

.AU DISPUTE RESOLUTION POLICY (auDRP) REVIEW

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Background

The purpose of the .au Dispute Resolution Policy (auDRP) is to provide a cheaper, speedier alternative to litigation for the resolution of disputes between the registrant of a .au domain name and a party with competing rights in the domain name.

The auDRP is an adaptation of ICANN's Uniform Dispute Resolution Policy (UDRP), which has been in place for gTLD disputes since 1999. auDA's Dispute Resolution Working Group (DRWG) made slight modifications to the UDRP to take account of .au policy restrictions, and to address some practical constraints in the UDRP that had become apparent at the time. The DRWG's reports and consultations are archived on the auDA website at <http://www.auda.org.au/drwg/drwg-index/>.

In August 2007, auDA reviewed the auDRP where it called for public comments and invited the four auDRP Providers to participate in the review.

As an outcome of that review, auDA implemented the following actions:

- increased the auDRP fees from \$1,500 to \$2,000 for single member panel, and from \$3,000 to \$4,500 for three member panel.
- amended the auDRP Rules to clarify:
 - the use of website archives such as the "Wayback Machine"; and
 - auDA's role in relation to ensuring the overall integrity of the auDRP.

In August 2010, auDA introduced changes to require electronic filing and transmission of auDRP complaints, namely the "auDRPe". The changes are reflected under current policy.

auDRP Proceedings since 2002

The auDRP came into effect on 1 August 2002.

As of 30 October 2012, there have been 300 auDRP proceedings involving 433 domain names.

Table A: auDRP Proceedings by Provider

| Year | Total Number | CIArb | IAMA | LEADR | WIPO |
|------|--------------|-------|------|-------|------|
| 2002 | 1 | 0 | 1 | 0 | 0 |
| 2003 | 14 | 1 | 0 | 6 | 7 |
| 2004 | 14 | 0 | 0 | 6 | 8 |
| 2005 | 23 | 1 | 4 | 13 | 5 |
| 2006 | 33 | 1 | 2 | 16 | 14 |
| 2007 | 30 | 1 | 6 | 11 | 12 |
| 2008 | 32 | 1 | 2 | 10 | 19 |
| 2009 | 26 | 0 | 2 | 11 | 13 |
| 2010 | 42 | 0 | 0 | 21 | 21 |

| | | | | | |
|------|----|---|---|----|----|
| 2011 | 53 | 0 | 0 | 13 | 40 |
| 2012 | 32 | 0 | 0 | 8 | 24 |

Table B: auDRP Proceedings by Decision

| Year | Total Number | Name Transfer | Decision for Respondent | Name Cancelled | Complaint Withdrawn |
|--------------|--------------|-----------------|-------------------------|----------------|---------------------|
| 2002 | 1 | 0 | 1 | 0 | 0 |
| 2003 | 14 | 8 | 5 | 0 | 1 |
| 2004 | 14 | 11 | 1 | 0 | 2 |
| 2005 | 23 | 12 | 10 | 1 | 0 |
| 2006 | 33 | 17 ¹ | 14 ¹ | 0 | 3 |
| 2007 | 30 | 20 | 6 | 0 ² | 3 |
| 2008 | 32 | 19 ¹ | 8 ¹ | 1 | 4 |
| 2009 | 26 | 14 | 8 | 0 | 4 |
| 2010 | 42 | 26 | 7 | 1 | 8 ³ |
| 2011 | 53 | 28 | 12 | 0 | 13 |
| 2012 | 32 | 18 ¹ | 9 ¹ | 1 | 4 |
| TOTAL | 300 | 173 | 81 | 4 | 42 |

¹ In these proceedings, the Panelist found for the complainant and the respondent in relation to different domain names, so the decision has been recorded under both "Name Transfer" and "Decision for Respondent".

² No further action pursuant to Para 4(k) of the auDRP.

³ A proceeding was dismissed due to Administrative Deficiency.

auDRP Policy and Rules

The auDRP Policy sets out three grounds for complaint, each of which must be proved by the complainant in order to succeed:

- the domain name is identical or confusingly similar to a name, trademark or service mark in which the complainant has rights; and
- the registrant has no rights or legitimate interests in respect of the domain name; and
- the domain name has been registered or subsequently used in bad faith.

