, under the UDRP Rules, additional submissions are inappropriate except in the rarest of circumstances, such as discovery of evidence not reasonably available to the submitting party at the time of its initial submission or arguments by the respondent that the complainant could not reasonably have anticipated: *CRS Technology Corp. v. Conde Net, Inc.*, NAFFA 0002000093547; *Plaza Operating Partners, Ltd. v. Document Technologies, Inc. v. International Electronic Communications, Inc.*, WIPO Case No. D2000-0270 (June 8, 2000); *Universal City Studios, Inc. v. G.A.B. Enterprises*, WIPO Case No. D2000-0416 (July 3, 2000); *Wal-Mart Stores, Inc. v. Richard MacLeod*, WIPO Case No. D2000-0662 (September 21, 2000); *Electronic Commerce Media, Inc. v. Taos Mountain*, NAFFA 0008000095344; *Parfums Christian Dior S.A. v. Jadore*, WIPO Case No. D2000-0938 (November 9, 2000); *Viz Communications, Inc. v. Red Sundbawww.animerica.com*, WIPO Case No. D2000-0905 (December 29, 2000) and *Goldline International, Inc. v. GoldLine*, WIPO Case No. D2000-1151 (January 8, 2001). The Rules are no different in this regard from the UDRP Rules.

The Panel does not admit the supplementary submissions because they relate to actions alleged to have been taken after the relevant date of filing of the Complaint, and which therefore do not advance either party's case.

4. Factual Background

Tourism Tasmania is an instrumentality of the Complainant established by section 4 of the *Tourism Tasmania Act 1996*. It is a body corporate, which may sue and be sued in its corporate name. Its objective is to promote tourism in Tasmania.

Tourism Tasmania is the registered proprietor of the following trademarks in relation to the promotion of tourism:

“TASMANIA Australia’s Best Holiday”, No. 532944, registered on April 23, 1990.

“TASMANIA Be Tempted”, No. 542028, registered on September 14, 1990.

The Complainant is the registered proprietor of the following trademarks in relation to the promotion of tourism:

“TASMANIA Discover your natural state (with image of Tasmanian Tiger, water and plants)”, No. 674285, registered on October 5, 1995.

“TASMANIA More than you imagine (with image of Tasmanian Tiger, water and plants)”, No. 772617, registered on September 9, 1998.

On October 12, 2000, Tourism Tasmania became the registrant of the domain name <discovertasmania.com.au> and on November 7, 2000, it became the registrant of the domain name <discovertasmania.com>. It has maintained an active website at those addresses since March 15, 2001. The words “Discover Tasmania” appear on the title bar of every webpage.

On November 28, 2002, Tourism Tasmania registered the business name “Discover Tasmania”. Twice previously registered and deregistered, that business name had been available for registration for the immediately preceding period of nearly two years.

Also on November 28, 2002, the Respondent, who has considerable experience in the tourism industry in Tasmania, registered the disputed domain name <discover-tasmania.com.au>. As at the date of the Complaint, that domain name resolved to a website which, in the context of tourism, depicted, described and criticized forestry practices in Tasmania said to be permitted and encouraged by the Complainant. The relationship in Tasmania between forestry practices, tourism and environmental protection has been controversial for some time.

5. Parties’ Contentions

A. Complainant

The Complainant puts forward the following contentions.

It has used the brand “Discover Tasmania”, in conjunction with its trademarks, since the mark “TASMANIA Discover your natural state” was registered in 1995, and has by such use established a common law right to the exclusive use of the name “Discover Tasmania”.

The disputed domain name is confusingly similar to the Complainant’s registered mark “TASMANIA Discover your natural state” and is identical to and confusingly similar to the Complainant’s business name “Discover Tasmania”.

By reason of his experience in the tourism industry and his receipt of correspondence from the Complainant bearing the mark “TASMANIA Discover your natural state (with image)”, the Respondent knew of the Complainant’s rights and business reputation relating to its brand “Discover Tasmania” and of the Complainant’s web address.

