

**Transfers (Change of Registrar) Policy (2002-08)**  
**January 2003 Review**  
**ACCC Comment**

## **Introduction**

The .au Domain Administration Ltd (“auDA”) has invited public comment on the Transfers (Change of Registrar) Policy (“CoRTP”) for its January 2003 review.

The Australian Competition and Consumer Commission (“ACCC”) welcomes the opportunity to offer the following comments regarding current and potential consumer protection issues relating to the CoRTP. The ACCC notes it neither endorses nor approves the CoRTP in providing these comments.

## **Role of the ACCC**

The role of the ACCC is to administer the *Trade Practices Act 1974* (“TPA”). In particular Part V of the TPA contains consumer protection provisions prohibiting certain types of conduct including false and misleading misrepresentations and deceptive practices whilst Part IV of the TPA contains provisions prohibiting a range of anti-competitive conduct and activities. Accordingly, the Commission is keen to encourage the development of policies which facilitate a competitive Domain Name Industry (“DNI”), compliance with the TPA as well as benefit and protect consumers. This is particularly important in new and evolving e-commerce areas such as the DNI where there is current potential for an increase in transfer activity and accompanying sharp practices. Nevertheless, in its role as an enforcement body, the Commission will take action in appropriate circumstances to stop illegal conduct and ensure compliance, particularly where the conduct involves widespread consumer detriment.

## **Current Issues**

The ACCC is aware of consumer protection issues in the DNI particularly those involving false and misleading representations and/or deceptive claims made by domain name suppliers in relation to the supply or renewal of Domain Names. Notwithstanding this the ACCC has not received a significant number of complaints in relation to the operation of the CoRTP.

However, the Commission is aware of the increased challenges facing the DNI. For example:

- the recent introduction of competition;
- the steady growth in the registration and renewal of .au<sup>1</sup> Domain Names;
- an increased awareness by consumers of their rights; and
- potential industry ‘shake out’ and individual business failure<sup>2</sup>;

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<sup>1</sup> <http://www.zdnet.com.au/newstech/ebusiness/story/0,2000024981,20271056,00.htm>

<sup>2</sup> <http://www.auda.org.au/about/news/2003012003.html>

may result in an increase in Domain Name Transfer activity with the potential for other consumer protection issues to emerge in the future.

### **ACCC Comment on the Transfer Policy**

The CoRTP, amongst other things, seeks to encourage a competitive domain name environment by permitting registrants to choose and transfer to their registrar of choice. The ability of registrants to simply and easily transfer their domain names in a secure and reliable environment is a key element of a competitive domain name market place which can result in significant consumer benefits. However, international experience indicates that domain name transfers can give rise to significant consumer protection issues, for example fraudulent transfers and refusing or hindering transfers.

The TPA is also likely to impact on transfer activity within the domain name industry to the extent the activity falls within the ambit of the Act by way of prohibitions on misleading or deceptive conduct, prohibitions on unconscionable conduct and contracts and by way of the competition provisions.

For example misleading and deceptive conduct by a supplier relating to the requirements for an effective transfer resulting in consumer detriment may be caught under s 52 of the Act. Potential competition issues may also arise. For example the refusal by a registrar or reseller to transfer a name may raise misuse of market power issues under s 46 of the TPA.

Industry also needs to be aware of and manage the risk of anti-competitive practices in policies such as the CoRTP. For example, there is the possibility that action under the CoRTP, to the extent it is an agreement between competitors may amount to anti-competitive behaviour contrary to Part IV of the TPA<sup>3</sup>. However such arrangements may be authorised under the TPA if it can be shown benefits to the public of the relevant conduct outweigh the anti-competitive detriment.

Whilst the ACCC encourages the development of policies such as the CoRTP to address these concerns the ACCC believes the CoRTP may benefit from improvement in certain areas and further clarification in particular instances.

### **Policy Content**

#### *Application and operation*

The CoRTP is a document primarily aimed at the Domain Name Industry. However it is important that consumers are both aware of and understand the relevant rules. To achieve its stated objectives and address specific and potential consumer protection issues the CoRTP must contain clearly defined principles as well as specific rules and accompanying guidelines. The policy does contain specific principles and rules concerning when and under what circumstances the policy will apply as well as provisions targeting specific consumer protection issues. However there are areas

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<sup>3</sup> For example prohibitions on members dealing with other industry participants or imposing sanctions for non-compliance where such sanctions affect a party's ability to compete.

where such provisions are not accompanied by clear guidelines and examples of how the provisions will operate which can result in an inappropriately informed market and potential consumer detriment.

