

auDA Domain Name Suppliers' Code of Practice
December 2002 Review
ACCC Comments

1. Introduction

Following the introduction of the .au Domain Name Suppliers Code of Practice¹ (“the Code”) and in conjunction with its review obligations, the .au Domain Administration Ltd (“auDA”) has requested industry comment regarding the effectiveness of the Code and the level of industry and public awareness, understanding and compliance with its requirements.

The Australian Competition and Consumer Commission (“ACCC”) welcomes the opportunity to participate in this process and offers the following comments regarding the effectiveness of the Code in addressing current and potential consumer protection issues and encouraging compliance with the Trade Practices Act 1974 (“TPA”). The ACCC notes that in providing these comments it should not be taken to have either approved or endorsed the Code or its associated policies.

2. Role of the ACCC

The role of the ACCC is to administer the TPA. In particular, Part V of the TPA contains a number of consumer protection provisions prohibiting certain types of conduct including false and misleading representations and deceptive practices. Accordingly the Commission is keen to encourage the development of industry Codes which facilitate compliance with the TPA, and best practice in consumer protection. This is particularly important in new and developing areas such as e-commerce and the domain name Industry. Nevertheless, in its role as an enforcement body, you will be aware that the ACCC has and will continue to take enforcement action in appropriate circumstances to stop illegal conduct to ensure compliance, particularly where the conduct involves significant consumer detriment.

3. Current Domain Name Services Industry Issues

The Commission has identified a number of recurring consumer protections issues within the industry which have caused and continue to have the potential to result in widespread consumer and small business detriment. Most commonly these involve false and misleading representations and /or deceptive claims made by domain name suppliers in relation to the supply or renewal of domain name and other related services.

¹ v1.2002

4. ACCC Enforcement Action

In response to the significant number of complaints regarding the conduct of particular traders and the Industry in general the ACCC has instituted legal proceedings in a number of cases. The Commission has been successful in seeking various remedies for alleged misleading conduct in relation to the provision of domain name services including interlocutory and permanent injunctions, declarations, corrective advertising, refunds and costs. For example:

ACCC v Internet Registrations Australia (“IRA”)

The ACCC instituted proceedings in September 2002 after it was alerted to IRA’s conduct following an influx of complaints about unsolicited domain name ‘renewal advice’ notices which looked like invoices for payment. In December 2002 the ACCC obtained court-enforceable undertakings by IRA to provide refunds to recipients of its misleading ‘renewal notices’ who responded to its apology. The Court made orders against IRA for making false or misleading representations regarding registration and renewal of Internet domain names including representations that:

- They had a pre-existing relationship or prior dealing with them;
- They had the authority to register or renew a consumer’s domain name and could provide the services of registration or renewal;
- They could register ‘.com.au’ domain names on the Internet for a period of four, six, eight or ten years, and that registration for periods over two years would involve savings;
- A payment for unsolicited domain names services must be made;
- Renewal fees paid by recipients for registration of .com.au domain names are not fully refundable even where registration has been unsuccessful;
- Statutory warranties that the service will be rendered with due care and skill and be fit for the purpose made known by the consumer do not exist or may be excluded; and
- Clauses of the terms and conditions posted on providers websites were capable of avoiding the effect of the TPA.

ACCC v Internet Name Group (ING)

Here, similar allegations to those in the IRA case were made against ING. In addition, the Commission alleged that ING misled consumers by purporting to have a sponsorship, affiliation or approval that it did not. On 17 October 2002, the Federal Court issued consent orders, including injunctions, declarations and ordered ING post corrective advertising on its website regarding its false and misleading conduct.

ACCC v COM.AU.REGISTER

Declarations, court orders by consent, refunds and corrective mechanisms were obtained after the Federal Court found that a facsimile was likely to mislead recipients that COM.AU.REGISTER was responsible for registering Internet domain addresses when it was not, and that it had dealt with recipients previously. Other misleading

conduct included claims of affiliation with bodies responsible for the registration of Internet Domain Names.

The Commission also notes the action taken by auDA in the NetRegister matter.

In that matter auDA filed court proceedings against a reseller, Internet Registry and its director. It was alleged the company engaged in conduct similar to that outlined in the IRA matter. On 26 September 2002 the Court referred the matter to mediation. That resulted in auDA obtaining court enforceable undertakings from NetRegister.

