

It is possible for a person to register a business name, just for the sole purpose of obtaining a misspelling of a popular domain name and it is possible to use this domain name for cybersquatting or typosquatting, in order to divert trade or traffic or in order to sell this misspelled domain to the popular domain name owner.

I am writing this submission, because I am the owner of a popular domain name and matching brand name, and it was possible for someone to register a business name for the sole purpose of deliberately registering a misspelling of my popular brand name and domain name, for the sole purpose of diverting trade and traffic. I made a complaint to the AuDa under the Prohibition of Misspellings Policy, but my complaint was denied.

Wording in the *2012-04 - Domain Name Eligibility and Allocation Policy Rules for the Open 2LDs* and the *2012-05 - Guidelines on the Interpretation of Policy Rules for Open 2LDs* - renders the *2008-09 - Prohibition on Misspellings Policy* completely toothless in preventing or remedying a similar situation to mine. The scope for abuse under the current policies, undermines the integrity of the *2008-09 - Prohibition on Misspellings Policy* and the intent of the policy to prohibit cybersquatting and/or typosquatting.

I believe the current policies could have been used to protect my popular domain name, but that they are either not being adhered to, are contradictory, are open to misinterpretation or open to abuse.

The combination of the following policies:

*2008-09 - Prohibition on Misspellings Policy*

*2012-05 - Guidelines on the Interpretation of Policy Rules for Open 2LDs*

*2012-04 - Domain Name Eligibility and Allocation Policy Rules for the Open 2LDs*

Allowed this situation to occur with my domain name and my only recourse appears legal action against the other registrant.

A person with a popular domain name, can find that another person has registered a business name and obtained a misspelling of their popular domain name, and can lodge a complaint with the AuDA but it is will be rejected for the following reasons.,

- The registrant meets the eligibility criteria for com.au domain names listed in Schedule C 1(a) and Schedule E 1(a) of the Domain Name Eligibility and Allocation Policy Rules for the Open 2LDs (2012-04), because they have a current Registered Business Name (RBN),
- There is a close and substantial connection between the registrant and the domain names as defined in Schedule C 2(a) and Schedule E 2 (a) of the above-mentioned policy, because it is an exact match of the registrant's registered business name.

In assessing this complaint, we have determined the domain names are not a misspelling of an entity, personal or brand name that does not belong to the registrant nor; have the domain names been deliberately registered in order to trade on the reputation of another entity or brand because the registrant has a matching RBN.

The complaint is dismissed, just because they have a business name that is an exact match of a misspelling of a popular domain name.

1. *To be eligible for a domain name in the com.au and net.au 2LD, registrants must be:*

*b) trading under a registered business name in any Australian State or Territory; or*

Even if a person doesn't actually trade under the business name - they just own the business name, they have established their eligibility for a .au domain name with this business name.

Their choice of domain name, the allocation of a domain name must meet the following:

2. *Domain names in the com.au and net.au 2LD must be:*

*a) an exact match, abbreviation or acronym of the registrant's name or trademark; or*

*b) otherwise closely and substantially connected to the registrant, in accordance with the categories of "close and substantial connection" set out in the Guidelines on the Interpretation of Policy Rules for the Open 2LDs.*

2012-05 - Guidelines on the Interpretation of Policy Rules for Open 2LDs paragraph 7. ALLOCATION CRITERIA - "EXACT MATCH"

7.1 *An "exact match" is where the requested domain name matches one, some or all of the words comprising the name used by the registrant to establish their eligibility. The words must be used in the same order as they appear in the name. Refer to the examples in Schedule B.*

A business name might be used to establish eligibility and the domain names might be an exact match of this business name with one, some or all of the words comprising the business name by this definition, but it is not an *an exact match, abbreviation or acronym of the registrant's name or trademark*

*a) an exact match, abbreviation or acronym of the registrant's name or trademark;*

Is open to misinterpretation.