Complaints are determined by a single member or a three member Panel. The available remedies are transfer of the domain name to the complainant or cancellation of the domain name. Panel decisions are binding on both parties and there is no appeals process. If the unsuccessful party is not satisfied with the outcome of an auDRP proceeding, they may decide to initiate legal proceedings against the other party.

The auDRP Rules define the way in which auDRP proceedings are administered, including procedures and timelines for lodging a complaint and filing a response. The average auDRP proceeding takes 45 days.

Full text of the auDRP Policy and Rules is available on the auDA website at <http://www.auda.org.au/policies/auda-2010-05/>.

On 3 Oct 2011, ICANN published a Final Issues Report on the current state of the UDRP (available at <http://gns0.icann.org/issues/udrp/udrp-final-issue-report-03oct11-en.pdf>) requested by the GNSO Council.

A summary of issues was raised by the community and attached as Annex 2 to the Final Issues Report. Given that the auDRP is an adaptation of the UDRP, these are some of the issues are of possible relevance to auDRP:

| Policy/Process Issue | Description |
|--|--|
| Safe Harbors | Policy should include clear safe harbors, such as to protect free speech and fair use or other non-commercial rights of registrants |
| Appeals | No appeals of process in policy itself-- two options appeal of decision or trial de novo |
| | Establish an internal appeals process to ensure implementation of fair trial requirements |
| Statute of Limitations | There should be an express time limitation for claims brought under the policy |
| Reverse Domain Name Hijacking/ Uniform Procedures for Transfers | A finding of reverse domain name hijacking is rarely found, and panelists should be encouraged to make this finding when appropriate |
| | No specified timeframe for implementing transfers |
| Business Constituency | Delays often experienced in implementation of decisions by Registrars |
| Loser Pays Nothing | Losing Respondent should pay filing fees and attorney's fees |

For the full list of issues raised by the community under Annex 2, please refer to the Final Issues Report.

Review Questions:

- **Are there any aspects of the auDRP Policy and/or Rules which require clarification or modification?**
- **Should any of the issues raised by the community in ICANN's Final Issues Report be considered under this review? If so, which issues and why?**

auDRP Providers and Panelists

Each auDRP proceeding is conducted by an auDA-approved auDRP Provider. The Provider is responsible for appointing the Panel, managing communications with the parties and general administration of the proceeding.

auDA has published an Approval Process for auDRP Providers (2008-02) at <http://www.auda.org.au/policies/auda-2008-02/> which sets out the criteria which Providers must meet in order to be approved. There is no direct contractual relationship between auDA and an approved Provider, but it would be open to auDA to withdraw approval if the Provider no longer meets the approval criteria.

The policy restrictions in .au mean that parties to an auDRP proceeding will almost always be Australian. For this reason, auDA requires that Providers appoint only Panelists who are Australian citizens or Australian residents, or otherwise able to demonstrate knowledge and experience of the Australian DNS.

There are currently three auDRP Providers listed on the auDA website:

- The Institute of Arbitrators and Mediators Australia (IAMA)
- LEADR - Association of Dispute Resolvers
- World Intellectual Property Organisation (WIPO)

Review Questions:

- **Is auDA's approval process for auDRP Providers appropriate?**
- **Should auDA formalise its relationship with auDRP Providers?**

auDRP Fees

The complaint filing fees for auDRP proceedings are fixed by auDA at \$2,000 for a single Panelist and \$4,500 for a three member Panel (it is up to the Provider to determine how the fees are distributed).

This is not the same as the UDRP, where Providers are entitled to set their own fees in a globally competitive market. The price range varies according to number of Panelists, the administrative fees of providers, and number of domain names under dispute. The fees charged by UDRP Providers are as follows:

- Asian Domain Name Dispute Resolution Centre (ADNDRC)

| Number of Disputed Domain Names | Panelists Fees (single-member or three member) | ADNDRC Admin Fees | Total Fees |
|---------------------------------|--|-------------------|-----------------------|
| 1-2 | US\$ 700 - \$2,200 | US\$600 | US\$1,300 – US\$2,800 |
| 3-5 | US\$ 900 - \$2,600 | US\$700 | US\$1,600 – US\$3,300 |
| 6-9 | US\$ 1,100 - \$3,000 | US\$800 | US\$1,900 – US\$3,800 |
| 10 or more | To be determined by ADNDRC | | |

