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RESPONSE TO NAMES POLICY DISCUSSION PAPER

This document responds to the November 2010 call by auDA for public comment on the Names Policy Panel Discussion Paper in connection with the Review of the .au Policy Framework.

In summary, proposals to further weaken the dot au regime should be strongly resisted by auDA in the public interest. The appearance of regulatory capture (ie perceptions that auDA policy is being determined by dominant players within the domain name industry) with ongoing erosion of a coherent and effective policy framework threatens to damage the legitimacy of auDA as an organisation.

Basis of submission

The following paragraphs reflect over two decades of practice in telecommunications regulation and information discovery. They reflect a submission to the Department of Broadband, Communications & the Digital Economy (DBCDE) last year about Australia's stance on changes by the Internet Corporation for Assigned Names & Numbers regarding new gTLDs.

I teach intellectual property and information law (including law regarding the Australian and global domain name systems) in the Law Faculty at the University of Canberra. I am a contributor to major academic and practitioner texts on intellectual property and information law for publication in 2011. My writing about the domain name system, online resource identification and cyberspace regulation has been extensively cited in leading overseas and Australian studies by academics, industry figures and government agencies. I am a former member of auDA, IIA and ISOC-AU panels. Work as a consultant to a major offshore domain registrar included detailed analysis of name policy rules and administrations in all countries.

I am therefore able to provide a submission that is founded on an understanding of industry practice, end-user concerns and legal frameworks.

This submission is independent of the University of Canberra. It is also independent of any commercial entities. It does not involve what would be reasonably construed as a conflict of interest and is not eliciting a research opportunity.

Overview

auDA's task is to administer dot au for the Australian community. In undertaking that task it must be mindful of what the discussion paper characterizes as "key stakeholders" among the domain name services (DNS) industry, ie enterprises that

act as registrars (and as agents of registrars), as registry operators, domainers and a small cohort of consultants who comprise 'the usual suspects'.

Mindfulness does not involve complaisance. It is important that auDA not privilege the interests of the DNS industry over those of the Australian community, whether because DNS industry representatives on the auDA board and policy panels –

- allege financial harms,
- shout loudly or
- use personal influence within the 'magic circle' of people who are considered to be informed/authoritative because they go to the same meetings, have mutual contacts and speak the same technical language.

The interests of the industry (or of key actors within that industry) are not identical with those of the Australian community. The auDA board should be wary of conflating benefit for a handful of registrars and domainers (in an environment that continues to be marked by strong oligopolies) with benefit for most Australians. The Global Financial Crisis of the past decade, in part attributable to indifference and incapacity on the part of public and private sector gatekeepers, should be a salutary reminder of the need to question assertions that what's good for General Motors (or for Lehman Bros or VeriSign or Enetica or Melbourne IT) is necessarily good for the national economy. That wariness is particularly important because of the light touch approach adopted by the DBCDE, an approach uninformed by overseas developments and an awareness of implications.

In that respect your attention is drawn to the comment by the WIPO Arbitration & Mediation Center in its 2 December 2010 letter to ICANN regarding regulatory capture evident in the latter's proposed *Guidebook* –

> Regrettably, our preliminary review of the *Guidebook* confirms our previous observation that ICANN's determinations rely principally on an institutionalized framework of committees and processes stated to cover the views of broader communities, but appear synchronized with registration purposes. ....
>
> Such substitution of process for substantive dialogue can hardly be reconciled with the Affirmation of Commitments calling for ICANN "to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied." More seriously … it does little for the sustainability of the resulting decisions, which in fact in some instances represent setbacks in policy choices and operational feasibility.
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> Whether expressed through ICANN processes or otherwise, we believe that ICANN's policies should reflect the considered and reasoned input made by representative bodies with public responsibilities and substantive expertise.

Empirical Data

Given the significance of the responsibility entrusted to auDA under the national co-regulatory scheme (ie with power ultimately being held by the Commonwealth) it is

important that policy-making by the organisation's board should be both informed and transparent. A feature of auDA policy-making has been reliance on statements of faith and assertions, rather than empirical data that is independently verifiable or that can be rigorously critiqued.

That reliance has resulted in the 'build it and they will come' adoption of 'geographic' 2LDs (which contrary to enthusiastic early statements by proponents have not attracted substantial community support and appear unlikely to do so in future) and promotion of the 'id' 2LD. It has also resulted in the weakening of rules on monetization and trading, 'fixing' a system that was not broken, a 'fix' that is advantageous for a handful of commercial interests rather than the Australian community as a whole.

