



**AUSTRALIAN DIGITAL ALLIANCE**

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Ms Jo Lim  
Secretariat  
auDA Name Policy Advisory Panel

Dear Ms Lim

Please find attached the submission of the Australian Digital Alliance with respect to the Name Policy public consultation paper of the .au Domain Authority.

Please feel free to contact me if you have any questions.

Yours sincerely

Nick Smith  
Executive Officer  
7 December 2000

# Australian Digital Alliance Submission on Australian Domain Name Policy

## *Introduction*

The .auDA Name Policy Advisory Panel refers to the Australian DNS as a 'valuable public asset and a crucial piece of the national information infrastructure'. The ADA wishes to endorse this perspective. We believe that there is an increasing tendency to view Internet infrastructure as a tool to serve commerce alone. Commerce is one very important use to which the Internet can be put but it is by no means the only one. It is important to see the Internet (and the DNS which facilitates it) as a medium for communications and not simply transactions.

The ADA suggests that the .auDA must have a reasonably clear idea of which Australians are seeking or will be seeking to obtain domain names and develop a policy which suits all interests equally. Broadly, it might be observed that current and potential users of the DNS may be divided according to the following categories: commercial versus non-commercial and organisations versus individuals. It also may be observed that such categories are not static: individuals become organisations and non-commercial bodies begin trading commercially.

It is important as a general consideration that (i) users falling under all potential categories are catered for; and (ii) boundaries between categories not be too strongly-defined to accommodate the degree of potential change which is common with respect to the Internet.

### **4.1.1 Eligibility to apply for a domain name licence**

The ADA believes that there is some merit in requiring a domain name holder to fit the purpose envisaged by the 2LD. This enables Internet users to have some basic information about websites they are viewing and it enables easier searching for sites they may be seeking.

However, the ADA questions whether the proposal at 4.1.1 (within the context of the current set of 2LDs) will fully serve the Australian Internet community. If .com.au is confined to commercial organisations, .org to non-profit etc, little is left for individuals. The Australian DNS currently only provides 2LDs such as .dropbear.id.au for individuals which are not satisfactory.

Today, the largest domain space in the world, .com, is 'open-slather' and may be (and is) used by anyone. A small hobbyist has the same capacity (as far as domain names are concerned) to represent herself to the Internet as does IBM or Microsoft. The ADA does not necessarily advocate that the Australian DNS be opened up in the way that .com has been, rather that the full range of domain users be catered for in some way.

## Relationship Between Trade Marks and Domain Names

The proposed linkage between the holding of a trade mark and eligibility of a trademark is distinctly problematic. A trade mark may be registered with respect to 42 classes of goods or services (see [http://www.ipaustralia.gov.au/trademarks/T\\_class.htm](http://www.ipaustralia.gov.au/trademarks/T_class.htm) for the range of goods or services). For example, the word 'wombat's is registered by different parties with respect to a number of different goods or services (such as *12.Vehicles; apparatus for locomotion by land, air or water* and *34.Tobacco; smokers' articles; matches*) Which company that trades under the name 'wombat' is eligible to apply for the domain name [www.wombat.com.au](http://www.wombat.com.au)?

Such a system also excludes a hobbyist who does not consider herself a business at all (and thus does not apply for a trade mark) until her website later (and perhaps unexpectedly) becomes very successful. Unlike traditional 'bricks and mortar' businesses, the distinction between a commercial enterprise and a hobby may not be great.

#### **4.1.2 One domain name licence per entity**

The ADA has no problem with the change as proposed.

#### **4.1.3 Direct derivation of a domain name from an entity name**

The ADA is opposed to this proposal for reasons similar to those given in response to 4.1.1

Under the current DNS arrangements in Australia, as an individual, the Executive Officer of the ADA, Nick Smith, is confined to a domain such as [www.nicksmith.wombat.id.au](http://www.nicksmith.wombat.id.au). The enormous potential value of a domain name is therefore simply not available to an individual.

Suppose, for example, an individual wishes to protest a certain law, government department or corporation. Why should she not be able to register (something like) [www.downwiththeADA.com.au](http://www.downwiththeADA.com.au)?

(By way of comparison, a number of 'protest sites' have been registered overseas such as [www.walmartsucks.com](http://www.walmartsucks.com). This has led to an even more disturbing infringement of individual rights where such sites have been taken away by the corporation being criticised. In the case of [www.guinnessucks.com](http://www.guinnessucks.com), the domain name was held to be an infringement of the Guinness PLC's trademark because it was deceptively similar and would fool potential customers; an idea which is patently ridiculous.)