Other potential issues emerging within the domain name industry include:

- Fabricating Internet domain names or extensions;
- Alleging that particular Internet domain names or extensions are designated for a specific use when they are not;
- Inducing and persuading consumers to register names by threatening that the name will be taken up by a ‘cyber-squatter’;
- Registering domain names (front running or warehousing) for the purpose of preventing its use by someone else, or the sole purpose of selling it;
- Failing to supply the domain name renewal services within a reasonable time or by the renewal deadline, or at all; and
- Confusion relating to the ability to transfer Domain Names;

The Commission is also aware of the increased challenges facing the Industry with the recent introduction of competition and the potential for other issues to emerge in the future.

5. ACCC Comment on the Code

The 2000 *Industry Self Regulation in Consumer Markets Report* prepared by the *Taskforce on Industry Self Regulation* (“SRR”), whilst recognising there is no single ‘best practice’ model for self regulation, identifies critical elements for successful schemes. Also, the Ministerial Council on Consumer Affairs (MCCA) Guide, *Fair Trading Codes of Conduct: Why we have them, How to prepare them*, outlines the minimum essential elements or a ‘basic template’ for effective codes of conduct.

The ACCC encourages the Domain Name Industry to take these elements into account in the development of the Code.

Whilst the ACCC believes the Code addresses a number of the recommended minimum elements required of a Code including, the consultation process, scope and objectives, core rules, reporting methods and plain, easy to understand language, some key elements required of a code have been omitted or may be improved on. The SRR notes that wide industry coverage and publicity, fair and independent dispute resolution procedures (with clear sanctions options) as well as effective administration, monitoring and reviewing processes are essential elements of a successful code. It is essentially in these areas that the ACCC believes the Code may be improved upon.

(a) Content

To be effective in addressing consumer concerns the ACCC agrees with the SRR recommendations that a code needs to have rules which address common complaints and concerns about industry practices and which set standards for participants. Such rules should address specific problems and not simply be written as broad general principles.

The Code does contain specific provisions directed at some of the issues facing the Industry such as unsolicited communications, disclaimers and the supply of customer information. However it is also necessary, to the extent possible, that such provisions are accompanied by clear guidelines explaining when, how and under what circumstances this information will be provided and examples of how these protections will operate. This can result in increased confidence and certainty and reduce ambiguity and vagueness both for consumers and the Industry.

For example domain name suppliers are required to disclose² a number of matters to their customers including the supplier's identity, the identity of the accredited registrar (if a reseller), terms and conditions and customer support information. The Code is not however clear about when the relevant information must be provided or the form in which the information must be supplied. In the majority of cases the onus to advise consumers should arise during the course of the relevant transaction and therefore the specific provision can only be effective if clear and specific guidelines to that effect exist.

Accordingly, the ACCC believes that there needs to be further clarification of when and how disclosure of provider identity and contractual terms and conditions are made available to potential customers and consideration should be given to possible inclusion of the same within the Code.

(b) Administration, Monitoring and Reporting of Activities under the Code

Effective administration, monitoring and reporting is an important aspect of compliance. The SRR notes that administration and monitoring of codes is essential to ensure that agreed standards are being met and that the Code is still relevant to the Industry. Furthermore, MCCA notes 'best practice' requires that monitoring mechanisms should be embodied within a code and need to be performed regularly, systematically and visibly.

Industry and consumers cannot guard against specific Industry problems that they do not know exist. Accordingly an effective administrative body and accompanying process is needed to facilitate the identification of issues, collection of data, and monitoring of the Code. This in turn can enhance credibility and increase levels of compliance. For example data collection regarding the level of complaints and their resolution can be an effective tool in monitoring the effectiveness of the Code and in identifying both systemic problems and trends. auDA, in conjunction with Industry is then able to consider and address the identified issues and report and publicise their

² Paragraph 10.1-10.2

recommendations and responses which in turn can result in increased credibility, accountability and effectiveness of the Code.

The Commission is concerned that the Code does not currently provide a comprehensive compliance³, monitoring or reporting mechanism. There is a positive requirement that registrars have a compliance process in place but no compulsion or requirement that a registrar confirm or demonstrate to auDA or anyone else its existence. For example registrars are not required to place a comprehensive outline on their web site or lodge with or report back to auDA regarding the same at regular intervals or at all.

The Code may benefit from the inclusion of a positive obligation on registrars' to provide information to auDA demonstrating they have addressed the mandatory 'compliance systems associated with the Code' requirement, prior to or at accreditation and at subsequent agreed intervals. Consideration may also be given to developing a 'standardised' compliance program (perhaps provided by an independent third party as part of the accreditation process) that registrars must become a signatory to and lodge with auDA.

