Education Services Australia

Response to auDA's Policy Review Panel's Public Consultation Paper: *Reform of Existing Policies and Implementation of Direct Registration*

Version 1.0
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1. Introduction

Education Services Australia (ESA) is a national, not-for-profit company owned by all Australian education ministers. It was established to support the delivery of national priorities and initiatives in the schools, training and higher education sectors. ESA traditionally delivers large-scale technology infrastructure projects, with a pedagogical instructional design component.

ESA has provided registrar services for the closed edu.au second level domain for over 15 years. As the edu.au Domain Registrar, ESA is accountable to the edu.au Domain Administration Committee (eDAC), which meets quarterly and includes representatives from the Higher Education, VET and Schools sectors across the States and Territories of Australia. eDAC is in turn accountable to .au Domain Administration Ltd (auDA).

The responses provided are provided by ESA in its capacity as the edu.au Domain Registrar. Note that the question number formatting for our responses matches the Policy Review Panel's Public Consultation Paper: *Reform of Existing Policies and Implementation of Direction Registration*.

5. Public Consultation Paper: Topics for Discussion

5.1 Reform of Existing Policies

5.1.1 Eligibility and Allocation – the Australian presence requirement

For all domain names ending in .au, it is proposed that the registrant must be an Australian citizen or permanent resident or entity established under Australian law. It is recommended that where an applicant is relying on a trade mark registration or application to establish an Australian connection, the trade mark must be an exact match to the domain name.

- What are your views on the recommendation to introduce a single, simple Australian presence test for all domain name registrations in the .au name space (i.e. at the second and third levels of .au)?

ESA agrees with the proposal to introduce a single, simple Australian presence test for all domain names in the .au namespace. We agree that the registrant should be “a legal person with an Australian presence” (as noted in the public consultation paper), and believe this should be defined as “an Australian citizen or permanent resident or entity established under Australian law” (as noted in this question).

It is our understanding that “a potential registrant will still need to satisfy any other applicable eligibility and allocation criteria for a 2LD”, and therefore this change will have no impact on the edu.au registration policy, which will still require an applicant either to be registered with an Australian government authority or to warrant that the primary function of their organisation relates to the provision of education and training in Australia.

- Should the ground of satisfying the Australian connection requirement be retained for holders of Australian trade mark registrations and applications that may be held by legal persons outside of Australia?

ESA supports the retention of the Australian connection requirement.

- If so, should this ground be limited to instances where the domain name is an exact match to the trade mark registration or application (e.g. Nike Innovate CV could hold a trade mark for the word Nike and register nike.com.au, but not be allowed to register runningshoes.com.au that does not match their trade mark)?

ESA supports the panel’s recommendation that where an applicant is relying on a trade mark registration or application to establish an Australian connection, the trade mark must be an exact match to the domain name.

5.1.2 Resale and warehousing

It is proposed that stricter controls be put in place to ensure that domain names are not being registered solely for the purpose of resale or warehousing (ie. holding a large collection of domain licences for future resale when they become more valuable).

- What are your views on the recommendation to retain and strengthen the resale and warehousing prohibition rule?

ESA notes that the edu.au registration policy already provides strict controls to prevent the registration of edu.au domain names for the sole purpose of resale or warehousing. We expect that, regardless of the recommendations of this public consultation, the controls within the edu.au policy will remain unchanged.

In the broader .au domain space, ESA agrees with the recommendation that stricter controls be implemented, as we believe that stricter controls would better protect the reputation and integrity of the .au space. We also believe that stricter controls would act as a protection mechanism for edu.au registrants, who have in the past told us of their experiences of receiving unsolicited emails offering, for example, .com.au domains, which have been registered for the sole purpose of resale or speculation, at excessive cost.

We acknowledge that warehousing is not prohibited in many other domain spaces outside of .au, but believe that the prohibition in .au offers an opportunity to differentiate this space as more trustworthy and therefore a more attractive offering to potential registrants.

- What are your views on the proposal to strengthen this prohibition by introducing a list of factors indicating that a domain name is likely to have been registered primarily for resale or warehousing, thereby shifting the onus to the registrant to demonstrate that is not in fact the case? What factors should the Panel recommend be used?

ESA agrees with this proposal, and that onus should be on the registrant to prove otherwise. We understand that demonstrating intent to warehouse or resale can be very difficult, and believe that auDA having a standard checklist or rubric against which to assess registrations would be very useful and would ensure an objective and consistent approach. We agree with the proposed criteria in Section 3.3 of the public consultation paper.

