

REVIEW OF .AU POLICY FRAMEWORK

2010 NAMES POLICY PANEL

FINAL RECOMMENDATIONS TO THE auDA BOARD, AUGUST 2011

EXECUTIVE SUMMARY

The Panel's recommendations to the auDA Board are summarised below for ease of reference, however the Panel urges readers to consider each recommendation in conjunction with the explanatory text provided in the body of the report.

1. Domain Name Eligibility and Allocation Policy Rules for the Open 2LDs (2008-05) and Guidelines for Accredited Registrars on the Interpretation of Policy Rules for Open 2LDs (2008-06)

Recommendation 1A

The Panel recommends that the requirement for registrants to be Australian (or registered to trade in Australia) should remain in place.

Recommendation 1B

The Panel recommends that the "special interest club" eligibility criterion for org.au and asn.au domain names be more clearly defined.

Recommendation 1C

The Panel recommends that auDA should publish the results of its periodic policy compliance audits.

Recommendation 1D

The Panel recommends that registrants should be able to license a domain name for a 1, 2, 3, 4 or 5 year period.

Recommendation 1E

The Panel recommends that auDA's position on third party rights with respect to domain name leasing or sub-licensing arrangements should be clarified and published.

Recommendation 1F

The Panel recommends that, in the absence of any compelling technical or policy reason to maintain the restriction, single character domain names should be released (subject to the registrant being eligible to register the name).

Recommendation 1G

The Panel recommends that the close and substantial connection rule for id.au be relaxed to include domain names that refer to personal hobbies and interests.

Recommendation 1H

The Panel recommends that direct registrations under .au not be allowed at this time.

2. Reserved List Policy (2008-03)

Recommendation 2A

The Panel recommends that the Reserved List Policy be retained, and updated as necessary to ensure consistency with Commonwealth legislation.

Recommendation 2B

The Panel recommends that the names and abbreviations of Australian states and territories should remain on the Reserved List, but may be released on application provided that the proposed registrant is eligible to use the name under normal policy rules, and that they have received permission from the relevant state or territory government.

3. Domain Monetisation Policy (2008-10)

Recommendation 3

The Panel recommends that:

- a. the Domain Monetisation Policy (2008-10) should be abolished as a separate policy;
- b. Schedules C and E of the Domain Name Eligibility and Allocation Policy Rules for Open 2LDs (2008-05) should be amended to include domain monetisation under the close and substantial connection rule for com.au and net.au domain names (as exemplified in Attachment A to the Panel's report);
- c. the existing conditions of use on domain names registered on the basis of domain monetisation under the "close and substantial" connection rule should be retained;
- d. the definition of "domain monetisation" should be replaced with a description of permissible practice, to accommodate a range of monetisation models; and
- e. the Guidelines for Accredited Registrars on the Interpretation of Policy Rules for the Open 2LDs (2008-06) should be amended to include additional explanatory material regarding domain monetisation.

4. Prohibition on Misspellings Policy (2008-09)

Recommendation 4

The Panel recommends that the Prohibition on Misspellings Policy be retained in its current form.

BACKGROUND

In August 2010 the auDA Board established the 2010 Names Policy Panel to:

- review the policy framework underlying the allocation and use of domain names in the .au domain space; and
- provide recommendations to the auDA Board.

Specifically, the Panel was asked to review the following Published Policies:

- Domain Name Eligibility and Allocation Policy Rules for the Open 2LDs (2008-05) at <http://auda.org.au/policies/auda-2008-05>
- Guidelines for Accredited Registrars on the Interpretation of Policy Rules for the Open 2LDs (2008-06) at <http://www.auda.org.au/policies/auda-2008-06>
- Reserved List Policy (2008-03) at <http://www.auda.org.au/policies/auda-2008-03>
- Prohibition on Misspellings Policy (2008-09) at <http://www.auda.org.au/policies/auda-2008-09>
- Domain Monetisation Policy (2008-10) at <http://www.auda.org.au/policies/auda-2008-10>

Full text of the Panel's Terms of Reference, a list of Panel members and minutes of Panel meetings to date, are available on the auDA website at <http://www.auda.org.au/2010npp/2010npp-index/>.

PUBLIC CONSULTATION

Under its Terms of Reference, the Panel was required to undertake at least two rounds of public consultation to ensure that its recommendations to the auDA Board were properly canvassed with, and informed by, key stakeholders and the general community.

Discussion Paper, November 2010

In November 2010, the Panel released a Discussion Paper which invited comments on the Panel's general deliberations to date. The Panel received 177 complete responses to the online survey and 30 submissions; non-confidential submissions are archived on the auDA website at <http://www.auda.org.au/2010npp/2010npp-index/>.

The Panel was pleased to note that the use of an online survey form for the first time, resulted in the highest rate of response to any Panel consultation.

Panel members noted that respondents to the Discussion Paper appeared to be broadly representative of the community, and there was no evidence of an organised response campaign. The Panel also noted that no major new issues were raised by respondents, and that overall, there seemed to be general acceptance of the current system.

Draft Recommendations, May 2011

In May 2011, the Panel released its Draft Recommendations for public comment. The Panel received 31 complete responses to the online survey and 11 submissions; non-confidential submissions are archived on the auDA website at <http://www.auda.org.au/2010npp/2010npp-index/>.

The Panel noted that the second consultation process attracted less interest than the first consultation. Overall, the majority of comments were supportive of the Panel's draft recommendations.

2LD HIERARCHY

2LD	Purpose
asn.au	For non-profit organisations, associations, clubs and special interest groups
com.au	For commercial entities and traders
csiro.au*	For the Commonwealth Scientific and Industrial Research Organisation (CSIRO)
edu.au*	For educational entities
id.au	For individuals
gov.au*	For government departments and agencies
net.au	For commercial entities and traders
org.au	For non-profit organisations, associations, clubs and special interest groups
act.au, qld.au, nsw.au, nt.au, sa.au, tas.au, vic.au, wa.au*	For local community groups. Only Australian place names may be registered – eg. ballarat.vic.au and wollongong.nsw.au

*These 2LDs were excluded from the Panel's Terms of Reference.

RECOMMENDATIONS

The Panel structured its deliberations according to the five Published Policies listed in the Terms of Reference.