The Respondent has no rights or legitimate interest in the disputed domain name. It is not being used to offer goods or services for a fee and there is no evidence of preparation to do so. Any use must be misleadingly to divert the Complainant’s prospective customer to the Respondent’s site and to tarnish the Complainant’s name and trademark.

The Respondent is not and has not been known by the disputed domain name either as an individual, a business or in any other respect.

At the time of registration, the Respondent did not satisfy the eligibility and allocation rules for .com.au registration as set out in Schedule C of the *Domain Name Eligibility and Allocation Policy Rules for Open 2LDs* in that he did not have a company, business, trading, association or statutory body name with which the disputed domain name could match exactly, for which it could be an acronym or with which it could otherwise be substantially connected.

The disputed domain name was registered or is subsequently being used in bad faith in that the Respondent certainly knew of the public profile of the Complainant's trade marks, in particular "TASMANIA Discover your natural state"; its rights and business reputation relating to its brand name "Discover Tasmania"; the Complainant's statutory role in promoting tourism in Tasmania and the Complainant's web addresses.

Further the Respondent registered the disputed domain name primarily for the purpose of disrupting the Complainant's business activities. At a meeting at the Hobart Library coffeeshop on December 4, 2002, with Mr. Robert Hogan, General Manager Communications and Information Technology of Tourism Tasmania, the Respondent said that one of his objectives was that his site at <discover-tasmania.com> would undermine the brand values that the Complainant was promoting to the world. He indicated that he was not willing to part with the disputed domain name because it provided a means to inform people of the forestry practices in Tasmania and that he saw it as his role to do so; that he was investigating using a suite of "Discover Tasmania" sites to generate business (income) by linking to his commercial sites. The Respondent expressed an anti-Government view and was angry at the tourism industry for what he saw as its subservient approach to Government policy on forestry.

Prior to creating the <com.au> site the Respondent established a site at <discover-tasmania.com> which was clearly intended to tarnish the Complainant's reputation and mark. The site still contains a defaced and disparaging version of the TM image, which is registered with the words "TASMANIA Discover your natural state". At the top of the title page of the Respondent's <com.au> site, a prominent direct link to the disparaging <.com> site is provided, as it is elsewhere on the site.

The Respondent has subsequently registered the domain name <discovertasmania.au.com>, further evidence of an intention misleadingly to divert and to tarnish. That domain name is published on the <com.au> site.

The use of the disputed domain names suggests that there exists an affiliation or endorsement with/from the Complainant. For example, materials published on the Respondent's website display the Complainant's TM image and contain links to other websites of the Complainant, which carry official endorsements.

B. Respondent

The Respondent puts forward the following contentions.

As to the Complainant's entitlement to bring this proceeding, the Complainant claims trademark, business name and domain name registrations which are registered in the name of Tourism Tasmania, a separate legal entity which is not a party to this Complaint. The Complainant's rights extend only to its rights in Tourism Tasmania.

Apart from use in the title bar of the Tourism Tasmania webpage since March 15, 2001, there is no evidence of use of the purported brand "Discover Tasmania" nor that those descriptive words have become exclusively associated with the Complainant or Tourism Tasmania. The Complaint does not specifically plead any right to "Discover Tasmania" as an unregistered trademark. Neither the word "Discover" nor the word "Tasmania" can give rise to exclusivity either separately or in combination. In any event, here the Complaint shows they are used in the reverse order – "Tasmania Discover".

The domain names of Tourism Tasmania do not confer upon it proprietary rights.

The disputed domain name is not confusingly similar to the trademark "TASMANIA Discover your natural state".