5.1.3 Eligibility and Allocation – "Close and Substantial Connection" Rule

The "close and substantial connection" rule means the domain licence must be:

- a product that the licence holder manufactures or sells; or
- a service that the licence holder provides; or
- an event that the licence holder organises or sponsors; or
- an activity that the licence holder facilitates, teaches or trains; or
- a venue that the licence holder operates or a profession that the licence holder's employees practise.

It is proposed that this rule be expanded to recognise online directories (e.g. lawyer.com.au) and informational services that specifically relate to the subject matter denoted by the domain name. It is also proposed that Domain Monetisation (ie. the use of a website which is automatically generated with paid advertising matching the subject of a domain licence e.g. books.com.au) no longer be a basis to meet the allocation criteria to register a domain name.

- Should the close and substantial connection rule be retained?

ESA agrees that the close and substantial connection rule should be retained.

- What are your views on the recommendation to replace the current Domain Monetisation test as a basis for establishing a close and substantial connection with a narrower test (recognising online directories and informational services that specifically and predominately relate to the subject matter signified by the domain name)?

ESA expects that the edu.au allocation criteria, which do not currently allow domain monetisation as the basis for establishing a connection to a proposed domain name, will not be affected by the outcomes of this question.

- Should it be permissible to register a domain name under the close and substantial connection rule for the purpose of Domain Monetisation?

ESA expects that the edu.au allocation criteria, which do not currently allow domain monetisation as the basis for establishing a connection to a proposed domain name, will not be affected by the outcomes of this question.

5.1.4 Eligibility and allocation – Grandfathering considerations

It is proposed that grandfathering provisions be introduced for existing licence holders.

- What are your views on the recommendation to grandfather, or apply new policies from the point in time when the domain licence is renewed, rather than applying them with immediate effect?

ESA has experience of operating two grandfathering arrangements in the edu.au domain space:

- The first allows the New South Wales and Tasmanian Departments of Education to maintain and register domain names for government schools at the fifth level, through the creation of the schools.nsw.edu.au and education.tas.edu.au child zones. (edu.au policy dictates that such domains should be registered at the fourth level, but that the use of the child zones can be approved as an exception, by the edu.au Domain Administration Committee).

- The second arrangement relates to the definition of generic education and training terms, which was expanded in the edu.au registration policy in 2012. It was decided at that time that the new guidelines regarding the use of generic terms would not apply to pre-existing domain names. Existing registrations from before 2012 have therefore henceforth been treated as grandfathered and not subjected to the new criteria (subject to meeting all other eligibility and allocation criteria, and continuing to renew the registration – i.e. if the domain name lapses, it cannot be re-registered).

The first arrangement has caused no issues: the grandfathering arrangement is clearly defined, and any new child zone applications are referred to the edu.au Domain Administration Committee for approval before implementation.

However, the second arrangement (for generic education and training terms) has been more problematic, and has led to at least one complaint. It is our experience that new applicants who are rejected on the basis of their proposed domain name using a generic education and term often cite grandfathered domain names in support of and comparison to their own application, and claim that the grandfathering arrangement is unfair. It could be argued that in this instance the grandfathering approach inadvertently contradicts the intent of prohibiting generic education and training terms, which is to “support the reputation and effective operation of the edu.au domain as a fair and equitable service for the education and training sector”.

We would therefore advise that whilst the grandfathering approach works in some instances, it is not always an appropriate solution, particularly when applied to core policy criteria, or to criteria or controls that are being implemented to better protect the integrity of the space.

- Should another grandfathering approach be used, and if so, why?

We would suggest that any grandfathering approach be reviewed on a case-by-case basis. In some instances, it may be suitable, but in others it may be more appropriate to allow current registrations to run their course, but require that the new criteria be applied from the point of renewal (similar to the approach applied to the recent enforcement of the Reserved Names List). When assessing the most appropriate approach, we would recommend taking into account the reason for the change in policy criteria. For example, if the change in policy is to address an existing loophole, it could be argued that those existing domains should never have been registered in the first place, and therefore they should not be grandfathered. The guiding principal for defining the approach in each instance should be fairness both to existing registrants, and to potential and future registrants.

We do not believe that domains registered under a grandfathering approach should be eligible for priority registration as part of the implementation of direct registrations, and believe all priority registrants should be required to warrant compliance with current policy before registering the .au equivalent.