Accordingly the Commission believes that further clarification of the process and relevant consequences is required. This could be achieved by way of examples, clearly identified as such in 'shaded label boxes' explaining when a change in the registrar of record does and does not occur and the potential comparative consequences. The use of flow-charts for the different scenarios may also be of value.

### *Consumer Awareness*

Consumer education and awareness is particularly important in emerging and dynamic areas such as the DNI. Registrants must be aware of their rights and suppliers must be aware of their obligations under the policy if it is to be effective in achieving its goals.

For example it is the Commission's experience that there is already a level of confusion regarding the DNI and the CoRTP. There is also significant potential for increased levels of consumer confusion in this process in the future. It is important that registrants are aware that they can change registrars or resellers and the relevant alternatives. In the event a registrant transfers their domain name (i.e. in the case of poor service) an informed registrant will be better placed to weigh the relative advantages and act in their best interest thereby reducing the potential for detriment. For example a small business may have a number of domain names registered and accordingly may face considerable expense in the event that each licence must be renewed and they are unaware of all the possible alternatives.

It has been suggested<sup>4</sup> that as a minimum requirement to ensure at least all current and potential registrants are aware of the Domain Name Supplier's Code of Practice ("COP") there should be an onus and positive obligation with accompanying guidelines to advise registrants of the COP at the time of the relevant transaction involving the supply of the domain name services.

Accordingly, given the current and potential future level of uncertainty the Commission believes consideration of a similar requirement in regard to the CoRTP, both immediately and prior to the provision of supplier domain name renewal information may be beneficial.

Furthermore the Commission believes an awareness raising educative campaign targeting both current registrants and re-sellers may be of benefit, for example a document or booklet explaining the CoRTP for consumers and small business to read. This should ideally be followed up by auDA providing similarly relevant independent information to registrants prior to the provision of renewal information by domain name suppliers. This will benefit the policy and serve to enhance its effectiveness as there will be independent information available to registrants prior to them receiving information from their current registrar or other potential registrars or re-sellers.

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<sup>4</sup> See Code of Practice Review: ACCC Comment Paper.

### *Unauthorised or fraudulent transfers and refusing or hindering transfer*

Following the introduction of competition into the industry there is potential, as overseas experience has shown, for losing registrars to attempt to obstruct or prohibit a transfer or for unauthorised or fraudulent transfers. Notwithstanding the CoRTP has addressed these<sup>5</sup> issues and the scope for such activity may therefore be limited, the provisions require further clarification. Furthermore, it is important that specific rules and clear guidelines be provided in the event there is a failure to comply with the requirements of the policy as well as the relevant applicable penalties.

The .au domain space CoRTP provides for a specific set of procedures which must be followed in order for a transfer to occur. For example, prior to transfer, the gaining registrar must comply with Paragraph 4.1. which requires:

- they receive a written request for transfer (that includes a valid domain name password);
- they retrieve the full domain name record from the registry using the password;
- they send a confirmation e-mail to the person requesting the transfer and the registrant contact listed in the database;
- they receive an affirmative response from the registrant contact and check the registrant is still eligible to hold the domain name.

The policy provides a standard form for the ‘confirmation e-mail’ example step but no more. This has the potential to introduce a level of inconsistency into the DNI in relation to the transfer process which may be used as a pretext by unscrupulous industry participants to avoid their obligation under the CoRTP and engage in inappropriate conduct. Accordingly, the Commission believes that the provision of a standard form ‘written request for transfer’ and a registrant eligibility ‘check-list’ that must be completed and signed by the transferring registrant along with a specific document retention, reporting and audit process requirement on the registrar would be of benefit in relieving the level of uncertainty. There should also be a standard form for the registry notification to the losing registrar to further ensure consistency.

Currently, gaining registrars are required to maintain all records of the transfer in the event auDA requires them<sup>6</sup>. However, there is no time limit for retention specified, no standard manner or form in which the documents must be collected or requirement to confirm to auDA that the provision is being complied with. Accordingly the Commission believes the policy may benefit from the inclusion of a compliance and monitoring process whereby registrars must establish at specified intervals that they have complied, audited and are able to report on the process.