1. Domain Name Eligibility and Allocation Policy Rules for the Open 2LDs (2008-05) and Guidelines for Accredited Registrars on the Interpretation of Policy Rules for Open 2LDs (2008-06)

1.1 The Policy Rules for the open 2LDs (asn.au, com.au, id.au, net.au and org.au) are divided into two types of criteria:

- eligibility – ie. what makes a registrant eligible to register a domain name?
- allocation – ie. what type of domain name can a registrant register?

The Guidelines provide more explanation of the eligibility and allocation criteria, and specify the information that a registrant must provide to demonstrate compliance.

1.2 There are a number of different eligibility criteria for each 2LD. In most cases, in order to demonstrate eligibility, a registrant must provide an official identifier which is verified against a government database. For example, one of the eligibility criteria for a com.au or net.au domain name is an Australian registered company. To demonstrate eligibility, a company must provide its ACN or ABN, which the registrar is required to verify against the ASIC database.

1.3 There are two allocation criteria for each 2LD – a registrant can register a domain name that is:

- an exact match, abbreviation or acronym of their own name or trade mark
- otherwise closely and substantially connected to them – known as the “close and substantial connection rule”.

Responses to both rounds of public consultation reinforced the Panel's view that, overall, the Policy Rules remain appropriate and desirable. The Policy Rules appear to be reasonably well understood and accepted by the community, and there is no serious level of demand for significant change to the eligibility and allocation criteria for .au domain names.

The Panel focused its discussion on some issues that may require amendment or clarification in order to improve the effectiveness of the Policy Rules and provide better outcomes for the community – these are outlined below.

1A: Registrants must be Australian (or registered to trade in Australia)

Current policy:

1.4 Foreign entities are eligible to register a com.au or net.au domain name if they are registered to trade in Australia and have an ARBN (verified against the ASIC database), or if they are the applicant for, or owner of, an Australian registered trade mark and have a TM number (verified against the ATMOSS database).

Issues:

1.5 It has always been a fundamental policy principle that the .au domain is for Australians, and the eligibility criteria are designed to ensure that only Australian (or Australian registered) entities and individuals are able to register .au domain names.

1.6 The Panel was advised by auDA staff that foreign entities often attempt to circumvent the eligibility rules, usually in one of two ways:

- registering an ABN as an “other incorporated entity”
- using an Australian agent such as a reseller or registrar.

1.7 In December 2009 auDA found that one registrar had breached the Registrar Agreement by using a related entity to act as an agent for foreign entities that were otherwise ineligible to register com.au domain names¹. The Panel notes that the use of agents is common in many other TLDs, and many foreign entities therefore expect to be able to do the same in .au.

Public consultation outcomes:

1.8 The Panel notes that the overwhelming majority of public comments were in favour of retaining the current policy, that registrants must be Australian or registered to trade in Australia. Reasons given for this view related to maintaining the perceived integrity of .au, consumer protection and support for Australian businesses online, especially small business. In essence, the Panel's consultations reflected a very strong community acceptance that ".au means Australian".

Views of the Panel:

1.9 Whilst the Panel acknowledges that the Internet is a global marketplace, the majority of Panel members believe that .au should remain restricted to Australian entities and individuals. Several reasons have been put forward to support this view:

- the restriction has been in place since the inception of .au, and past auDA Panels have all confirmed the principle that ".au" means "Australian"
- given the strong growth in the .au domain name space², there is no present need to open up the space by relaxing or expanding the ways in which foreign entities can be eligible to register .au domain names
- ARBN registration or TM application/registration are relatively low barriers to entry for foreign entities that have a genuine intention to carry on business in Australia
- allowing foreign entities to register .au domain names without having to register an ARBN or TM number may cause significant administrative problems in entity verification and policy enforcement
- opening up .au to more foreign entities may lead to a flood of registrations by overseas domainers, making it more difficult for local businesses and individuals to register .au domain names
- opening up .au to more foreign entities may have an adverse impact on the security (or perceived security) of the .au domain, with a higher risk of fraudulent registrations or other scam activities.

RECOMMENDATION 1A

The Panel recommends that the requirement for registrants to be Australian (or registered to trade in Australia) should remain in place.

1B: Org.au eligibility criterion – "special interest club"

Current policy:

1.10 In the past, org.au domain names were restricted to incorporated associations, non-profit Australian registered companies, registered charities, registered political parties and trade unions – these entities were required to provide an official identifier such as ACN or ABN. Following a Panel review in 2004, the eligibility rules for org.au domain names were relaxed to also allow a "special interest club" to register a domain name without having to provide an official identifier. The registrant must warrant that it meets the eligibility criteria, and auDA reserves the right to delete the domain name if it is found that the registrant has made a false warranty.

Issues:

1.11 In May 2009, auDA conducted an audit of over 18,000 org.au registrations³. The audit uncovered a number of registrants who had registered multiple org.au domain names under the

¹ <http://www.auda.org.au/news-archive/auda-06122009/>

² Approximately 22% growth per annum for .au domain registrations since 1 July 2002.

³ <http://www.auda.org.au/news-archive/orgau-audit/>

special interest club criterion, but which turned out to be commercial entities or individuals who appeared to be using the domain names for monetisation or other commercial purposes. Often this was relatively easy to prove, however the term “special interest club” is not defined and therefore auDA’s decision in some cases was necessarily subjective.

1.12 There is evidence to suggest that the special interest club criterion, combined with the close and substantial connection rule, provides an easily exploitable loophole for people to register multiple org.au domain names and use them for commercial purposes (eg. domain monetisation). The same loophole exists in asn.au, but it does not appear to have been exploited due to lower recognition and popularity of asn.au domain names.

Public consultation outcomes:

1.13 The Panel notes that public comments clearly affirmed the current policy that informal clubs and groups should be allowed to register org.au domain names. Respondents also generally endorsed the current enforcement approach towards registrants who breach the policy.

Views of the Panel:

1.14 The Panel believes that genuine clubs and groups should be accommodated in org.au without being forced to incorporate or otherwise acquire some sort of official identifier, and therefore the “special interest club” eligibility criterion for org.au domain names should be retained.

1.15 Panel members consider that it would be useful to amend the policy to include a clearer description or definition of “special interest club”, including the evidence requirements for establishing eligibility. The challenge is to formulate eligibility criteria that prevent illegitimate registrations without disadvantaging legitimate registrants, or unduly increasing administrative costs for registrars and/or auDA.