The Respondent registered the disputed domain name and Tourism Tasmania registered the business name "Discover Tasmania" on the same day, November 28, 2002. The business name had been available for registration for the previous 1 year, 10 months and 10 days. The registration certificate states that Tourism Tasmania started to trade under that name on November 26, 2002. Apart from that statement, there is no evidence Tourism Tasmania has ever traded under that business name and no evidence that it has been authorized by the Minister pursuant to the *Tourism Tasmania Act 1996, s. 7(4)(b)* to do so.

The Respondent contends that the business name was registered in bad faith by the Complainant as a means to secure rights to the Respondent's <discover-tasmania.com> domain name and constitutes manufactured evidence. The not to au DAPolicy paragraph 4(a)(i) makes clear that if a complainant relies on a name, it must be a duly registered company, business or other legal or trading name. Here the business name was registered on the same day as the disputed domain name. It is ridiculous to claim rights in a name that has been registered for only a few hours.

The Respondent was aware of the Complainant's web address <discovertasmania.com> sometime after March 15, 2001.

The Complainant's account of the conversation in the coffee shop is denied. The meeting was to discuss the Respondent's domain name <discover-tasmania.com>. Mr. Hogan was given a copy of the mission statement from the website at the disputed domain address which said:

"Discover-Tasmania.com.au To inform people about environmental issues across Tasmania and to assist in the ending of Clearfelling of Old Growth Forests in Tasmania coupled with the facilitation of the marketing of environmentally sustainable products and services of Tasmania."

This was followed by the statement:

"Under construction. See: Discover -Tasmania.com".

That was when Mr. Hogan first became aware of the disputed domain name. The Respondent told Mr. Hogan that the objective of his website at the domain <discover-tasmania.com> was to tell the other side of the environmental story and that in the Respondent's opinion it was unfortunate the Government chose to hide this story as it was creating considerable polarisation and discontent within the Tasmanian community by giving a misleading image that Tasmania was clean, green and natural and that the

Government brings on itself any undermining of perceived brand values as it was responsible for the truth of the matter, all the Respondent does is report it. Mr. Hogan offered to purchase both domain names. When this was rejected, he offered the Respondent a job if he would hand the domain names over.

The Respondent stated to Mr. Hogan that the Government had not trademark in Australia or USA for Discover Tasmania and Mr. Hogan acknowledged that fact.

The Respondent says the conversation has been misrepresented by the Complainant. The meeting was conducted for the purpose of enticing the Respondent into manifesting bad faith for the purposes of the auDAP Policy and is evidence of bad faith on the Complainant's part.

As to legitimacy, by tracing the Respondent's Australian Business Number from the <discover-tasmania.com.au> website, the Complainant could have ascertained that the Respondent, operating under the name Australian Business Cards.com, is in the business of constructing and developing websites and associated products and services. There is evidence that the Respondent's websites at <australianbusinesscards.com> and <ausfloristdirect.com> have been visited by Tourism Tasmania, so the Complainant was well aware of the Respondent's business of designing and developing websites and would have been well aware that the Respondent was to use the disputed domain name for directory purposes, free services and purposes connected with developing Tasmanian business, tourism and environmental websites. Accordingly its allegations that, *at the time of filing the Complaint, the Respondent's use of the disputed domain name does not demonstrate that it is being used in connection with offering any goods and services for a fee or is in preparation for such use and that there is no indication that the site is to be used commercially as a serious and made in bad faith.*

The Respondent became aware of the websites at the domains <discovertasmania.com> and <discovertasmania.com.au> and noticed the use of the descriptive term Discover Tasmania was common to both of them. He thought the term Discover Tasmania to be a good descriptive term that would be adaptable to any aspect of Tasmania. He registered the domain name <discover-tasmania.com> on November 2, 2002, and published at that domain on November 19, 2002, an environmental website named Discover Tasmania, which soon led to publicity for the Respondent's interpretation of discovering Tasmania.

