

2017 Policy Review Panel Final
Report and Recommendations
auDA Management Response

.auDA
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Introduction

In 2017, the Board of .au Domain Administration (auDA) established the Policy Review Panel (PRP) to examine and make recommendations on the consolidation and reform of the auDA Published Policies and to develop an implementation model for the introduction of registration of domain names at the second level (direct registration). On 25 March 2019, the PRP submitted its Final Report on recommendations for the reform of the auDA Published Policies and an implementation model for the registrations at the second level ('direct registration').¹ The PRP made a total of 25 recommendations, with 21 recommendations relating to policy reform and four recommendations on the implementation of second level domain name registrations. The PRP noted that auDA was responsible for updating and consolidating the auDA Published policies relating to Registrants.²

The auDA Management in reviewing the PRP recommendations has taken into consideration the contractual framework within which auDA administers the .au ccTLD and imposes and enforces its policies. auDA administers the .au ccTLD under a Sponsorship Agreement with the Internet Corporation for Assigned Names and Numbers (ICANN) and the Australian Government's endorsement of .au Domain Administration to administer the .au ccTLD dated 31 December 2000 and revised on 18 April 2018. The Australian Government Terms of Endorsement require auDA to administer the .au domain in the public interest and to perform the core functions of, among others:

- respond quickly to matters that compromise Domain Name System (DNS) security
- promote principles of competition, fair trading and consumer protection
- establish appropriate dispute resolution mechanisms

The requirement for auDA to promote the principles of competition, fair trading and consumer protection is reinforced by the Australian Government's reserved powers under sections 475 and 476 of the *Telecommunications Act 1997* and section 17 of the *Australian Communications and Media Authority Act 2005* (Cth) in relation to electronic addressing. These principles are enshrined in the *Competition and Consumer Act 2012* (Cth).

auDA has no legislative powers and as a private corporation enforces its policies through a series of contractual arrangements between auDA and Registrars (Registrar Accreditation Agreement) and Registrars and Registrants (Licensing Agreement). auDA as a third-party beneficiary of the Licensing Agreement has the right to enforce its policies under the Licensing Agreement.

The Management response to the PRP recommendations is set out in two parts:

- (1) implementation status of the PRP recommendation, including why a recommendation has not been accepted; and
- (2) other policy reforms recommended by auDA management.

Where management has implemented a PRP recommendation, it has relied solely on the veracity of the PRP process in examining the policy issues and provides no further comment. A quick reference table setting out the implementation status of the PRP recommendations for policy reform and implementation of second level domain name registrations is at Attachment A.

¹ Policy Review Panel, [Final Report: Recommendations to the auDA Board: reform of Existing Policies & Implementation of Direct Registration](#) (25 March 2019).

² Policy Review Panel, [Minutes of the meeting of 9 August 2018](#), [1.4.1]; [Policy Review Panel, Minutes of the meeting of 10 September 2019](#), [2.4].

Management Response

PRP Recommendations

Australian Presence

Recommendation 1:

Existing policies be simplified and consolidated into three policies.

Status: Implemented

Management has simplified and consolidated the policies into the Licensing Rules and the Registrar Rules. The Licensing Rules comprise the Registrant and Complaints Policies. The rationale for including both the Registrant and Complaint Policies in a single document is that it is more user friendly and contains all the key terms and conditions including resolution of complaints.

Recommendations 2 & 3:

For all domain names registered in .com.au, .net.au, .org.au, .asn.au, .id.au and .au, the registrant must be a legal person with an Australian presence (rec 2)

A consistent Australian presence test should apply to all domain names registered in .com.au, .net.au, .org.au, .asn.au, .id.au and .au (rec 3)

Status: Implemented

The requirement for a registrant to be a legal person and have an Australian presence has been implemented for all namespaces within the .au domain. Paragraph 1.4 of the Licensing Rules defines a person by reference to an exhaustive list of legal and natural persons. The Australian presence definition under paragraph 1.4 of the Licensing Rules incorporates and updates Annexure B of the PRP Final Report.³ Paragraph 2.4.1 of the Licensing Rules provides that a Person must have an Australian presence to apply for a licence in any namespace.