1.16 The Panel notes that the exact wording of any amendment is a matter for auDA, but one option, raised in the Discussion Paper, would be to use the legal definition of an unincorporated association: “an association, society, club, institution or body formed or carried on for any lawful purpose and that has not less than five members”. As the eligibility criteria for asn.au are the same as for org.au, the Panel recommends that the same amendment should be made in both 2LDs.

RECOMMENDATION 1B

The Panel recommends that the “special interest club” eligibility criterion for org.au and asn.au domain names be more clearly defined.

Issue 1C: Policy enforcement

Current policy:

1.17 Registrants are required to provide certain types of information at the time they register a .au domain name. The registrar must verify any official identifier provided by the registrant, eg. ACN, ABN, TM number. Otherwise, the registrar is entitled to rely on the warranty made by the registrant that they comply with the .au policy rules. auDA reserves the right to delete the domain name if the registrant is later found to have made a false warranty.

Issues:

1.18 Panel members acknowledge that there is no point having policy rules unless they are enforced. Policy rules in the .au domain have long been enforced through a combination of upfront verification of some registrant details at the time of registration, and complaints-based investigations after registration.

1.19 Although registrars are already required to validate official identifiers such as ACNs and ABNs at the time of registration, it was suggested to the Panel that consideration be given to

implementing more stringent upfront identification verification measures. This was considered particularly important where the domain name is a personal name, and the Panel is aware of a few instances of a well-known personal name being registered as a .au domain name by someone other than that person⁴.

Public consultation outcomes:

1.20 The Panel notes that the majority of respondents were unsure of auDA's current enforcement mechanisms. Suggested improvements included clearer or more objective policy rules, upfront verification of compliance, an independent review mechanism, cheaper and more informal dispute resolution processes, and more power for auDA to impose fines and other sanctions.

Views of the Panel:

1.21 Panel members do not believe there is a need to introduce more upfront registrant identification checks at the time of domain name registration. The Panel notes that the issue regarding well-known personal names exists in other registration systems (eg. it is possible to register someone else's personal name as a business name in Victoria), and other naming authorities do not perform extensive identification checks. Panel members also note that it is difficult and costly to implement effective online identity checks, and there is a concern not to place undue burden on registrars and registrants.

1.22 The Panel was provided with information about auDA's complaints-handling processes, and high-level statistics on the number, type and outcome of complaints handled by auDA during 2010. Based on the available information, Panel members believe that the current complaints system is reasonably effective in dealing with policy breaches after registration. The Panel suggests that its views on this issue might have been better informed if it had access to more detailed complaints statistics (eg. how many complaints involve unique registrants versus "repeat offenders").

1.23 The Panel notes that, in January 2011, auDA introduced a Registrant Review Panel to provide for independent review of a decision by auDA to delete a registrant's domain name for breach of policy.⁵ The Panel commends auDA on the introduction of the scheme, which should help to address concerns about the lack of recourse for registrants who are dissatisfied with auDA's enforcement processes.

1.24 The Panel is aware that auDA conducts periodic audits of "high risk" registrants, which is consistent with the compliance approaches of other regulatory bodies such as the Australian Taxation Office and the Australian Communications and Media Authority. The Panel recommends that auDA should publish the results of audits, to help educate other registrants and the general public about policy compliance, and to act as a deterrent to potential offenders. Published information should include sufficient detail to be meaningful, but should be de-identified in the interests of registrant privacy. Panel members agree that audit results should only be published at the conclusion of the audit process, allowing time for any review process.

RECOMMENDATION 1C

The Panel recommends that auDA should publish the results of its periodic policy compliance audits.

⁴ Example: <http://www.abc.net.au/news/stories/2009/08/20/2662278.htm>

⁵ Refer to the Registrant Review Panel Rules (2011-01) at <http://www.auda.org.au/policies/auda-2011-01/>.

Issue 1D: Two year licence period

Current policy:

1.25 There is a fixed 2 year licence for all domain name registrations in the open 2LDs.

Issues:

1.26 The fixed 2 year licence period was introduced in all open 2LDs in 2002. At the time, a fixed licence period simplified the consumer protection message in the face of persistent mail out scams that attempted to mislead registrants into believing that their domain name was due to expire.

1.27 The gTLDs and many other ccTLDs allow domain name licence periods between 1 and 10 years.

Public consultation outcomes:

1.28 The Panel notes that the public consultation produced a clear outcome on this issue. The majority of respondents strongly supported a move away from the current fixed 2 year licence to allow for a wider range of licence periods. Respondents were given the option to select preferred licence periods from 1 to 5 years, and the results were fairly evenly spread. A number of respondents also favoured a 10 year licence period.

Views of the Panel:

1.29 The Panel believes that the .au domain name licensing system should be able to provide registrants with greater flexibility and choice. Variable licence periods would give registrants better choice in terms of managing their domain names. For example, a shorter licence period would be attractive for start-ups or personal use domain names, while large businesses and trade mark holders would probably prefer a longer licence period.

1.30 Panel members do not support licence periods over 5 years, due to the higher risk that, over a longer time period, domain names would lie dormant and registry data would become out-of-date. It is common for registrant contact details to change even within a 2 year licence period, let alone 5 years. To that end, Panel members also suggest that a regular WHOIS data verification check should be introduced along with the change to licence periods.

1.31 Under auDA policy, registrants are able to transfer their domain name to another registrar at no cost to themselves, but some registrars may not be prepared to take on the long-term provision of support and infrastructure services when they will not receive any payment until the end of the licence period. Whilst it is not within scope of the current review, Panel members suggest that auDA's transfers policy could be modified along the lines of ICANN's policy, which allows the gaining registrar to charge for a minimum one year renewal when accepting a transfer.

1.32 The Panel acknowledges that registrars may incur some costs in adapting their systems to accommodate different licence periods, however it would not be compulsory for registrars to offer the service. The Panel understands that changing the licence period would have significant cost and revenue implications for auDA and the registry operator, and that implementation may have to be delayed until the next registry licence period in 2014; these are matters for the auDA Board to consider.

RECOMMENDATION 1D

The Panel recommends that registrants should be able to license a domain name for a 1, 2, 3, 4 or 5 year period.