On November 19, 2002, the Respondent searched the name registry of the Australian Securities and Investment Commission for the business name Discover Tasmania. He found no current registration for it and two instances of previous registration and deregistration. On November 21, 2002, he searched the Australian Trade Marks registry for words that include Discover. He found the Complainant's mark "TASMANIA Discovery your natural state" and none he considered similar enough to cause confusion with the stand-alone term Discover Tasmania. At around the same time he searched the Tasmanian White Page telephone directory (printed and on-line versions) and did not find an entry for Discover Tasmania. He checked the availability of the disputed domain name and found it to be available. He visited the websites <discovertasmania.com> and <discovertasmania.com.au> and found them to be identical, with no use of the expression Discover Tasmania anywhere except descriptively in the title bar of the webpages.

By reason of his interest in law, the Respondent was aware of the passage in the judgment of Stephen J. in *Hornsby Building Information Centre v. Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 229.

He thus believed that all usage of the term Discover Tasmania was and could only be descriptive; that no one had any trademark, business name or common law rights in that term; and that if anyone believed they had, they would have taken steps to establish and legally protect those rights.

Accordingly, after having read and understood the Australian Domain Name Eligibility and Allocation Policy Rules for Open Second Level Domains (No. 2002-07), he applied to register the disputed domain name. He considered his registered business name AustralianBusinessCards.com satisfied the requirements of Schedule C, paragraph 1(b) and/or (c) and that the disputed domain name would satisfy the requirements of paragraph 2(c)(i) and (ii) and he stated to the Registrar: *“I provide a website that informs people about environmental issues across Tasmania which will also be facilitating the marketing of environmentally sustainable products & services of Tasmania via the internet and print media”*.

The Mission Statement appeared on the website at the disputed domain name before notice to the Respondent of this Complaint. The Respondent regarded use of the descriptive term Discover Tasmania as fair use, which also corresponded to the content of the website at the domain.

When the Respondent learned through the Complaint that the Complainant objected to the use of the image component of the trademark “TASMANIA Discovery your natural state”, he removed it next day. The Respondent says the words “TASMANIA Discovery your natural state” have never appeared on the website. The image alone was used to depict the extinct Tasmanian Tiger, with the word “extinct” superimposed, preceded by the words “Government emblem”.

Having regard to the apparent claim of the Complainant that the Respondent is passing off his website as that of the Complainant, the Respondent on February 18, 2003, while denying liability, added to the website a disclaimer of any association with the Complainant.

The Respondent denies bad faith registration or use.

The Respondent asks the Panel to make a finding of Reverse Domain Name Hijacking, based on the Complainant having made false statements and selective disclosure; having knowledge or means of knowledge of the Respondent’s legitimate interest in the disputed domain name; having manufactured evidence; having recklessly or maliciously made spurious allegations and wrongfully certified its Complaint as being complete and accurate, thereby putting the Respondent to expense and other losses: see *G.A. Modelfine S.A. v. A.R. Mani*, WIPO Case No. D2001-0537 (July 20, 2001).

6. Discussion and Findings

Paragraph 15(a) of the Rules instructs the Panel as to the principle the Panelist uses in determining this dispute: “A Panel shall decide a complaint on the basis of the statements and documents submitted in accordance with the Policy, these Rules, and any rules and principles of law that it deems applicable.”

Paragraph 4(a) of the Policy requires a Complainant to prove:

- (i) the domain name is identical or confusingly similar to a name (Note 1), trademark or service mark in which the complainant has rights; and
- (ii) the Respondent has no rights or legitimate interests in respect of the domain name (Note 2); and
- (iii) the domain name has been registered or subsequently used in bad faith.

Note 1

For the purposes of this policy, a DA has determined that a "name... in which the complainant has rights" refer to:

- a) the complainant's company, business or other legal or trading name, as registered with the relevant Australian government authority; or
- b) the complainant's personal name.

Note 2

For the purposes of this policy, a DA has determined that "rights or legitimate interests in respect of the domain name" are not established merely by a registrar's determination that the respondents satisfied the relevant eligibility criteria for the domain name at the time of registration.

