

auDA Domain Name Suppliers' Code of Practice
June 2003 Review
ACCC Comments

1. Introduction

Following the initial review of the .au Domain Name Suppliers Code of Practice¹ ("initial Code"), and in conjunction with its continuing review obligations², the .au Domain Administration Ltd ("auDA") seeks further industry comment regarding the current effectiveness of the Code³ ("current Code")⁴ and the level of industry and public awareness, understanding and compliance with its requirements.

The Australian Competition and Consumer Commission ("ACCC") welcomes the continuing opportunity to participate in the review 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 considers the review process, in conjunction with enforcement of the Code and law enforcement activity, essential to address current industry concerns and to ensure the industry is well positioned to adequately meet future challenges. The ACCC notes that in providing these comments it should not be taken to have either approved or endorsed the amended Code or any associated policies.

Notwithstanding amendments to the initial Code resulting from the first review the ACCC believes comments made in its earlier submission are still relevant. Accordingly this submission will provide comment on changes to the Code resulting from the December 2002 review and will summarise issues previously identified.

2. Issues in the Domain Name Services Industry

The introduction of the Code, industry efforts, and ACCC and auDA activity have arguably increased the level of consumer and small business awareness of the often complex issues facing the industry, particularly issues involving potentially misleading conduct. Accordingly, the Code and the review process continue to be important in facilitating communication, increasing transparency and providing guidance to the industry.

The consumer protection issues identified by the ACCC in its previous submission do not appear to have changed significantly since the introduction of the initial Code 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

¹ v1.2002

² Paragraph 1.7

³ v1.2003

⁴ To avoid confusion, footnotes referring to the initial code will refer specifically to v1.2002

deceptive claims made by domain name suppliers in relation to the supply or renewal of domain name and other related services.

The ACCC also welcomes the current auDA review of the WHOIS policy as issues relating to the access and accuracy of WHOIS information both in Australia and internationally are proving to be a related area of concern. An example is the use of WHOIS information to send unsolicited and often misleading or deceptive email.

3. ACCC Enforcement Action

The ACCC has issued proceedings and sought various remedies in response to complaints regarding certain traders.

The ACCC notes continuing ‘consumer alert’ warnings in relation to online conduct and conduct affecting online commerce in breach of the Code on auDA’s website, for example:

- Conduct involving Domain Names Australia sending letters/faxes to registrants regarding the .com version of their .au domain name being available, in a communication which may be mistaken for an invoice
- Actions by Discount Domain Name Services (DDNS) that are in breach of the new auDA Transfers policy: and
- Melbourne IT conducting a mailout to registrants, not in the spirit of the Code, marked ‘important account information’ which was in fact promotional information.

It is important that in a rapidly developing environment such as the Domain Name Industry, new and emerging issues continue to be identified, monitored and addressed and publicised.

The ACCC will continue to take enforcement action to stop illegal conduct and to ensure compliance, particularly in cases involving potentially significant consumer detriment.

4. ACCC comments on changes pursuant to the December 2002 Review

The ACCC welcomes amendments to the Code resulting from the December 2002 Review, including simplification and clarification of language, as well as a number of substantive changes which may have benefits for registrants and the industry. Potentially the most substantial benefits for consumers are in the areas dealing with Complaints Handling Principles and Rules⁵ and Code Enforcement⁶.

(a) Complaint Handling Principles

The reform of Section 14 is welcomed by the ACCC. The obligation on the Domain Name Supplier to ensure complainants are aware of their rights under the Complaint

⁵ Section 14 and 15

⁶ Section 13

Handling Principles and Rules⁷ potentially represents a significant benefit to consumers.

Although the initial code imposed an obligation on Domain Name Suppliers to implement an efficient, fair and accessible complaint handling mechanism⁸, there was no requirement that the consumers be informed of these rights. This effectively means that in many circumstances the complaint handling mechanism was not effectively utilised, as consumers were not aware of it. The introduction of paragraph 14.5 a) represents a strengthening of the Code which benefits consumers and demonstrates the importance of continued review and reform of the Code.

