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9 April 2019

By Email: policy.review@auda.org.au

Policy Review Panel
c/o .au Domain Administration Ltd
PO Box 18315
MELBOURNE VIC 3001

Dear Sir/Madam

Submission - Reform of Existing Policies & Implementation of Direct Registration

1. This submission is made in response to the Policy Review Panel's Public Final Report "Recommendations to the auDA Board: Reform of Existing Policies & Implementation of Direct Registration" and ACIL Allen Consulting's "Cost-Benefit Analysis Final Report" (**ACIL Allen Report**) into direct registration in Australia.

2. REA Group Limited (**REA**) has made previous submissions on the subject of "direct registration" on 2 March 2018 and 8 November 2018.

EXECUTIVE SUMMARY

3. REA submits that the proposed ".au" direct registration should not be implemented. There is currently no objective evidence showing a net benefit to industry. The ACIL Allen Report justifies the implementation of direct registration by asserting that "*a very small lift in e-commerce will more than outweigh the costs of direct registration*". However, there is no evidence to suggest that implementation of direct registration would result in new market entrants or that it would increase expenditure with existing e-commerce platforms. The ACIL Allen Report also ignores the Policy Review Panel's (**PRP**) proposed 'lock down' model for implementation which is relevant to the cost-benefit analysis.

4. If direct registration is implemented (despite the lack of any evidence that it will produce a net benefit to the Australian economy), REA supports the proposed "lock down" model, provided that:

    a. it includes an indefinite "lock down" period. REA does not support any model with a finite "lock down" period which might allow auDA to auction or monetise contested domain names without the consent of all holders of corresponding domains at the Contestable Level.
    b. the Cut Off Date is not extended beyond 4 February 2018. REA is aware of instances where auDA members, including members that have participated in the .au direct registration consultation process, have registered third level domains to which they have no apparent connection. Any further extension of the Cut Off Date Is likely to allow industry insiders to unfairly impede other domain name licensees.
    c. paragraph 9.9 of the Draft Direct Registration Policy is amended to prevent bad faith registration and use of Tokens.

COST-BENEFIT ANALYSIS

5. REA submits that the ACIL Allen Report is a self-serving justification of .au direct registration, rather than an independent analysis of its purported benefits.

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Costs understated

6. The ACIL Allen Report significantly understates the cost of .au direct registration to industry. For example, the ACIL Allen model is based on a domain name registration cost of $10 per year. Most corporates, government or educational bodies outsource their domain name management to a third party provider. These providers charge fees closer to $40 per domain name for a 12 month .com.au or .net.au licence. Further, the retail price charged by large Australian registrars for a .com.au domain name licence ranges from $11.95 per annum to $39.00 per annum.[1] The ACIL Allen Report also ignores other costs to industry, including obtaining legal advice on the new extension and the process for registration and the cost to many businesses of negotiating with other eligible applicants, and costs of dealing with disputes. These additional costs on industry should all be factored into a cost-benefit analysis.

Benefits overstated

7. The ACIL Allen Report suggests that "o*ne of the key benefits of direct registration is its potential ability to enhance growth in the value of internet shopping (B2C e-commerce) in Australia, by encouraging Australians to spend more on Australian shopping websites (which affords them protection via Australia's privacy and consumer protection laws) and relatively less on overseas shopping websites.*" The report suggests that "*a very small lift in e-commerce will more than outweigh the costs of direct registration*". The ACIL Allen Report suggests that in order to outweigh the costs, the implementation of .au direct registration must cause an increase in the growth rate of internet shopping of between 0.036% and 0.065% per annum (depending on the model relied upon).

8. The premise of ACIL Allen's cost-benefit analysis is flawed. The implementation of .au direct registration can only uplift the rate of growth of online shopping in one of two ways; (i) by causing the creation of new Australian e-commerce sites, or (ii) by causing Australian consumers to spend more on existing Australian e-commerce sites than they otherwise would have, in the absence of direct registration.

9. The first scenario is implausible because it suggests that the availability or non-availability of a ".au" domain name is a determinative factor in starting a new e-commerce business. If a new market entrant wanted to commence an e-commerce business under the domain name "brand.com.au" and that was not available, they would have two choices, adopt another ccTLD or GTLD (eg. brand.com or brand.shop) or alternatively, choose another 3LD under the .au ccTLD (eg. brandstore.com.au or brand.net.au). It is implausible that a new market entrant would simply walk away from commencing a new business because their first choice domain name was not available. Introducing .au direct registration will not increase the number of new Australian e-commerce businesses.

10. The ACIL Allen Report also completely ignores the implementation model which has been proposed by the PRP. This is surprising as the PRP has previously suggested that a full cost-benefit analysis needed to take account of the PRP's proposed implementation model. The PRP has recommended that existing 3LD registrants (each a 'Priority Applicant') will have a six-month priority period to register the corresponding 2LD. If there are multiple Priority Applicants, then they can each purchase a Token, negotiate for the purchase of the 2LD and in the absence of agreement, the contested 2LD will be locked indefinitely. In the first scenario above, if the 3LD 'brand.com.au' was already registered by another business, then that business would have Priority Applicant status over the 2LD 'brand.au'. Therefore, the new market entrant would be no more likely to obtain a preferred .au domain name under direct registration than they are under the current regime.