- National Arbitration Forum (NAF)

| Number of Disputed Domain Names | Single-Member Panel | Three-Member Panel |
|---------------------------------|-------------------------|--------------------|
| 1 – 2 | \$1,300 | \$2,600 |
| 3 – 5 | \$1,450 | \$2,900 |
| 6 – 10 | \$1,800 | \$3,600 |
| 11 – 15 | \$2,250 | \$4,500 |
| 16 or more | To be determined by NAF | |

- WIPO

| Number of Disputed Domain Names | Single-Member Panel | Three-Member Panel |
|---------------------------------|--------------------------|--------------------|
| 1 – 5 | \$1,500 | \$4,000 |
| 6 – 10 | \$2,000 | \$5,000 |
| 10 or more | To be determined by WIPO | |

- The Czech Arbitration Court Arbitration Center for Internet Disputes (CAC)

| Number of Disputed Domain Names | Panelists Fees (single-member or three member) | CAC Admin Fees | Total Fees |
|---------------------------------|--|---------------------|----------------------|
| 1-5 | EUR€250 - EUR€1,200 | EUR€250 - EUR€700 | EUR€500 – EUR€3,100 |
| 6-10 | EUR€500 - EUR€1,500 | EUR€300 - EUR€900 | EUR€800 – EUR€4,000 |
| 11-20 | EUR€750 - EUR€1,800 | EUR€400 - EUR€1,100 | EUR€1,150– EUR€4,700 |
| 21-30 | EUR€750 - EUR€2,100 | EUR€400 - EUR€1,300 | EUR€1,150– EUR€5,500 |
| 31-40 | EUR€1,000 - EUR€2,400 | EUR€500 - EUR€1,500 | EUR€1,500– EUR€6,300 |
| 41-50 | EUR€1,000 - EUR€2,700 | EUR€500 - EUR€1,700 | EUR€1,500– EUR€7,100 |
| 51 or more | To be determined by CAC | | |

The reason why auDA decided to fix fees for auDRP, rather than follow the UDRP model, was to ensure a low barrier to entry for prospective complainants.

Review Questions:

- Are the current auDRP fees appropriate?
- Should auDA continue to fix fees, or allow Providers to set their own fees in a competitive market (i.e. as per number of disputed domain names)?

Clarification of Registrar Obligations

Registrars are not required to participate in the proceeding, nor do they bear any liability for the outcome of the proceeding. However they are required to cooperate with the auDRP Provider to ensure the efficiency and effectiveness of the proceeding.

In 2003, auDA published a further policy clarifying registrar obligations within the .au dispute resolution process. Under the Clarification, registrar obligations include:

- confirmation registrant contact details with the auDRP Provider;
- request AusRegistry to place a server lock on the domain name(s) subject to dispute; and
- implement the auDRP decision.

Review Questions:

- Should the Clarification of Registrar Obligations be incorporated into the auDRP?
- Are there any additional clarifications required for registrar obligations under auDRP process?

auDRP Search Database

The .au Dispute Resolution Search Database is a free resource for searching administrative proceedings determined under the auDRP and is located at <http://www.auda.org.au/audrp/search/>.

The database is organised primarily by proceeding number, commence and decision date, panelist name, domain name, name of parties, outcomes and key issues, examples of which include:

- generic, descriptive domain name
- multiple Complainants or Respondents
- inactive use of domain name
- no response filed
- Respondent offered domain name for sale

Review Questions:

- **Is the auDRP Search Database useful?**
- **What improvements could be made to the auDRP Search Database, if any?**

auDRP Training Sessions

As a part of the introduction of the auDRPe in 2010, auDA held training sessions in Sydney and Melbourne for auDRP Panelists and other interested parties (i.e. legal practitioners).

During the sessions, auDA covered the new procedural rules regarding the auDRPe as well as auDRP basics for people who are new to the process, such as the development of the UDRP and the auDRP, and the key differences between the two policies.

A number of Panelists attended the training sessions, and there were some good discussions had on auDRP policy and practicalities.

auDA also received very positive feedback on these sessions including the suggestion to hold more training sessions in future.

Review Questions:

- **How often should auDA hold these training sessions?**
- **What types of issues should these training sessions cover?**

In addition to the review questions posed in this paper, auDA welcomes any other comments and feedback on the operation of the auDRP.