

# eDAC response to the Final Report of the AUDA Policy Review Panel

**FINAL REPORT**

Version 1.0  
April 2019

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# 1 Introduction

## 1.1 The Role of eDAC

The .edu.au Domain Administration Committee (eDAC) monitors developments, contributes to major policy, and provides advice to key agencies on issues related to monitoring and regulating the edu.au domain space.

eDAC comprises representatives from:

- The State and Territory Government schools sector
- National Catholic Education Commission
- Independent Schools Council of Australia
- The Vocational Education and Training (VET) sector
- The Higher Education sector

eDAC is a representative body encompassing all education sectors within Australia. It provides policy direction for the closed edu.au second level domain. eDAC is supported by the registrar for edu.au, Education Services Australia (ESA) and meets quarterly. eDAC is in turn accountable to .au Domain Administration Ltd (auDA). eDAC can speak for the Australian education sector on domain name issues.

Its role is set out in auDA policy 2015-02 - Governance Arrangements for the edu.au 2LD.

Additional information is available at the eDAC website maintained by the Registrar located at <https://www.domainname.edu.au>

## 1.2 General Considerations

In making this response to the Final Report of the auDA Policy Review Panel (23 March 2019) eDAC has given primary consideration to the role of the closed domains, and their requirements in a time of policy consolidation and change.

The objectives of eDAC are to ensure a stable domain space in a closed second level domain (edu.au) for the Australian education industry. Use of the domain by education has had a very high acceptance and take up, and the domain therefore has a high level of knowledge and acceptance; it is a pity that the work on consumer perceptions undertaken by OmniPoll for the PRP - *Consumer perceptions of domain name extensions January 2019* - did not include edu.au. We believe that it would have shown a high level of awareness and trust of the domain, comparable to that shown for gov.au. This support from education is shown in the excellent coverage of the industry by the edu.au 2LD.

## 1.3 High Level Summary of this Submission

eDAC wishes to emphasise the following major points made in this submission to the Policy Review Panel and the auDA Board. eDAC believes that key success factors for the new policy structure and the introduction of direct registrations include the following (the relevant recommendation is given in each case).

- eDAC suggests that some further key terms should be defined in auDA policies and a glossary provided (Rec.7, 15, 22)
- There should be a period in which interested people could propose prospective new 2LDs (Rec.20)
- In addition to law enforcement agencies, regulatory bodies including TEQSA and ASQA should be able to request takedown of a domain name if it is being used in breach of regulation for the respective higher education or vocational education and training sectors. (Rec.15)
- There should be a public interest test applied to reserved names and other forms of prohibition of use. eDAC argues that a partial public interest approach is taken now, e.g. in the case of reservation of names for future use, application of criteria such as the stability of the DNS, and the misspellings policy. In particular, a public interest approach should be taken in the cases of:
  - The use of suffixes in new second level names (e.g. monashedu.au) (Rec.16)
  - Reserved list status for generic education and training terms and application of a public interest test for direct registrations (Rec.20)
  - Prohibition of the creation of private or unofficial or misleading registries using direct registration (e.g. schools.au) (Rec20)
- The lock down period must be indefinite in duration (Rec.23)
- eDAC proposes that the cut-off date be reconsidered and if the date remains unchanged, eDAC proposes an exemption from the cut-off date for all edu.au domains registered between the cut-off date and the commencement of the priority allocation period. (Rec.23)
- auDA should apply the principle of no hierarchy of names to all levels including 5<sup>th</sup> level names (Rec.22, 23)

## 2 Arrangement of this submission

The final report of the Policy Review Panel (PRP) is a report to auDA, and follows closely on an Issues Paper of the Policy Review Panel entitled ***Public Consultation Paper: Reform of Existing Policies & Implementation of Direct Registration***, issued in February 2019.

Throughout the process of consultation by the PRP it has considered the two issues (policy reform of auDA, and the introduction and implementation of direct registration) “as a cohesive whole and as a package”.

The structure of this response follows the report itself and its 25 recommendations (rather than the high level summary of the report on pages 32-33). The arrangement also lists the sections of the Final Report.

eDAC notes the close connection between the two main documents published by the PRP so far in 2019, in February (undated) and on 25 March. eDAC did not respond to the first of these two reports, although the registrar for the edu.au domain, Education Services Australia (ESA) did respond, and eDAC generally endorses that response.

