

**Domain Name:** www.nehos.com.au

**Name of Complainant:** Nehos Communications Pty Limited

**Name of Respondent:** The trustee for The Penrose & Godfrey Family Trust

**Provider:** LEADR

**Panellist:** Jennifer A Scott

**Date:** 3 August 2011

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**1. THE PARTIES**

1.1 The Complainant in this proceeding is Nehos Communications Pty Limited of 10 Mayfair Place Boondall, Queensland, Australia

1.2 The Respondent to the proceeding is The Trustee for The Penrose & Godfrey Family Trust c/- info@sunshinenetworks.com.au

**2. THE DOMAIN NAME, REGISTRAR AND PROVIDER**

2.1 The domain name in dispute in this proceeding is “www.nehos.com.au” (“**Domain Name**”).

2.2 The registrar of the Disputed Domain Name is VentraIP, (“**Registrar**”).

2.3 The provider in relation to this proceeding is LEADR (“**Provider**”).

**3. PROCEDURAL MATTERS**

3.1 This is a proceeding under the .au Dispute Resolution Policy (“the Policy”) and Rules For .au Dispute Resolution Policy (“the Rules”) published by .au Domain Administration Limited ABN - 38 079 009 340 (“auDA”). The procedural history in this matter is set out in Annexure “A” to this determination.

3.2 LEADR appointed me sole Panellist in this matter on 22 July, 2011. I have had no prior association with either party and have no conflict of interest. The Panel has been properly constituted.

3.3 The Panel is satisfied that the Respondent has been served with and/or is on full notice of this Complaint. The content of the Procedural History annexure 'A' affirms this and, further, the Respondent has responded to the Complaint.

3.4 Certain written material has been submitted to the Panel as provided by the Complainant and the Respondent to the Provider. The content of the Procedural History Annexure 'A' also affirms this. The observations in this determination

arise singularly from the material submitted. I have read all of the materials. There is no need that I traverse all of the material in the reasons here given, but all of it has been noted and analysed.

#### **4. FACTUAL BACKGROUND**

##### **Facts alleged by the Complainant**

- 4.1 In submissions attached to its Complaint, the Complainant raises the matters set out below:
  - 4.1.1 The Complainant is the registered business Nehos Communications Pty Ltd, a business providing telecommunications services, in particular, Voice over Internet Protocol (VOIP) services. Since 21 October 1995 the Complainant has owned and operated the website [www.nehos.net](http://www.nehos.net). Norman Howlett, a director of the Complainant, owns registered trade mark 1081510 (incorrectly identified as 108510) for the stylized mark NEHOS in class 38 for “Telecommunications services being Voice over Internet Protocol (VOIP) services” (Nehos Mark).
  - 4.1.2 The Respondent is a director of Sunshine Networks Pty Ltd, a competitor in VOIP services and is also based in Queensland.
  - 4.1.3 The Complainant claims it was first alerted to the Respondent’s registration of the website around 30 May 2011. The Complainant subsequently contacted the Respondent by email, requesting the Respondent transfer the Domain Name to the Complainant, and subsequently offered to purchase the Domain Name. The Respondent agreed to sell at a price of \$7,000, which the Complainant rejected.

##### **Facts alleged by the Respondent**

- 4.2 In submissions the Respondent raises the matters set out below:
  - 4.2.1 The Respondent confirms that the Complainant approached it with a request to acquire the Domain Name and that the Respondent agreed to sell it for \$7,000 as it had invested in Search Engine Optimization.
  - 4.2.2 The Respondent claims that the Domain Name is a personal website hosted for the Respondent’s friends. The word “nehos” is a gaming name, or “battalion” name in an online multiplayer game. It is not related to Sunshine Networks, a business also providing telecommunication services.

#### **5. DISCUSSION AND FINDINGS**

##### **Jurisdiction**

- 5.1 Paragraph 2.1 of the auDRP states:

*“All domain name licences issued in the open 2LDs from 1 August 2002 are subject to a mandatory administrative proceeding under the auDRP. At the time of publication, the open 2LDs are asn.au, com.au, id.au, net.au and org.au...”*

- 5.1.1 The Domain Name is an open 2LD within the meaning of this provision. It was registered with the Registrar on 28 November 2010. It is therefore subject to the mandatory administrative proceeding prescribed by the auDRP.

### **Basis of decision**

- 5.2 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.”*

### **Elements of a successful complaint**

- 5.3 According to paragraph 4(a) 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, trademark 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.*

- 5.3.1 It is to be noted that the three elements of a complaint under paragraph 4(a) of the auDRP Policy are cumulative; all of them must be proved if the complaint is to be upheld.