Recommendation 4

The applicant or owner of an Australian trade mark application or registration can rely upon that application or registration to establish an Australian presence, but only in respect of a domain that is an exact match to the Australian trade mark application or registration. This trade mark application or registration must be for a word mark, not a device or logo mark. If a trade mark registration is cancelled or removed from the Register, or if a trade mark application lapses, there is an automatic loss of the Australian presence on this ground.

Status: Implemented

The definition of Australian presence under paragraph 1.4 of the Licensing Rules includes a Person who has applied for or registered a word mark under the *Trade Mark Act 1995* (Cth) and who may thereby apply for a domain name that is an exact match of the applied for or registered trademark. The trademark exception in practice will only apply to foreign entities and nationals, as Australian residents and entities will satisfy another Australian presence requirement. IP Australia reported that 65 percent of trademark applications are made by resident firms.⁴

³ Policy Review Panel, [Final Report: Recommendations to the auDA Board: reform of Existing Policies & Implementation of Direct Registration](#) (25 March 2019).

⁴ IP Australia, Australian Intellectual Property Report (2018), https://www.ipaustralia.gov.au/sites/g/files/net856/f/ip_report_2018.pdf

Paragraph 2.11.5 of the Licensing Rules provides that .au Domain Administration or a Registrar may cancel a licence when a Person no longer satisfies the Australian presence requirement.

Resale and Warehousing Prohibition

Recommendations 5

The resale and warehousing prohibition rules should be retained and strengthened.

Status: Implemented in part

Resale

The prohibition on registering a domain name for the sole purpose of resale has not been retained. The resale prohibition is inconsistent with the principle of no proprietary interest in a domain name. The grant of a licence does not give a Person a proprietary interest in a domain name.⁵ A Person cannot legally sell a domain name. However, the prohibition on the registration of a licence for the sole purpose of transfer to another party has been retained.⁶ This reflects that a Person can transfer a licence to another eligible Person by novation of the Licence Agreement and by the transferee Person entering into a new Licence Agreement. The commercial nature of this arrangement is a matter between parties.

The prohibition has been retained for the non-commercial purpose namespaces (edu.au, asn.au, org.au and State and Territory namespaces) but not for the commercial purpose namespaces com.au, net.au and .au namespace. There is no evidence that domain name flipping as an investment strategy is having a negative impact on the utility of the .au domain nor resulting in a scarcity of domain names.⁷ A new entrant in the .au or com.au, or net.au namespaces has the option of entering into a commercial arrangement for the transfer of a licence registered to another party or to apply for a licence using an available domain name.

Warehousing

Warehousing is not prohibited under the existing auDA Published Policies. There is no restriction on the number of domain names that may be licensed by a registrant.⁸ Paragraph 10.8 of the *Guidelines on the Interpretation of Policy Rules for Open 2LDs* (2012-05) provides that "it is not acceptable for registrants to use the close and substantial connection rule to engage in domain name speculation or warehousing". An examination of the policy history for this paragraph indicates that these practices do not constitute a "service" or an "activity" under the categories of close and substantial connection and not a prohibition on warehousing *per se*.⁹ The registration policies for the .uk ccTLD, .nz ccTLD, .eu ccTLD, .de ccTLD, .fr ccTLD and .ca ccTLD do not prohibit warehousing by registrants.

The PRP has not provided any evidentiary material on which to assess the nature of the warehousing problem and what, if any, action is required.

⁵ Policy Review Panel, [Final Report: Recommendations to the auDA Board: reform of Existing Policies & Implementation of Direct Registration](#) (25 March 2019), 13

⁶ Paragraph 8 of Schedule A of the *Domain Name Eligibility and Allocation Rules for Open 2LDS* (2012-04).

⁷ There are approximately 643 untrigintillion domain names available for registration using the current syntax rules in the .au domain.

⁸ Paragraph 6 of Schedule A of the *Domain Name Eligibility and Allocation Policy Rules for Open 2LDs* (2012-04)

⁹ Paragraph 10.8 of the [Guidelines for Accredited Registrars on the Interpretation of Policy Rules for Open 2LDs](#) (2003-07)

The warehousing prohibition appears to disproportionately target domain investors as the licence portfolios or holdings of trademark and brand owners will be excluded under the PRP proposal. This proposal elevates the rights of trademark and other intellectual property owners over other licence holders in the .au domain, which may give rise to issues of market power and anti-competitive practices. Management believes that further information is required to assess whether the net benefit to the community of prohibiting warehousing in respect of a class of registrants outweighs the competition issues. For these reasons Management believes that there should be no change to the existing policy position.