The two documents deal with the same issues, and are very closely similar, with only one or two points of significant difference. This response is a response to the two documents.

## 3 Reform of Existing Policies

**Recommendation 1: That the existing policies be simplified and consolidated into three policies.**

eDAC supports the review, simplification and consolidation of the existing policies where possible. Over the past nineteen years, the policies have evolved and this has led to the complex mesh of policies set out in Annexure A of the Final Report.

### 3.1 Eligibility and Allocation - the Australian Presence Requirement; & 3.2 Trade Mark applications and registrations

**Recommendation 2: For all domain names registered in .com.au, .net.au, .org.au, .asn.au, .id.au and .au, the registrant must be a legal person with an Australian presence.**

eDAC strongly supports this recommendation and the move to a single, simple Australian presence test for all domain name registrations across the .au name space. We agree that the registrant should be “a legal person with an Australian presence”, defined as “an Australian citizen or permanent resident or entity established under Australian law.”

This requirement does not impact on the edu.au registration policy. In addition to the requirement for an Australian presence, registrants in edu.au must meet the eligibility requirements specific to the 2LD - namely, that an applicant must be registered with an Australian government authority, or warrant that the primary function of their organisation relates to the provision of education and training in Australia. The eligibility requirements have generally worked well.

**Recommendation 3: A consistent Australian presence test should apply to all domain names registered in .com.au, .net.au, .org.au, .asn.au, .id.au and .au.**

eDAC strongly supports this recommendation. It seems likely that all registrants in edu.au would meet the Australian presence requirements.

**Recommendation 4: The applicant or owner of an Australian trade mark application or registration can rely upon that application or registration to establish an Australian presence, but only in respect of a domain that is an exact match to the Australian trade mark application or registration. This trade mark application or registration must be for a word mark, not a device or logo mark. If a trade mark registration is cancelled or removed from the Register, or if a trade mark application lapses, there is an automatic loss of the Australian presence on this ground.**

eDAC notes that the trade mark provisions relate to the Australian presence of registrants who lack other grounds for registering an Australian domain name. For all other trade mark owners, there will be other grounds for obtaining a domain name. The exact match requirement therefore applies only where a registrant has no other basis for obtaining a domain name, and eDAC strongly supports this requirement

### **3.3 Eligibility and allocation - Resale and warehousing**

**Recommendation 5: The resale and warehousing prohibition rules should be retained and strengthened.**

eDAC supports this recommendation. It notes that the existing 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 in this final report the controls within edu.au will remain unchanged.

Within the broader .au domain space, eDAC agrees with the recommendation that stricter controls would better protect the reputation and integrity of the .au space. Stricter controls might also protect edu.au registrants, who sometimes receive unsolicited emails offering, for example, com.au domains which match their edu.au domain and which have been registered for the sole purpose of resale.

We acknowledge that warehousing and resale are not prohibited in many (or most) other domain spaces outside of .au but believe that this is an opportunity to differentiate the .au space as more trustworthy and therefore more attractive to potential registrants.

**Recommendation 6: Registrants should be prohibited from registering a domain name “primarily” for the purpose of resale or warehousing; and**

eDAC as noted above supports this recommendation.

**Recommendation 7: A list of factors indicating that a domain name has been registered primarily for resale or warehousing should be included in the new Registrant Policy, and if the majority of these factors are met, then the onus should shift to the registrant to demonstrate that the registrant did not register the domain name for the purpose of resale or warehousing.**

eDAC suggests that the recommendations relating to warehousing and resale might be further strengthened if there were a definition of the key terms, “warehousing”, “resale” and “monetisation”.

The Final Report, in 3.3, notes the difficulty of enforcing the existing rules, and some of these difficulties relate to the lack of clarity in the terminology and concepts involved. The text of the report (page 9) refers to an additional probation, which is registering for the purpose of “transfer to another entity”, and also provides some guidance as to actions which would NOT be prohibited.

The list of factors proposed as indicating that a domain name has been primarily registered for warehousing or resale seem sensible - for example, owning more than 100 domain names unrelated to registrant trademarks or business names, owning names which are acronyms or common phrases, domain names not in use, advertisement for sale of names, transfer of more than six names over a period of six months, and other criteria.