As a consequence it is strongly suggested that the auDA board look beyond assertions by DNS industry members and rely on substantive data in considering proposals to change the dot au regime. On a precautionary basis, if substantive data is not available – and in particular available in a form that can be publicly disclosed – the board should not change the regime. The onus should instead be on proponents of change to demonstrate that public benefit is tangible and outweighs benefits that will be received by those proponents. Assembly of data will, of course, involve expenditure by commercial enterprises seeking change. It is entirely appropriate that the cost of that expenditure be borne by those enterprises, rather than by auDA.

Q1: Registration

1A Should the restriction on registrants being Australian (or registered to trade in Australia) remain in place?

auDA should retain the existing emphasis on 'dot au means Australian', ie registration to trade or an Australian trade mark rather than merely putative 'Australian content' as per para 1.11 of the auDA discussion paper. As para 1.10 notes, the existing regime provides low entry barriers for genuine commercial entities, facilitates verification/enforcement action and inhibits inappropriate exploitation by domainers. The notion of an 'Australian content' requirement has been canvassed in past auDA consultations. Weakening the existing regime through a mere 'content' requirement is not necessary: where is the evidence of substantial failure and a strong indication that the 'fix' would be better? A 'content' regime would be onerous to administer and would be readily subverted on a large scale, eg through automated insertion of an image of some wattle and a koala and a news item or 'dinky di' product offer onto sites registered by domainers.

1B Should informal clubs and groups be allowed to register within org.au? Should informal clubs and groups be allowed to register within com.au and net.au (ie. relax the eligibility criteria for com.au and net.au)? How should the policy rules address illegitimate registrations, such as the use of org.au domain names for commercial purposes?

The audit conducted by auDA (para 1.13) is strongly commended. The "easily exploitable loophole" identified by auDA and indicated in that audit is attributable to past weakening of auDA policy. Further weakening is undesirable and proposals for relaxation of the com 2LD and net 2LD are opposed. Are substantial numbers of 'genuine' unincorporated organizations being disadvantaged under the current

regime? Merely providing a 'statement of principles' is hardly a rigorous – or meaningful – test and therefore should be avoided. An express prohibition on domain monetization in the org 2LD and asn 2LD is unexceptional, could be readily undertaken and is wholly consistent with the basis for those 2LDs. If there is a substantive need for a new 2LD (evidence has not been provided to demonstrate that need) it can be tested through a transparent and vigorous public consultation process that is informed by the history of past demand for (and benefits from) new dot au 2LDs.

1C Are current enforcement mechanisms in the .au domain space adequate and effective? If not, how could they be improved?

In the absence of detailed statistics it is difficult to assess whether the existing mechanisms are effective. One response is that perceived problems can and should be addressed through an enhanced community awareness program, ie ensuring that existing/potential registrants and complainants are aware that auDA is not the "business name police" or "trade mark advocacy organisation". auDA and the domain name registrars may wish to engage with IP Australia and even with curriculum development bodies to foster greater awareness of domain name, business name and trade mark basics among registrants and the next generation. The auDRP *does* involve expenditure; the reality of commercial activity is that enforcement of private rights involves costs. Is there hard data demonstrating that those costs, in relation to the DNS, are insuperable?

1D Should the fixed 2 year domain name licence period be changed? If so, what other domain name licence periods should be made available?

A consistent domain name licence period is desirable. The optimum period appears to be two years, particularly as the registration cost is low and auDA does not have a 'use it or lose it' philosophy. The mooted benefits of variable periods are outweighed by the disadvantages (including confusion) and enthusiasts for a 1 year period are challenged to explain why not a six month or even a three month period. Given concerns about WHOIS accuracy evident within Australia and elsewhere (and the Panel's comments at paras 1.28 and 1.29) the desirability of adding five, seven, ten or other licence periods is unclear.

1E Should a registrant be allowed to lease their domain name to another entity? If so, under what circumstances?

Allowing leasing fundamentally erodes the 'close and substantial connection' philosophy. The rational for allowing leasing – a relaxation that is likely to be exploited and, as the Panel notes at 1.34 is inconsistent with prohibition on 'registration for sale' – is unclear. Registration of a dot au name does not cost a lot of money; it is the equivalent of a coffee or two per week and substantially less than the equivalent of a packet of cigarettes per week. An appropriate price for registrants in dot au is forgoing revenue through leasing of names that are not being used by those registrants.

1F Should single character domain names (a-z, 0-9) be permitted in the .au domain? If so, what requirements should a registrant have to meet to be eligible to register a single character domain name?

The utility of single character names, other than as a mechanism for revenue raising through an auction by auDA, is unclear. Neither dot co nor dot net are models of best practice that should be emulated by auDA. Permitting single character names will confuse consumers and disadvantage the fumble-fingered.

1G Should individuals be able to register domain names that relate to a personal hobby or interest? If so, how should the eligibility criteria be changed to accommodate this type of domain name?