Grammatically, It should be interpreted as;

(Interpretation one) An exact match relating only to the registrant's name or trademark, so matching one, some or all of the words comprising the registrant's name or trademark OR an abbreviation or acronym of the registrant's name or trademark.

To register a business name for the sole purpose of obtaining a misspelling of a domain name, a registrant might read it in the following context:

(Interpretation two) An exact match where the requested domain name matches one, some or all of the words comprising the name used by the registrant to establish their eligibility OR an abbreviation or acronym of the registrant's name or trademark

Or they might read it in the following context:

(Interpretation three) An exact match where the requested domain name matches one, some or all of the words comprising the name used by the registrant to establish their eligibility OR an exact match of the registrant's name or trademark OR an abbreviation or acronym of the registrant's name or trademark

If the policy should be applied as interpretation two or interpretation three, then it should be rewritten as two separate sub paragraphs:

*a) an exact match where one, some or all of the words comprising the name used by the registrant to establish their eligibility or;*

*b) abbreviation or acronym of the words comprising the name used by the registrant to establish their eligibility or trademark; or*

I think that this policy should re-written as above, because the *2012-05 - Guidelines on the Interpretation of Policy Rules for Open 2LDs paragraph 5.3 The following are NOT legal entities and must NOT be entered in the registrant name and ID fields of the registry database:*

*a) a registered business name;*

*b) a trade mark;*

*c) a trust; and*

*d) a partnership.*

And if a business name is a substitute for "registrant's name" then the definition above, contradicts *2012-04 - Domain Name Eligibility and Allocation Policy Rules for the Open 2LDs paragraph 2 (a)*

The "exact match" rule and the Close and Substantial rules are two different policies.

*2012-05 - Guidelines on the Interpretation of Policy Rules for Open 2LDs ALLOCATION CRITERIA - "OTHERWISE CLOSELY AND SUBSTANTIALLY CONNECTED", OR THE "CLOSE AND SUBSTANTIAL CONNECTION" RULE paragraph 10.2*

*... It is important to note that this rule is NOT intended as a "free for all", and the degree of flexibility is limited by the categories of close and substantial connection outlined below, as well as the specific conditions of use outlined in the policy rules.*

*10.5 In com.au and net.au, the categories of close and substantial connection are:*

- a) a product that the registrant manufactures or sells; or
- b) a service that the registrant provides; or
- c) an event that the registrant organises or sponsors; or
- d) an activity that the registrant facilitates, teaches or trains; or
- e) a venue that the registrant operates; or
- f) a profession that the registrant's employees practise.

The close and substantial connection, does not include a business name

So to have a complaint under the Prohibited Misspellings policy, denied because:

- There is a close and substantial connection between the registrant and the domain names as defined in Schedule C 2(a) and Schedule E 2 (a) of the above-mentioned policy, because it is an exact match of the registrant's registered business name.

Is incorrect. The complaint is denied because the domain meets *7. ALLOCATION CRITERIA - "EXACT MATCH"*

*7.1 An "exact match" is where the requested domain name matches one, some or all of the words comprising the name used by the registrant to establish their eligibility.*

It could be argued that unless a business name is also;

- a) a product that the registrant manufactures or sells; or
- b) a service that the registrant provides; or
- c) an event that the registrant organises or sponsors; or
- d) an activity that the registrant facilitates, teaches or trains; or
- e) a venue that the registrant operates; or
- f) a profession that the registrant's employees practise.

Then the business name and misspelled domain name have NO close and substantial connection at all.

To prevent a person from registering a business name for the sole purpose of obtaining a misspelling of a popular domain name, an additional policy principal needs to be inserted between the current Policy Principles, 2 and 3:

The domain name must not be, or incorporate, an entity name, personal name or brand name in existence at the time the domain name was registered". This condition is intended to ensure that a

domain is not used as a cover for cybersquatting or other misleading or fraudulent activity. In determining whether a registrant is in breach of this condition, auDA will take into account whether the domain name is a generic word or may have an alternative meaning which is not related to a specific entity, person or brand

This addition protects Company names, Incorporated Associations, Government bodies, trademarks, people and businesses that have a popular brand name, that has an existing domain that is an “exact match” of their entity, personal name or brand name, from someone registering a business name or using an existing business name for the sole purpose of obtaining a misspelling of a popular domain name and using it as a cover for cybersquatting, misleading activity, or to divert trade or traffic.