1E: Leasing of .au domain names

Current policy:

1.33 Currently, there is no .au policy that expressly addresses whether a registrant can lease (or sub-license) their domain name to another entity.

Issues:

1.34 The Panel is aware that some registrants have sought to generate revenue by leasing .au domain names to another entity. The domain name may be temporarily leased while the registrant prepares to launch a website, or may be used only for leasing if the name itself is highly sought after. If the domain name has been registered under the close and substantial connection rule, then questions arise as to whether:

- the registrant has a genuine connection with the domain name if they are leasing it to someone else; or
- the entity actually using the domain name has a close and substantial connection to it, and whether this would (or should) be sufficient to satisfy the policy rules.

Public consultation outcomes:

1.35 The Panel notes that public comments on this issue were fairly evenly split between those who did not see any problem with leasing, and those who thought it would undermine .au policy rules.

Views of the Panel:

1.36 The Panel acknowledges that there may be legitimate commercial reasons for sub-licensing domain names (eg. leasing arrangements between holding and subsidiary companies as part of intellectual property rights management). The issue is whether or not leasing arrangements between unrelated entities would or should be acceptable under .au policy, particularly where the registrant has registered the domain name under the close and substantial connection rule. The Panel notes that the same issue may arise with respect to other third party arrangements, such as trusts.

1.37 The Panel understands that auDA's current position (unpublished) is that the registrant remains responsible for the domain name, regardless of any arrangement that it may have with a third party to use the domain name. As far as auDA is concerned, a third party user does not have any rights in relation to the domain name. For example, if auDA receives an eligibility complaint about the domain name then it will investigate whether or not the registrant is eligible. If it determines that the registrant is not eligible then it will delete the domain name, regardless of whether a third party is using it.

1.38 The Panel believes that any attempt to codify or regulate leasing, trust or other such arrangements would be difficult and administratively burdensome. However, Panel members consider that it would be beneficial for auDA to publish its position on third party rights, so that parties who want to enter into such an arrangement are aware of their rights and responsibilities under .au policy.

RECOMMENDATION 1E

The Panel recommends that auDA's position on third party rights with respect to domain name leasing or sub-licensing arrangements should be clarified and published.

Issue 1F: Single character domain names (a-z, 0-9)

Current policy:

1.39 Single character domain names (eg x.com.au or 4.net.au) are currently not able to be registered in any .au 2LD⁶.

Issues:

1.40 Although previously restricted for technical reasons, many TLDs have now released single character domain names (eg .co, .net).

Public consultation outcomes:

1.41 The Panel notes that there was no clear majority support for the release of single character domain names. The main objections raised by respondents were the difficulty in determining eligibility for a single character domain name, and suspicions that it would be merely a revenue-raising exercise for auDA and the industry.

Views of the Panel:

1.42 Notwithstanding public comments on this issue, the Panel believes that as there is no longer any technical restriction on single character domain names, there would need to be compelling policy reasons why these domain names should not be released.

1.43 The Panel feels that people who opposed the release of single character domain names did so on the basis of eligibility concerns, as opposed to concerns about releasing the domain names per se. Panel members acknowledge that determining what would meet the eligibility rules for a single character domain name would be challenging. Given that there is a limited number of single character domain names available, the Panel suggests that it would be relatively easy to check for policy compliance.

1.44 There is also the question of the most appropriate release mechanism for these domain names. The Panel is aware that auDA has used auction and ballot methods in the past for the release of generic and geographic domain names, however it is not clear whether single character domain names would have any significant market value.

1.45 The Panel regards application of eligibility rules and choice of release mechanisms for single character domain names to be implementation matters for the auDA Board to consider.

RECOMMENDATION 1F

The Panel recommends that, in the absence of any compelling technical or policy reason to maintain the restriction, single character domain names should be released (subject to the registrant being eligible to register the name).

1G: Registration of domain names for personal use

Current policy:

1.46 Individuals who want to register a .au domain name for personal use have the following options under the current eligibility criteria:

- registration in id.au, provided the domain name is an exact match, abbreviation or acronym of the registrant's personal name, or a name by which they are commonly known (ie. a nickname)
- registration in com.au or net.au, provided the registrant has an ABN or a registered business name
- it is not possible for an individual to register in asn.au or org.au, because the eligibility criteria only allow for organisations, associations, clubs or groups.

⁶ There are a few existing single letter domain names (eg. i.net.au, x.net.au), which are legacy domain names created prior to auDA's administration of the .au domain.

Issues:

1.47 Panel members have pointed out that the eligibility criteria for the open 2LDs do not accommodate individuals who want to register a domain name that relates to a personal hobby or interest. For example, an individual who wants to set up a personal hobby website about yachting but is not carrying on business, nor is known by the name “yachting”, would not be able to register the domain name “yachting” in any of the open 2LDs under current eligibility criteria.

1.48 Anecdotal evidence suggests that people who want to register this type of domain name end up registering an ABN in order to meet the com.au eligibility criteria (which, given they are not commercially trading, possibly constitutes an abuse of the ABN registration process), or registering the domain name in a gTLD.

Public consultation outcomes:

1.49 The Panel notes that public comments were generally in favour of making it easier for individuals to register .au domain names for personal use. Whilst some comments argued for removing all restrictions in com.au, most respondents were in favour of maintaining the commercial nature of com.au and allowing individuals to register in other 2LDs. Some respondents suggested creating a new 2LD, which is outside the scope of this Panel.

Views of the Panel:

1.50 The Panel agrees that there is a public benefit in preserving the different purposes of the various 2LDs, and that id.au is the most appropriate 2LD for individuals to register domain names. Panel members support a relaxation of the close and substantial connection rule in id.au to allow people to register domain names that refer to personal hobbies and interests. The Panel notes that id.au would provide a controlled environment to test the policy relaxation, with a low risk of wider impact. Panel members also believe that relaxing the policy rules might stimulate some interest and growth in the relatively under-used id.au 2LD.

RECOMMENDATION 1G

The Panel recommends that the close and substantial connection rule for id.au be relaxed to include domain names that refer to personal hobbies and interests.