Within edu.au this is not likely to be a direct issue, but it is important for the stability of the .au name space that the policies operate effectively, and are not subject to confusion, litigation or ambiguity. We note that the PRP suggests that this is one area which may be held over for further consideration and discussion (Final Report, 1.2)

### **3.4 Eligibility and Allocation - “Close and Substantial Connection” rule; & 3.5 Domain Monetisation**

**Recommendation 8: The “close and substantial connection” rule be retained and expanded to recognize online directories and informational services that specifically and predominantly relate to the subject matter denoted by the domain name;**

eDAC supports retention of this rule, and also the expansion of the concept to incorporate “online directories ... and informational services that specifically relate to the subject matter denoted by the domain name.”

**Recommendation 9: Domain monetisation should no longer be a basis to meet the allocation criteria to register a domain name in the .com.au and .net.au domain name spaces; and**

eDAC supports this recommendation, while noting that there is likely to be some ambiguity in the operation of the new policy. The rule is unlikely to affect the operation of edu.au, the rules of which do not support monetisation.

**Recommendation 10: A registrant should have a six months grace period from first registration to meet the close and substantial connection test.**

eDAC supports this approach, although there is likely to be some ambiguity in individual cases.

### **3.6 Eligibility and allocation - Grandfathering considerations**

**Recommendation 11: Existing registrants should be allowed to retain their registrations until the end of the current registration period, but should only be able to renew their registrations if they meet the then current eligibility and allocation rules at the time of renewal.**

This recommendation does not have significant impact on edu.au registrants, and eDAC notes that existing policies within edu.au deal with this. Moreover, this recommendation applies primarily to entities where the current registration conflicts with new policies, in particular the policies relating to domain monetisation and close and substantial connection.

The PRP Final Report includes several grandfathering options. However, the proposed option - “retain ... until the end of the current registration period” could refer to a period of between one day and five years, and it may be better to also include a provision of a six month grace period in addition to the proposal in Recommendation 11. In its submission to the February consultation by the PRP, ESA made some suggestions which related to grandfathering.

### **3.7 Licence conditions - Licence transfer**

**Recommendation 12: A process be created to allow transferees of existing domain names to receive the benefit of the remainder of the licence period.**

eDAC agrees that this would be fairer than current arrangements. However, as suggested by ESA in their recent submission, in the impression which may be given by this proposal that domain names are property, with proprietary rights, rather than licences. The current transfer process, in effect results in the existing licence being “cancelled” and a “new” licence being issued. This reinforces to new registrants that the registration is a licence and not owned by either party. This needs to be made clear in the process and policy documentation.



### **3.8 Licence conditions - Licence suspension and cancellation**

**Recommendation 13: In addition to auDA’s ability to cancel a domain name licence in defined circumstances, auDA will have the power to suspend a domain name licence. The period of suspension should be limited.**

eDAC supports this change. It has long been anomalous that the only penalty has been cancellation, when this may have a devastating impact on a registrant.

**Recommendation 14: During the period of suspension, the registrant of a suspended domain name will have the ability to appeal the suspension under the new Complaints Policy; and**

eDAC supports this policy. The period of suspension should be at the discretion of auDA but auDA should publish a list of standard suspensions and processing times for enquiries into particular types of breaches, and provide a guide to reasonable expectations.

**Recommendation 15: The ability to cancel or suspend a domain name licence to “comply with a request of a law enforcement agency, or an order of a court or under any applicable law, government rule or requirement, or under any dispute resolution process” will be clarified as set out above.**

eDAC notes that the term “law enforcement agency” is not defined. Many entities have an interest in exercising this kind of power, and it is important. eDAC supports using an existing definition as proposed in the Final Report (page 14) but definition of a “government rule or requirement” is a matter for auDA.

eDAC also strongly believes that this section should be further expanded to include the registration authorities which have regulatory or legislative responsibilities for the sector in which a registrant operates. In particular, 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 suspension of a domain name if it is being used in breach of regulation for the respective higher education or vocational education and training sectors.

### **3.9 Prohibition on misspellings; & 3.10 Unblocking domain names on the Prohibited Misspellings List**

**Recommendation 16: The Prohibited Misspellings List be retained.**

eDAC supports the retention and expansion of the Prohibited Misspellings List, because it is a pragmatic solution - a list - for a range of issues. eDAC also supports the refinements to the policy as set out on page 16 of the Final Report.