Recommendations 6 & 7

Registrants should be prohibited from registering a domain name “primarily” for the purpose of resale or warehousing (rec 6); and

A list of factors indicating that a domain name has been registered primarily for resale or warehousing should be included in the new Registrant Policy, and if the majority of these factors are met, then the onus should shift to the registrant to demonstrate that the registrant did not register the domain name for purpose of resale or warehousing (rec 7).

Status: Not implemented

Management does not support the PRP recommendation for a resale and warehousing prohibition for the reasons set out earlier. The proposed test for determining whether a registrant has contravened the resale and warehousing prohibition will increase compliance costs for registrants and administration, monitoring and enforcement costs for auDA. These costs may be disproportionate to the risk or severity of the harm to the community from warehousing and the cost of a licence in the .au domain.

Close and Substantial Connection

Recommendation 8

The “close and substantial connection” rule be retained and expanded to recognise online directories and informational services that specifically and predominantly relate to the subject matter of that domain name.

Status: Implemented

The close and substantial connection categories have been retained for the com.au, net.au, org.au and asn.au namespaces under the Licensing Rules. A person who satisfies the Australian presence and any applicable eligibility criteria for the namespace will be able to register a domain name that is an exact match or synonym of the name of a close and substantial connection category. The inclusion of a synonym ensures there is an objective nexus between the domain name and a service, good, activity, event, venue, profession, or program that a Person provides. A Person will still have the freedom to use a descriptor of the goods or services they provide, such as gardening services. This also implements PRP recommendation 9 as discussed later.

The Licensing Rules incorporates the definition of a ‘service’ under section 2 of the Australian Consumer Law. This definition is broad enough to encompass online directories and informational services.

Recommendation 9

Domain Monetisation should no longer be a basis to meet the allocation criteria to register a domain name in the .au domain space.

Status: Implemented in part

The domain monetisation rule has been abolished for the com.au and net.au namespaces. A prohibition on Domain Name Monetisation has been retained for the org.au, asn.au, edu.au and State and Territory namespaces. This prohibition prevents a Person who is eligible for a licence in these namespaces using that licence for domain monetisation purposes. This reflects that Persons who register in these namespaces are not for profits and generally provide services to the community or a sector of the community. The prohibition on domain name monetisation will reduce consumer search costs when trying to locate the right community service provider.

A Person who satisfies the eligibility and allocation criteria for a licence in the com.au, net.au or .au namespace will be able to use that licence for any legitimate purpose, including domain name monetisation or domain name investment. This is consistent with the approach in other ccTLDs, including .ca, .nz, .fr, .uk and .de domains.

To ensure there is no ambiguity or reliance on interpreting 'content', auDA management has recommended an additional allocation criteria can be applied to com.au and net.au which would include that a domain name could be used for the purpose of pay-per-click or affiliate web advertising/ lead generation, or electronic information services including email, file transfer protocol, cloud storage or managing Internet of Things (IoT) devices.

Recommendation 10

A Registrant should have a six months grace period from first registration to meet the close and substantial connect test.

Status: Not Implemented

A Person should be required to satisfy the allocation criteria for a domain name at the time of making an application for a licence. This ensures that domain names are allocated to Persons who already satisfy the close and substantial connection category at the time of making an application, rather than a Person who may satisfy the allocation criteria in six months. The six months grace period potentially creates a 'free for all' window of opportunity for Persons to register any domain name related to a close and substantial connection category to test the market for that domain name. This policy would also increase administration, monitoring and enforcement costs for Registrars and auDA, as frequent audits of the Registry data would be required.

Management notes that there will be circumstances where a Person wants to register a domain name prior to a product or service launch. A Person has other options to register that domain name based an application for an Australian trademark or a registered business name.

Eligibility and allocation - Grandfathering

Recommendation 11

Existing registrants should be allowed to retain their registrations until the end of the current registration period, but should only be able to renew their registrations if they meet the then current eligibility and allocation rules at the time of renewal.