5.1.5 Licence conditions – licence transfer

It is proposed that if a domain licence is sold, the new licence holder should receive the benefit of the remaining licence period. (Currently, when a licence is sold a new licence period is created for one, two, three, four or five years and any remaining licence period is lost.)

- What are your views on the recommendation to allow new licence holders to receive the benefit of the remaining licence period when a domain name is transferred?

We believe that the recommended approach would be fair to the registrant and consistent with international and consumer practice.

We do, however, have a small concern that this recommendation could create the impression that the domain registration is a piece of property being transferred (and therefore infer proprietary rights) rather than a licence transfer. The current transfer process, which, in effect, results in the existing licence being "cancelled" and a "new" licence being issued, reinforces to new registrants that the registration is a temporary licence, and the domain name is not "owned" by either party. We would therefore recommend that this be clearly stipulated in process and policy documentation.

5.1.6 Licence conditions – licence suspension and cancellation

It is proposed that a process be developed to allow for the suspension of a domain name licence, rather than cancellation of a domain name licence, where there is a breach of a policy.

- What are your views on the recommendation to clarify the definition of "law enforcement agency"?

ESA agrees that the definition of "law enforcement agency" should be clarified.

We also believe this should be further expanded to include the registration authorities that have regulatory or legislative responsibilities for the sector in which a registrant operates. For example, we would like to see the Tertiary Education Quality and Standards Authority (TEQSA) and the Australian Skills Quality Authority (ASQA) given the authority to request the suspension of a domain name if it is being used in breach of regulation for the respective Higher Education or Vocational sectors.

- What are your views on the recommendation to create a procedure to allow auDA to suspend a domain name licence (as an alternative to cancellation)?

ESA supports this recommendation.

- Should the maximum period of suspension be set, and if so, should it be capped at one month or some other period of time (and should it be renewable)?

We believe that the period of suspension would have to be dependent on the reason for the suspension, as well as the source of the suspension request, as these factors would both affect the time required to process the review of the suspected policy breach. We would expect auDA to publish a list of "standard processing times" for enquiries into policy breaches, categorised by circumstances, in much the same way as the Government might published visa processing times based on the visa category.

5.1.7 Prohibition on Misspellings

It is proposed that the Prohibition on Misspelling List be retained. This is important to prevent typosquatting – the deliberate registration of a domain name that is a misspelling of a brand name, entity or person for the purpose of misleading users of the misspelt domain name. Such names can be monitored for compliance with the registration rules or blocked from registration.

- Should the Prohibited Misspellings List be retained?

ESA strongly believes the Prohibited Misspellings List should be retained and expanded in light of the proposed implementation of direct registrations, as noted in our previous submissions to the Policy Review Panel.

We do not believe that any of the changes in this current Public Consultation Paper adequately address potential issues that could be created specifically or uniquely by the implementation of direct registration. We remain concerned about the potential registration of names suffixed with existing second level domains: for example, atogov.au or monashedu.au. This poses a significant risk to the integrity of the .au domain space, especially to the closed second-level domains, gov.au and edu.au. Given Section 4.2c of the Prohibition on Misspellings Policy already affords existing registrants protection from names prefixed by "www" (e.g. wwwseek.com.au), the same principle should be applied to add new criteria related to suffixes matching existing second level domains.

- What details should be published on the Prohibited Misspellings List? Should they include the date it was blocked, the identity of the complainant, and the rights that the complainant relied upon?

We believe that the Prohibited Misspellings List should include as much detail as possible, in order to allow us as a Registrar to respond to queries from our registrants. The publication of more details would also better equip our team when assessing applications for new domain names, to understand precedent.

- What are the processes that auDA should be implement to ensure that the Prohibited Misspellings List remains current, including dealing with complaints and requests to unblock a name on the list?

We believe clear processes should be put in place to ensure that the Prohibited Misspelling List remains current. Of most importance to us is that the processes are available on auDA's website and regularly reviewed, to ensure transparency and continuous improvement.

5.1.8 Reserved names

It is proposed that the Reserved Names List be retained, and revised to include additional categories. Currently, the list contains words and phrases restricted under Commonwealth legislation (e.g. ANZAC that are blocked from registration at the central registry).

- What are your views on the recommendation to retain and publish the Reserved Names List?

- Do you agree that the Reserved Names List should be expanded to include words and phrases that are restricted under State and Territory laws?

ESA agrees with the recommendation that the Reserved Names List should be retained and published.

As noted in our previous submissions, we also believe that, in relation to direct registrations, the Reserved Names List should be expanded to include generic education and training terms.

