



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

(Or by email to policy.review@auda.org.au)

Dear Mr Swinson,

**CAANZ Submission to .au Domain Administration Ltd's Policy Review Panel in response to the
'Registrant Policy: Enabling Australia's Digital Economy and Society' Issues Paper**

Background

The Australian Consumer Law (ACL) applies to all Australian jurisdictions so all consumers in Australia enjoy the same core consumer law rights and all businesses have the same core consumer law obligations, irrespective of which state or territory they engaged in transactions. The ACL also regulates the safety of consumer products and product-related services. Contraventions of the ACL can involve a criminal law with financial penalties (with imprisonment in some jurisdictions in some circumstances), or a law imposing a civil pecuniary penalty.

The ACL is administered and enforced jointly by the ACCC and the state and territory consumer protection agencies, with the involvement of ASIC on financial services matters, under a 'single law, multiple regulator' model. Consumer affairs officials from all of the ACL regulators collaborate through Consumer Affairs Australia and New Zealand (CAANZ).

On 25 January 2018, the .au Policy Review Panel released an issues paper 'Registrant Policy: Enabling Australia's Digital Economy and Society'. CAANZ notes that submissions are due by 5pm on Sunday 4 March 2018 and that submissions will be published.

The issues paper repeatedly refers to consumer trust and consumer protection. ACL regulators, through CAANZ, support initiatives by auDA to strengthen consumer protections and consumer confidence online.

Of note, the issues paper recommends the ability for the auDA CEO to suspend a domain name where it is alleged that the domain name is being used to facilitate or engage in criminal activity. The paper also notes the current auDA policy for cancelling or suspending domain names allows auDA to accept requests from law enforcement agencies in relation to applicable laws, government rules or requirements. The issues paper further notes that the terms 'law enforcement agency' and 'government requirement' are undefined, and there is no 'lawful' test in relation to requests.

CAANZ submissions on behalf of ACL regulators

1. Include provisions in the new policy for auDA to accept and consider requests to cancel or suspend domain names from ACL regulators and other regulators administering laws with consumer protection provisions where there is evidence of a likely contravention of those laws.

ACL regulators note auDA's current policy on cancelling a domain name:

auDA may cancel a domain name in the following circumstances:

- (1) registrant breaches any auDA Published Policy;*
- (2) in order 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; or*
- (3) to protect the integrity and stability of the domain name system or the .au registry.*

ACL regulators support the inclusion of provisions in the new policy that allow auDA to cancel and suspend domain names that breach laws, including consumer laws, after auDA is satisfied that the requisite grounds have been met. auDA should be able to consider and act in response to notifications or requests from any person, where those notifications or requests meet the grounds in auDA's policies for suspending or cancelling domain names.

Specifically, ACL regulators submit that ACL regulators (and other regulators administering consumer laws, as these consumer protection responsibilities for specific industries are sometimes shared between multiple agencies within a jurisdiction) should be able to lodge requests for suspension or cancellation of a domain name with auDA, where the regulator has demonstrated a likely contravention of a consumer law, for auDA's consideration and appropriate action. A domain name suspension and cancellation process administered by auDA would complement ACL regulators' own compliance and enforcement powers to help protect consumers online. The ability to quickly seek suspension or cancellation of a domain through auDA is an essential tool for ACL regulators when there is evidence of likely contraventions of consumer laws and the entity continues to accept payment from consumers using the online domain.

ACL regulators investigate alleged contraventions and initiate enforcement action in relation to the ACL and other consumer laws administered by ACL regulators that involve criminal law and laws imposing civil pecuniary penalties. ACL regulators submit that the ordinary meaning of 'law enforcement agency' would apply to ACL regulators. Accordingly, should auDA's policy for domain name suspension and cancellation continue to refer to a request from a 'law enforcement agency', ACL regulators support that definition capturing ACL regulators.

Furthermore, individual ACL regulators are commonly considered a 'law enforcement agency' under various state, territory and Commonwealth legislation (including *Privacy Act 1998* (Cth)). In other jurisdictions, including Canada and Singapore, law enforcement agencies (including those administering consumer laws) are able to lodge requests with the domain authority to cancel or suspend domains.

ACL regulators offer to work with auDA to ensure appropriate processes are implemented that ensure requests from ACL regulators are of a suitable standard for auDA to determine. For example, auDA may have requirements relating to information about the allegations of contraventions of the law, requirements relating to the internal approval processes within ACL regulators, and requirements to demonstrate the request is lawful.

An alternate position (though not one preferred by ACL regulators) might be that auDA can accept requests from ACL regulators for temporary suspensions, but that Court orders are required for permanent cancellations of domains. A further alternative may be that requests for cancellation are accepted from ACL regulators, but a temporary suspension occurs (e.g. 28 days) while the domain name user is asked to provide reasons why the domain should not be cancelled, with auDA then, depending upon the domain user's response, either lifting the suspension or cancelling the domain.

2. Support restrictions on sub-leasing of a domain name.

ACL regulators rely on the registers and WHOIS service to identify who is using a domain. It is now a relatively quick process to establish an e-commerce platform on a domain to take money from consumers on the promise of providing goods and services. The ability to sub-lease domains without prompt updating of registers limits the ability of consumers, law enforcement agencies and Courts to identify persons contravening the law. Consequently, ACL regulators support the proposal to prohibit subleasing of domain names unless the party acquiring the use of the domain name satisfies the Australian presence and eligibility and allocation criteria and the parties are entered into the WHOIS service (as per paragraph 96 of the issues paper).

3. Improve information published on the WHOIS service about who is using a domain.

It is the view of ACL regulators that parties effecting registrations for people using domains should be prohibited from masking the identity of the persons using the domain. It is becoming more common for details to be masked with the details of the party affecting the registration. This limits the ability of consumers, law enforcement agencies and Courts to identify persons contravening the law and undermines consumer trust in online commerce.

4. Strengthen requirements for parties registering .au domains to have a presence in Australia or to only register domains directly matching a trademark if they do not have a presence in Australia.

There are practical issues with enforcing the ACL and other Australian consumer laws on foreign entities. Requiring an Australian presence for registering an .au domain will ensure Australian consumer laws can be applied to parties registering .au domains. It will also increase consumer confidence that government is in control of the .au domain should traders engage in unlawful activity.

5. Tighten the registration process to ensure details included in registrations (particularly ABN numbers) belong to the parties involved in the registration.

ACL regulators have seen an increase in registrations that quote an ABN not belonging to any party involved in the registration process. Quoting an ABN lends credibility to a domain name registration; when this ABN is not genuine or does not belong to the party using the domain name, consumers are being misled into trusting the party using a domain name. ACL regulators often see this conduct in cases where websites are used to take payments from consumers without supplying the promised goods and services, and the identity of the persons responsible is obfuscated.

Should you require any further information regarding this submission, please contact Valerie Griswold, Executive Director, Compliance and Enforcement, NSW Fair Trading, 02 9895 0574, Valerie.griswold@finance.nsw.gov.au

Yours sincerely,



Dale Webster
Chair of CAANZ
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