In addition, the requirement imposed on the Domain Name Supplier in paragraph 14.5 b) to tell the Complainant about their own complaints handling procedures will potentially lead to an increase in consumer knowledge about their rights. While the initial code introduced a mandatory complaints handling mechanism⁹, this amendment extends and clarifies this principle. Details concerning the minimum requirements that a complaints handling mechanism should include would be of further benefit.

Paragraphs 14.6 and 14.7 strengthen and clarify the referral process for unresolved complaints to au DA. The initial code, which gave auDA ultimate responsibility to resolve breaches of the Code¹⁰, failed to impose the current obligations, which allow specifically for escalation of a complaint¹¹ and oblige the Domain Name Supplier to inform the consumer of their right to have a complaint escalated to auDA¹². This facilitates consumer awareness of their rights, and is an important amendment supported by the ACCC.

Paragraph 14.8 provides auDA with the right to investigate a complaint at any time. This has the potential to provide significant benefits to consumers if issues affecting a wide range of individuals are identified and addressed at an early stage.

(b) Complaint Handling Rules

This section of the initial Code underwent substantial revision, however the substantive effect of the section appears unchanged.

The current Code no longer enables consumers to enquire on the progress of their complaint¹³, except to the extent provided in paragraph 15.6 d), which is in complex cases. The ACCC queries the rationale behind the removal of this provision. However, the current Code enables complainants to refer complex complaints which can not be dealt with in the 30 day time period to auDA¹⁴, which may be of benefit.

(c) Code Enforcement

⁷ Paragraph 14.5 a)

⁸ Paragraph 14.1

⁹ Paragraph 14.1

¹⁰ Paragraph 13.3

¹¹ Paragraph 14.6

¹² Paragraph 14.7

¹³ Removal of paragraph 15.12 f) g) v1.2002

¹⁴ Paragraph 15.6 d)

The ACCC welcomes the inclusion of paragraphs 13.5 and 13.6, which provide clarification for code enforcement.

(d) General comments

The review of the Code led to general amendments which represent potential benefits for the Domain Name Services Industry. For example;

- The current Code is more user friendly and readable, as it includes cross references, for example paragraph 15.2 a) refers to the part of the code detailing publication mediums¹⁵ and paragraph 6.3 refers to the part of the Code covering disclaimers¹⁶.
- The current Code more clearly specifies the objectives regarding the application of the Code¹⁷ and aims to prevent practices which undermine the reputation of the industry and participants, incorporating a 'good will' element to the Code¹⁸.
- The current code explicitly restricts the type of customer contact that can be made, promoting consumer awareness of the independence of a domain name licence from other products hosted by the Domain Name Supplier¹⁹. This promotes compliance with the TPA, specifically s 52, s 53 (aa) and s53 (c). These provisions prohibit misleading and deceptive conduct²⁰, prohibit falsely representing that services are of a particular standard, quality, value or grade²¹ and prohibit representations that services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have²². The addition of this provision seeks to increase consumer's knowledge about the product and/or service they are purchasing, reducing the risk of consumers being misled.
- The current Code includes a specific reference to the ability of Domain Name Suppliers to inform auDA of a breach of the Code²³.

However, the December 2002 review led to an amendment which may result in a potential lessening of registrants' rights.

The change is in the Customer Information section²⁴. The onus from the initial Code was to 'inform' registrants of changes to their policy.²⁵ In the current Code the onus on Domain Name Suppliers has been lessened, such that Domain Name Suppliers only need to 'publish' information about a policy change²⁶. The ACCC believes registrants should be informed, or at least made aware that a policy change has occurred, with instructions as to how they can receive more information about the policy change. This is partly remedied by paragraph 10.3, which places an obligation on Domain Name Suppliers to take reasonable steps to make registrants aware of the

¹⁵ Paragraph 12.1 a)

¹⁶ Paragraph 8.1

¹⁷ Paragraph 2.1 b)

¹⁸ Paragraph 2.1 e)

¹⁹ Paragraph 5.5 e)

²⁰ TPA s 52

²¹ TPA s 53 (aa)

²² TPA s 53 (c)

²³ Paragraph 11.2

²⁴ Section 10

²⁵ v1.2002 Paragraph 10.2

²⁶ Paragraph 10.2

changes if they are not published on their web site. However, it is foreseeable for a Domain Name Supplier to amend their policy, without registrants being aware of the change.