We strongly believe that the registration of generic education and training terms at the second level presents a risk to the sustainability, operational stability and reputation of the edu.au second level domain and its registrants as they:

- present an increased risk for the creation of “de facto” new second level domains, by the creation of private or unofficial registries whereby sub-domains or other services attached to a domain are sold to or used by an entity other than the registrant (e.g. melbourne.university.au, melbournehigh.school.au);

- adversely reflect on or target the education and training sector by appearing to be authoritative/representative, without being required to adhere to the eligibility and allocation rules applied in the edu.au domain, and by extension facilitate fraudulent or misleading business practices (e.g. school.au, university.au, training.au);

- may adversely impact the education and training sector through registrants gaining an unreasonable advantage over other education and training entities which may be operating in the same sector or offering the same or similar services (e.g. sciencetraining.au);

We believe that the exact terms to be reserved should be identified and advised by education sector stakeholders, and stress the need for auDA to ensure robust policy documentation and strong enforcement mechanisms are in place (such as the rapid de-registration or suspension of direct registrations that are used as unofficial registries) to counter the potential for unofficial registries and to avoid undermining the edu.au domain.

We agree that the Reserved Names List should be expanded to include words and phrases that are restricted under state and territory laws, and would recommend that government sector stakeholders should also be consulted on terms or names that should be reserved in general interest.

Finally, we would encourage the panel to reconsider its decision not to recommend that the Reserved List be expanded to include a public interest test, as we believe this would be an effective mechanism to protect terms that may not be protected by legislation, but could be misused (e.g. primeminister.au). We believe this public interest test should be applied to all direct registrations – including in the priority allocation period to contested domains.

- Is it appropriate that the onus should be on the relevant government department or agency to notify auDA of any words or phrases that are restricted by law and should be added to the list?

We agree that this is appropriate, but also that it is the responsibility of auDA to:

- make government departments and agencies aware of the existence of the Reserved Names List through their stakeholder engagement strategy;

- update the Reserved Names List as they are made aware of any words or phrases that are restricted by law (whether through advice from the relevant government department, through a complaint or some other source), and;

- ensure Reserved Names are locked at the registry.

5.2 Implementation of Direct Registration

5.2.1 Priority Allocation Period

It is proposed that the holder of a domain licence at the third level of .au (e.g. telstra.com.au) will have priority to register the corresponding domain name at the second level of .au (e.g. telstra.au) for a six-month period from the Launch Date. There may be registrants at the third level with corresponding domain names.

- Is it appropriate to have a priority allocation period for the registration of new second level domain names to give priority to the registrants of existing domain names in .au?

ESA strongly believes that it is appropriate to have a priority allocation period for the registration of new second level domain names to give priority to the registrants of existing domain names in .au, and that this would be in the interests of our registrants.

- Is a six-month priority allocation period fair to both existing registrants and potential new registrants?

As noted in previous submissions and in our focus group responses, we believe a priority allocation period of six months is fair provided that its implementation is adequately advertised and communicated to registrants. This will require the development of a clear communications plan from auDA, and sufficient advance notice for registrars, so that they can plan and implement communications campaigns to their registrants.

5.2.2 Conflict Resolution Process

It is proposed that if more than one corresponding domain name exists at the third level, it would be reserved or locked down from registration. For example, bsmc.com.au is used by a group of entrepreneurs and bsmc.net.au is used by a medical practice in Woodend, Victoria. In this scenario, the matching .au domain name (bsmc.au) would be locked down and both parties would receive a token. Token holders could negotiate with each other for the release of the .au domain name. If agreement could not be reached, then the .au domain name would remain reserved indefinitely and would not be made available for registration.

- Is the lock down process a fair process to resolve conflicts when there are competing claims at a contestable level?

ESA believes the lock down process is the fairest of the methods suggested to resolve contested domains.

- Will you be harmed by the lock down process, and if so, how?

ESA does not believe registrants will be harmed by the lock down process, as long as the lockdown period is indefinite. This approach will allow our registrants to protect their branding without the need to defensively register a domain in the new zone, where it is contested.

- Should the lock down period be: a) six months b) one year c) two years d) indefinite?

As noted in our focus group responses, we believe the lock down process can only be implemented if the lock-down period is indefinite. If the period is not indefinite, and another method for resolution will still be required at the end of the lock down period, the lock down will be redundant.

We agree that that those holding tokens for contested domains should be required to confirm that they still wish to hold a token for the contested domain on a regular basis (this could be annually, biannually or in line with the renewal of their domain).

