

2 March 2018

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 - Registrant Policy: Enabling Australia's Digital Economy and Society

1. This submission is made in response to the Policy Review Panel Issues Paper "Registrant Policy: Enabling Australia's Digital Economy and Society".

EXECUTIVE SUMMARY

2. REA submits that the decision to implement .au direct registration should be reviewed.
3. If auDA determines that it will proceed with implementation of .au direct registration, REA submits that auDA should adopt an order of priority allocation model with first priority given to .com.au registrants.
4. REA would also consider the following allocation models (in order of preference), provided that they were implemented with appropriate safeguards:
 - a. Priority access for owners of trade marks that are an exact or close match to the direct registration;
 - b. A hybrid lottery model with the safeguards described at paragraph 35; or
 - c. A hybrid consensus model with the safeguards described at paragraph 29.

Background

5. REA Group Limited (REA) is a Melbourne-based, multinational digital advertising company specialising in property. REA's core business involves advertising properties on behalf of agents and providing a platform for property seekers to search for properties by reference to criteria such as type (e.g. sale or rent), property type (e.g. house, apartment, land etc.), location and features.
6. In Australia, REA operates (among other things) the residential property website www.realestate.com.au and an equivalent mobile site (**REA website**). The REA website is an online portal for property "listings" (i.e. advertisements for properties published on behalf of real estate agents) and associated information. REA also offers applications for the iOS and Android operating systems, through which users can access property listings and associated information in much the same form as on the REA website.
7. The REA website, which is operated by REA's subsidiary, realestate.com.au Pty Ltd, is currently the 20th ranked website in Australia by unique audience.¹ The REA website receives over one million unique visitors each day² and approximately six million unique visitors per month³. The website flatmates.com.au is a share accommodation website operated by REA's subsidiary, flatmates.com.au Pty Ltd which receives approximately 350,000 unique visitors per month.⁴

¹ Nielsen Digital Ratings Monthly, rank by unique audience (February 2018)

² Nielsen Digital Content Ratings, average daily unique audience (Jul - Nov 2017) & (2-31 Jan 2018)

³ Nielsen Digital Ratings Monthly, average unique audience (Nov 2017 to Jan 2018)

⁴ See note 1.

8. Domain names form an important party of REA’s marketing strategy. REA and its subsidiaries have 17 pending and registered Australian trade marks which include the “.com.au” 2LD. These word and device trade marks include realestate.com.au, realcommercial.com.au, property.com.au, flatmates.com.au, realbusinesses.com.au and 1form.com.au. In addition, REA uses domain names as part of the company names of its subsidiaries. REA and its subsidiaries have also registered numerous business names incorporating the .com.au 2LD, including REALESTATE.COM.AU, REALCOMMERCIAL.COM.AU, PROPERTY.COM.AU and FLATMATES.COM.AU.

.au domain names as brands

9. Since the late 1990s, the practice of using a domain name as both a web address and a brand has become increasingly common. This is particularly the case, in the .com.au 2LD.
10. There are currently 2,334 pending and registered trade marks (see table) which incorporate the .com.au 2LD, including well known businesses such as realestate.com.au, carsales.com.au, seek.com.au, news.com.au, rent.com.au, ancestry.com.au, comparethemarket.com.au, taste.com.au, fetch.com.au, catch.com.au, lastminute.com.au, carsguide.com.au and finder.com.au.

	.com.au	.net.au	.id.au	.org.au	.asn.au	.edu.au	.gov.au
Pending Trade Marks	179	3	0	1	0	1	1
Registered Trade Marks	2,155	46	0	47	3	6 ⁵	18
Total	2,334	49	0	48	3	7	19
Number of corresponding active websites	Many	18	0	23	1	5	7

11. The marketing of organisations by reference to 2LDs other than .com.au has been far less successful. While there are 49 pending and registered trade marks incorporating the .net.au 2LD, only 18 of these domain names remain active. The organisations which have pending and registered trade marks incorporating the .net.au 2LD would be unknown to most of the Australian population.
12. Similarly, there are only a small number of pending and registered trade marks incorporating the .org.au, .asn.au, .edu.au and .gov.au 2LDs. Very few of these brands would be known to the average consumer (smarttraveller.gov.au, abs.gov.au and aec.gov.au being notable exceptions).
13. The proposed introduction of “.au” direct registration by auDA creates an enormous problem for trade mark owners, particularly those operating in the .com.au 2LD. Based on the established domain name hierarchy in Australia, businesses have chosen to build brands around the .com.au 2LD, which they perceived to be the most valuable and marketable 2LD under the .au ccTLD. These business owners have tethered the goodwill in their businesses to the “.com.au” 2LD without knowledge that auDA might seek to introduce a new domain name extension which would differ only marginally from the existing 2LDs. They face a very significant risk of brand dilution if they are not provided with priority rights to register their corresponding .au direct registration. This includes diminution in the value of their existing .com.au domain name licences, diminution in the value of registered trade marks and diversion of web search traffic.