Status: Implemented

Paragraph 4.3 of the Licensing Rules provide that a Person will only be subject to the new rules where the Person makes an application for a licence, renews a licence or transfers a licence after the commencement date of the Licensing Rules. For example, a Person who was issued with a five year licence on 1 March 2019 will not be subject to the new rules until the Person renews the licence on 1 March 2024. The licence will be governed by the auDA Published Policies in existence at the time of the licence application.

Licence Transfer

Recommendation 12

A process be created to allow transferees of existing domain names to receive the benefit of the remainder of the licence period.

Status: Implemented

A licence in the .au domain is a personal right to use the DNS with a domain name, and not a proprietary right. When a Person transfers a licence to another party, they must novate their Licensing Agreement and the new party must enter into a Licensing Agreement on the same or new terms and pay the licence fee. The payment of a licence fee is what makes the Licensing Agreement legally enforceable by the Registrar or auDA. This arrangement has the additional benefit of bringing more registrants under the new Licensing Rules, as the new party must enter into a Licensing Agreement under these rules. This will reduce costs associated with administering and enforcing two sets of rules.

A significant number of licence transfers will be commercial agreements between parties, involving in some cases the sale of a business or assets. Any costs associated with the licence are likely to be figured into any agreement. It is worth noting that there has been a significant uptake of one year licences over the past 8 months, which means that any benefit to the transferee party may be minimal.

Management recommends that the remaining value from the previous licence agreement, may be offered as a credit against a new licence.

Licence Suspension and Cancellation

Recommendation 13

In addition to auDA's ability to cancel a domain name licence in defined circumstances, auDA will have the power to suspend a domain name licence. The period of suspension should be limited.

Status: Implemented

Registrars and auDA will have the power to suspend a licence under paragraph 2.16.4 of the Licensing Rules. The suspension power will only be exercised in circumstances where a Registrant's non-compliance with the Licensing Rules does not warrant the cancellation of a licence. A licence can only be suspended for a maximum of 30 calendar days under the general test or for a period specified by the auDA Chief Executive Officer under the Public Interest test. For example, a licence will be suspended for 30 calendar days where the licence information is incomplete or not up to date. The licence suspension will be lifted as soon as the Registrant rectifies the information deficit. However, if a Registrant fails to update their information, the licence will be automatically cancelled after the end of 30 calendar days period, subject to the complaints process.

Recommendation 14

During the period of suspension, the registrant of a suspended domain name will have the ability to appeal the suspension under the new Complaints Policy

Status: Implemented

A Person will be able to ask for a review of a Registrar or auDA decision to suspend their licence under Part 3 of the Licensing Rules. A Person will not be able to seek a review of the auDA CEO's decision to suspend a licence under the Public Interest test. The auDA CEO will be able to suspend a licence under the Public Interest test on a written affidavit from an enforcement or intelligence agency and if satisfied of the matters under paragraph 1.17.4 of the Licensing Rules.

Recommendation 15

The ability to cancel or suspend a domain name licence 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" will be clarified as set out above.

Status: Implemented in part

Definitions

auDA has an obligation to administer the .au ccTLD in the public interest and to respond quickly to matters that compromise the DNS security and promote competition, fair trading and consumer protection, among other matters. Management considers that the PRP recommendation to define law enforcement agencies by reference to section 15 K of the *Crimes Act 1914* (Cth) or section 110A of the *Telecommunications (Interception and Access) Act 1975* (Cth) is too narrow as it excludes Commonwealth intelligence agencies, Crown prosecution services and State and Territory Government consumer protection agencies, and bodies with responsibility for the protection of public revenue. The preferred approach is to use the definition of enforcement body under section 6 of the *Privacy Act 1998* (Cth) as this incorporates both law enforcement and consumer protection bodies.

The PRP proposal does not acknowledge that other Australian Government agencies that have a role in supporting the security and stability of the .au domain. Management recognises that intelligence agencies may need to request auDA to take an action affecting the DNS or one or more licences where it is necessary to support the integrity, stability and security of the DNS. The definition of intelligence agency includes only those agencies subject to the *Intelligence Services Act 2001* (Cth).

The Licensing Rules also provide definitions of Australian law, court order and foreign officer, which give effect to or strengthen the PRP definitional concerns.