5. Summary of ACCC Comments - December 2002 Review

(a) Content

The ACCC commends and believes the Code is beneficial to the extent that it contains specific provisions directed toward some of the current issues facing the Industry such as unsolicited communications, disclaimers and the inappropriate use of customer information. However, it would be beneficial to provide clear guidelines regarding the operation and application of the provisions.

An example would be further specific information about a domain name supplier's requirement to disclose information regarding their identity, terms and conditions and customer support information²⁷.

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

The ACCC believes that the Code's requirement for a compliance process is essential, and its inclusion is imperative for consumer protection. However, an improvement would be a positive obligation on registrars to confirm the existence of compliance programs to auDA. This is currently not mandatory, required only at auDA's request.²⁸

Furthermore, information on how auDA undertakes compliance monitoring would benefit the industry, as it would increase transparency, accountability and provide information on how auDA views existing compliance programs.

(c) Complaint and Dispute Resolution Mechanisms

The provisions of the Code relating to complaint and dispute resolution mechanisms were revised in the December review, and the changes to the Code, namely the addition of paragraphs 14.5-14.8, are welcomed by the ACCC.

The Code requires Domain Name Suppliers to implement a complaints handling and escalation process, which the ACCC supports. However, these provisions may benefit from further guidance as to the standard of service required.

Further clarification regarding the factors a supplier must take into account when implementing their complaints handling mechanism would be useful. Further direction should address issues such as how to proceed with a complaint, the nature of the complaint and whether a complaint is 'complex'²⁹ and whether a complaint handling mechanism should include an escalation mechanism.

²⁷ Paragraph 10.1-10.2

²⁸ Paragraph 3.3

²⁹ Paragraph 15.6 d)

The ACCC is of the view that the Code should explicitly provide that the supplier advise the complainant that they have the right to request a response in writing, as currently there is no such obligation.³⁰

The inclusion of specific reporting requirements to assist auDA in monitoring and evaluating the effectiveness of internal complaint handling mechanisms would be beneficial, as the current provisions are potentially open to broad and inconsistent construction.³¹

In addition, it is unclear what factors auDA will consider in determining what type of further action to take, if any. The Code would benefit if this type of information were included.

(d) Consumer Awareness and Understanding

The ACCC considers that consumer awareness and understanding would benefit if the Code were to include a mandatory requirement to advise registrants of the Code.

In addition, the ACCC recommends the Code require a declaration by registrars and their resellers' of a minimum acceptable level of recognition and compliance with respect to the Code, in preference to the existing arrangement,³² which does not involve formal recognition of the Code.

(e) Examples and Case studies

In its first submission the ACCC recommended that the Code may benefit from further examples, clearly labelled as such in 'shaded boxes' in particular relating to:

- Provision of customer information;
- The complaint handling process at first instance;
- The escalated auDA complaint handling process.

The ACCC notes the format of examples in the Code have been revised in accordance with recommendations from the ACCC's previous submission.

(f) Review and Amendment of the Code

The ACCC believes that the Code should incorporate ongoing targeted review for problematic areas of the Code. The ACCC queries whether planning an extensive review at 3, 6 and 12 monthly intervals³³ is necessary, and recommends a review process which is flexible and responds to the demands of the industry, rather than conducting reviews of the Code when they are not required. However, the ACCC believes it is essential that complaints data is regularly examined, to ensure that close monitoring of the industry continues. In addition, independent input regarding amendments would be beneficial. Furthermore, for a short period of time following the review auDA should make available on their website a 'marked up' version of the

³⁰ Paragraph 15.6 a)

³¹ Paragraph 15.9 - 15.11

³² Paragraph 11.1 -11.3.

³³ Paragraph 1.7

Code clearly showing the relevant revisions to facilitate feedback and to encourage transparency of process.

Conclusion

The ACCC 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 the ACCC.