Merits of .au direct registration

14. REA was not aware of the first issues paper published on direct registration which invited submissions by 10 November 2017. The issues paper was not widely circulated in industry, as is evident from the limited

⁵ Identical single class applications have been counted as a single trade mark.

submissions from industry participants. In the circumstances, we set out below our brief views on the merits of direct registration followed by an examination of proposed implementation models.

15. REA considers that direct registration of “.au” domain names should not be implemented unless there is a clearly demonstrated need and demand from consumers of Australian domain names. This should be supported by empirical data, including new qualitative and quantitative consumer research.
16. REA does not find the current case for “.au” direct registration compelling. In particular, we consider that the following arguments for direct registration are weak.
 - a. ‘Consumers want shorter domain names’ – this argument ignores the trend toward mobile phones over personal computers and the tendency of consumers to search for organisations via search engines rather than typing out URLs.
 - b. ‘Individuals need a viable alternative to .id.au’ – it is our view that the limited uptake of “id.au” domain names is because (i) most individual consumers of domain names under the .au ccTLD are sole traders and small businesses who are eligible to register in the .com.au and .net.au spaces via their ABN, (ii) individuals who require an online presence for private use are likely to use social media (Facebook, LinkedIn, Instagram) or blogging sites (Tumblr) rather than hosting their own website containing private content. Other use cases for individual domain names are extremely limited (eg. use of a .id.au 2LD for a private email address) and should not be used as a justification for “.au” direct registration, unless there is supporting empirical data.
 - c. ‘Australian domain name consumers need more options’ - this ignores the fact that the .au ccTLD has one of the highest penetrations in the world, even before the implementation of .au direct registration (as shown below). There is no evidence that Australian organisations genuinely require more domain names than their overseas counterparts. Introduction of a new domain space will simply increase defensive registrations and the passive renewal of domain names. At best, it will result in some businesses migrating content from their existing .com.au domains to the .au space.

ccTLD	.au	.de	.uk	.ru.	NI	.eu	.fr	.ca	.nz	.mx	.cn
Direct Registration?	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Registrations	3.1m	16.3m	10.7m	6.4m	5.8m	3.7m	3.1m	2.7m	0.7m	0.9m	21.4m
Population	24.1m	82.7m	65.6m	144.3m	17.0m	743.1m	66.9m	36.3m	4.7m	127.5m	1.379b
Domains per capita	1 to 7.8	1 to 5.1	1 to 6.1	1 to 22.5	1 to 2.9	1: 201	1 to 21.6	1 to 13.4	1 to 6.7	1: 142	1: 64

- d. ‘There is demand for “.au” direct registration’ – research from Hermes consulting in 2015 showed that less than 10% of domain name licensees were aware of the proposal for “.au” direct registration and this did not materially change when prompted.⁶ When informed about the proposal for “.au” direct registration, a minority of domain name licensees expressed support.⁷ Further qualitative and quantitative testing should be undertaken before .au direct registration is implemented. Anecdotal evidence from those that are set to gain from direct “.au” registrations such as domain registrars should not be used as a substitute for empirical evidence.
- e. “.au” domain names will be ‘more recognisable or appealing for international marketing’ – this justification is entirely speculative and is not supported by any evidence.
- f. “.au” direct registrations will ‘provide consumers with more choice’. Given that any implementation model will provide some form of priority access to existing 2LD holders, it is likely that the most valuable “.au” registrations will be secured by existing 2LD holders.
- g. “.au” direct registrations will enhance value under the .au ccTLD. There is no evidence to suggest that registrants will create new content. The current practice of most .com.au 2LD registrants is to

⁶ .auDA Awareness and perceptions of direct registration – Qualitative and Quantitative Insights, May 2017, pp. 22-23.