The Rule

Management has taken into consideration the PRP's concern that the existing 'request provision' under paragraph 6.2 of the *Mandatory Terms and Conditions Applying to .au Domain Name Licences* (2008-07) was too broad, in particular that there is "no requirement that the relevant request be lawful or enforceable" and that the term "government rule of requirement" may simply refer to a policy or wish of a government party.

auDA notes that where a court order or a notice is issued to auDA under an applicable Australian law, that auDA must comply with that order or notice.

However, auDA shares the PRP's concerns that the current 'request provision' is too broad and may lead to enforcement bodies making requests which are outside their legislative powers. auDA has strengthened the PRPs proposal by providing that a licence can only be suspended, cancelled or dealt with otherwise on a request by an enforcement body, intelligence agency, foreign officer or pursuant to a foreign court order where auDA considers it in the public interest to do so. The public interest test introduces an element of scale as the consequences flowing from the use of the DNS or licence/s must concern the public at large or a significant proportion of the public. The consequences must also be directed at an exhaustive list of matters that are considered in the public interest, such as national security or consumer protection. A request under the public interest test must be by written affidavit and address:

- the grounds for why the suspension or cancellation is in the public interest;
- why auDA is the appropriate body to determine the request;
- why the requested action cannot be undertaken by another statutory body or under an Australian law;
- the licence suspension period or the period for which any other action is required; and
- any other matter considered relevant to the request.

The auDA CEO will retain the discretion as to whether the request should be approved. The public interest test complements existing Australian Government and State and Territory Government arrangements for dealing with cyber related crimes and acts.

Prohibition on Misspellings

Recommendations 16, 17, 18 & 19

The Prohibited Misspelling List be retained (rec 16);

The list remain publicly available on the auDA website. The following details will be disclosed on the published list: the blocked domain name, the date the domain name was blocked, the person or entity that lodged the complaint, and the rights the complainant relied on. The misspelling should be blocked in all relevant name spaces (rec 17);

Prohibited misspellings will be blocked from registration, unless a potential registrant can demonstrate that it has legitimate grounds for use of the domain name (rec 18); and

auDA will have the discretion to unblock the prohibited misspelling if the potential registrant can demonstrate that it has legitimate grounds for use of the domain name (rec 19).

Status: Not Implemented

Management does not support the retention of the *Prohibition of Misspellings Policy (2008-09)* as it duplicates existing causes of action under common law passing off, consumer law relating to misleading and deceptive conduct, trademark infringement and the *.au Dispute Resolution Policy (2016-01)*. States and Territory Governments have created cost effective administrative tribunals that are accessible by individuals and small business owners which have jurisdiction to hear matters under the Australian Consumer Law.

The Prohibition of Misspellings Policy (2008-09) is unique to the .au ccTLD. Other ccTLDs and gTLDs deal with complaints about misspellings under the Uniform Dispute Resolution Policy or the ccTLD version. The .au Dispute Resolution process (.auDRP) has proven effective in dealing with misspellings.

The Commonwealth of Australia Department of Foreign Affairs and Trade was successful in having the licence smarttraveller.com.au transferred to it on the grounds that it was a misspelling of the Commonwealth's 'smartraveller' trademark.¹⁰

The PRP has recommended that a misspelling is permanently blocked from registration. This means that a brand, personal or entity rights holder does not need to defensively register the domain name, as is required under all other dispute or court mechanisms. It provides a financial incentive to use the prohibition on misspellings policy over the auDRP process. Any increase in claims under the misspellings policy will have resource implications for auDA, including the recruitment of legally trained staff.

Management notes that the issue relating to the use of names that are deceptively similar to the name of an existing namespace (comm.au, ntgov.au, atogov.au) have been dealt with under the Domain Name Availability Rules in paragraph 2.5 of the Licensing Rules.

Reserved List Policy

Recommendation 20

A Reserved List will be retained and comprised of:

- Words, phrases and acronyms prohibited by Australian law, including both Commonwealth and State law;
- Names and abbreviations of Australian states and territories and the name "Australia";
- Names that threaten the integrity and stability of the .au name space; and
- Names for use as future 2LDs.

