

## ADMINISTRATIVE PANEL DECISION

**Penelope Blair v. Choice 4U Pty Ltd**  
**LEADR-auDRP 11\_03**  
**petinsurance.com.au**

### 1 The Parties

The Complainant is **Penelope Blair**. She was represented in the proceedings by herself and **Hamish Blair**. The Complaint records her address as Camberwell in Victoria.

The Respondent is **Choice 4U Pty Ltd**, a company with its office in Brighton In Melbourne. It was represented in the proceedings by Erhan Karabardak of Cooper Mills Lawyers of Melbourne.

### 2 The Disputed Domain Names and Registrar

The disputed domain name is petinsurance.com.au. The registrar of the disputed domain name is Net Registry.

### 3 Procedural History

This is an administrative proceeding pursuant to the .au Dispute Resolution Policy originally adopted by auDA on 13 August 2001, and subsequently amended in March 2008 (“auDRP”); the auDA Rules for .au Dispute Resolution Policy (“Rules”) and the LEADR Supplemental Rules to Rules for .au Domain Name Dispute Resolution Policy (“LEADR Supplemental Rules”).

A LEADR Domain Name Dispute Complaint Form was initially filed with LEADR on or about 2 March 2011. That application was found by the LEADR Case Manager to be deficient during the internal review process and the deficiency was advised to the Complainant on 8 March 2011 and a period of 5 days was allowed for rectification. The defects identified were:

*.auDRP Policy, Schedule B, Part 3 (ix)*  
*Please refer to the policy Schedule A, Part 4 (i), (ii) and (iii).*

That advice was copied to the Respondent and a rectified, application was received by LEADR On 12 March 2011.

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 Net Registry on 14/03/2011.

On the 16/03/2011 the Registrar confirmed via email that the domain name in dispute has been locked.

LEADR advised auDA of the complaint on 17/03/2011 via e-mail.

On the 17/03/2011 LEADR sent the Respondent (Choice 4U Pty Ltd) an email and written notification of the complaint lodged against them. The complainant was copied in on these notifications.

The due date for the response to the complaint was confirmed to be 6 April 2011

On the 29 March 2011, Erhan Karabardak on behalf of the Respondent (Choice 4U Pty Ltd) submitted a response to the domain name complaint.

LEADR forwarded a copy of the Complaint to both Registrars and to the Respondent, and advised auDA of the Complaint. NetRegistry confirmed to LEADR on 12 April 2010 that they had received a copy of the Complaint and that the Disputed Domain Name had been locked.

On 12 April 2011 the Complainant filed with LEADR a “supplementary document ... to address some of the issues raised in the Response”. LEADR advised the Complainant that the Panel would determine the admissibility of its supplementary filing. That supplementary submission was copied to the Respondent and the Respondent’s legal adviser. On 13 April 2011, the Respondent through their adviser provided a submission in relation to the Complainant’s ‘clarifying document’. That submissions stated in part:

*The Respondent objects to the panel being provided with the email and any other submissions. The Complainant had the benefit of in effect, unlimited time to prepare its complaint and to consult lawyers. The auDRP Policy does not provide for parties to make response submissions.*

*The Respondent has already met the case put against it. It is the Respondent’s view that the Complainant has deliberately made submissions at the ‘eleventh hour’ knowing the panel’s decision is due this week, with a view to prejudicing the Respondent’s position. On the grounds of procedural fairness the additional submissions should be disregarded.*

*Please confirm that Complainant’s correspondence of 12 April 2011 and any further submissions will be disregarded by the Panel.*

I have not provided any guidance to the parties on how these submissions would be considered, if at all. It is relevant to disclose my views and it appears to be as useful a method as any to deal with each of the extracted paragraphs:

Objection to provision of submissions to panel – The administering body, in this matter LEADR does not; so far as I am aware; have a role that would allow it to filter correspondence and deny the Panellist access to any and all submissions. The auDRP is designed to grant panellists a wide discretion in consideration of material. While the sentiment expressed in the paragraph is understood the request is outside the authority of LEADR.

Submissions should be denied on the basis of procedural fairness – While the provisions of the rules and policy do not contemplate iterative submissions, that of itself does not proscribe the process, if those submissions weighed on the ultimate decision it would be reasonable to make a request to the Respondent to address a particular issue. This was not required.

Undertaking these and any subsequent submissions will be disregarded by the panel – In my view it is not possible to provide to a party an undertaking of the breadth sought. Accordingly I have not provided that undertaking.

I have read and considered the supplementary or clarifying submissions of the Complainant. Where relevant I have referred to them below.

The Panel was appointed on 4 April having advised LEADR that there was no conflict of interest with either of the parties. The decision is required to be completed no later than 18 April 2011.