A. Rights in a name or mark

The name "Tasmania" cannot function as a trademark unless its geographical significance is shown to have been displaced by long and extensive use as a brand by a single trader in such a manner as to distinguish that trader's goods and services from those of competitors: *HERMAJESTY THE QUEEN, in right of her Government in New Zealand, as Trustee for the Citizens, Organisations and State of New Zealand, acting by and through the Honourable Jim Sutton, the Associate Minister of Foreign Affairs and Trade v. Virtual Countries, Inc.*, WIPO Case No. D2002-0754 (November 20, 2002).

The descriptive word "Discover" cannot add distinctiveness to the geographical indication Tasmania. The Panel accepts the Respondent's submission that the following well-known passage from the judgment of Stephen J in the High Court of Australia in *Hornsby Building Information Centre v. Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 229 is apposite:

"There is a price to be paid for the advantages flowing from the possession of an eloquently descriptive trade name. Because it is descriptive it is equally applicable to any business of a like kind, its very descriptiveness ensures that it is not distinctive of any particular business and hence its application to other like businesses will not ordinarily mislead the public. In cases of passing off, where it is the wrongful appropriation of the reputation of another or that of his goods that is in question, a plaintiff which uses descriptive words in its trade name will find that quite small differences in a competitor's trade name will render the latter immune from action (*Office Cleaning Services Ltd. v. Westminster Window and General Cleaners Ltd.* (1946) 63 RPC 39, at p 42, per Lord Simonds). As his Lordship said (1946) 63 RPC, at p 43, the possibility of blunders by members of

the public will always be present when names consist of descriptive words - " So
long as descriptive words are used by two traders as part of their respective trade names, it is possible that some members of the public will be confused whatever the differentiating words may be." The risk of confusion must be accepted, to do otherwise is to give to one who appropriates to himself descriptive words an unfair monopoly in those words and might even deter others from pursuing the occupation which the words describe."

Apart from the appearance of the words Discover Tasmania in the title bar of the web pages accessed through the domain names of Tourism Tasmania <discovertasmania.com> and <discovertasmania.com.au> and advertisements of the web address <www.discovertasmania.com>, there is no significant evidence of any use of the words Discover Tasmania either by the Complainant or by Tourism Tasmania to an extent which might conceivably support a claim to have established public recognition of, and proprietary rights in, Discover Tasmania as a trademark. Whilst use in a title bar, which is a consequence of specific coding in a webpage HTML, might arguably qualify a trademark use in some circumstances, particularly if the mark in question is genuinely distinctive, the Panel does not consider that to be so in the present case. Rather, in the evident absence of any relevant use of Discover Tasmania in the website content, it seems more likely that the title was simply used to identify web pages for the <www.discovertasmania.com> website. Use of the web address <www.discovertasmania.com> also appears to have been subordinate to use of the recognised Tasmanian Tiger device mark and not such that it would be perceived as functioning as a trademark in its own right.

Consequently, the Panel considers that the Complainant has not produced evidence adequate to support any claim that, through use, the distinctiveness necessary to give rise to common law trademark rights has been established in the descriptive words Discover Tasmania. ve

The Complainant is the registered proprietor of Australian trademark No. 674285 comprising the words "TASMANIA Discovery our natural state" beneath a stylised image of a Tasmanian Tiger, water and plants. The evidence before the Panel is that, insofar as it may have been used, this mark appears either with the words "Discover our natural state" above the image, followed by the word TASMANIA, or with the image followed by the words "Discovery our natural state TASMANIA". he

The Complainant does not claim that any of the other registered trademarks in which it claims rights (two of which are registered in the name Tourism Tasmania) are relevant.