If this policy is relevant to stopping cybersquatting or other misleading or fraudulent activity on monetized domains, it is just as important for all com.au and net.au domains.

Even if there were no changes to the existing policies on Eligibility, and a person can register a business name for the sole purpose of obtaining a misspelled domain name, the Prohibition on Misspellings Policy (2008-09) - that prohibits the registration of misspellings of entity, personal and brand names - should prevent them from KEEPING this domain name, but it doesn't.

Prohibition on Misspellings Policy (2008-09) 2. *TERMINOLOGY*

*2.1 This policy uses the following terms:*

*a) “entity name” means the name of an Australian registered company or incorporated association as listed with the Australian Securities and Investment Commission (ASIC), or the name of an Australian government body. **It does not include a registered business name;***

*b) “personal name” means the given name(s) and/or last name of a person; and*

*c) “brand name” means the name of an identifiable and distinctive product or service, whether commercial or non-commercial.*

It is clear that an entity name does not include a registered business name.

It is clear that a personal name does not include a registered business name

It is clear that a Business Name is NOT automatically a brand name but a brand name could be the same as your business name.

If it is the intent of this policy that a person can register a business name, or use an existing business name for the sole purpose of purchasing a misspelling of a popular domain, it should only be acceptable if the definition of “ENTITY” was re-written as;

*a) “entity name” means the name of an Australian registered company or incorporated association as listed with the Australian Securities and Investment Commission (ASIC), or the name of an Australian government body. **It includes a registered business name;***

or paragraph 4.1 a) would remain the same, but paragraph 4.1 c) must be rewritten as follows:

*c) “brand name” means the name of an identifiable and distinctive product or service or business name, whether commercial or non-commercial.*

It seems very clear that this paragraph of the policy does not want to include a business name as an entity, because a person should not be able to just register a business name for the sole purpose of obtaining a misspelling of a popular domain name.

If it is the intent of this policy is to prevent a person from registering a business name, or use an existing business name for the sole purpose of purchasing a misspelling of a popular domain, then the entity, personal or brand name, must take precedence over a business name. And the precedent of first come, first served - ie. no hierarchy of rights or recognition to prior rights, needs to be applied. If you are first to register a domain name, it is an “exact match” of your entity, personal name or brand name, then this should also take precedence over a business name. If the person raising the complaint can prove that they have an exact match for their entity name, personal name or brand name and that it is an exact match of their domain name, and that domain name was registered first, then the other registrant’s domain name is a misspelling, unless they provide evidence to show that their domain name is not a prohibited misspelling - That they have an exact matching entity, personal or brand name also.

### 3. POLICY PRINCIPLES

*3.1 auDA’s objective in enforcing a prohibition on misspellings is to preserve the integrity of the .au domain space by discouraging “typosquatting”, whereby a person deliberately registers a misspelling of a popular domain name in order to divert trade or traffic.*

This policy was designed to discourage “typosquatting”. Registering a business name, or using an existing business name for the sole purpose of obtaining a misspelling of a popular domain name, is something that this policy is trying to prevent.

*3.2 auDA recognises that a domain name that appears to be a prohibited misspelling may not in fact be a prohibited misspelling given the particular circumstances of the case (eg. where two registrants have very similar entity, personal or brand names). The complaints-handling process set out in section 4 of this policy gives the registrant an opportunity to respond to the complaint and provide reasons why the domain name is not a prohibited misspelling. auDA will consider each case on its own merits.*

The “eg. where two registrants have very similar entity, personal or brand names”, is insufficient. It needs to be clearer. It should not be an example, but a specific set of terms or requirements that can cannot be misinterpreted, or used or abused by a person who is just using a business name for the sole purpose of obtaining and keeping a misspelling of a popular domain name.