⁷ auDA Awareness and perceptions of direct registration – Qualitative and Quantitative Insights, May 2017, pp. 28. Only 40% of .com.au licensees expressed support for .au registration.

- register similar extensions (such as .com and .net.au) and either redirect these to their primary .com.au site or to passively hold them without a redirect. There has been no evidence from NZ or the UK to suggest that direct registration has led to increased content creation.
- h. 'Direct registration has been successful in NZ and the UK'. While registrations have increased in the .nz and .uk namespaces, this is not surprising as organisations seek to acquire defensive registrations. The more relevant measure of success is whether organisations have created new content or migrated their existing websites to their new .nz and .uk domains. Following introduction of direct registration in New Zealand and the UK, many of the largest companies and top websites continue to utilize .co.nz⁸ and .co.uk⁹ 2LDs as their primary domain names.
17. REA submits that the 2015 Names Panel consultation process had several major flaws which warrant a re-examination of the merits of direct registration.
- The 2015 terms of reference required the Names Panel to consider the merits of direct registration without considering the proposed implementation model. REA submits that the two questions cannot be considered in isolation. This is evident from the many submissions to the 2015 Names Panel which provided conditional support, depending on the method of implementation.
 - The 2015 Names Panel was not able to consider objective evidence of both the registration *and use* of direct registrations in New Zealand and the UK. Any assessment of the success of direct registration in these markets, must take into account the level of use as a primary domain name and the level of new content creation.
18. auDA should not proceed with the implementation of .au direct registration until these matters have been considered and addressed.

IMPLEMENTATION MODELS FOR .AU DIRECT REGISTRATION

Order of priority - .com.au registrants

19. REA supports a priority of rights implementation model for “.au” direct registration. REA submits that .com.au licence holders should be given a priority right to register the corresponding “.au” 2LD.
20. .com.au licences account for 88%¹⁰ of domain names registered under the .au ccTLD. They are the overwhelming majority of users of the Australian domain names system and we submit that an order of priority favouring .com.au licence holders will result in the lowest harm to existing 2LD holders and the lowest number of complaints through the auDRP system. An order of priority model has been successfully utilised in both the United Kingdom and New Zealand.
21. It has been suggested that an order of priority model should not be utilised because the Australian domain name system subscribes to a philosophy that there is “no hierarchy of rights”. auDA’s constitution sets out the objects and principal purposes under which it operates. Notably, auDA’s constitution makes no reference to the “no hierarchy of rights” principle. We submit that an order of priority allocation model is consistent with auDA’s objects¹¹ to:
- maintain and promote the operational stability and utility of the .au ccTLD;

⁸ See for example google.co.nz, airnewzealand.co.nz, farmers.co.nz, thewarehouse.co.nz, trademe.co.nz, stuff.co.nz, nzherald.co.nz, tvnz.co.nz, anz.co.nz, westpac.co.nz, kiwibank.co.nz, spark.co.nz and seek.co.nz. Of the top 50 websites in NZ, only pinterest.nz utilised a .nz direct registration: Alexa.com, Top sites in New Zealand, February 2018: <https://www.alexacom/topsites/countries/NZ>

⁹ See for example, google.co.uk, amazon.co.uk, bbc.co.uk, ebay.co.uk, dailymail.co.uk, rightmove.vo.uk, pinterest.co.uk, tripadvisor.co.uk, barclays.co.uk, hsbco.co.uk, bankofscotland.co.uk, sainsburys.co.uk. Of the top 50 websites in the UK, only gov.uk utilised a .uk direct registration: Alexa.com, Top sites in United Kingdom, February 2018: <https://www.alexacom/topsites/countries/GB>

¹⁰ AusRegistry EOM Report for General Release High Level Scorecard, January 2018; .au Policy Review Panel Issues Paper: Implementation of Second Level Domain Name Registrations (Direct Registration), October 2017, p9.

¹¹ Constitution of .au Domain Administration Ltd, cl 3.