Given the opportunities for people to establish blogs, 'fan sites' and 'avocation sites' in commercial spaces such as Facebook and Blogspot, in the id 2LD of dot au and in other 2LDs (as noted in para 1.39) the need for a change of rules is unclear. Is there a strong demand that is not met by the existing regime? One response – consistent with the substantial empirical literature over the past ten years regarding online resource identification (noted in past auDA consultations) – is that most consumers find sites other than through using domain names 'as the directory' and that the authors of hobby sites both can and do promote their online content through means other than the domain name. Why weaken the rules if there is no need.

1H Should .au be opened up to direct registrations? If so, what requirements should a registrant have to meet to be eligible to register a dot au domain name?

As indicated in the discussion paper, issues regarding direct registration were canvassed by the 2007 Panel. There is no reason to believe that arguments against direct registration have become less weighty. In essence, the rationale for direct registration appears to be additional opportunities for commercial exploitation rather than consumer benefit. If the current panel is committed to revisiting the past the concerns expressed above regarding legitimacy and regulatory capture mean that it is incumbent on the auDA board to conduct any public consultation on a vigorous and transparent basis, featuring for example independent research rather than a small-scale questionnaire exercise that is invalidated through weaknesses regarding population selection (eg biased towards 'write-ins' by proxies for the DNS industry, an issue apparent in some elections) and question design. Such a consultation if undertaken offers an opportunity for engendering increased community awareness of auDA's operation and the dot au regime rather than merely securing the desired answers.

Q2: Reserved List

Do you have any comments about the contents of the Reserved List, and/or the operation of the Reserved List Policy?

A review of restricted words and phrases is not required but would be opportune, for example to ensure compliance with developments such as special treatment under Australian law for Don Bradman and Mary McKillop.

Q3: Monetisation

What do you understand by the term 'domain monetisation'? Should domain monetisation continue to be subject to specific regulation? If so, how could the Domain Monetisation

Policy be made more workable? If not, would the general Policy Rules offer sufficient safeguards to deal with bad faith registrations by domainers? Should domain monetisation be permitted in the non-commercial 2LDs (asn.au, id.au and org.au)?

The assumption in para 3.5 about congruence between website content and domain names is problematical

As noted above, apart from benefiting domainers the rationale for monetization in the non-commercial 2LDs is unclear. Monetisation of those 2LDs is inconsistent with the auDA's stated intentions regarding those 2LDs. The comment that other ccTLDs and gTLDs feature monetization is an inadequate justification for monetization and weakening of the dot au regime should be resisted. The legal systems of other nations feature stoning and amputation of limbs for a variety of offences; the fact that something happens elsewhere does not mean that it is necessary or desirable in Australia. The board of auDA should in particular be wary about a regulatory capture that involves ongoing incremental weakening of a coherent system of rules, with each erosion ostensibly providing a basis for further changes that benefit sectoral interests rather than the community as a whole. In that respect it would be useful for the board to critically review the claims that were made and accepted in justifying past changes, such as the id 2LD and the geographic 2LDs – claims that have been belied by actual practice.

More broadly, auDA has an opportunity to restate its objectives regarding domain names. Is dot au a space in which provision of a registration fee is essentially all that is required. Is it instead a space in which there is an acknowledgement that "the public interest lies in ensuring that internet users are not diverted to monetized sites that offer no relevant service or benefit". Australia's experience with the internet is sufficiently advanced to enable a skeptical view of the 'anything goes' approach evident in the dot com gTLD and opportunistic emulators such as the dot co ccTLD that operate on a for-profit basis with disregard for paramount community interests.

Q4: Misspellings

Should the restriction on prohibited misspellings remain in place? If so, what type of names should be protected? How should a prohibition on misspellings be enforced?

Australian law is capable of dealing with misrepresentations of corporate, institutional, brand and personal names. Existing auDA policy restrictions, for example regarding the ATO, are appropriate and should be maintained. Maintenance of a registry list of some 2000 names is not onerous and should be regarded as part of auDA's corporate citizenship.

auDA, its rules and administrative mechanisms do not operate in isolation. auDA in the past has rightly rejected calls by some governance advocates for extraordinary restrictions on names or takedown action on the basis of restricting phishing and other illegality. That stance should be maintained.

As part of broader education and engagement with the community it is desirable that trade mark holders and others that have issues with misspellings should be referred to both the auDRP and to traditional legal remedies. That recourse will not satisfy every disputant but does not need to. The reality of information law in

Australia and in comparable legal systems is that remedies are sufficient rather than comprehensive; major intellectual property rights owners have both the resources and commitment to exercise their rights.

Yours sincerely

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