If the AuDA are genuine in their intent to discourage typosquatting, then the terms of what is not a prohibited misspelling, should be clearly defined. Entity, personal or brand name should be the only terms of reference. If the AuDA believe that it is in the best interest of the integrity of the .au domain space, that a person should be able to register a business name for the sole purpose of obtaining a

misspelling of a popular domain name, then it needs to include EXACT MATCH as one of the qualifiers for NON-misspelling, and it refers to the EXACT MATCH definition in *2012-05 - Guidelines on the Interpretation of Policy Rules for Open 2LDs paragraph 7 EXACT MATCH*

A complaint under the Misspellings Policy will be rejected because the registrant's business name is included as a non prohibited misspelling, though this is NOT cited as an example of why it shouldn't be a misspelling.

If the AuDA want to prevent a person from registering a business for the sole purpose of obtaining a misspelling of a popular domain name, then a new definition of EXACT MATCH needs to be created, where an exact match of an entity, personal name or brand name, is given precedence over an EXACT MATCH of *a domain name that matches one, some or all of the words comprising the name used by the registrant to establish their eligibility*, where that domain name was registered first.

I do not believe that it should be as easy as purchasing a business name, to give you the right to the misspelling of a popular domain name, and I believe that the Prohibition of Misspellings Policy's intent, shows that the AuDa does not want this to happen either.

Despite the paragraph that outlines some misspellings as not being misspellings at all, paragraph 4. SCOPE OF PROHIBITION reiterates what is considered to be a misspelling, and either contradicts the above reason for it not to be a misspelling, or the criteria for the prohibition is being ignored, misinterpreted or it is open for interpretation.

#### *4.1 The prohibition on misspellings applies where:*

*a) the domain name is a misspelling of an entity, personal or brand name that does not belong to the registrant; and*

As an example, there might be a popular website called typosquatting.com.au registered in 2000, that sells a product called the Typo Squatting Ball - an exercise ball you can sit on while you are typing. They have a business name registered in QLD called Typo Squatting This is a very popular brand name, Another company with a similar product called "Work Ball", registers the a business name, Typo Squatting in NSW. They register the domain name typosquattings.com.au in 2010 and use that domain to sell their product and their brand "Work Ball."

The original domain owner, might not have a Company Name, their personal name might be Jane Doe, but their brand is clearly recognised as "Typo Squatting" and it is an identifiable and distinctive product and their domain name was registered 10 years before the other registrant..

The registrant of the misspelled domain, might not have a company name either, their personal name might be John Citizen and the identifiable and distinctive product that they sell from this misspelled domain - their Brand name - is "Work Ball"

If the purpose for this principal, is to allow a person to register a business name for the sole purpose of obtaining a misspelled popular domain name, or use an existing business name for the same purpose,

then either the definition of “Entity” needs to be rewritten or the scope for prohibitions needs to be rewritten, to include;

*a) the domain name is a misspelling of an entity, name used by the registrant to establish their eligibility, personal or brand name that does not belong to the registrant; and*

Changing this policy wording to the suggestion above, allows any person to register a business name or use an existing business name for the sole purpose of obtaining a misspelled popular domain name. I do not think it should be rewritten as above, but the policy should be ENFORCED as it is written now, and not open to interpretation, abuse, interpretation or misinterpretation.

*4.1 The prohibition on misspellings applies where:*

*b) the registrant has deliberately registered the misspelling in order to trade on the reputation of the other entity, person or brand.*

If the domain name workball.com.au was freely available, and there was no mention of their business name on their website, just their brand name, it could be easy to establish that this business has registered the misspelling years afterwards, in order to trade on the reputation of the other entity, person or brand.