We believe that the implementation of direct registration will create new issues which can be characterised as misspellings, or misleading spellings. We are particularly concerned about the potential registration of names suffixed with existing second level domains; for example, atogov.au, or monashedu.au. These pose a significant risk to the integrity of the .au domain space, especially to the closed 2LDs, edu.au and gov.au. Section 4.2c already provides some protection through the Misspellings policy in the case of www (e.g. wwwseek.com.au).

Clear processes should also be put in place to ensure that the Prohibited Misspellings List remains current and provides sufficient detail so that it can be used effectively by registrars.

**Recommendation 17: The list remain publicly available on the auDA website. The following details will be disclosed on the published list: the blocked domain name, the date the domain name was blocked, the person or entity that lodged the complaint, and the rights the complainant relied on. The misspelling should be blocked in all relevant name spaces.**

eDAC believes that the list should provide as much detail as possible, and information which would be useful to registrars and registrants.

**Recommendation 18: Prohibited misspellings will be blocked from registration, unless a potential registrant can demonstrate that it has legitimate grounds for use of the domain name; and**

eDAC agrees with this recommendation.

**Recommendation 19: auDA will have the discretion to unblock the prohibited misspelling if the potential registrant can demonstrate that it has legitimate grounds for use of the domain name.**

eDAC agrees with this recommendation, and also agrees that there should be a periodic (e.g. bi-annual) review to ensure the continued currency and value of the List.

### **3.11 Reserved List**

**Recommendation 20: A Reserved List will be retained and comprised of**

- **Words, phrases and acronyms prohibited by Australian law, including both Commonwealth and State law;**
- **Names and abbreviations of Australian states and territories and the name “Australia”;**
- **Names that threaten the integrity and stability of the .au name space; and**
- **Names for use as future 2LDs, with registrations at the third level.**

eDAC believes that there should be a wider scope for the reserved list. The over-arching role of the reserved list is to ensure that names that are not in the public interest to be used as domain names are not used. In effect, it operates to prevent the registration of names which it is illegal to use, or which it is not in the public interest to register. As is the case with the Prohibited Misspellings List, the least ambiguous approach is a list.

While the reserved list is not a precise tool, eDAC believes that within the education sector, one of the three sectors with closed 2LDs, there is a need for reserved names which are generic education and training terms. eDAC believes that it is very important for the stability and utility of the domain name system that the reserved list include more than simply those names whose use is illegal in some way.

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 the Australian DNS more widely because 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) rules.
- 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. creation of de facto 2LDs like school.au, university.au and training.au).
- May adversely impact on 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).

eDAC supports a broader public interest test for the reserved names list, as proposed by the submission from the Digital Transformation Agency in its response to the PRP's recent consultation paper.

eDAC is curious as to why the inclusion of the 11 gTLDs which existed in 2002 on a reserved list is imperative. There are now many more such TLDs than those eleven, and if the use of one threatens the integrity and stability of the .au name space, then so might the use of others.

eDAC also accepts the case for reservation of future 2LDs, although which future 2LDs constitutes a dilemma. eDAC suggests that submissions on this matter be sought for both open and closed new 2LDs prior to the implementation of direct registration, and that a period of six months might be allocated, after which names not reserved for this purpose could be made available.

**Recommendation 21: The Reserved List will be published in its entirety on the auDA website (except for names that cannot be published for security reasons).**

eDAC agrees that this is important.

## 4 Implementation of Direct Registration

### 4.1 Recommendations

**Recommendation 22: That Direct Registration be implemented as soon as practical in accordance with the implementation policy set out in Annexure E to this paper.**

eDAC believes that there are several steps which must be taken before direct registration is implemented, and our understanding is outlined below in our comments on the Draft Registration Policy.

eDAC also seeks clarification on a matter of nomenclature. If a domain name registered at the second level is a SLD (section 4.1), what is a second-level domain, such as com.au? Does this remain a 2LD? Will there be confusion? eDAC suggests that a glossary be developed, with the additional definitions proposed above.

**Recommendation 23: That domain names directly registered under .au will have no eligibility or allocation criteria, other than an Australian presence requirement.**

eDAC notes the recommendation of the PRP.

