Dear auDA,

Thank you for the opportunity to comment upon proposed updates to the .au Reserved Names List and, in particular, the proposal of the Digital Transformation Agency (DTA) to reserve a limited list of .au domain names "for future use as Second Level Namespaces"[1].

As a both a former auDA employee and Australian Government official, I have a strong understanding of the policy issues associated with the allocation, reservation and revocation of names in the Domain Name System (DNS).

Further, as co-Chair of ICANN's cross-community Working Group on the use of Country and Territory Names as TLDs[2], I led significant research and discussion on developing global policy frameworks for the DNS. These deliberations included the implications of using of international standards and reservation lists to recognise the rights of all significantly interested parties and I believe that experience is pertinent to auDA's current consultation.

Summary

There are a number of reasons why auDA should refrain from soliciting, considering and implementing reservation mechanisms and, in particular, lists, in the operation and management of the .au name space. This includes for potential use as new 2LDs.

- Lists of names are ultimately fallible. No amount of consultation or preparation will create a perfect list.
- Names, titles and acronyms change over time, creating inconsistencies and conflicts and maintaining an evolving reserved list to accommodate these changes would require dedicated resources as well as specific expertise that auDA does not possess, and is not within its narrow technical remit to operate the .au name space.
- auDA risks putting itself in a position of determining what should be reserved and what should not. This creates policy and legal risk for auDA.
- The act of establishing a list possibly creates a hierarchy of rights that did not previously exist, an outcome that is inconsistent with auDA's Constitutional responsibility to facilitate openness, predictably, consistency, consumer choice and competition in .au.
- Protection instruments, hierarchies of rights and dispute resolution mechanisms already exist. These, rather than lists, should be used to balance the need for protection and competition and choice.

Throughout this response, I write in general terms against the use of Reserved Lists, or at least anything beyond the narrow list auDA currently maintains. I note that this is broadly consistent with auDA's 2017 Policy Review Panel Final Report and Recommendations[3].

The PRP was right to refuse reservations that were in "the general public interest". This was a dangerous and ill-formed concept. However, I believe the Panel erred in allowing the possibility of reserving names as future 2LDs. This latter decision has opened a back door for general and *ad hoc*

[1] https://www.auda.org.au/assets/Uploads/auDA-Reserved-Names-List-Update-20190703.pdf
[2] https://ccnso.icann.org/en/workinggroups/ccwg-unct.htm
[3] https://www.auda.org.au/assets/Uploads/Final-Paper-Reform-of-Existing-Policies-Implementation-of-Direct-Registration-Mar2019.pdf

reservations, which includes the examples the PRP itself gave, as well as early exploitation of policy such as the piecemeal list provided by DTA. I have seen no reasoned logic by auDA, the PRP nor DTA regarding why these names (in particular) were chosen and why they should be granted preeminent rights as potential new 2LDs. I invite those reading this submission to note that I am keeping these current proposals in mind, when writing generally about lists and their uses and abuses.

The fallibility of lists in the Domain Name System

The ICANN Working Group on Country Names gathered international representatives from country codes (ccTLDs), the commercial and generic namespace (gTLDs), governments, the legal and dispute resolution professions, academia and civil society.

Through its vast collective expertise, one of the WG's key observations was that, to the maximum extent possible, the use of lists should be avoided when developing policies for the DNS. This is because lists are ultimately fallible. No volume of research, checking, standardisation or consultation will ever deliver a perfect list that captures all permutations of reserved names or guarantee no confusion or conflict in the future. An incredible level of complexity is associated with any attempt to definitively categorise a sub-set of domain names, especially when such an effort could include multiple languages or scripts.

In the case of the WG, we found a relatively clear concept such as the name of a country, created infinite complexity when it came to reservations. Should short names be reserved? Official names? Names in official languages, the six languages of the UN or all living languages and in all scripts? Should reservations be based upon UNESCO resources, or others or a combination?

Similarly, the brief list of names proposed for protection as "possible" new 2LDs by DTA cannot be considered comprehensive, exhaustive or complete and is therefore vulnerable to gaps and the inconsistent application of policy.

For example, the list seeks to reserve the term "military" and abbreviation "mil". However, for whatever reason, the list does not include specific branches of Australia's defence forces. Even if they were, "airforce.com.au"[4] is a legitimate registration for an air-conditioning company who presumably would be interested in registering "airforce.au".

Military is also a generic term, with no single or exclusive use. The use of the term could be used in any number of contexts. The relatively meaningless abbreviation to "mil" is even worse, as MIL is also a common acronym and proposed registration list restrictions might aggrieve Melbourne Injury Lawyers, the legitimate registrants of "mil.com.au"[5]. As an extra complication, most of this conjecture is redundant, as .mil is already an existing TLD and, as such, would be reserved to avoid confusion and for technical and stability reasons.