### **Complaints**

It is essential that registrants have access to a timely and effective complaints handling mechanism at minimum cost. The CoRTP states registrants must direct

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<sup>5</sup> Paragraphs 3.2 and 4.1 of the CoRTP

<sup>6</sup> Paragraph 4.4

registrar complaints<sup>7</sup> through the complaint handling channels set out in auDA's *Consumer Safeguard Policy*. This draft policy has since been superseded by the Code of Practice Complaint Handling Mechanism. Accordingly the policy requires amendment to reflect the current procedure.

Nevertheless, if a registrant wishes to make a complaint, for example in the event that a registrar engages in conduct that hinders or prevents the registrant from transferring their domain name, contrary to the CoRTP, redress must be sought through the 'losing registrar' internal complaint handling policy set out in the COP.

The Domain Name Suppliers Code of Practice: ACCC Comments Papers outlines a number of concerns with this process which are equally applicable in this instance.

Accordingly the Commission believes that specific guidelines and remedies should be embodied in the CoRTP to provide specific redress for such conduct. Alternatively the specific remedies could be enshrined in the Code of Practice with a suitable provision in the CoRTP directing the complainant to the same.

### **Objection to Transfer**

Losing registrars are also afforded the opportunity to object to a transfer. There is however no standard objection form and no clear or specific guidelines. The objection will not stop the transfer occurring unless auDA considers that the registrant has been 'harmed'<sup>8</sup> or auDA decides the objection has 'substance'<sup>9</sup> in which case auDA may direct the registry to reverse the transfer. Apart from a registrar having breached the Code of Practice or the Registrar Agreement, there is no indication of the factors that must be considered or the relevant thresholds in determining when a registrant is 'harmed' or when an objection is of 'substance'.

Accordingly the ACCC believes the policy should provide further clarification regarding such objections and include them in the policy.

### **Termination of registrar or reseller**

Potentially significant consumer protection issues may arise in the event that a registrar's accreditation is terminated. Apart from an 'exceptional transfers' clause<sup>10</sup>, where auDA reserves the right to waive paragraph 4.1 requirements in certain circumstances, there are no clear guidelines in the CoRTP regarding registrants who are customers of a suspended or disqualified registrars or resellers.

In this instance the transfer policy provides no indication whether auDA would assume responsibility for their registrants and under what circumstances, for how long and the obligations that auDA would have. As mentioned, there are provisions for auDA to deal with 'exceptional transfers' but there are no guidelines on how that process will operate in any specific circumstances. For example the CoRTP does not provide that the names be transferred to auDA. Nor are there any indications of any

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<sup>7</sup> Paragraph 3.3

<sup>8</sup> Paragraph 5.2

<sup>9</sup> Paragraph 5.3

<sup>10</sup> Paragraph 7.1

safeguards where following a suppliers loss of accreditation and due to no fault of their own a registrant's domain name is registered by another person due to it lapsing.

Following the recent termination of a registrar auDA has taken steps to prevent potential consumer detriment in respect of the registrants involved and has posted information on its website detailing the steps any affected registrant should take.

The above issues raise potentially significant consumer protection issues and accordingly the Commission believes they require adequate consideration and specific provisions addressing them enshrined in the CoRTP.

## **Review**

The Commission recognises the CoRTP has a direct impact on the competitiveness and the efficiency of the DNI and believes that such policies should provide for adequate review of its operation at specified levels and intervals. Whilst the CoRTP provides for a review six months after its implementation to ensure that it is meeting its stated objective the Commission believes the policy should provide for ongoing reviews at specified periods beyond that point.

The reviews should ideally be independent, encourage and incorporate external stakeholder consultation and input as well as be made publicly available. The review should also facilitate, and embody within the policy itself, mechanisms for reporting on the administration, monitoring, compliance and overall effectiveness of the policy.

The current review clause has little clarification of any obligations other than auDA will 'hold a public review of this policy after 6 months of its implementation'. Accordingly the Commission believes consideration should be given to independent, ongoing, reviews with concomitant monitoring and public reporting mechanisms.

Furthermore consideration should be given to the need to review the CoRTP two years on in light of developments in relation to the competitiveness of the Industry.

## **Conclusion**

The Commission thanks auDA for the opportunity to provide comment on the CoRTP review. Should you have any queries or wish to discuss the above comments please do not hesitate to contact me.