1H: Direct registrations under .au

Current policy:

1.51 It has never been possible for people to register a domain name directly under .au (eg. domainname.au). Instead, the .au domain is structured into a number of 2LDs and people must register their domain name as a 3LD (eg. domainname.com.au, domainname.org.au). The .au 2LD hierarchy was created by the first administrator of the .au domain, Robert Elz.

Issues:

1.52 The issue of direct registrations under .au was last considered by the 2007 Names Policy Panel, which recommended that .au not be opened up to direct registrations at that time. The 2007 Panel found that there was no groundswell of support for direct registrations, and even among those who supported it, there was no agreement on a method of implementation.

Public consultation outcomes:

1.53 The Panel notes that the majority of public comments were against allowing direct registrations under .au. People thought that the current 2LD hierarchy is well-known and understood, and introducing direct registrations would cause unnecessary confusion for little public benefit.

Views of the Panel:

1.54 The Panel notes that there does not seem to have been any shift in public opinion since the issue of direct registrations under .au was last considered in 2007.

1.55 Members of the current Panel acknowledge arguments that direct registrations have been successfully introduced in other ccTLDs. However, the Panel agrees that such a major change to the Australian DNS would require a much stronger level of support from the community than has been demonstrated through this consultation process.

RECOMMENDATION 1H

The Panel recommends that direct registrations under .au not be allowed at this time.

2. Reserved List Policy (2008-03)

2.1 The Reserved List Policy was introduced by auDA in 2002 on the recommendation of the first Names Policy Advisory Panel. The current Reserved List contains names (including letters, numbers and hyphens) that:

- are restricted under Commonwealth legislation; or
- may pose a risk to the operational stability and utility of the .au domain.

2A: Reserved List Policy in general

Current policy:

2.2 Words and phrases on the Reserved List are blocked at the registry and cannot be registered unless consent is provided by a particular governing body, with the exception of the words “Commonwealth” and “Federal”, where total restriction applies.

Issues:

2.3 The Panel invited people to comment on the contents of the Reserved List and the operation of the Reserved List Policy.

Public consultation outcomes:

2.4 The Panel notes that relatively few comments were received in relation to the Reserved List Policy, and they were generally supportive of the current policy approach.

Views of the Panel:

2.5 The Panel believes that the current policy is appropriate and effective, but may require updating to ensure consistency with Commonwealth legislation.

RECOMMENDATION 2A

The Panel recommends that the Reserved List Policy be retained, and updated as necessary to ensure consistency with Commonwealth legislation.

2B: Reservation of Australian state and territory names and abbreviations

Current policy:

2.6 Currently, all the names and abbreviations of Australian states and territories are on the Reserved List (although this is not mentioned in the policy itself).⁷ They were first placed on the list as part of the general reservation of geographic names, but were not released when all the other geographic names were released in 2005. The Panel understands that, at the time, auDA took the view that these names are of national significance, and therefore should continue to be reserved from general use. Unlike other names on the Reserved List, there is no specified approval process for registration of these names.

⁷ There are a few existing state and territory domain names (eg. nt.com.au, sa.com.au), which are legacy domain names created prior to auDA’s administration of the .au domain.

Issues:

2.7 The Panel was asked to consider whether state and territory names should be available for registration, and if so, who would be the appropriate entity to register them, and what approval process should apply. Panel members identified three options, which were put forward in the second public consultation report:

- Option A: The names and abbreviations of Australian states and territories should remain on the Reserved List, but may be released on application provided that the proposed registrant is eligible to use the name under normal policy rules, and that they have received permission from the relevant state or territory government authority (eg. Premier or Attorney-General's Department).
- Option B: The names and abbreviations of Australian states and territories should be treated in the same way as other geographic names and released from the Reserved List; and that the process for releasing them should be determined by auDA.
- Option C: The names and abbreviations of Australian states and territories should remain on the Reserved List, and there should be no provision for registration of the names.

Public consultation outcomes:

2.8 There was majority support for Option C.

Views of the Panel:

2.9 The Panel notes that the majority was slim and possibly not statistically significant (approximately 54% of respondents supported Option C). The remaining 46% of respondents broadly supported some reservation of the domain names with the ability to release them subject to specific approval procedures (either by auDA or government).

2.10 Panel members consider that it would be inconsistent with existing policy to have a category of names on the Reserved List that cannot be released under any circumstances. Provided that the registrant entity has been approved by the relevant state or territory government, the Panel cannot see any reason why the names should not be released.

RECOMMENDATION 2B

The Panel recommends that the names and abbreviations of Australian states and territories should remain on the Reserved List, but may be released on application provided that the proposed registrant is eligible to use the name under normal policy rules, and that they have received permission from the relevant state or territory government.

3. Domain Monetisation Policy (2008-10)

Current policy:

3.1 Under the Domain Monetisation Policy, "domain monetisation" means "registering a domain name in order to earn revenue from a monetised website", and a "monetised website" means "a website or landing page that has been created for the purpose of earning revenue from advertising".

3.2 The policy permits the registration of domain names for the purpose of domain monetisation under the close and substantial connection rule, under the following conditions of use:

- the content on a monetised website must be related specifically and predominantly to the domain name

- 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.

Issues:

3.3 When the Domain Monetisation Policy was first introduced in 2006, a monetised website was easily recognisable and mostly followed a common format, which meant that enforcement of the policy was relatively straightforward. However, the practice of domain monetisation has significantly changed from a simple webpage with click-through advertising links, to incorporate other formats such as news articles, blogs, images and so on. Methods employed by domainers (ie. people who register domain names for monetisation purposes) are becoming increasingly sophisticated and complex. In some cases it may be that domainers are attempting to circumvent the policy. However, to be fair to the domainer industry, the practice itself is constantly evolving as domainers test and refine ways of generating revenue.

3.4 auDA advised the Panel that it is becoming increasingly difficult to determine whether or not a website is monetised within the meaning of the policy, and the decision is necessarily subjective. Domainers and complainants alike have expressed frustration at the apparently inconsistent outcomes of complaints made under the policy.

3.5 There is a suggestion that domain monetisation should no longer be subject to specific regulation, but should simply be included within the general Policy Rules, for the following reasons:

- domain monetisation is a legitimate commercial endeavour and has been an accepted practice in the gTLDs for some time
- conditions about the content of monetised websites are redundant since it is in the interest of domainers to ensure that the content of the website is relevant to the domain name
- auDA's jurisdiction arguably does not extend to checking or controlling the content of websites.