Although the Complainant describes itself as "The Crown in Right of the State of Tasmania trading as 'Tourism Tasmania'", it is clear that, by legislation, Tourism Tasmania is an instrumentality of the Crown having separate legal personality as a body corporate entitled to sue and be sued in its own name. It is therefore not entirely clear to the Panel that the Complainant can itself claim to have rights in the business name Tourism Tasmania, which was registered in the name of the body corporate Tourism Tasmania on the same day as the disputed domain name. For the purposes of these proceedings, the Panel is nevertheless prepared to assume that the Complainant is entitled to assert rights in the business name Discover Tasmania.

Although that business name was registered only on the same day as the disputed domain name, the relevant time by which a Complainant must establish rights, for the purposes of paragraph 4(a)(i) of the Policy, is the time of the filing of the Complaint.

Accordingly, as the requirement under paragraph 4(a)(i) has been satisfied in a literal sense, the Panel is prepared to accept that the Complainant has shown that it has rights in the registered trademark “TASMANIA Discovery our natural state (with image)” and the business name Discover Tasmania.

B. Identical or Confusingly Similar

In *GlobalCenter Pty Ltd v. Global Domain Hosting Pty Ltd*, WIPO Case No. DAU2002-0001 (March 5, 2003) a three-member Panel decided that, as is the case under the UDRP, essential or virtual identity is sufficient for the purposes of the Policy: see *The Stanley Works and Stanley Logistics, Inc. v. Camp Creek Co., Inc.*, WIPO Case No. D2000-0113 (April 14, 2000); *Toyota Jidosha Kabushiki Kaisha d/b/a Toyota Motor Corporation v. S&S Enterprises Ltd.* (September 9, 2000), WIPO Case No. D2000-0802; *Nokia Corporation v. Nokia girls.com a.k.a. IBCC*, WIPO Case No. D2000-0102 (April 20, 2000) and *Blue Sky Software Corp. v. Digital Sierra Inc.*, WIPO Case No. D2000-0165 (May 1, 2000).

Likewise, the Panel in the *GlobalCenter* case held that the test of confusing similarity under the Policy is confined to a comparison of the disputed domain name and the name or trademark alone, independent of the other marketing and use factors usually considered in trademark infringement or unfair competition cases. See *BWT Brands, Inc. and British Am. Tobacco (Brands), Inc. v. NABR*, WIPO Case No. D2001-1480 (March 26, 2002); *Koninklijke Philips Elecs. N.V. v. In Seo Kim*, WIPO Case No. D2001-1195 (November 12, 2001); *Energy Source Inc. v. Your Energy Source*, NAFC Case No. FA96364; *Vivendi Universal v. Mr. Jay David Sallen and GO247.COM, Inc.*, WIPO Case No. D2001-1121 (November 7, 2001) and the cases there cited.

The Panel finds the disputed domain name is essentially identical to the business name Discover Tasmania in which it is prepared to accept that the Complainant has rights. The Panel otherwise considers that the disputed domain name is not confusingly similar to the trademark “TASMANIA Discovery our natural state (with image)”.

The Complainant has therefore established this element of its case and meets the criteria of Paragraph 4(a)(i) of the Policy.

C. Rights or Legitimate Interests

Although a complainant bears the onus of proving absence of rights or legitimate interest in the disputed domain name on the part of a respondent, where a complainant has asserted that the respondent has no rights or legitimate interests in respect of the domain name, it is incumbent upon the respondent to come forward with concrete evidence rebutting this assertion, since the information is uniquely within the knowledge and control of the respondent: *Do The Hustle, LLC v. Tropic Web*, WIPO Case No. D2000-0624 (August 23, 2000).

The words Discover Tasmania are descriptive. The Respondent is not known by the disputed domain name. However he has a legitimate interest in that domain name because he is using the descriptive words Discover Tasmania to describe his interpretation of discovering Tasmania. The Respondent has provided clear evidence to show that before he registered the disputed domain name the Respondent took all reasonable steps to assure himself that the words Discover Tasmania were not registered or used as a trademark or as a business name. The Panel has seen no evidence to suggest that when he subsequently registered the disputed domain name, the Respondent was aware of the registration that same day of the business name

Discover Tasmania by Tourism Tasmania.