- b. ensure a cost effective administration of the .au ccTLD and its sub-domains;
 - c. ensure the continued operational stability of the domain name system in Australia;
 - d. promote fair trading; and
 - e. promote consumer protection.
22. While the principle of “no hierarchy of rights” is embedded in some auDA policies,¹² this appears to have been introduced based on convention rather than any legal requirement enshrined in auDA’s constitution or imposed by ICANN. While the principle that ‘all 2LDs are created equal’ may have been true in the early 1990s when the .au ccTLD was first implemented, this is no longer the case in 2018. The market has clearly determined that .com.au is the preeminent 2LD in Australia. For example:
- a. 88%¹³ of domain names registered in Australia are in the .com.au 2LD;
 - b. 153 of the top 155 prices paid for domain names in the .au ccTLD in 2017 were for .com.au 2LDs.¹⁴ The other 2 sales were for send.net.au (41st of 155) and virtualassistant.net.au (119th of 155); and
 - c. 120 of the top 500 websites in Australia utilize a .com.au 2LD. This is followed by 27 which use a .edu.au 2LD,¹⁵ 16 using a .gov.au 2LD and 3 using a .net.au 2LD. There are no websites in the top 500 which utilize a .asn.au or .id.au 2LD.¹⁶
23. The order of priority model does not involve a value judgment that commercial entities are more important than other organisations. It reflects the use and registration of .com.au 2LDs which are more prevalent than other 2LDs. It will also be the allocation model which will prejudice the lowest number of registrants.
24. REA submits that the 2LDs .gov.au, .edu.au and .org.au play a special role in informing consumers about the structure and the bona fides of an organisation. Consumers trust organisations that use a .gov.au, .edu.au and .org.au 2LD precisely because they know that these 2LDS have special eligibility criteria.¹⁷ If government, education providers and not for profit organisations enter the “.au” namespace, it will make it more difficult for consumers to determine whether they are dealing with a commercial entity or a not for profit, government department or education provider. REA submits that Australian consumers would be best served if the “.au” space is limited to commercial organisations and individuals. auDA can appropriately protect .gov.au and .edu.au registrants through a sensible reserved list including the names of government departments and major tertiary education providers.

Order of priority – trade mark owners

25. REA would also support an implementation model which provides priority access to the owners of registered trade marks which are an exact or close match for the 2LD. For example, priority access to registration of “brand.au” could be provided to the owner of the trade mark BRAND, BRAND (Device) or BRAND.COM.AU.
26. While this implementation model would be inconsistent with the ‘no hierarchy of rights’ principle, REA submits that auDA is not bound to adhere to this principle. auDA and the policy review panel have already expressed a willingness to displace the ‘first come first served’ principle. In the circumstances, there is no compelling reason that an exception could not be made to the ‘no hierarchy of rights’ principle.

¹² Eg. the Domain Name Eligibility and Allocation Policy Rules for Open 2LDs, cl 2.3.

¹³ AusRegistry EOM Report for General Release High Level Scorecard, January 2018; .au Policy Review Panel Issues Paper: Implementation of Second Level Domain Name Registrations (Direct Registration), October 2017, p9.

¹⁴ <https://www.dntrade.com.au/threads/domain-sales-list-2017.11114/>

¹⁵ The data for .edu.au sites is likely to have high visits data but comparatively low unique audience as tertiary institutions tend to use their 2LDs for university websites and intranet as well as email addresses. This is not reflective of a wide customer use or knowledge of these websites.

¹⁶ Alexa.com, Top sites in Australia, February 2018. <https://www.alexa.com/topsites/countries/AU>

¹⁷ auDA Awareness and perceptions of direct registration – Qualitative and Quantitative Insights, May 2017, p. 20. For example, approximately 60% of domain name registrants recognise that only ‘not for profits’ can use a .org.au 2LD.

Longest continuous registrant / longest continuous registration

27. REA does not support an allocation model based on the longest continuous registrant or longest continuous registration. While such implementation models may seem fair on the surface, they have a number of problems. For example:
- in many instances, long term domain squatters will be favoured over legitimate businesses that have engaged in legitimate trade, albeit from a later date;
 - registrants may be prejudiced by legitimate transfers which have occurred as part of a business sale or corporate restructure. This will require a complex dispute resolution process to determine eligibility; and
 - this system is reliant on accurate and complete data on domain name creation dates which is not possible for domain names registered prior to 2002.