### **Is www.nehos.com.au identical or confusingly similar to a name, trade mark or service mark in which the Complainant has rights?**

- 5.4 The Panel must determine whether, on the basis of the facts set out in section 4 above, the Complainant has rights in a relevant name, trademark or service mark.

- 5.4.1 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.”*

5.4.2 The auDRP Policy does not provide guidance as to the intended meaning of “identical” or “confusingly similar”. Panelist N J Hickey in *Camper Trailers WA Pty Ltd v Off Road Equipment Pty Ltd* LEADR Case number 06/2004(12 November 2004) provided a summary of recent principles arising out of other domain name dispute decisions:

“(a) *“Identical”*

As was noted in *BlueChip InfoTech Pty Limited v Roslyn Jan and Blue Chip Software Development Pty Ltd* LEADR Case No. 06/03 (26 December 2003), “essential or virtual identity” is sufficient.

5.4.3 The Domain Name is clearly identical in all respects to the Complainant’s Company Name and to the Complainant’s trade mark. The Respondent does not dispute this although it does submit that the Complainant’s trademark evidence should be excluded due to an error by the Claimant in its trade mark number. The Panel notes the error, which is minor and is satisfied that the evidence of exhibit A is sufficient to rectify the error.

5.4.4 The Complainant has, therefore, satisfied the requirement of “identical” in paragraph 4(a) (i) of the auDRP Policy.

**Does the Respondent have any rights or legitimate interests in respect of [www.nehos.com.au](http://www.nehos.com.au)?**

5.5 Paragraph 4(c) of the auDRP Policy sets out particular circumstances, which can demonstrate a Respondent’s “*rights or legitimate interests to the domain name for purposes of Paragraph 4(a) (ii).*”

5.5.1 The first issue to consider is whether the Respondent, prior to being notified of the subject matter of the present dispute, made “*bona fide use of or demonstrable preparations to use the domain name or a name corresponding to the domain name in connection with an offering of goods or services*” (paragraph 4(c) (i)).

5.5.2 The Panel notes that the Respondent makes no claim to the Domain name except that it was available and purchased and is used for a private online game among friends. It is prepared to sell it to interested parties for \$7,000.

5.5.3 The Complainant alleges that until approximately 3 June 2011, the website hosted at the [nehos.com.au](http://www.nehos.com.au) was substantially identical to the website at [www.sunshinenetworks.com.au](http://www.sunshinenetworks.com.au), the website of Sunshine Networks Pty Ltd, a direct competitor of the Complainant under the control of the Respondent. The Respondent denies this allegation and claims that the source code evidence in exhibits E & F have been altered by the Complainant and do not reflect the correct information. The Panel has carefully looked at the source codes and is

- unable to satisfy itself as to whether the Complainant has altered exhibit E, being the source code for [www.nehos.com.au](http://www.nehos.com.au).
- 5.5.4 The Panel notes, however, that the Complainant has provided further evidence in support of its claim, namely, that until approximately 3 June 2011, the website hosted at [www.nehos.com.au](http://www.nehos.com.au) included a contact page (exhibit G) with the contact details of Sunshine Networks Pty Ltd. The Respondent again claims that the Complainant has also altered this page.
- 5.5.5 The Panel notes, in exhibit C that the Whois Domain data for [www.nehos.com.au](http://www.nehos.com.au) currently lists [info@sunshinenetworks.com.au](mailto:info@sunshinenetworks.com.au) as the registrant contact email, and that Bing and Google searches dated 22 July clearly connect [nehos.com.au](http://nehos.com.au) with Sunshine Networks, which is a direct competitor of the Complainant.
- 5.5.6 As there are several entries that support the Complainant's claim, the Panel does not accept the Respondent's allegation that the Complainant has fraudulently manipulated these entries.
- 5.5.7 The Panel notes that the Respondent claims that the domain name is currently used for private online games; this is supported to some extent by the source code it provided in its Response, however this evidence is insufficient to support the allegation. Irrespective of the use, the search screens that are viewed by the public clearly create a connection between the Domain Name and Sunshine Networks Pty Ltd.
- 5.5.8 Based on its evaluation of all the evidence presented, the Panel is not satisfied that the Respondent's use of the Domain Name was "bona fide".
- 5.5.9 With respect to paragraphs 4(c) (ii) and 4(c) (iii) of the auDRP Policy, the Panel is satisfied that the Respondent has neither been commonly known by the Domain Name, nor is the Respondent making legitimate non-commercial or fair use of it. The Panel considers the Respondent's website to be "*likely to misleadingly divert customers*" from the Complainant.
- 5.5.10 Accordingly, the Panel finds that the Respondent has no right or legitimate interest in the Domain Name, and so paragraph 4(a)(ii) of the auDRP Policy has been satisfied by the Complainant.