All other procedural requirements appear to have been regular and do not require further comment.

#### **4 Factual Background**

The following facts, taken from the Complaint, are uncontested.

The disputed domain has been held consistently since 2002 and subsequently lapsed for want of renewal. The Respondent acquired the domain through an auction process, shortly after it became available for auction.

The Respondent has since acquisition approached an insurance underwriter known to the Complainant in relation to developing a business relationship to provide an insurance product for the pet industry.

The majority of the remaining assertions of the parties are in conflict.

## **5 Parties' Contentions**

### **5.1 Complainant**

**The Complainant makes the following principal contentions:**

**A. The Disputed Domain Name is confusingly similar to a name, trademark or service mark in which the Complainant has rights.**

The Complainant submits that she has worked extensively in developing the pet insurance industry in Australia since 2002. They assert this site is crucial to that development. However this is not the central issue which must be established. The submission is that the relevant name (no Trademark or Service mark is alleged to be in place) is "Pro Sure - Vets Own Pet Insurance". They assert the tag line (this being the four words following the hyphen) is emphasised to a greater extent in their logo than in other providers of similar products or services.

**B. The Respondent has no rights or legitimate interests in respect of the Disputed Domain Names.**

The Respondent has not been and was not offering these products or services at the time they purchased the disputed domain. The Respondent has no particular history in the pet insurance industry and is alleged to have purchased the domain in contravention to the auDRP

The obligation in this instance falls for the Claimant to establish the absence of rights of the Respondent. The Complainant has largely sought to reinforce the earlier submission that they do have rights.

**C. The Disputed Domain was registered or is being used in bad faith.**

The Complainant asserts that the process of purchase of the domain via netfleet auction is in direct conflict with 'Schedule A (8) of auDA Domain Name Eligibility and Allocation Policy Rules for Open 2LDS'.

Additional support for this ground included the likely use of the site for commercial gain and creating competition with the Complainant's principal website. Finally it is submitted that by its acquisition some clients of the Complainant could be confused when seeking to access the Claimant's products via use of the disputed domain.

### **5.2 Respondent's Response**

The Response formally denies that any of the grounds set out in paragraph 4 of the auDRP are satisfied. The Respondent has addressed each of the three elements. Their submissions can be summarised as follows:

**A. The Disputed Domain Name is confusingly similar to a name, trademark or service mark in which the Complainant has rights.**

The Respondent notes that the Complainant has not established that they are the owners of the rights in ProSure.com.au (this being the destination site for the disputed domain). In support of this they have provided an ASIC Company extract for ProVet, which supports this contention. I note the 'clarifying submissions' of the Complainant<sup>1</sup> asserts the existence of a trust structure, though this not evident from the ASIC extract and no supporting material has been provided. I also note the assertion in those submissions that the Complainant is the daughter-in-law of Mr Chris Blair named on the destination site.

Similarly they contest that even if these rights were established the names are not confusing and have directed my attention to several other panel decisions which included in the disputed domain name generic descriptors.

I also note in relation to this element they have referenced similar product offerings in the same industry category, including:

- Real Pet Insurance
- RSPCA Pet Insurance
- Medibank Pet Insurance

Each using the identical words to those relied on as comprising both the complete domain name (excluding 2LD) in the same sequence and operating in competition.

**B. The Respondent has no rights or legitimate interests in respect of the Disputed Domain Names.**

The Respondent asserts that having formed the view that a commercial opportunity existed in developing a product offering for those persons seeking insurance for their pets they have developed clear legitimate interests and notes the Complaint's own submission in relation to seeking to secure a relationship with an insurance underwriter. The Respondent has provided further evidence of the establishment of trademark applications and other activities each indicative of genuine commercial activity and the creation of rights.

The Respondent has also asserted previous experience in the online provision of insurance products and this assertion is consistent with statements made by him in material provide by the Complainant.

Finally, I note the Respondent considers the history of the Complainant in of developing the sector, has no bearing on their rights or interests in the disputed domain name.

**C. The Disputed Domain was registered or is being used in bad faith.**

Of the two assertion made in support of the Respondent's position is the first; (is largely irrelevant as auDA is aware of and allows the operation of Domain Snapper. As to the second assertion, that the domain has not held active pages for all but the shortest period of its 9 year existence. In support of the second element they have provided an extract from the 'wayback machine'.

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<sup>1</sup> This document consistently describes the Complainant as Respondent and similarly inverts the titles of the Respondent. As this is apparent from t context of their use, I have not sought clarification. The naming confusion does not occur in the original submissions.

## 6. Requirement of the Policy

It has been put to me by the Respondent that the Complainant bears the onus of satisfying me of the merit of their submissions and to achieve this they must establish on the balance of probabilities that the three elements discussed above (and found in paragraph 4 of the auDRP). I accept that these statements are correct.