Consensus approach

28. REA does not support a pure consensus approach for the following reasons:
- It will be long, protracted and expensive as legitimate organisations will be forced to negotiate with opportunistic registrants who are engaging in rent seeking behavior;
 - It will place an undue burden on SMEs which do not have the resources to deal with protracted negotiations;
 - It will result in delayed uptake of “.au” registration and confusion amongst the public; and
 - It is inconsistent with auDA’s principal purpose “to ensure a cost effective administration of the .au ccTLD and its sub-domains”.
29. REA would consider a hybrid consensus approach with the following minimum conditions:
- Eligible registrants of 3LDs are asked to opt in if they wish to register a corresponding 2LD;
 - All participants who have opted in are provided with 3-6 months to negotiate as to who will be entitled to register the corresponding 2LD; and
 - In the absence of agreement, the corresponding 2LD will be permanently blacklisted by auDA.
30. While this approach may result in some prominent and useful 2LDs being permanently closed off for use, it would protect legitimate organisations from unreasonable demands from other 3LD registrants.

Auction

31. An auction allocation model would result in the most efficient use of new “.au” registrations by favouring those parties who most highly value the new registrations. However, this model would be inequitable to SMEs and individuals.

Lottery or random allocation

32. REA does not support a lottery allocation model in the format suggested in the PRP’s public consultation forums. Under the PRP’s proposal, eligible licensees of corresponding 3LDs (eg. example.com.au, example.org.au and example.net.au) would opt in to a lottery process, they would then have 3 months to negotiate and in the absence of consensus, the 2LD (example.au) would be awarded by random draw.
33. A lottery model is problematic for the following reasons:
- it is economically inefficient in that it will require large organisations to pay passive registrants either for their non-participation in a lottery process or for the underlying domain name licence if another participant is successful. In many cases, such payments will be made regardless of whether

- the third party meets eligibility criteria for their 3LD or has any bona fide claim to the direct registration. This process adds no value to the domain name system or the Australian economy.
- b. If organisations choose not to engage in negotiation with passive or bad faith registrants, they risk the loss of their corresponding direct registration which must then be recovered through the auDRP complaints process. This will place a significant burden on the auDRP complaints system.
 - c. It is unfair because it grants the same rights to a passive 3LD holder as to an active business that has invested substantially in marketing and trading over an extended period. The proposed lottery allocation model provides upside to passive holders and a risk of enormous downside for legitimate active traders.
34. A search of prominent brands reveals that many will face competition in a lottery model, even where competing registrants have no discernible link to the 3LD they have registered. auDA should commission independent research to assess a sample of well known domains in the .com.au, .net.au, org.au, .edu.au and .gov.au namespaces and determine the potential impact of domain squatting on a lottery allocation model.
35. If auDA elects to implement a lottery model, notwithstanding the views of industry stakeholders, we submit that it must, at a minimum, include the following safeguards:
- a. All lottery holders must demonstrate that they meet the eligibility and allocation rules for their 3LD licence before they are granted a lottery ticket for the corresponding .au 2LD;
 - b. All lottery holders must demonstrate that they have registered and used their 3LD in good faith and for a legitimate purpose, prior to a designated cut-off date. Domain monetization, splash pages, holding pages and “parked for resale” pages should not be deemed legitimate use and should not be eligible for entry into any ensuing lottery. If 3LD registrants are not utilizing their existing domain name rights, there is no compelling reason to grant them further rights; and
 - c. Registrants should not be eligible in a lottery unless they have used their 3LD in a public facing capacity prior to a designated cut-off date. Registrants who use a 3LD for private networks or email servers will be unaffected by the introduction of “.au” registration. Such registrants can continue to utilize their existing 3LD licence for private networks and would not be prejudiced by the award of a “.au” registration to a third party.
36. The minimum protections needed to support a lottery model will be costly and time consuming as it will require an independent arbiter to make complex judgments about eligibility and good faith use. It will also require an appeals or dispute resolution process which may cause a significant delay in the rollout of “.au” direct registrations. For this reason, REA submits that an order of priority model is preferable.

Should the .au Domain namespace be a ‘general purpose’ domain for all Australians allowing use for any purpose?

37. If .au registration is introduced, REA submits that it should be a general purpose space for use by commercial entities and individuals.
38. Consumers and domain name industry stakeholders recognise that .edu.au,¹⁸ .gov.au¹⁹ and .org.au 2LDs play an important role in conditioning consumers that they are dealing with a reputable website which can be trusted. This signaling mechanism would be undermined if education providers, government and not for profits were to enter the “.au” direct namespace.

¹⁸ Education Services Australia Limited, <https://www.domainname.edu.au/benefits.htm>: “the .edu.au domain is universally recognised and provides education and training providers with a trusted internet ‘brand’ on which to build and establish their online presence”.