**Has [www.nehos.com.au](http://www.nehos.com.au) been registered or subsequently used in bad faith?**

- 5.6. Paragraph 4(b) of the auDRP Policy sets out circumstances "*evidence of the registration and use of a domain name in bad faith*".
- 5.6.1 The Complainant claims that the Respondent's preparedness to sell the Domain Name at an inflated price is evidence of bad faith. The Respondent claims there is no evidence of inflated price and that the Complainant's threat to close down the

site is bad faith tactics. The Panel does not accept the Respondent's allegation as the Complainant's request to its legal representative, is in keeping with its entitlement to seek a resolution in accordance with the auDRP Policy. Locking of a domain name in dispute is part of the process. Although the Respondent had offered the Domain Name for sale to other parties, it did not offer it for sale to the Complainant until the Complainant approached the Respondent. I am therefore, not satisfied that it was acquired for the purpose of selling or transferring it to another person for valuable consideration.

- 5.6.2 The Panel however, considers there is sufficient evidence for a finding with respect to paragraph 4(b) (ii) of the auDRP Policy, namely that the Respondent has registered the Domain Name in order to prevent another person, namely the Complainant, from reflecting its company name in a corresponding domain name.
- 5.6.3 With respect to paragraph 4(b) (iii) of the auDRP Policy, the Complainant has not provided sufficient evidence to satisfy the Panel, that the Respondent registered the Domain Name with the primary purpose of disrupting the Complainant's business activities.
- 5.6.4 The Panel considers there is sufficient evidence for a finding with respect to paragraph 4(b) (iv) of the auDRP Policy. The evidence provided by the Complainant clearly shows that the Complainant and Respondent's company are currently competitors and are in the same business. The Respondent was aware of the Complainant's presence in the market. The clear inference is that the Respondent was hoping to capture the custom of consumers who were seeking to contact the Complainant through the internet. In the Panel's view, the likelihood is that the Respondent registered the Domain Name "*intentionally attempting to attract, for commercial gain, Internet users to a website or other online location by creating a likelihood of confusion.*"
- 5.6.5 For the reasons outlined above, the Complainant has satisfied the requirements of paragraph 4(a) (iii) of the auDRP Policy.

## 6. **RELIEF**

### **Transfer of the Domain Name**

- 6.1 The Complainant has sought that the Domain Name be transferred to the Complainant.
- 6.2 Eligibility for a domain name in the open 2LDs is governed by auDA's Domain Name Eligibility and Allocation Rules for the Open 2LDs (2002-07) ("**Eligibility Rules**").
- 6.3 The Complainant is an Australian registered company and the Disputed Domain Name forms part of the Complainant's Company Name. The Complainant therefore satisfies the Eligibility Rules.

6.4 The Panel orders that the Domain Name be transferred to the Complainant.

**7. DECISION**

7.1 The Complainant has satisfied the elements of paragraph 4(a) of the auDRP Policy.

Dated: 3 August 2011

**Jennifer A Scott**  
**Sole Panelist**

## Procedural History

[nehos.com.au]

[auDRP\_11\_10]

1. Complaint lodged to LEADR on **8/7/2011**
2. An acknowledgement of receipt of complaint was emailed to the Complainant on **11/7/2011**.
3. LEADR sent non-compliance notification via email to Complainant on **11/7/2011**
4. Complete complaint with rectifications received from Complainant via email on **12/7/2011**
5. A copy of the complaint was submitted and a request to clarify Respondent details and lock the domain name during proceedings was emailed to the registrar **VentralP** on **12/7/2011**
6. On the **12/7/2011** the Registrar confirmed via email that the domain name in dispute has been locked.
7. LEADR advised auDA of the complaint on **12/7/2011** via e-mail.
8. On the **12/7/2011** LEADR sent the Respondent (**The trustee for The Penrose & Godfrey Family Trust**) an email and written notification of the complaint lodged against them. The complainant was copied in on these notifications.
9. Acknowledgement of notification received from Respondent on **13/7/2011**
10. The due date for the response to the complaint was confirmed to be **1/8/2011**
11. On the **18/7/2011**, the Respondent (**The trustee for The Penrose & Godfrey Family Trust**) submitted a response to the domain name complaint



12. On **21/17/2011** the provider approached the Panellist. The panellist confirmed their availability, informed LEADR that they had no conflict issues with the parties and accepted the matter on **22/7/2011**.
13. The Case file and relevant correspondence was forwarded onto the Panellist on **22/7/2011**
14. The parties to the dispute were notified of the panellist's allocation on the **22/7/2011**.
15. The date on which the decision is due is **5/8/2011**