3.6 Arguments for the retention of a separate policy for domain monetisation include:

- domain monetisation is inconsistent with the long-standing .au policy principle that there must be some kind of valid and recognisable link (ie. a "close and substantial connection") between the registrant and their domain name
- in the case of domain monetisation, the public interest lies in ensuring that Internet users are not diverted to monetised websites that offer no relevant service or benefit
- the conditions of use under the current policy are not onerous, and there is evidence to suggest that many domainers have already modified their practices to ensure compliance.

Public consultation outcomes:

3.7 Public comments indicated general uncertainty about what domain monetisation is, and how the policy applies. There were divergent views on how domain monetisation should be treated under .au policy, ranging from calls to abolish all policy restrictions on domainers, to arguments for stronger regulation or outright banning of domain monetisation. Ultimately, there was majority support for the Panel's draft recommendation on this issue.

Views of the Panel:

3.8 The Panel notes that the origin of the domain monetisation policy was a clarification of the close and substantial rule under the eligibility policy. The policy sets up a connection between the registrant and the domain name where there is otherwise no connection available under the existing eligibility rules. In other words, the policy allows registrants who would otherwise not be eligible under the existing close and substantial connection rule, to register domain names for monetisation purposes. For this reason, the Panel notes that simply abolishing the domain monetisation policy without making any other provision would result in registrants not being allowed to register for monetisation purposes at all. Therefore,

the Panel's consideration of this issue has been focused on possible changes to the policy, as opposed to complete abolition of the policy.

3.9 The current policy imposes two conditions of use on domain names registered for monetisation purposes. The first condition is that "the content on a monetised website must be related specifically and predominantly to the domain name" (known as the "content rule"). The Panel has considered arguments that the role of auDA is domain name regulation, not website content regulation, and that registrants should be allowed to put any content they like on their website. However, these arguments fail to recognise that the purpose of the content rule is to create a close and substantial connection between the registrant and the domain name that would not otherwise exist. If the content rule was removed, then that would be akin to removing the close and substantial connection rule altogether.

3.10 Panel members understand that if the close and substantial connection rule was to be removed for monetisation, then it would have to be removed for all registrations – ie. all registrants would be allowed to register any domain name they wanted, on an open slather basis. There is a consensus amongst Panel members to support retaining the current allocation criteria, reaffirming the long-standing policy principle in .au that there must be some kind of connection between a registrant and their domain name.

3.11 Further, with respect to the content rule, Panel members note comments from domainers that most registrants would comply with the content restrictions for their own business reasons in any case, because a monetised website with irrelevant content will not attract internet traffic.

3.12 The second condition of use on domain names registered for monetisation purposes is that "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". There is a consensus among Panel members that this condition should also be retained, to guard against bad faith registrations.

3.13 Whilst the Panel is in favour of retaining the current conditions of use on domain names registered for monetisation purposes, Panel members do not see the need to retain a separate domain monetisation policy. In keeping with the mainstreaming of monetisation practices on the Internet, the Panel believes that domain monetisation should be incorporated into the general eligibility and allocation policy rules, as an additional category of close and substantial connection. The Panel also believes that references to "domainers" in auDA policy should be removed, to avoid singling out a particular class of registrant. Whilst the exact wording would be a matter for auDA, the Panel has provided sample text at Attachment A to illustrate how auDA could implement the changes if they were to be adopted.

3.14 The Panel is also in favour of broadening the scope of the policy to accommodate a range of different monetisation models. Rather than try to define the term "domain monetisation" by reference to a "monetised website" or other prescribed usages, the Panel believes it would be sufficient to describe permissible practice along the lines of "registering a domain name where the predominant purpose of the registration is to obtain revenue through use of that domain name." This would give registrants greater flexibility in their use of domain names registered under the close and substantial connection rule, provided that they meet the conditions of use outlined above.

3.15 The Panel notes that public comments on this issue highlighted a lack of understanding of the domain monetisation policy, even among members of the domainer community. The Panel believes that this could be addressed by providing further explanatory material, including examples of acceptable practice, in the policy guidelines.

3.16 Three Panel members did not agree with the recommendation on this issue. Their views are expressed in a minority report at Attachment B.

RECOMMENDATION 3

The Panel recommends that:

- a. the Domain Monetisation Policy (2008-10) should be abolished as a separate policy;**
- b. Schedules C and E of the Domain Name Eligibility and Allocation Policy Rules for Open 2LDs (2008-05) should be amended to include domain monetisation under the close and substantial connection rule for com.au and net.au domain names (as exemplified in Attachment A to the Panel's report);**
- c. the existing conditions of use on domain names registered on the basis of domain monetisation under the "close and substantial" connection rule should be retained;**
- d. the definition of "domain monetisation" should be replaced with a description of permissible practice, to accommodate a range of monetisation models; and**
- e. the Guidelines for Accredited Registrars on the Interpretation of Policy Rules for the Open 2LDs (2008-06) should be amended to include additional explanatory material regarding domain monetisation.**

4. Prohibition on Misspellings Policy (2008-09)

Current policy:

4.1 The Prohibition on Misspellings Policy prohibits the registration of domain names that are misspellings of entity, personal or brand names (also known as typosquatting). For example, under the policy, google.com.au is a prohibited misspelling of google.com.au. The main reason people register misspellings is to "catch" Internet users who intended to go to the real website. auDA maintains a list of names that have been determined under the policy to be prohibited misspellings; the list currently contains approximately 2,000 names.

Issues:

4.2 The policy protects entity, personal and brand names. Entity and personal names are straightforward and objectively defined, but brand names are more problematic. The term "brand name" is defined in the policy as "the name of an identifiable and distinctive product or service, whether commercial or non-commercial". The policy was drafted under the assumption that only well-known, trademarked brand names would be the target of a typosquatter, eg. Google, Yahoo, Microsoft, Telstra, Optus, Qantas, all the major banks. These make up the bulk of the names on the list of prohibited misspellings.

4.3 auDA advised the Panel that over time, it has received an increasing number of complaints from SMEs and sole traders that their "brand name" has been infringed in breach of the policy. In some cases auDA has determined that they do have a brand name, in some cases it has not. This raises the following issues:

- the subjective nature of the policy with respect to brand names
- whether it is appropriate for auDA to recognise brand names that are not recognised in law
- whether it is appropriate for auDA to protect brand names in the first place.