¹⁹ gov.au Domain Administration Submission to the 2015 Names Policy Panel: “Research has indicated that gov.au domains form an important element of trust in government websites and digital services by citizens.”

39. auDA should work with government to introduce an appropriate reserved list to protect the interests of government departments and major tertiary institutions in the “.au” 2LD. Registrants of .gov.au, .edu.au, .asn.au and .org.au 2LDS should also have mechanisms to seek redress against confusing names in the direct “.au” space through the auDRP complaints system.

Should the .net.au and .asn.au namespaces be closed to new registrations? If so, should existing net.au and .asn.au registrants be permitted to continue to renew their domain name indefinitely?

40. One of the main arguments used to support the introduction of .au direct registrations has been that it will provide registration opportunities for legitimate registrants who have been unable to secure other domains in the 2LD space (eg. .com.au, .net.au, .asn.au). In the circumstances, the proposed closure of the .net.au and .asn.au 2LD spaces to new registrations would conflict with one of the main justifications which has been used to support the introduction of .au direct registrations.
41. auDA should undertake quantitative research before closing off the .net.au and .asn.au namespaces to new registrations. Evidence suggests that consumers place a significantly higher value on .com.au 2LDs than .net.au 2LDs (eg. see paragraph 22) and that .net.au is frequently registered for either defensive purposes or domain squatting.

Should auDA continue to maintain a public reserved list? Should the public reserved list be published? What process or steps should auDA take before deleting a restricted or prohibited name?

42. auDA should continue to maintain a public reserved list which should be published on the auDA website. Where there are registrants who currently hold domain names prohibited under Australian law, such registrants should be given 6 months to obtain the relevant Ministerial consent, failing which the domain name could be deleted.

Should auDA be able to reserve names in the public interest? How should the public interest be defined? What names should be reserved in the .au domain namespace? Should the public interest test replace the Prohibition on Misspellings Policy?

43. auDA should be permitted to reserve names in the public interest. The public interest should include:
- prevention of unfair trading;
 - avoidance of consumer confusion;
 - prevention of cultural harm; and
 - prevention of uses which promote or incite extremism, violence or other illegal activity.

44. The Prohibition on Misspellings Policy should also be retained.

Should the names identified in the discussion paper be reserved as future 2LD namespaces? Are there other names that should be reserved for use as future 2LD namespaces and why?

45. The names identified in the discussion paper should be reserved as future 2LD namespaces. The names embassy.au and consulate.au should be added to the list.

Should there be a requirement for auDA to publish a list of names that are reserved for use by the registry and names that pose a risk to the operational stability and utility of the .au domain?

46. auDA should publish a list of names that are reserved for use by the registry and names that pose a risk to the operational stability and utility of the .au domain.

How should the Australian presence requirements be defined? Should trademark applicants and registrants only be allowed to register a domain name that is an exact match to their Australian trademark application or registration when relying on the trademark application or registration to establish an Australian connection?

47. If .au direction registrations are introduced, REA submits that they should be subject to an Australian presence requirement that the registrant is:
- an Australian legal entity;
 - an Australian citizen or Australian permanent resident;
 - the holder of an Australian Business Number (ABN); or
 - the applicant or registrant of an Australian trade mark that is an exact match for, or closely corresponding to, the second level domain. For example, a foreign company that is the owner of a pending or registered Australian trade mark “BRAND” could register the domain name “brand.au”.
48. REA agrees with the proposal that foreign trade mark applicants and registrants should only be permitted to register a domain name that is an exact match or closely corresponding to their Australian trade mark application or registration when relying on the trade mark application or registration to establish an Australian connection. The policy may require some flexibility to allow for the fact that:
- a. foreign registrants may have registered device trade marks which include visual elements that cannot be incorporated into a domain name; and
 - b. foreign registrants should be permitted to differ from their trade mark in immaterial respects. For example:
 - a. the replacement of ampersands with the word “and”;
 - b. the use of hyphens instead of spaces; and
 - c. the use of other material which does not substantially affect the identity of the domain name. For example a foreign company that is the owner of the trade mark “BRAND” could register the domain name “brandservices.au”.

What eligibility and allocation rules should apply to the .au domain namespace (direct registration) and the open 2LD namespaces, and why?