**Recommendation 24: That all auDA Policies (where applicable) apply to domain names directly registered under .au.**

eDAC notes the recommendation of the PRP.

**Recommendation 25: That there be a widespread education and awareness campaign leading up to the release of direct registrations.**

eDAC strongly endorses this recommendation, and understands that this will be a key element in the success or otherwise of the process set out in the Draft Registration Policy. This education and awareness campaign should encompass all registrants, and all registrars in both receiving information and actively participating in the campaign.

### 4.2 Additional comments and suggestions

eDAC makes the following comments and suggestions on section 4.3 and subsequent sections of the Final Report, dealing with implementation of direct registration.

## **Timing**

eDAC agrees that the implementation should be able to be achieved in less than a year. eDAC notes that the PRP Final Report contemplates the likelihood that the process would not be completed until some time in 2020 (4.8).

## **Board response**

After receipt of this Final Report, we assume that the auDA Board will issue a response, and allow for comment on this.

## **Communications campaign and formal implementation**

We assume that this will be followed by formal implementation of direct registration, including a six month priority allocation period. eDAC strongly believes that such a priority allocation period is essential. A period of six months is adequate, provided that all registrants are aware of it; we assume that the auDA Board response will incorporate a communication plan and that there will be sufficient advance notice to registrars so that they can plan and implement their role in the communications campaign.

We assume that some of the 14,000 edu.au registrants will take advantage of the priority allocation period, and indicate their interest, receiving a token where there is more than one name; others would register their name as the direct level; and others would remain solely within the edu.au 2LD. While we assume that the great majority would fall into the last category, we do not know.

## **Conflict resolution process**

eDAC strongly supports the conflict resolution through allocation of tokens and the lock down process set out in the draft policy. We believe that it is the fairest of the methods proposed, provided that the lock down is indefinite. The approach will allow edu.au registrants to protect their branding without the need to defensively register new domains in the new zone.

eDAC agrees that those holding tokens for contested domains should be required to confirm their continued interest periodically.

## **Cut-off date**

eDAC believes that the proposed cut-off date of 4 February 2018 is too early because it would exclude a significant number of registrants with claims to a SLD. The date proposed, 4 February 2018, is already more than a year ago. The PRP itself (4.8) contemplates that the proposed cut-off date may need to be revisited, and that there may need to be safeguards to protect new business entrants and others.

If the cut-off date is not changed we propose an exemption from the cut-off date for all edu.au domains registered between the cut-off date and the commencement of the priority allocation period.

A further issue relates to the case of education.tas.edu.au. The creation of the new child zone was deliberately delayed to coincide with the transition to the new registry operator in July 2018, and it would be unfair to penalise the Tasmanian Department of Education for this. The creation of education.tas.edu.au was approved by eDAC in November 2017, prior to the proposed cut-off date.

## **Contestable levels**

eDAC believes that excluding domains registered at the fifth level from the priority allocation period, as is proposed by the PRP, is contrary to the principle of no hierarchy of rights in the Australian domain space (page 24 of the Final Report) and to the statement that “Government and educational bodies, charities, community organisations, individuals and business all should have access to domain names at the second level.” The statement of principles is also very clear that there should be no hierarchy “within spaces . . . or . . . between levels.”

It needs to be made clear that there are domain name licences stored in the central .au registry which are legitimately registered at the fifth level. For edu.au these are school domain names registered under the schools.nsw.edu.au and the education.tas.edu.au child zones. eDAC believes that it is unfair that domain names of some schools would be excluded from the same rights to direct registration held by thousands of other Australian entities. To treat all registrants fairly, all domain name licences stored in the central .au registry should be able to participate in the priority allocation. Why should a Tasmanian school be any different from a Victorian school?

The Final Report notes that panel members had differing views, but does not say why. It says that few submissions were received, but this is because the education and government sectors have representative bodies - eDAC in the case of schools. This does not mean that schools will not feel aggrieved if they are excluded from direct registration for reasons which are not stated.

eDAC also believes that where domain name licensees do not have their domain names included in the central registry at present, they should be given the opportunity to do so before the implementation of direct registration, without a cut-off date. This is so that they are not excluded from the priority allocation process because of legacy and historical factors.