- If the lock down period is finite, what should happen to resolve any outstanding conflicts at the end of the lock down period?

We believe the lock down process can only be implemented if the lock-down period is indefinite.

5.2.3 Cut-off Date

A cut-off date of 4 February 2018 is proposed, as this is when the Panel began its public consultation.

- Is 4 February 2018 a fair and reasonable cut-off date for eligibility to participate in the conflict resolution process and the lock down process?

ESA notes that the selection of 4 February 2018 will mean a number of registrants in edu.au and gov.au (education.tas.edu.au, tas.gov.au and nt.gov.au) will currently be ineligible to participate.

In the case of education.tas.edu, the creation of the new child zone was deliberately delayed to coincide with the transition to the new registry operator in July 2018. It seems unfair to penalise the Tasmanian Department of Education for this, when the creation of the education.tas.edu.au child zone was approved by eDAC in November 2017, prior to the proposed cut-off date.

However, we recognise that the selection of 4 February 2018 as the cut-off date will prevent domain name investors and those most familiar with the proposed implementation from having an advantage over registrants who may not be aware of the proposal.

We would therefore be happy to support this date but would like to see education.tas.edu.au and relevant .gov.au domains treated as an exception, in light of the circumstances.

5.2.4 Contestable Levels

It is proposed that holders of domain licences stored in the central .au registry at the third level (e.g. ato.gov.au) and fourth level (e.g. dpc.nsw.gov.au) can participate in priority allocation and conflict resolution for direct registration (e.g. ato.au and dpc.au). The Tasmanian and Northern Territory Governments regulate their own domain names, which sit outside the central .au registry.

- Is it appropriate to exclude domain names registered at the fifth level from participation in the priority allocation process and the lock down process (e.g. images.dpc.nsw.gov.au)?

We believe that excluding domains registered at the fifth level from the priority allocation period is contrary to the principle of no hierarchy of rights in the .au space. We believe the example provided (images.dpc.nsw.gov.au) is misleading as it appears to be a sub-domain of dpc.nsw.gov.au and not a domain licence that could be created in the central .au registry. It needs to be clear that there are domain licences stored in the central .au registry that are legitimately registered at the fifth level. As we understand it, edu.au is the only zone that allows registration at this level. For edu.au, these are school domain names registered under the schools.nsw.edu.au and education.tas.edu.au child zones. It remains unclear to us why fifth level domain names are being excluded, and we believe all domain licences stored in the central .au registry should be eligible to participate in the priority allocation period in the interests of treating all registrants fairly.

- Is it appropriate to exclude domain names registered at the fourth level that are not registered in the central .au registry from participation in the priority allocation process and the lock down process (e.g. justice.tas.gov.au)?

We believe that the government departments should be given the opportunity to register these domains in the central .au registry prior to the implementation of direct registrations and that they should be exempt from the cut-off date of 4 February 2018. If the registrants elect not to do so, it is appropriate that they should be excluded. However, if they want to be registered in the central registry, they should be included in the priority allocation and lockdown process, as we believe that the reason for these domains not being registered in the central .au registry currently are legacy and historical, from a time when no one foresaw the introduction of direct registrations and the associated implications.

5.2.5 The Draft Policy

See the proposed Draft Policy attached as Annexure E to this paper.

- Is the wording of the draft Direct Registration Policy clear and understandable?

We commend the Panel's work on the Direct Registration Policy, which we believe is both clear and understandable.

- Does the draft Direct Registration Policy correctly reflect the intent set out in this paper?

In principal, the draft policy seems to reflect the intent documented in the paper. We would like to see some further definition regarding the implementation of the token system for contested domains, as it remains unclear how this will be implemented, the associated costs to be borne by registrants and the role of registrars in this process.

- Do you believe that you will benefit from Direct Registrations if implemented in accordance with the Direct Registration Policy?

ESA believes that if implemented in accordance with the Direct Registration Policy, Direct Registrations could pose a risk to us and our registrants, namely if:

- The misspellings policy is not adequately expanded to address the use of second-level domain names as suffixes, e.g. atogov.au, monashedu.au (see our response to Section 5.1.7)
- Generic education and training terms are not reserved from direct registrations (see our response to Question 5.1.8)
- A public interest test is not applied to direct registrations (see our response to Question 5.1.8)
- The policy does not address and prohibit the creation of private or unofficial registries using direct registrations (see our response to Question 5.1.8)
- The lock down period for contested domains is finite (see our response to Question 5.2.2)