49. If .au direction registrations are introduced, REA submits that only applicants that meet the Australian presence requirement at paragraph 47 should be eligible. The eligibility and allocation rules should otherwise be an amalgamation of those applicable under the existing open .com.au and .id.au 2LDs. For the reasons described earlier, REA submits that the .au namespace should be limited to commercial entities and individuals. There must be some nexus between the domain registrant and each registration and REA submits that this should be achieved by an amalgamation of existing allocation criteria for .com.au and .id.au domains.
50. REA submits that no changes are required to the existing eligibility and allocation rules for open 2LD namespaces.

Should the close and substantial connection rule be retained and why?

51. REA submits that the close and substantial connection rule should be retained. The abolition of the close and substantial connection rule could produce unintended or anomalous results (given that a substantial proportion of domain name licensees are currently relying on the rule to support their eligibility for existing licences).

52. REA submits that the close and substantial connection rule could be more effectively regulated by measures implemented as part of the registration process. For example:
- a. Registrant selects “close and substantial connection”;
 - b. Registrant is served with a drop down box with different categories of close and substantial connection Eg. (i) a good or service sold by the registrant, (ii) an event organized or sponsored by the registrant, (iii) an activity that the registrant facilitates, teaches or trains, (iv) a venue that the registrant operates, (v) a venue that the registrant operates, (vi) a profession that the registrant or its employees or members practice in, (vii) a name that includes or is derived from one or more words of the registrant’s name, (viii) a name by which the registrant is commonly known;
 - c. After selecting an option from the drop down box, the registrant is provided with a mandatory free text field requiring the registrant to disclose the nature of their connection. For example, for the 3LD “investment.com.au”, the registrant could enter “Registrant provides financial advice services in Australia”;
 - d. The information would be accompanied by a warranty that the information is true and correct and the registrant meets the eligibility and allocation criteria; and
 - e. Ideally, the allocation information could be made available to third parties via a request process to auDA, in a similar format to requests for domain name creation dates.
53. By requiring more information at the time of registration:
- a. Registrants would be deterred from opportunistic registrations. The current system encourages a ‘register now, justify later’ approach to domain registration;
 - b. auDA and auDRP panelists would be assisted in resolving matters under the Complaints Policy. auDA could use the information provided at the time of registration in order to implement a truncated process for clear cut domain name disputes; and
 - c. Third parties could better assess the viability of an auDRP complaint under the allocation rules, before filing a complaint. This would reduce dispute resolution costs and limit complaints to those which have reasonable prospects of success.

Should allocation criteria be removed, and the focus be on registrant eligibility?

54. REA submits that both eligibility and allocation criteria should be retained. It is important that domain names licensees retain some nexus to each domain name licence they subscribe for.

Should domain monetisation continue to be permitted in the com.au and net.au 2LD and at the second level?

55. REA submits that domain monetisation should not be permitted at the second level. The new “.au” namespace should focus on maximizing productive use. Domain monetisation is a generally unproductive use. A ban on monetisation in the “.au” namespace would differentiate the new namespace from existing 2LDs and would contribute to the development of the new namespace as trustworthy and reputable.

How should domain monetisers interests be balanced against the needs of the broader Australian Internet Community?

56. auDA should continue to allow domain monetisation in the third level, subject to compliance with auDA’s domain monetisation policy. A rule should be implemented to require that domains registered for monetisation be utilized within 6 months of their registration date, failing which, third parties may apply for cancellation of the domain name licence.

Should internationalised domain names be trialled at the second level, and under what conditions?