[4] http://airforce.com.au/
[5] http://www.mil.com.au/

Creating rights where they don't exist

Looking through recent auDA consultations on policy development, it also appears that there has been little community buy-in and the fact DTA was the only party to propose such reservations as future 2LDs (albeit supported by DoCA) should serve as a warning, not a reason to grant their request.

A very real risk exists that many other Australian Internet users, who auDA purports to act in the best interests of, have no idea that such changes are being considered and that there are rights being asserted or potentially limited.

The list of proposed names from DTA is flawed in its assertion that either the Australian Government, DTA or mentioned parties / agencies have any greater right to the use of a name as a 2LD than other significantly interested parties.

For example, the term archive is completely generic and is in no way automatically associated with the National Archives of Australia. The National Film and Sound Archive, state and city archives and records, and the Australian Lesbian and Gay Archives all legitimately use the term, as do Archive Antiques from Hobart, registrants of archive.net.au.

The National Library of Australia does not have exclusive nor preeminent rights to the term "library", as also used by the Australian Library and Information Association, State libraries, university libraries and even toy libraries.

Courts are not only of the legal variety, but also relevant in tennis, basketball and netball. Badminton.court.au should be as valid as High.court.au.

Overall, the DTA list is woefully exclusive and limited and lacks any obvious reasoning for inclusions and exclusions. To stake a claim to any of the listed names simply asserts exclusive rights where they did not previously exist.

Maintenance of lists

Further, individual "lists" are typically static and cannot provide comprehensive, consistent or universal guidance regarding the various representations of a sub-set of names, particularly when external changes occur.

Using the ICANN example of country names, one could mistakenly assume name lists would remain consistent and, therefore, so would reservation lists. However, a considerable number of countries have formed, dissolved, merged and separated over the last 30 years. Yugoslavia and Czechoslovakia ceased to exist, numerous former Soviet States returned to independence or came in to being, Cape Verde became Cabo Verde, and most recently, FYROM became North Macedonia. None of these changes could have been foretold during the formative years of the Internet. Even if reserved lists were updated, "new" country names may have already been registered as domain names, creating inconsistent rights allocation and an avoidable situation of inequality.

In the same way, no one in the Australian Government, DTA nor auDA can accurately predict what changes may occur in relation to federal naming structures and conventions. Similarly, no one can predict with certainty which 2LDs, if any, may come into existence. While proposed reserved terms would continue to be protected, would maintenance or updating of the list deliver equal protections for new terms, should nomenclatures change? And who would pay for this maintenance and ensure

the accuracy and effectiveness of reserved lists?

A suitable role for auDA?

This leads to another related, and even more significant issue. That is, whether auDA even has the authority to determine what should be reserved and what should not. auDA has a very clear and limited technical remit and maintaining lists of "government" names or "official" names or "important" names is not within the organisation's scope.

auDA could expose itself to significant legal risk by implementing and maintaining protections that do not apply predictably, reliably and consistently to the domain name space. This is just the same as the awkward situation ICANN found itself in when discussing country names. A global manager of the Internet's naming and numbering resources simply cannot be in a position to determine the highly charged question of what is, and is not, a country.

Moreover, DTA is not an agency with authority to take naming decisions for the Australian Government. Traditionally, names have been listed under specific legislation such as the ACMA Act, Banking Act or Human Services (Medicare) Act. auDA has used those reservations as an authoritative source. auDA was therefore not the decision maker and neither was a single government agency which had undertaken a questionable amount of stakeholder consultation, if any at all.

Changes to protected names would require changes to legislation, ensuring a transparent, exhaustive and consultative decision-making process. For auDA to acquiesce to the requests of DTA would be a dangerous first step in needing to be responsive to every other agency or significant stakeholder group that lobbied for protection for future 2LDs. Further, this process would only ever be piecemeal, at best.

Use what is already working

As mentioned above, I welcome the opportunity to share my views and comments. While I am concerned that current efforts are poorly promoted and engaged with, open consultation is critical if auDA is to achieve best-practice in policy making.

This consultation allows voices such as mine to voice reasonable concerns and to provide context on why things were done a certain way in the past. It also allows auDA to consider this advice and avoid short-sighted policy decisions.

In criticising proposed reservations championed by DTA, I realise I present a problem. So, as a solution, I propose that adequate mechanisms already exist for the registration of names and for the protection of rights. The .au namespace already has a solid and predictable policy framework that registrants must accord with to secure the names they wish to use. Dissatisfied parties can lodge a complaint with auDA and the organisation's decisions are also open to reconsideration requests and possible arbitration. Reserve lists that are limited but based on well-established standards of decision-making already exist and, as a final resort, dispute-resolution and legal avenues are also available to all Australian stakeholders. All these tools and resources – particularly sound policy and decision making – will be equally useful when it comes to proposing and evaluating new 2LDs. These tools will also be useful in determining what domain names are registered *within* new 2LDs.

I do not believe *ad hoc* additions of reserved names in general, and broad stroke reservations of entire future 2LDs in particular, are nearly as useful or appropriate.