Status: Implemented

Paragraph 2.6.1 of the Licensing Rules implement the PRP recommendation. Paragraph 2.6.2 of the Licensing Rules establishes the circumstances in which a Person will be able to reserve a name.

In relation to the reservation of names for future use as 2LDs, Management has considered it necessary to include a requirement that a name cannot be reserved where it is already registered in the .au namespace.

Management notes that the issue relating to the use of names that are deceptively similar to the name of an existing namespace (comm.au, ntgov.au, atogov.au) have been dealt with under the Domain Name Availability Rules in paragraph 2.5 of the Licensing Rules. Management does not consider it necessary to reserve the names of existing gTLDs, such as .museum. There is minimal risk of consumer confusion and to the DNS system as a result of the use of wildcards.

Recommendation 21

The Reserved List will be published in its entirety on the auDA website (except for names that cannot be published for security reasons)

Status: Not implemented.

The publication of the Reserved List on the auDA website is a business decision and is not included in the draft rules.

¹⁰ *The Commonwealth of Australia, Department of Foreign Affairs and Trade v Domain Admin, Palmside Holdings*, Case No. DAU2018-0038.

The publication of the reserved list creates a public expectation that it is an exhaustive list of names, words, phrases or acronyms whose use is prohibited or restricted under Australian law. By publishing the list auDA may be perceived as having an obligation to enforce compliance with legislation which is normally the exclusive remit of government agencies and public prosecutions. The requirement to maintain and publish a list of all prohibited or restricted words under Australian law holds auDA to a higher standard than that expected of a Commonwealth or State or Territory department. For example, the Australian Securities and Investment Commission notes that it is the responsibility of a person applying for a business name to ensure that they can use that name under Australian law.¹¹

Direct Registration Implementation

Recommendation 22

That Direct Registration be implemented as soon as practical in accordance with the implementation policy set out in Annexure E to this paper.

Status: Implemented in part.

Competition in the .au domain namespaces is enshrined in the principles of no hierarchy of rights, no proprietary interest in a domain name and first come, first served. The principle of no hierarchy of rights means that no person has a greater entitlement to a domain name than any other person, and no one namespace should be given priority over another. The no proprietary interest in a domain name means that no one owns that domain name. A domain name is not the personal property of a person. The first come, first served principle means that the first person who makes a valid application for a licence using that domain name will be able to register that domain name.

auDA acknowledges there is a persuasive argument for protection of incumbent interests to protect consumers but notes that the consumer risks are no different to those encountered already in the 2LD namespaces.

Recommendation 23

That domain names directly registered under .au will have no eligibility or allocation criteria, other than an Australian presence requirement.

Status: Implemented

Paragraph 2.4.3 of the Licensing Rules provide that there are no eligibility and allocation criteria for the .au namespace other than an Australian presence.

Recommendation 24

That all auDA Policies (where applicable) apply to domain names directly registered under .au.

Status: Implemented

The Licensing Rules will apply to all namespaces in the .au domain, except gov.au and csiro.au. These namespaces are restricted for government use and subject to intergovernmental policy arrangements.

¹¹ <https://asic.gov.au/for-business/registering-a-business-name/before-you-register-a-business-name/business-name-availability/guidelines-for-ministerial-consent/guidelines-for-ministerial-consent-undesirable-names/>

Recommendation 25

That there be a widespread education and awareness campaign leading up to the release of direct registrations.

Status: Implemented.

A nation-wide public awareness and consultative campaign will begin on the 15th of April 2019 to inform Australia's digital community, and the broader public, of the proposed changes. This campaign will be combined with a dedicated website to allow for feedback and submissions to be easily lodged and recorded.

In addition to this campaign, and subject to further approval, a more extensive national campaign will be developed and implemented leading up to 'go-live' date. This will involve extensive liaison with registrars, the registry operator and registrants to ensure that .au customers and the broader public are aware of the changes and the process to register .au domain names, in addition to the conflicted names process.