In the absence of any evidence that the words Discover Tasmania have become distinctive of the Complainant (or of Tourism Tasmania), the proposition that customers of the Complainant or of Tourism Tasmania would expect the disputed domain name to lead to website authorized or operated by or affiliated with the Complainant or Tourism Tasmania is unconvincing. In these circumstances, the contention that it was the Respondent's intention misleadingly to divert such customers away from the Complainant or Tourism Tasmania stretches credibility.

Although the Respondent's website was under construction when the Complaint was filed, it did by then have content which, even if rather dull or uncomfortable reading for some, would be considered relevant to others seeking to "Discover Tasmania". The Complaint was filed less than two months after the disputed domain name was registered, a period which included the Christmas and Australian summer holidays. The Panel is not prepared to draw any inference adverse to the Respondent from these circumstances.

The links from the Respondent's website at the disputed domain name to his site at <discover-tasmania.com> (not the subject of these proceedings) and the content of that site are also insufficient to persuade this Panel that the Respondent lacks a legitimate interest in the described domain name in dispute in these proceedings.

The image portion of the Complainant's registered trademark "TASMANIA Discover your natural state (with image)" specifically mentioned that it was a "Government emblem" and was used at the <discover-tasmania.com.au> website to convey the Respondent's contention that the Complainant was responsible for the extinction of the Tasmanian Tiger depicted in the image. The Panel does not regard this use of the image as evidence that the Respondent does not have a legitimate interest in the disputed domain name.

Although compliance with the eligibility requirements for .au registration is not evidence of legitimacy, as per note 2 to paragraph 4(a) of the Policy, the Complainant relies on alleged failure to comply with those requirements as evidence of its absence in this case. The Panel considers that the Respondent complied with those requirements in that he is trading under a registered business name as a sole trader (see Schedule C, paragraphs 1(b) and (c) of the *Domain Name Eligibility and Allocation Policy Rules for Open 2LD*) and that the disputed domain name is closely and substantially connected to the Respondent because it refers to a service that he provides, namely information about discovering Tasmania (see paragraph 2(c)(ii) of that Schedule).

The parties disagree as to the conversation in the coffee shop on December 4, 2002, in particular as to whether the Respondent said that one of his objectives was that his site at <discover-tasmania.com> (and, by inference, his site at the disputed domain name) would undermine the brand values that the Complainant was promoting to the world. The Panel recognizes that proceedings of this kind are unsuited to the resolution of such issues, but finds it unnecessary to determine whether or not the Respondent made that statement because, even if he did, the Panel interprets the reference to "the brand values the Complainant was promoting to the world" as a reference to the "clean, green and natural" image of Tasmania, rather than to any trademark or other intellectual property rights of the Complainant. This is supported by the descriptive character of the words Discover Tasmania; by the fact that the Respondent had only a few days earlier searched for any trademark registration or use by the Complainant or Tourism Tasmania of those words without finding any; and by the content of the Respondent's

website at the disputed domain name.

The Panel therefore finds that the Complainant has failed to establish this element of its case and the requirements of Paragraph 4(a)(ii) of the Policy are not met.

D. Registered and Used in Bad Faith

Contrary to the Complainant's submissions, the Panel believes that the evidence suggests the Respondent had no knowledge of any exclusive rights of the Complainant in the "brand" Discover Tasmania. This is because the Complainant has failed to prove that it has or ever had any such rights. The Respondent was aware of the "TASMANIA Discovery our natural state (with image)" mark, but this is irrelevant since it is neither identical nor confusingly similar to the disputed domain name.