It follows that in the event that the Complainant fails to establish to my satisfaction any single element then the Complaint will fail.

## 7. Application of the Policy to the facts

### A. The Disputed Domain Name is confusingly similar to a name, trademark or service mark in which the Complainant has rights.

This element has three clear limbs, first the requirement to establish the confusing similarity, the second is that it must be to a name, trademark or service mark and the third element is the establishment of the Complainant's rights in the confusingly similar name mark or the like.

The Complainant has not persuaded me that there is a confusingly similar name. The material before me shows a name exists that concludes with the words Pet Insurance and a logo has been evidenced that includes these words. While I accept these are the words used in the disputed domain, I am unable to discern how they can be said to be confusingly similar. The words and logo are strongly differentiated by the presence of the words "Pro Sure" and "Vets Own". These terms distinguish the disputed words in the same way the evidenced sample of competitive offerings in the market place (Real Pet Insurance, RSPCA Pet Insurance and Medibank Pet Insurance) use the same words but again the branding element precedes the descriptive phrase.

It follows that having found the first limb has not been established given the nexus with the second limb that also is not established to my satisfaction.

The Respondent has also put the third limb of establishing the Complainant's rights to the name / mark alleged to be so similar that confusion will follow. The Complainant has not established beyond a mere statement that they have any rights in the name "Pro Sure - Vets Own Pet Insurance". It is very clear, and not in contest that she has promoted that domain and the development of the industry. However there is no evidence of how rights are held by the Complainant in the other name or mark. As I have noted above the onus rests with the Complainant to establish this, and I note the matter is plainly in contest in the Adjudication response. I considered the 'clarifying submissions' of the Complainant and am still not persuaded that any reliable evidential standard has been met. Indeed to some extent the Complainant's position in this regard is weakened. Setting aside for a moment the incorrect names applied (see earlier footnote) the Complainant has stated the following in support of the rights they hold:

*The Respondent is a shareholder in Vet Insurance (via a family trust).*

In this regard I note that there is no supporting evidence to support the ownership of the disputed domain by the company that the Complainant is asserting rights are owned. It is a further issue that the issue is not bought by the trustee, nor is it asserted that the complainant is the trustee. The rights of beneficiaries to bring actions on behalf of the trust are complex and those rights will generally have to be established in the Deed or by principles of equity – neither have been put to me.

I also note the alternate name said to be owned and possibly bringing confusion to the public is the lapsed business name VETS OWN PET HEALTH INSURANCE, which is the relied on tag line save for

the omission of the word health. Given the registration of that name has lapsed and absent any further clarifying submissions from the Complainant this possible 'confusion' could not in my view be validly sustained on either the basis of an actual confusion or the establishment by the Complainant of the rights necessary to sustain the complaint as validly pressed.

Having found the first requirements are not established there is no need to consider and decide the other submissions however I will quickly deal with them for the sake of completeness.

**B. The Respondent has no rights or legitimate interests in respect of the Disputed Domain Names.**

I do not accept that the Complainant has made out this ground. The Respondent has evidenced clear commercial activities which are consistent with the correct commercial exploitation of the asset they have acquired. The Complainant has not established an absence of such rights.

The objection raised with regard to the original purchaser of the lapsed domain name are not established as being fatal to the rights of a subsequent purchaser, and there is no reason to find they would not have the best title in all the world save the true owner (to draw a parallel with entitlement to stolen property). However, in this matter the disputed name was not acquired by fraud, theft or the like, it lapsed for want of renewal.

**C. The Disputed Domain was registered or is being used in bad faith.**

The Respondent has evidenced an intention to use the disputed domain name for ordinary commercial sale of products and services. I do accept that the movement of persons to the website of the Complainant may be reduced, however, I do not accept that this is a disruption which could be said to be evidence of bad faith. The examples used in clause 4(b) of the policy while non exhaustive can be said to form a class or indicative sample of 'bad faith activities'. None of the listed items or practices that could be reasonably linked to such activities is evidenced or even alleged.

It follows this ground is also not established.

**8. Reverse Domain Hijacking**

The Respondent has sought a finding that the actions of the Complainant both prior to the making of the complaint and in making the complaint is best characterised as reverse domain hijacking. I am not persuaded that finding is appropriate. In my view the Complainant has endeavoured to secure a domain name that they believed they had the rights too. I do not accept that having failed to establish their alleged entitlement pursuant to the auDRP, a finding of what is to all reasonable extent a finding of mal fides in relation to the Complainant's application.

**9. Decision**

The Complainant having failed to make out all of the elements of paragraph 4(a) of the auDRP, the Complaint is denied.



Scott Pettersson  
Sole Panellist  
18 April 2011