Management policy reforms

Internationalised Domain Names

Management believes that domain names in the .au namespace should be linguistically inclusive and reflects the multicultural diversity of the Australian population. The use of Internationalised Domain Names (IDNs) is about enhancing the linguistic diversity of the .au domain and the broader internet. The [2017 EURID IDN World Report](#) estimated that two percent of all domain names are IDNs and that there is a strong correlation between the use of IDNs and the language content of the website. IDNs are widely used in emerging economies in South and South-east Asia and in European ccTLDs.

auDA has a responsibility in administering the .au domain to ensure that it meets the needs of all Australians, whether social or economic. Australia is a multi-cultural country with approximately a third of its population born overseas, and more than one fifth of Australians speak a language other than English at home.¹² The next most common languages spoken at home are Mandarin, Arabic, Cantonese and Vietnamese.¹³ Australian Government and State and Government agencies already acknowledge the importance of providing essential information about services to persons in other languages. The Australian Government Department of Human Services provides translated information in 75 different languages.¹⁴ Print media also caters for the Australian Chinese speaking population by providing a Chinese language edition of the Age and Australian newspapers.

Australia's economy depends on the ability of its producers and service providers to export their goods and services to overseas markets. The ability to have language specific domain names will facilitate entry into these new markets, especially China. Australia's four top export trading partners are China, Japan, United States of America and Korea.

Under the management proposal, a Person will be able to register an IDN using Chinese (Simplified), Korean, Japanese, Arabic and Vietnamese script, subject to the syntax rules in the applicable IDNs Table.

¹² Australian Bureau of Statistics, 2016 Census
<http://www.abs.gov.au/ausstats/abs@.nsf/lookup/Media%20Release3>

¹³ Ibid

¹⁴ Commonwealth of Australia, Department of Human Services, Information in your language
<<https://www.humanservices.gov.au/individuals/information-in-your-language>>

A Person will only be able to register an IDN in the .au namespace as there are no allocation rules governing the use of domain names in .au.

A Person will still need to satisfy the Australian Presence requirement. Management notes that there may be community demand for the introduction of IDNs in other languages but recommends a staged approach with the proposed list of IDNs being introduced initially to identify any implementation or compliance risks.

A draft rule for implementation of IDNs is at paragraph 2.8 of the Licensing Rules.

Public Interest test

Management recommends the introduction of a public interest test that will enable it to respond to incidents or risks to the DNS or the public interest. The .au DNS is a key enabler of Australia's digital economy and society, as businesses, government, non-government organisations, educational institutions and the public use the DNS to connect and transact with each other over the Internet. In 2014, the Internet based economy contributed \$79 billion to the Australian economy, and is expected to rise to as much as \$139 billion annually by 2020 (7.3 percent of GDP).¹⁵ The growing importance of the Internet to the Australian economy, and government service delivery means that it is an attractive target for cybercrime and espionage. It is a shared responsibility of government and the private sector to ensure that cybercrime and other malicious activities do not undermine public confidence in the Internet.

The Australian Institute of Criminology's (AIC) Report into *Criminal Misuse of the Domain Name System* found that the DNS could be used as a target or facilitator of cybercrime, such as the use of malicious domains and phishing activities.¹⁶ It is estimated that US \$1.02 trillion is lost in economic growth due to cybercrime.¹⁷

The conventional legal framework for investigating and prosecuting criminal offences is inadequate for dealing with the immediate threat to the Australian community from cybercrime activities involving the misuse of the .au DNS. A law enforcement or intelligence agency may not have specific powers under their legislation to request the rapid suspension or cancellation of a licence being used for criminal or espionage purposes. To accommodate the need for enforcement and intelligence agencies to respond to cybercrime or other criminal acts to protect Australian interests, the .au Domain Administration CEO will have the power to suspend or cancel a licence or take any other action in respect of a licence, where it is in the public interest. The "take any other action" provision enables the CEO to sinkhole a domain for intelligence or evidence gathering activities.

The public interest is defined by reference to an exhaustive list of matters that are essential to the functioning of government and society. An enforcement or intelligence agency will need to demonstrate that the suspension, cancellation or other action requested relates to a matter of public interest as defined. The public interest test is not a 'free for all' where enforcement and intelligence agencies can circumvent legislative restrictions on the exercise of their powers.