Under the current regime, and the regime as proposed by the .auDA Name Policy Panel, it would not be possible to register [www.downwiththeADA.com.au](http://www.downwiththeADA.com.au) unless it was registered as a trademark first. This is burdensome and expensive and detracts from the enormous communication potential of the Internet.

The ADA strongly believes that there must be a capacity for individuals or very small organisations to be able to register domain names that reflect their interests, hobbies or political persuasions, rather than just their personal or group names.

#### **4.1.4 Conflict Between Domain Names and Trade Marks**

As was stated previously, there may well be multiple holders of the same trade mark with respect to different goods or services. How is a conflict between such holders to be resolved?

This issue raises a wider problem: why should domain names be tied to trade marks in such a rigid fashion? The two systems exist for quite different reasons: one is to protect a trader's brand value and business reputation while the other is an important means of providing identification on the Internet.

Only those who are engaged in selling goods or services will require a trade mark whereas anyone who 'publishes' on the Internet may well want a domain name even if it is only to provide a means of identification for a collection of lightbulb jokes or a series of family photos.

The differences between the trade mark system and the domain name system (ie, 42 trade marks vs one domain name; purely commercial system vs general system) are such that problems will result when one is mapped onto the other.

The main reason that domain names and trade marks are drawn together is seemingly to protect the brand value of corporations that trade or advertise on the Internet.

The ADA believes there are two possible solutions to this:

1. Abandon domain names as a means of protecting business reputations in favour of more suitable, focussed areas of the law such as 'deceptive or misleading conduct' under the Trade Practices Act or the tort of passing off. Here a company or individual would be sued or prosecuted because they have unfairly tried to trade on another's business reputation, not because they happen to have an attachment to a word or phrase that another company also uses.
2. Quarantine this aggressive 'trade marks rule' approach to the purely commercial aspect of the DNS (ie, .com.au and possibly .net.au). Other 2LDs could have a less rigid approach to trade marks and thus could be more easily used for non-commercial purposes.

#### **4.1.5 Renewal Period for Domain Name Licences**

The ADA has no comment to make on this issue.

#### **4.2.1 and 4.1.2 (Restriction of) Licensing of Generic and/or Geographic Names**

The ADA has no comment to make on this issue at this time.

#### **4.3.1 Introduction of New 2LDs**

As has been stated previously, the ADA believes that the Australian DNS should have be able to accommodate all different types of domain name users. We do not believe that this has been achieved at present.

If the existing 2LDs are to be reserved for those who strictly fit the purposes of these spaces, then there does seem to be a need for new 2LDs (over and above the new gTLDs accepted by ICANN which do not seem particularly useful).

The ADA proposes therefore that 2LDs be created to allow individuals or loose organisations the capacity to obtain whichever domain names they like. Possible suffixes might be .alt.au or .web.au or .site.au . This would protect the integrity of the existing 2LDs and maintain their usefulness while providing a valuable and flexible resource to all other Australians who wish to have an identifiable presence on the Internet.

#### **4.3.1 Introduction of a System of Gateways**

The ADA has no comment to make on this issue at this time.

#### **4.4.1 Domain Names That Begin with a Number**

The ADA supports this proposal.

#### **4.4.2 Country Codes and gTLDs as Domain Names**

The ADA has no comment to make on this issue.

#### **4.5.1 Retrospectivity and Prospectivity**

The ADA supports this proposal.

#### **4.5.2 Dispute Resolution Procedure**

The ADA has no comment to make on this issue.

### **Summary**

- .auDA should pursue DNS policies that allow the maximum number of Australians engaged in all kinds activities to make the greatest use of the system and of the Internet itself.
- The integrity of the existing 2LDs should be maintained in so far as this is possible, subject to comments below.
- The existing range of 2LDs does not provide sufficient flexibility for all Australians (particularly individuals) to participate fully in the DNS. New 2LDs such as those proposed above should be considered.
- Failing this, existing 2LDs should be opened up to allow wider participation in the fashion of the .com and .net gTLDs.
- Individuals and organisations should not be confined to domain names that reflect their personal or trade names only. Such a restriction is a

limitation on freedom of expression and unnecessarily limits the usefulness of the DNS.

- The domain names and trade mark systems should not be closely linked, with the possible of exception of within the .com.au space (and even here such a link will be problematic).
- Other legal regimes such as the Trade Practices Act or Passing Off should be preferred as a means of resolving disputes of theft of business reputation or brand value.