[1] See GoDaddy, Crazy Domains, Melbourne IT, NetRegistry and VentraIP.

11. The second scenario above suggests that Australian consumers would be willing to spend more on Australian websites (that is, those operating under the .au ccTLD) than on sites under another ccTLD (eg .com). The reason given is that buying on an Australian website "affords them protection via Australia's privacy and consumer protection laws". Any suggestion that the applicability of the Australian Consumer Law and the Australian Privacy Principles is linked to the ccTLD used by a website is incorrect. An e-commerce business, regardless of where it is based, will be subject to Australian Consumer Laws if it is trading in Australia, that is, by offering goods and services to Australian consumers (see Valve Corporation v ACCC).[2] The ccTLD adopted by an e-commerce platform also has no bearing on whether the website operator is bound by the Australian Privacy Act (this will be determined by whether they are an APP Entity under the Privacy Act and have a turnover > $3million).

12. It is also unlikely that consumers will spend more on a ".au" website than on a ".com" website because they perceive that they will receive greater Consumer Law or Privacy Act protections. Consumers choose e-commerce platforms based primarily on their ease of use, range, price competitiveness and speed of delivery. The average consumer does not turn their mind to the legal protections they may or may not receive when shopping on a website. Consumers are familiar with dealing with a range of companies operating under foreign ccTLDs which are clearly still bound by Australian consumer and privacy laws, including large ASX listed e-Commerce and bricks and mortar retailers like kogan.com, davidjones.com and cottonon.com.

13. The ambivalence of Australian consumers to site location or ccTLD was apparent after Amazon.com ceased servicing Australian consumers in July 2018 and began redirecting them to its new local site, amazon.com.au. At the time, industry experts suggested that "*the winners out of this move will likely be other major e-commerce platforms such as eBay and AliExpress as Amazon's customer base abandon the platform and seek out other online retailers*".[3] In other words, rather than moving e-commerce business from Amazon US to Amazon Australia, the blocking of amazon.com to Australian consumers simply shifted business to other multinational e-commerce sites. Amazon faced enormous public backlash after Australian consumers were restricted to browsing a range of 80 million products on amazon.com.au compared to over 500 million that were previously accessible to them on amazon.com. In November 2018, Amazon reversed its decision and began facilitating orders by Australian consumers from amazon.com. This example illustrates that Australian consumers value ease of use, range and price competitiveness over other factors.

14. The ACIL Allen Report suggests that up to 30% of potential registrants drop out of the purchasing process when they do not have an ACN or ABN available to register a '.com.au' domain name. ACIL Allen suggest that because these applicants are ineligible for a '.com.au' domain name, they then use either .com or .co domain names or social media (Facebook or Instagram) which "benefit[s] the US economy at the expense of the Australian economy. Once again, the domain name extension chosen by a business is not determinative of its status under the Australian Consumer Law, Privacy Act or taxation laws. There are many prominent Australian businesses that choose to operate under a .com domain name (eg. Kogan, David Jones, Spotlight, Cotton On) and it is difficult to see how their election to trade under a .com domain name 'benefits the US economy at the expense of the Australian economy'.

IMPLEMENTATION MODEL - DRAFT REGISTRATION POLICY

15. Paragraph 8.1 of the Draft Direct Registration Policy affords Priority Applicant status to a person who holds an Australian domain name at a Contestable Level on the Launch Day and who can show that the licence

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[2] See for example, *Valve Corporation v ACCC* [2017] FCAFC 224 where the Full Court of the Federal Court found that a company based in Washington, USA which operated the gaming platform https://store.steampowered.com/ had breached the Australian Consumer Law by making false and misleading representations about consumer guarantees.

[3] https://www.smartcompany.com.au/industries/retail/amazon-bans-australians-gst-retail-industry/

has been registered continuously since the Cut-off Date (4 February 2018), *either in their name or in the names of one or more persons in unbroken succession.*

16. The current wording of paragraph 8.1 can be gamed by registrants with knowledge of the implementation model and the conflict resolution process. For example, Company A owns brand.com.au. Company B's major competitor purchases brand.net.au from a third party after the Cut-Off Date in order to stifle Company A's efforts to register brand.au.

17. For the reasons outlined at 16 above, REA submits that amendments should be made to clause 9.9 of Part B to deem certain conduct to be bad faith conduct warranting Token cancellation.

> *auDA may cancel a Token in accordance with the Complaints Policy (Policy 2019-3), where a licensee:*
>
> *a) has applied for a Token using a proxy or privacy service;*
> *b) has applied for, used or attempted to use a Token for the purposes of resale;*
> *c) has applied for, used or attempted to use a Token in bad faith or for an improper purpose. Without limitation, bad faith conduct may include:*
>
> *i. offering not to apply for a Token in exchange for payment;*
> *ii. offering to cancel a Token in exchange for payment;*
> *iii. applying for a Token to impede a competitor or disrupt the business or activities of another person; or*
> *iv. any bad faith conduct, within the meaning of Schedule A of the .au Dispute Resolution Policy (auDRP), in respect of a Token; or*
>
> *d) ceases to meet the eligibility and allocation rules.*

Yours faithfully,

Sarah Turner
General Counsel & Company Secretary
REA Group Limited