¹⁵ Commonwealth of Australia, Department of Prime Minister and Cabinet, Australia's Cyber Security Strategy, 14 < <https://cybersecuritystrategy.homeaffairs.gov.au/sites/all/themes/cybersecurity/img/PMC-Cyber-Strategy.pdf> >

¹⁶ Krone T & Smith R (2018). *Criminal misuse of the Domain Name System*. Research Reports No. 3. Canberra: Australian Institute of Criminology. <https://aic.gov.au/publications/rr/rr03>

¹⁷ Commonwealth of Australia, Department of Foreign Affairs and Trade, *Australia's International Cyber Engagement Strategy*, October 2017, 33.

An enforcement or intelligence agency will need to provide an affidavit setting out why .au Domain Administration is considered the appropriate body to determine the request and why the action cannot be undertaken by another statutory body or under an Australian law, amongst other matters.

A request must be made by a senior officer of the requesting agency. The .au Domain Administration CEO has the discretion to accept or reject a request from an intelligence or enforcement agency or to take any action that he or she considers appropriate given the circumstances. The CEO is not required to inform a Registrar of the action they have taken, where it may compromise an investigation.

A draft rule for the public interest test is at paragraph 2.17 of the Licensing Rules.

Implementation of the .au namespace

Management believes that the .au namespace implementation rules should deal exclusively with the priority registration and that the registration of a licence in the .au namespace should be governed by the Licensing Rules. The Licensing Rules establish a uniform licensing system for all namespaces in the .au domain, except the gov.au and csiro.au namespaces as they are subject to intergovernmental policy arrangements. This reduces the regulatory burden on registrants with licences in different namespaces as they only need to comply with one set of rules.

The implementation of the .au namespace comprises the priority status process and general availability of domain names. Prior to the commencement date, .au Domain Administration will reserve all domain names where the licence was created prior to 1 October 2019.¹⁸

Priority Status

A Person is eligible to apply for priority status if they hold a licence in a 2LD namespace with a creation date prior to 1 October 2019. A Person whose licence is not recorded in the Registry data maintained by the Registry Operator will not be eligible to apply for priority registration. The reasons for excluding these licences is that the Registry data is the sole reference point for determining eligibility and resolving disputes about eligibility for priority status.

An application for priority status is also subject to the:

- Person being eligible to hold their licence in the 2LD namespace at the time of making the application; and
- satisfying the Australian presence requirement to register a licence in the .au namespace; and
- the eligible licence in the 2LD namespace not be subject to a dispute resolution or court proceedings.

A Person must make the application for priority status to a Registrar before or on 31 March 2020. auDA will publish a list of the competing licences for each domain name on its website after the close of the application period, such as auda.org.au, auda.net.au and auda.com.au.

No competing claims

A Person with Priority Status for a domain name, will be able to register that domain name in the .au namespace where there are no other competing claims.

¹⁸ Policy Review Panel, [Final Report: Recommendations to the auDA Board: reform of Existing Policies & Implementation of Direct Registration](#) (25 March 2019), 32 [5.2.3]

Where a Person has not registered the domain name before the end of the Priority Status period, the domain name will be available to the public on a first come, first served basis.

Competing claims

Where there are competing claims, to qualify for the contention resolution process, the registrant must have registered their name before the cut-off date (4 February 2018).

Where there are multiple Persons with Priority Status for the same domain name, then those Persons must reach agreement as to which Person should have the right to register that domain name in the .au namespace. This is a private commercial matter between parties and .au Domain Administration will not provide any assistance to resolve competing claims. Parties may decide to use an alternative dispute resolution process. The parties will be able to contact each other using the relevant contact details in the WHOIS.

Where the parties reach agreement as to which Person has the right to register the domain name in the .au namespace, all unsuccessful parties must notify their Registrar that they are withdrawing their application. The Registrar will notify the Registry within two calendar days that the application has been withdrawn. Once the other priority status applications are withdrawn, the remaining Person will be able to register the domain name in the .au namespace. The Person must register the domain within 30 days of the contention being resolved. Any domain name not registered by the end of the Priority Status Period will be made available to the public on a first come, first served basis.

If the parties are unable to reach an agreement by the end of the Negotiation period, the domain name will become available to the public on a first come, first served basis.

General Availability

Domain names that are not reserved for priority status will be available to the public on a first come, first served basis. A Person must make an application for these domain names in accordance with the auDA Licensing Rules.

Draft .au Namespace Implementation Rules are provided. These rules also set out nominal time periods for the implementation of direct registration for illustrative purposes and the complaints process.