Just because a registrant has a business name that matches the misspelled popular domain name, that does not mean that the business name alone, is sufficient evidence or proof, that the domain has not been deliberately registered in order to trade on the reputation of another entity or brand.

It is clear that it is possible to register a business name or use an existing business name for the sole purpose of obtaining the misspelling of a popular domain name after the fact, and there appears to be nothing to stop them from associating this domain with a completely different product or different brand, or even a similar product with the intent and the express purpose of diverting trade or traffic to increase their sales, or to push this website higher in search results. There is nothing to stop them, because a business name is being cited as evidence for denying a complaint under the Misspellings Policy “*nor; have the domain names been deliberately registered in order to trade on the reputation of another entity or brand because the registrant has a matching RBN.*”

*4.2 For the purposes of the prohibition, a domain name will be regarded as a misspelling if it falls into one of the following categories:*

*a) the singular version of a plural name, or the plural version of a singular name (eg. woolworth.com.au, safeways.com.au);*

It is possible that a person could register the business name All People Please Look East, and register the domain name apples.com.au where their website might sell computers under the brand name “Johns Computer World”, in the hope of diverting trade from apple.com.au

It is possible that a person could register the business name Wool Worth Socks and register the domain woolworth.com.au in the hope that they will receive lots of visitors to their site, that were looking for the supermarket chain Woolworths at woolworths.com.au accidentally end up at woolworth.com.au and hope that they see their fabulous socks and make a purchase. It is the intent, the timing and the content that are evidence of deliberately registered the misspelling in order to trade on the reputation of the other entity, person or brand - not the business name. In both these examples, if the owners of apple.com.au or woolworths.com.au lodged a complaint with the AuDa, their complaints would be rejected. Luckily enough, the owners of these domains, have much money behind them, and a lawsuit would quickly sort that out. They would still have to resort to a lawsuit. The Misspellings Policy would not be able to protect them. For small independent Australian Businesses, the legal costs can be prohibitive. The AuDA policies should protect them in the first place. Legal action should not be required.

By being eligible to register and keep a domain name that is a misspelling of a popular domain name, just because you have a Business Name that is a plural version of your domain name or have a domain name that is a singular version of your Business Name or an acronym of your business name, renders the Policy of Misspellings, completely toothless.

Although ASIC took over the business name registration process and businesses will no longer be able to register the same business name in different states, so moving forward, two businesses will not be able to newly register the same business name, there are still duplicate business names registered in different states and successful businesses are still open to having another business trade off their goodwill, by registering a misspelling of a popular domain name.

It should not be allowed to happen, that a person can register a business name or use a business name, for the sole purpose of obtaining a misspelled domain name, of a popular brand name and use the goodwill of that brand to mislead or confuse customers or divert trade or traffic.

A person should not have to register every misspelling they can think of, just to protect their brand name, entity name or personal name, like we see happen in other counties. Australian businesses don't think they have to, because they are under the misguided notion that they have the Prohibition on Misspellings Policy to protect them. But they don't. Just as I thought the Prohibitions on Misspellings would protect my brand name and the integrity of my domain name, but it doesn't.

You would not be allowed to open a computer/phone store in High Street with a sign out the front "Apples" when there is a computer/phone store across the road that already has a sign out the front "Apple"

A local council wouldn't allow two streets to have the same name, in the same suburb. It shouldn't happen on the street and it shouldn't happen in Cyberspace either.

I believe that there are policies in place to prevent this, but the ability to misinterpret a policy, have a policy that is open to interpretation or have policies that contradict each other, currently allows this to happen, and needs to be addressed.

It shouldn't be that the only recourse the original domain owner has, is to take legal action to remedy this. The intention of the AuDA policies and adherence to these policies in the way that they were intended for

use, should be sufficient in protecting businesses and consumers, benefit all Internet users who want to find things easily and trust that “it does what it says on the tin”, to discourage cybersquatting and to continue to protect the integrity of the .au domain space.