Public consultation outcomes:

4.4 The Panel notes that the majority of respondents were in favour of retaining the prohibition on misspellings, citing benefits to brand name owners and consumers alike. A number of comments were concerned that the policy tends to benefit large organisations rather than small to medium businesses.

Views of the Panel:

4.5 The Panel believes that there are good consumer protection reasons behind the policy, such as preventing phishing scams, avoiding user confusion and generally protecting the integrity of the .au domain space. Many of the names on the list of prohibited misspellings belong

to major banks and well-known government agencies and programs (eg. ATO, Medicare), and there is a public interest in minimising the risk of Internet users mistakenly going to a bogus bank or government website. The Panel believes that the current policy and enforcement approach is largely effective in achieving this aim.

4.6 Panel members acknowledge that the policy does contain an element of subjectivity with respect to the definition of “brand name”, which can lead to uncertainty of outcome for both complainants and registrants. The Panel considered whether obvious brand names could be blocked at the registry, however it was felt that blocking so-called “obvious” brand domain names would be subjective and unfair to other businesses who also may claim to have a brand. Another option (raised in public comments) would be to restrict the list of misspellings to trademarked names only, however the Panel was concerned that such a restriction would disadvantage small businesses and sole traders who tend not to have a registered trademark. On balance, the Panel believes that the current policy is the most appropriate approach.

RECOMMENDATION 4

The Panel recommends that the Prohibition on Misspellings Policy be retained in its current form.

ADDITIONAL COMMENTS

The Panel is aware that auDA conducts a major Panel review of the .au policy framework every 3-4 years. Panel members would like to offer some suggestions to the auDA Board regarding the operation of future Panels.

Panel members think that the impending introduction of new gTLDs by ICANN may have a significant impact on the .au domain, with the possibility that changes to the global DNS could spark a demand for similar changes in the Australian DNS. In this context, the Panel believes that the two main policy issues that would need to be revisited in future are direct registrations under .au and personal domain names.

Panel members also suggest that there should be more extensive public surveys conducted ahead of the next Panel, which could then be used to better focus the review. More detailed statistical data from auDA regarding complaints and audits would also help to inform the next Panel's work.

GLOSSARY

Term	Definition
2LD	Second level domain, ie. a name at the second level of the .au domain name hierarchy (eg. com.au)
3LD	Third level domain, ie. a name at the third level of the .au domain name hierarchy (eg. domainname.com.au)
ABN	Australian Business Number
ACN	Australian Company Number
ARBN	Australian Registrable Body Number (ASIC identifier for foreign entities registered to trade in Australia)
ASIC	Australian Securities and Investments Commission
ATMOSS	Australian Trade Mark Online Search System
auDA	.au Domain Administration Ltd
auDRP	.au Dispute Resolution Policy
ccTLD	Country Code Top Level Domain (eg. .au, .uk)
Domainer	An entity or individual that registers domain names for the purpose of domain monetisation
Domain monetisation	The practice of registering domain names in order to earn revenue from advertising
DNS	Domain Name System
gTLD	Generic (or Global) Top Level Domain (eg. .com, .biz)
Registrant	An entity or individual that holds a domain name licence
Registrar	An entity that registers domain names for registrants and is accredited by auDA
SME	Small to medium enterprise
TLD	Top Level Domain (includes ccTLDs and gTLDs)
TM	Trade mark

**SAMPLE TEXT FOR RECOMMENDED CHANGES
REGARDING DOMAIN MONETISATION**

The Panel has drafted the following sample text in support of its Recommendation 3 regarding domain monetisation:

DOMAIN NAME ELIGIBILITY AND ALLOCATION POLICY RULES FOR THE OPEN 2LDS

SCHEDULE C

ELIGIBILITY AND ALLOCATION RULES FOR COM.AU

The com.au 2LD is for commercial purposes.

The following rules are to be read in conjunction with the Eligibility and Allocation Rules for All Open 2LDs, contained in Schedule A of this document.

1. To be eligible for a domain name in the com.au 2LD, registrants must be:
 - a) an Australian registered company; or
 - b) trading under a registered business name in any Australian State or Territory; or
 - c) an Australian partnership or sole trader; or
 - d) a foreign company licensed to trade in Australia; or
 - e) an owner of an Australian Registered Trade Mark; or
 - f) an applicant for an Australian Registered Trade Mark; or
 - g) an association incorporated in any Australian State or Territory; or
 - h) an Australian commercial statutory body.
2. Domain names in the com.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.

PROPOSED NEW TEXT

3. A domain name may also be registered in the com.au 2LD under paragraph 2(b) where the predominant purpose of the registration is to earn revenue through use of the domain name, provided that the following conditions are met:

- a) the content on the website to which the domain name resolves must be related specifically and predominantly to subject matter denoted by the domain name; and**
- b) 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.**

(The same text would be used for Schedule E, net.au domain names.)

**MINORITY REPORT ON RECOMMENDATION 3 -
DOMAIN MONETISATION**

Background

The Minority Panel ('MP') has chosen to provide the auDA Board with alternate recommendations on the issue of domain monetisation and related auDA policy. While the MP was in substantial agreement with the Panel on the majority of issues, the primary area of concern for the MP was the issue of Monetisation.

Where the MP has made a recommendation to the auDA Board, it is made as a genuine alternative and or variation to some of the recommendations made by the majority of the Panel.

The MP is composed of:

1. Erhan Karabardak
2. David Lye
3. Simon Johnson

Problems with the Domain Monetisation Policy

The MP has reviewed public submissions made to the draft recommendations sent out by the Panel in addition to undertaking its own consultations within industry and consumer groups.

There are a number of public submissions, which do not support the Panel recommendations.

The MP considers that the Panel should have considered, in more detail, the definition of 'monetisation' and the policy objectives/outcomes. These issues should be addressed in more detail by a suitably qualified working group, before the Board make a decision on the recommendations. The MP considers that the Monetisation Policy in its current form is unworkable, unreasonable, and inconsistent with existing auDA Policy.

The MP is very concerned that the Monetisation Policy seeks to and/or has the effect of imposing content regulations on domain name registrants.

The MP considers that content regulation of Australian websites is undesirable and outside the scope of auDA's mandate.

