



Australian Government

Department of Communications and the Arts

Suzanne Ewart
Interim Chair, .au Domain Administration
Level 17, 1 Collins St
MELBOURNE VIC 3000

5 August 2019

Dear Ms Ewart

Proposed new .au domain Licensing Rules

Thank you for our recent discussions on auDA's proposed new Licensing Rules (the Rules). As you are aware, the Department raised early concerns with the proposed changes to domain licensing, and indicated that consultation with other Australian Government agencies was required before a final position on these Rules could be provided. As a result of cross-agency consultation, the Department now offers the following comments on the public interest test, allocation rules, and auDA's consultation process:

Public interest test

The Department recognises that industry and the private sector have an important role to play in supporting law enforcement and security agencies in working towards a stable and secure online environment, and welcomes auDA playing an appropriate role in Australia's online ecosystem. However, we consider that the public interest test as it is currently drafted in the Licensing Rules is too broad and is not reflective of the role auDA should be playing. Specific concerns include:

- the public interest test ventures into areas outside of auDA's responsibility
- it is not clear how the proposed actions operate under Australian law
- references to auDA acting on behalf of foreign governments
- increased risk that auDA actions could interrupt existing operations or remove evidence
- increased risk of commercial liability.

Further, the Department has concerns that, while it may not be the intention, the current drafting of the Licensing Rules could:

- allow auDA to apply surveillance without appropriate authority or oversight
- allow registrants' personal information to be disclosed outside of the provisions in existing legislation
- inappropriately imply that actions that should be taken by law enforcement and security agencies may be taken by auDA without appropriate authority or oversight.

2 Phillip Law Street, Canberra ACT 2601, Australia
GPO Box 2154, Canberra ACT 2601, Australia

• telephone +61 (0)2 6271 1000 • website communications.gov.au • arts.gov.au

To assist auDA, the Department offers to facilitate a workshop between representatives from auDA and officials from relevant government agencies to work through issues of concern with the proposed policy and revise relevant sections of the Rules, ahead of further public consultation.

Removal of allocation rules for com.au and net.au registrations

The Department notes that the Licensing Rules propose that there will be no domain allocation criteria for the com.au and net.au namespaces, other than that the registrant must be a commercial entity. This is a significant departure from the longstanding registration policy set out in the *Domain Eligibility and Allocation Policy Rules for Open 2LDs*. This policy requires registrants to be:

- an Australian registered company
- trading under a registered business name in any Australian state or territory
- an Australian partnership or sole trader
- a foreign company licensed to trade in Australia
- an owner of an Australian registered trade mark
- an association incorporated in any Australian state or territory
- an Australian commercial statutory body.

The policy also requires domain names in com.au and net.au must be 'an exact match, abbreviation or acronym of the registrant's name or trademark' or 'otherwise closely and substantially connected to the registrant'. This change also conflicts with the recommendation of the Policy Review Panel (PRP), which was convened by auDA and undertook public and industry consultation to inform its recommendations on reforming existing policies. The PRP considered domain allocation and the 'close and substantial connection' rule and observed that there is no such rule in .com or many other international domains. However, the PRP concluded that, generally, the current rules for com.au and net.au were working well, and recommended that 'close and substantial connection' should mean that the domain licence must be:

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

The Department of Employment, Skills, Small and Family Business, and IP Australia have indicated that they would like further time to consider the implications of the proposed changes on their stakeholders. Staff at Employment also suggested that auDA consult with the Australian Small Business and Family Enterprise Ombudsman.

Public and government consultation

The .au domain is an important public resource, and the terms of the Australian Government's endorsement of auDA as the .au administrator include engaging and consulting widely to ensure auDA can understand and effectively represent the views of its stakeholders. The consultation on the Licensing Rules highlights a number of shortcomings in auDA's consultation processes.

For example, it appears that much of auDA's consultation has centred on notifying stakeholders via correspondence rather than comprehensive dialogue based on a mutual understanding of the

potential impact of the proposed changes. Further, it seems that some key stakeholders were not engaged, such as consumer representative bodies (for example, the Australian Communication Consumer Action Network and Internet Australia). It also appears that auDA has decided on outcomes in the absence of receiving information (for example, the Board approved the Rules in June ahead of the ACCC's written feedback, which was provided in July).

The implementation of a public interest test and the removal of the 'close and substantial connection' rule are significant changes and represent a departure from the recommendations of the PRP. The PRP consulted publicly for two years before making its recommendations; however, where recommendations have been rejected by auDA management, auDA's alternative was not subject to a similar level of public consultation, and decisions have been made within a matter of months.

The Department is concerned that the pace at which changes have been made by auDA management has not allowed time for all interested parties to be consulted. The *Process for the Development and Review of auDA Published Policies* published in November 2018 sets out the principles and processes that govern the development, review and implementation of policies for .au. This document states that auDA is committed to a process that identifies all feasible options, including the status quo, and that all options must identify the impact on stakeholders and the broader Australian community (Principle 2).

According to this policy, auDA will undertake further public consultation where significant changes have been made to the draft policy in response to stakeholder submissions and that auDA must publish:

- i. a redline version of the changes to the draft policy; and
- ii. a statement setting out why the changes have been made.

Thank you for your advice that a redline version will be published for comment as part of the process before final Board consideration.

The Department remains committed to the principles of multi-stakeholder internet governance, including, bottom-up consensus-driven policy-making. In keeping with these principles, and with Principles 1-8 set out in auDA's policy development and review process, the Department requests that auDA undertake further public consultation on the proposed changes before they are adopted.

This would include dialogue with government agencies, consumer groups, intellectual property and business interests, and internet users.

The Department supports auDA's implementation of Licensing Rules following comprehensive community consultation to achieve general consensus on changes. For transparency, this letter should be published on our respective websites.

Yours sincerely



Vicki Middleton
First Assistant Secretary