Furthermore, there is no information or specific guidelines on how auDA anticipates it will monitor compliance with the Code by its current 16 accredited registrars, or their resellers. With the exception that code signatories are required to provide auDA with information about their compliance programs if requested⁴ there is no reference to a compliance audit and subsequent reporting program by auDA.

The ACCC believes that the Code should explicitly provide for compliance monitoring by auDA, and that the Code should include specific reporting requirements to assist auDA in monitoring and evaluating the effectiveness of the Code. For example, an obligation to prepare and post an annual report and publicly report on all Code reviews.

It is critical to the effectiveness of the Code that the establishment of an effective compliance, monitoring and reporting mechanism be considered and enshrined in the Code to ensure among other things agreed standards are being met, that the Code is still relevant to the Industry and to enhance transparency and accountability.

(c) Complaint and Dispute Resolution Mechanisms

It is also vital that where the standard of conduct has been breached the Code should provide for an appropriate complaint handling and dispute resolution mechanism.

The 1997 *Benchmarks for Industry-Based Customer Dispute Resolution Schemes* paper contains published benchmarks for industry dispute resolution schemes. It envisages such schemes will be, accessible, independent, fair, accountable, efficient, effective and subject to independent review. In addition, the SRR states there should be range of appropriate sanctions available.

³ Paragraph 3.3

⁴ Paragraph 3.3

The mandatory complaint handling mechanisms required of registrars and their resellers in the first instance and auDA in the event of any escalated complaints are areas that may benefit from further consideration and fine tuning.

Generally, the current complaint resolution mechanisms provide limited guidance, ultimately relying on auDA⁵ to take action for a breach of contract in relation to a breach of the Code.

Under the auDA Complaints Policy, auDA is the office of last resort for a consumer and auDA will only investigate complaints if the consumer has already attempted to resolve the issue with the relevant registrar or reseller. Remedies available to the complainant include auDA requesting the registrar or reseller to:

- issue a full explanation and apology
- remedy the error and/or refund any payment for services rendered;
- amend the practice or procedure; or
- auDA may notify the registrar or reseller that they are in breach of the Code, the Registrar Agreement or auDA published policy and seek rectification.

Alternatively auDA can refer the matter to the relevant Government Authority or Agency.

If the Registrar or reseller involved does not comply with auDA's request, or there is a systemic breach, auDA may in the case of a reseller, direct the registrar not to accept any services from that reseller, and terminate any reseller licence in existence between the registrar and the reseller. In the case of a registrar, auDA may suspend or terminate the registrar's accreditation.

Domain Name Supplier Complaint and Escalation Handling Process

Internal complaint handling processes are essential to ensure dissatisfied consumers have access to cost effective mechanisms for resolving complaints at the first instance. Effective preliminary mechanisms serve to buttress consumer confidence provided they respond to consumer complaints within a reasonable time, in a reasonable manner and at minimal, if any cost at all.

The Commission has some concerns that although the Code does require Domain Name Suppliers implement a complaints handling and escalation process⁶ there is little guidance provided as to the standard of service required.

The Commission believes further clarification is required regarding the factors a supplier must take into account in determining:

- Whether and how to proceed with a complaint;
- The nature of the complaint and whether a complaint⁷ is 'complex';
- What 'reasonable' costs in a given circumstance are;

⁵ Paragraph 13.3

⁶ Paragraphs 1.4 – 1.6, 12.1 b) and 14.1-15.20

⁷ Paragraph 15.12 c)

- Whether and how much of the ‘reasonable’ costs a complainant should pay in the event the complaint is complex; and
- Whether a complaint handling mechanism should include an escalation mechanism.

The code should include clear guidelines regarding the complaint handling process and provide standard, consistent procedures to address the above issues. Without clarification and guidelines, a wide range of different and potentially inconsistent complaint handling mechanisms may develop which may result in considerable consumer and industry confusion. This could also impact upon auDA’s perceived or actual ability to resolve escalated matters in a uniform manner and monitor and report on the same leading to reduced levels of credibility and consumer confidence.

Notably, and of particular concern is that a supplier is not required to respond in writing unless the complainant makes such a request. There is no obligation on the supplier to advise the complainant they have the right to make such a request⁸.

The ACCC believes that the Code should explicitly provide that the supplier advise the complainant they have the right to make such a request.

It is also important that it is clear what level of reporting⁹ on complaint outcomes, the performance of the internal complaint-handling and escalation mechanism and review of the same, if any, would be required. The Code should ideally include specific reporting requirements to assist auDA in monitoring and evaluating the effectiveness internal complaint handling mechanisms.