The Respondent certainly knew of the Complainant's statutory role in promoting tourism in Tasmania and he acknowledged that, before he registered the disputed domain name, he was aware of and, indeed, searched the websites at <discovertasmania.com> and <discovertasmania.com.au> operated by Tourism Tasmania. Given the descriptive character of the words Discover Tasmania, such knowledge does not establish bad faith. See e.g. *Goldline International, Inc. v. Gold Line*, WIPO Case No. D2000-1151 (January 8, 2001). The evidence shows that the Respondent also checked beforehand for the existence of any relevant Business Name registration, which he might have expected to find if Tourism Tasmania had previously intended to try to establish any proprietary claim to exclusive use of "Discover Tasmania". At that time, he found that the name was not currently registered, although it had previously been, and was then available for registration.

The Panel has already found that, even on the Complainant's version, the conversation at the coffee shop does not assist it.

The Panel does not regard the linking of the <discover-tasmania.com> and <discover-tasmania.com.au> sites and the content of either site as establishing bad faith.

The Panel finds that none of the circumstances contemplated in any of the subparagraphs of Policy paragraph 4(b) nor any other ground for finding bad faith have been established. In particular, publishing views and information that are contrary to the policy of one's own Government in an endeavour to change that policy does not meet the description in subparagraph 4(b)(iii): "you have registered the domain name primarily for the purpose of disrupting the business or activities of another person".

The Panel therefore finds also that the Complainant has failed to establish this element of its case, and the requirements of Paragraph 4(a)(iii) of the Policy are not met.

E. Reverse Domain Name Hijacking

The Respondent has requested that the Panel make a finding of attempted reverse domain name hijacking against the Complainant.

Rule 1 defines reverse domain name hijacking as "using the Policy in bad faith to attempt to deprive a registered domain name holder of a domain name." See also Rule 15(e). To prevail on such a claim, it has been held that a respondent must show either that the complainant knew of the respondent's unassailable right or legitimate interest in the disputed domain name or the clear lack of bad faith registration and use, and

nevertheless brought the Complaint in bad faith: *Sydney Opera House Trust v. Trilynx Pty. Ltd.*, WIPO Case No. D2000 -1224 (November 8, 2000) and *Goldline International, Inc. v. GoldLine*, WIPO Case No. D2000 -1151 (January 8, 2001) or that the Complaint was brought knowing disregard of the likelihood that the respondent possessed legitimate interests: *Smart Design LLC v. Hughes*, WIPO Case No. D2000-0993 (October 21, 2000); or that the complainant knew with had no rights in the trademark or service mark upon which it relied and nevertheless brought the Complaint in bad faith: *Dan Zuckerman v. Vincent Peeris*, WIPO Case No. DBIZ2002 -00245; *HERMAJESTY THE QUEEN, in right of her Government in New Zealand, as Trustee for the Citizens, Organisations and State of New Zealand, acting by and through the Honourable Jim Sutton, the Associate Minister of Foreign Affairs and Trade v. Virtual Countries, Inc.*, WIPO Case No. D2002 -0754 (November 27, 2002).

Here there is some reason to believe that the Complainant, despite its assertions, was aware that its claim to have trademark rights in the words Discover Tasmania was weak. Even the specific attachments to the Complaint on which it relies to show use of this asserted trademark do not show any clear use of the words Discover Tasmania in a potentially distinctive trademark sense.

However, the Complainant has certainly used Discover Tasmania in its web page titles and in advertisements of the web address <www.discovertasmania.com>, so that there was some arguable basis for it to attempt to claim rights in the words, even if the case for this could not ultimately be made out on the evidence provided. The Complainant also relied on its registered mark "TASMANIA Discover your natural state (with image)". While it has failed to persuade the Panel that the disputed domain name is identical or confusingly similar to that mark, it cannot be said that it has acted unjustifiably or in bad faith in making these allegations against the Respondent.

Under the circumstances, the Panel dismisses the Respondent's request and declines to make a finding of reversed domain name hijacking.

7. Decision

For all the foregoing reasons, the Complaint is denied.

Alan Limbury
Presiding Panelist

Staniforth Ricketson
Panelist

Keith Gymer
Panelist

Dated: April 16, 2003