57. REA submits that internationalized domain names should not be trialed as it exposes legitimate brand owners to additional administrative, legal and brand protection costs. The cost to industry in filing defensive domain name registrations is likely to significantly exceed the benefits. Major Australian exporters are already adequately serviced by acquiring local domain names in their export markets.
58. Many brand owners will be familiar with the substantial costs in filing and prosecuting defensive trade mark and domain names applications in China. These include:
- Receiving unsolicited emails from Chinese cyber squatters in relation to “brand.com.cn” and “brand.cn” registrations. Many brand owners either proactively acquire these domain names to foil potential cyber squatting or later acquire them from squatters at considerable mark up in order to prevent misuse; and
 - Incurring significant costs to file and prosecute English, pinyin and Chinese character trade marks, as well as costs to formulate appropriate translations or transliterations of the brand owner’s marks.
59. Any proposed introduction of non-ASCII character domain names is likely to open a further avenue for domain name squatters. For example, domain name squatters may choose to register transliterations of well known brands. In the Issues Paper, the PRP has highlighted the difficulties auDA faces in policing the existing “close and substantial connection” test. It is submitted that it would be even more difficult for auDA to determine whether a non-ASCII character domain name is a close translation or transliteration of (i) an Australian company, business or individual name, or (ii) an Australian trade mark.
60. If non-ASCII character domain names are trialed, they should be subject to stringent eligibility and allocation rules, including Australian presence requirements. They should only be registrable by:
- an Australian legal entity;
 - an Australian citizen or Australian permanent resident;
 - the holder of an Australian Business Number (ABN); or
 - the applicant or registrant of an Australian trade mark that is an exact match for the second level domain.
61. The domain name should also be:
- an exact match, abbreviation or acronym of the registrant’s name or trade mark; or
 - a close translation of a registrant’s name or trade mark, as certified by a NAATI certified translator.
62. If non-ASCII character names are trialed, applicants should provide a NAATI certified translation at the time of application. This document would require manual checking by registrars and consequently a higher registration cost would be justified for cost recovery by registrars.

Should a registrant be able to sublease the domain name to an unrelated party? If yes, in what circumstances should this be permitted?

63. Sublicensing of domain names should only be permissible in certain prescribed circumstances such as:
- Between related entities; and
 - Between entities in a genuine commercial relationship. For example, a foreign trade mark owner might choose to sub-license a domain name to their exclusive Australian distributor in order to run an Australian website, while retaining control over the domain name head licence.

Where a domain name licence is transferred between registrants, should the transferee receive the benefit of the remainder of the licence period?

64. Where a domain name licence is transferred between registrants, the transferee should receive the benefit of the remainder of the licence period. Where a domain name is transferred in the last 6 months before expiry, the renewal and transfer should be processed together for administrative efficiency.

Should auDA be given the power to suspend a domain name licence? When should auDA suspend rather than cancel a domain name licence? What should be the maximum suspension period before a domain name licence is cancelled?

65. auDA should be given power to suspend a domain name licence. auDA should suspend a licence where there is a strong prima facie case that the registrant:
- has provided incomplete or clearly incorrect registrant information;
 - does not meet the eligibility criteria;
 - is using the domain name to engage in unfair or illegal activity (phishing and other scams);
 - is using the domain a name to promote or incite extremism, violence or other illegal activity.
66. Upon suspension of a domain name, the registrant should be provided with 28 days to rectify any defect (for example, update registrant information, explain why they meet eligibility criteria or explain why the domain name is not being used for an unfair or illegal activity). Failing provision of acceptable information, auDA could then opt to cancel the domain name.

For what purposes should auDA be allowed to collect, use and disclose registrant data?

67. auDA should be permitted to collect, use and disclose registrant data for the following purposes:
- to verify that the registrant meets eligibility and allocation criteria both at the time of registration and throughout the term of the licence;
 - to provide WHOIS information to the public;
 - to resolve complaints under auDA's published policies;
 - to respond to regulatory and law enforcement requests, subpoenas and court orders;
 - to contact registrants in relation to changes to auDA policies or changes to the domain name system (eg. implementation of .au direct registration).

Are there any concerns with the current level of information included in the public WHOIS service? Should the technical contact field be utilised for agent and lessee details?

68. The level of publicly available information via the WHOIS service is generally appropriate. This data is important to allow regulators, enforcement bodies and private parties to easily determine who is operating a website. WHOIS information is often important to allow parties to enforce their intellectual property rights. auDA should generally skew toward providing more information, rather than less information via the WHOIS service.
69. The technical contact field should be utilized for agent and lessee details.
70. The WHOIS service could be enhanced by:
- providing the domain name creation date;
 - providing the next domain name renewal date;
 - prohibiting the registrant descriptor "The Trustee of ABC Trust". Registrants should clearly identify the trustee. Eg. ABC Pty Ltd (as Trustee of ABC Trust) ABN 12 345 678 910; and
 - ensuring that registrars provide clear descriptions to domain registrants so that correct particulars appear in the "Registrant" field.

71. auDA could consider implementing a process to allow registrants to apply for redaction of their registrant information in extenuating circumstances (eg. for websites hosting political or religious content). This information could then be made available by auDA, only in response to certain categories of requests (eg. subpoena, regulatory requests, anticipated legal proceedings, journalism).

Yours faithfully,



Sarah Turner
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REA Group Ltd