Escalation to auDA

The Code provides¹⁰ that auDA’s powers of enforcement are ‘established by legal agreements between participants in the domain name industry’. The availability and effective use of appropriate sanctions can raise the level of credibility and consumer confidence in the Code.

Essentially however, the consumer must rely on auDA to enforce its contract rather than take direct action itself and where conduct relates to resellers, enforcement relies on a registrar taking action to enforce a contract with a reseller, rather than auDA or the complainant. Accordingly, because flexible remedies are not generally available in relation to a breach of contract and court procedures are likely to be costly and protracted in determining a breach of contract consumers may not benefit.

In the event a complaint is escalated to auDA, there is little guidance as to when auDA will take steps to impose any of the sanctions available, or before auDA would ultimately resolve to terminate a registrar’s contract and their accreditation status are not prescribed.

⁸ Paragraph 15.12 a)

⁹ Paragraph 15.16 a), b)-15.20

¹⁰ Schedule A, Background.

The commission believes further clarification is required regarding the factors auDA will consider in determining:

- The sanction, if any it will impose in a particular circumstance and associated ‘thresholds’;
- The processes that must be followed when imposing the sanction;
- What appeal process, if any will be available; and
- The monitoring and reporting of the outcomes of any action.

Consideration could also be given to the establishment of an Industry-funded compensation fund to enable consumers to obtain effective compensation where appropriate.

(d) Consumer Awareness and Understanding

The role of consumer education needs to be considered. In an emerging and rapidly developing environment such as Domain name services, consumers may be particularly vulnerable, requiring constant updates and information availability regarding market behaviour patterns and changes in the Industry that may affect them.

As a minimum requirement and to ensure at least all registrants are aware of the Code there should be an onus and positive obligation along with procedural guidelines enshrined in the Code, to advise registrants of the Code at the time of the relevant transaction involving the supply of the domain name services.

In many cases a code fails to operate effectively, not because its principles and procedures are inadequate, but because employees or industry members are either unaware of the code or fail to follow it in day to day dealings. For example, it has been Commissions experience in the Domain Name Industry that a number of escalated matters are the result of a ‘simple lack of understanding’ on the registrant’s or often the domain name supplier’s part. This appears to be particularly the case with respect to resellers in the domain name industry.

Accordingly, a campaign to address this group specifically either directly or through their registrars may be of value. A mandatory provision¹¹ in the Code that a registrar must declare and demonstrate that they and their resellers’ have a minimum acceptable level of understanding with respect to the Code and its policy may also benefit the Code. Furthermore the development of a short registrar ‘information session’ or ‘seminar’ program by auDA regarding developments with an obligation on registrars to disseminate this information to their resellers could be considered.

(e) Examples and Case studies

The developing nature of the Industry, the recent introduction of competition and current Industry issues may see a number of potentially complex issues raised under the Code. The Code generally and in particular the current complaints handling processes, may be susceptible to broad and inconsistent interpretation. This can give rise to confusion and inappropriate interpretation and application of the Code.

¹¹ In preference to the current provisions in Paragraph 11.1 -11.3.

There are a number of examples illustrating the operation of certain provisions in the Code. The Commission considers that the Code may benefit from further examples, clearly labelled as such in ‘shaded boxes’ in particular relating to:

- The time at which customer information should be expected to be provided;
- The complaint handling process at first instance including what a ‘complex’ case may be and what constitute ‘reasonable costs’; and
- The escalated auDA complaint handling process including examples of the sorts of circumstances in which auDA would act and the sorts of sanctions it may impose.

(f) Review and Amendment of the Code

The ACCC believes that codes must adequately provide for the review of its operation at specified levels and intervals. Whilst the Code provides for review¹² at 3, 6 and 12 month intervals following implementation, it should also provide for ongoing reviews at appropriately determined periods after this point.

Ideally the ACCC believes reviews should be independent, incorporate external stakeholder consultation, input and representation and be made publicly available. It should address and report on administration, monitoring, compliance, complaint handling and overall effectiveness. Furthermore, the processes and elements required to be the subject of the review should be embodied in the Code itself.

Currently the provision in the Code allowing for amendment only requires that auDA approve the amendment. Accordingly, the Commission believes consideration of some level of independent input regarding amendments and review reporting may be of value.

Conclusion

The Commission thanks auDA for the opportunity to comment on the review of the Code. If you have any queries or wish to discuss the above comments any further please do not hesitate to contact me.

¹² Paragraph 1.7