The MP notes that the Policy has a number of flaws, which make it unworkable, unreasonable and unnecessary:

1. The Policy does not advocate or demonstrate(a) any reasonable basis for the restrictions imposed by the Domain Monetisation Policy; and (b) define what monetisation is.
2. The majority of the Panel was unable to demonstrate any harm or detriment caused by the monetisation of domain names – the submissions received by the Panel did not advance any credible arguments either.

3. The Panel was repeatedly informed that abolishing the Monetisation Policy may cause "domainers" to be ineligible under the Domain Name Eligibility Policy. This proposition presupposes that the only grounds for eligibility for small business registrants / domainers is through this Policy; this is not the case. The MP does however support an express right to register domain names for the purpose of – and in the absence of all restrictions being abolished, the MP recommends that a definition developed by a suitably qualified industry working group be implemented to provide small business with certainty.
4. The Policy makes a vague reference to a need to ensure that '*domain monetisation is not used as a cover for cybersquatting or other misleading or fraudulent activity*'. The Policy does not prevent cybersquatting and other misleading or fraudulent activity, for example:
 - The auDRP and existing eligibility requirements (in addition to the law) already prevent cybersquatting;
 - Many fraudulent sites such as the widely reported <http://www.cheaper-flights.com.au/> and other websites containing malware, such as Zeus Botnets (<https://zeustracker.abuse.ch/statistic.php>) have and continue to operate without this Policy (and other auDA policies) being able to prevent their proliferation;
5. The Policy is inconsistent with Domain Name Eligibility and Allocation Policy Rules for the Open 2LDs (2008-05), as this policy specifically contemplates use of domain names for commercial / business purposes (which include deriving income from the use of a domain name), yet it imposes restrictions inconsistent with the purpose of registering domain names;
6. The Policy has unintended consequences by placing restrictions on small business operators who register a domain name for the purposes of operating ecommerce websites. For example:
 - a small business operator who registers a domain name under the close and substantial connection rule to sell shoes on shoes.com.au (which is specifically for the purpose of earning revenue from a monetised website), and then decides to place an advertisement for handbags and clothing – the registrant would be in breach of the existing Policy, as 'handbags' and 'clothing' are not related specifically and predominantly to the domain name;
7. The Policy discriminates against small business operators who rely on third party suppliers and do not store physical stock. For example:
 - a small business owner registers a domain name under the close and substantial connection rule for the purposes of selling a product such as a DVD on "How To Do X". The small business does not stock the product, rather they use a third party supplier to deliver the goods, this process is called drop shipping and is wide spread. The product could be offered for a limited time, in which case they use the domain for another product offer (How To Do Y). The registrant would be in breach of the existing Policy, as Product X and Y may not be related specifically and predominantly to the domain name. This specific concern was raised at a Panel meeting, and the Panel was informed that if the small business owner was a real (bricks and mortar) store, there would not be a problem.

8. The Policy requires that *'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 leads to many unintended consequences for example:

- Mr A registered seureshredding.com.au and places advertisements for secure shredding service providers – while he would comply with clause 4.3(a) he would be in contravention of clause 4.3(b) as it incorporates, *'an entity name, personal name or brand name in existence at the time the domain name was registered'* (in fact, the MP found that there are currently 3 entities on the ASIC database which utilise this term in their company name);

In this example, there could still be a breach of clause 4.3(b) above even if the entity whose name was incorporated was a shelf company or other non-trading business/entity. There is significant uncertainty in the use of the term *'entity name'*, and *'brand name'* which is defined to mean *'identifiable and distinctive product or service, whether commercial or non-commercial'*;

- Mrs B registers redshoes.com.au. There are 39 names in the ASIC database, of which most are removed (RMVD) or deregistered (DRGD). Despite the fact that these companies or entities are no longer trading, Mrs B could be in breach of Clause 4.3(b) as the domain incorporates, *'an entity name, personal name or brand name in existence at the time the domain name was registered'*;
- The Policy seems to unjustifiably convey trademark like rights.
- The Policy purports to regulate (in a manner inconsistent with the law) the use of company names, brand names, and personal names.

9. The Policy is not enforceable. On multiple occasions, the Panel was informed that auDA does not have the resources to actively enforce this policy - rather auDA relies on a "complaints based mechanism". This has the effect of some small business owners being "permitted to trade", while others are forced to respond to a complaint, often under pressure and time constraints (and often from third parties submitting malicious bad faith complaints to try and strip the domain name from the Registrant, to enable them to register it) – in order to save their domain name from being placed into Pending Delete.

Given the technical nature of the complaints, small businesses may incur significant legal costs in order to save their domain name, which in most cases means and includes their entire business.

10. Technology and advertising have moved on since the Monetisation Policy was created. Registrants may not have full control over what content is displayed on their website. For example:

- a small business owner registers a domain name under the close and substantial connection rule to sell shoes on shoes.com.au (which is specifically for the purpose of earning revenue from a monetised website). The registrant, in part earns revenue from advertising and places a Google AdSense ad feed on their website. The registrant does not control the types of ads provided to them by the advertiser (Google). Google delivers the advertising content but cannot always ensure the ads are displayed on contextually relevant web pages. For example a finance

company may use the keyword 'buy' to promote finance products, so a website about 'buying shoes' may display advertisements concerning finance and personal loans. The Registrant does not and cannot control content served by Google. In this example, the registrant could be in breach of the Monetisation Policy, as there could be more content (Google Ads) displayed on their website that does not relate to shoes.

The MP has compiled the examples from real world situations, some of which have already taken place, and which effectively illustrate the substantial, inherent risks with this Policy.

Recommendations

It is the position of the MP that the existing Monetisation Policy restrictions are antiquated, flawed and should be eliminated in their totality.

For practical purposes if the restrictions on monetisation are not eliminated in their totality, the MP makes the following recommendations:

1. That the Board amend the Domain Name Eligibility and Allocation Policy Rules for the Open 2LDs (2008-05) to explicitly allow registrants to register domain names for the purpose displaying advertisements, banners and or links;
2. That the Board remove clause 4.3(a) of the Policy;
3. That the Board limit the effect of 4.3(b) to 'Australian registered trade marks';
4. That an industry based working group be formed to define monetisation, and develop a workable definition.