

auDA Policy Review Panel

Public Consultation Paper: Reform of Existing Policies & Implementation of Direct Registration

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1. Introduction

1.1 Background

The auDA Board convened the Policy Review Panel (“**Panel**”) on 6 October 2017 to make recommendations on:

- reform of the existing policies listed in **Annexure A** of this paper; and
- the development of an implementation policy for direct registration at the second level of .au (that is, registration of a domain name directly before .au, such as yourname.au, instead of at the third level of .au – such as yourname.com.au).

The purpose of this consultation paper is to set out the Panel’s proposed recommendations in relation to the above, and to invite comments from the Australian internet community on the Panel’s current thinking.

Full text of the Panel’s Terms of Reference, a list of Panel members (past and present), discussion papers, interim reports, and agendas and minutes of Panel meetings to date are available on the auDA website at www.auda.org.au/policies/panels-and-committees/2017-policy-review-panel/.

The role of the panel and a summary of the public consultation undertaken to date is set out in **Annexure D**.

1.2 Interaction between Panel’s tasks

The Panel has two separate tasks (as set out above), but there is an interaction between these tasks. For example:

- Should existing policies apply to domain names registered directly at the second level?
- How should the policy rules differ for domain names registered directly at the second level and current domain names registered at the third level?

When direct registration is introduced, this will give new registrants a choice – for example, a business could register newname.au, newname.com.au or newname.net.au (or all three). As discussed in this paper, the Panel considers that there should be some differences between the .com.au and the .au name spaces. That is, there should be some policy differences between the rules applying to yourname.com.au and the rules applying to yourname.au. These differences are explained in this paper, and one key issue is summarised below in section 1.2.1.

The Panel in preparing its recommendations considered all the policy issues as a cohesive whole and as a package. Due to the interaction between the rules, the intent is that each recommendation of the Panel is not to be accepted or rejected in isolation, but considered as part of a package.

Section 3 of this paper considers reform of the existing policies.

Section 4 of this paper considers implementation rules for direct registration.

1.2.1 Eligibility and allocation rules

A key concept in existing auDA policies is that of eligibility and allocation. Eligibility and allocation rules apply to existing domain names, and decisions as to eligibility and allocation rules must be made in relation to the implementation of direct registration.

Eligibility rules determine who is eligible to register a domain name in a particular space. For example, an educational institution can register in .edu.au, but not in .gov.au. A commercial business can register in .com.au and .net.au, but not in .org.au. An individual can register in .id.au only, unless that individual is running a business.

Allocation rules determine what domain names can be registered by an eligible person. For example, in general terms, .com.au, allocation rules require that any domain name registered relates to the trading name of the business or has a “close and substantial connection” to the business.

For .com and many other “international” domain name spaces (including .uk and .nz), there are no eligibility or allocation rules. In contrast, currently in the Australian domain name space, there are relatively strict eligibility and allocation rules. The trend in Australia over the past 15 years has been to liberalise these rules in the .com.au space, thus making it easier for businesses to register a broader range of domain names.

As mentioned above, a key issue to be considered in the implementation of direct registration is the eligibility and allocation rules for the .au space, and as a consequence, whether this should have any impact on the eligibility and allocation rules for the .com.au space.

The Panel believed that the Australian domain name space has value to Australian Internet users when compared with international domain name spaces, because it signified “Australianness” and because the current rules helped to ensure that the Australian space signifies quality and integrity.

Accordingly, the Panel concluded that:

- the minimum requirement for every Australian domain name within the .au ccTLD is that the registrant has an Australian connection; and
- generally, the current rules for .com.au and .net.au are working well, apart from one loophole that is believed to allow registrants to evade the current allocation rules, discussed below (see section 3.2).

In relation to direct registration (that is, domain names registered directly at the second level), the Panel believes that if the current eligibility and allocation rules for .com.au remain, then there should be no eligibility or allocation rules for .au, other than the requirement that the registrant have an Australian connection. This is discussed in further detail in section 4.7.

1.2.2 Public Consultation

This is a public consultation paper. The Panel welcomes public consultation.

Annexure D summarises public consultation that has taken place to date.

Section 5 of this paper sets out topics where the Panel requests further public consultation.

2. Structure of policies

Many of the 26 existing policies listed in **Annexure A** are old, difficult to interpret, and sometimes contradictory. There are policies to assist in the interpretation of other policies. The existing policies have not fully adapted as the industry changed. Instead of being flexible, 'living' documents, for the most part the existing policies are reflective of a point in time in the past. Some policies have unintended loopholes.

The Panel will recommend, therefore, that the existing policies be simplified and consolidated into three policies:

1. Registrant Policy;
2. Registrar Policy; and
3. Complaints Policy.

This is simply a structural change. On many issues, the consolidation is intended to be "policy neutral". That is, there will be no changes to policy settings. This is because the Panel is conscious that the Australian internet community has become familiar with the intricacies of these documents. With this in mind, the Panel will not be recommending change just for the sake of change. All of the Panel's proposed recommendations have been carefully considered and weighed up against the *status quo*.

3. Reform of Existing Policies

This Section 3 sets out areas where the Panel is likely to recommend changes to the current policies. The Panel is seeking feedback in relation to these areas and the Panel's potential recommendations.

The issues that the Panel has identified as requiring reform, and the Panel's proposed recommendations in relation to those issues, are outlined below.

3.1 Eligibility and allocation – the Australian presence requirement

Currently, a legal entity or person wishing to register a domain name in an existing second level domain such as .com.au or .net.au (a '2LD') must have an Australian presence. The Panel has received overwhelming support from the Australian internet community that this requirement continue for 2LDs and also apply to domain names registered directly under .au (for example, yourname.au).

The current Australian presence tests for the open 2LDs are set out in **Annexure B**. The Panel considers that the current approach to the Australian presence requirement is unwieldy, as the requirement is not expressed in the same way across all 2LDs.

The Panel received feedback that there should be a single Australian presence test for all domain names administered by auDA, regardless of the domain name space. That is, the same Australian presence test should apply to domain names registered in .com.au, .net.au, .org.au, .asn.au, .id.au and (in future) .au.

(The Panel notes that a potential registrant will still need to satisfy any other applicable eligibility and allocation criteria for a 2LD.)

Generally, the Panel will recommend that for all domain names registered in .com.au, .net.au, .org.au, .asn.au, .id.au and .au, the registrant must be a legal person with an Australian presence.

The Panel believes that current policies that define an Australian presence for individual name spaces, when combined and updated, are a good base to work from to define a "global" Australian presence test, except in relation to one issue. That issue relates to trade mark applications and trade mark registrations.

3.2 Trade mark applications and registrations

The current eligibility rules for .com.au and .net.au provide that the Australian presence requirement can be satisfied if the registrant owns an Australian registered trade mark or is the applicant for an Australian trade mark.

This rule allows an offshore entity that holds an Australian trade mark registration or has a pending Australian trade mark application, and which does not otherwise have an Australian connection, to register any domain name in the .com.au and .net.au name spaces (provided the other eligibility and allocation rules for the 2LD are met). For example, the holder of the Australian trade mark for JKLM is eligible to register the domain name wxyz.com.au, which is unrelated to its registered trade mark.

The Panel will recommend that the applicant for an Australian trade mark registration, or the owner of an Australian trade mark registration, should only be allowed to register a domain name that is an exact match to their Australian trade mark application or registration (if the trade mark application or registration is the sole basis for their meeting of the Australian presence requirement).

Applying the example above, the holder of the Australian trade mark registration for JKLM could register jklm.au and jklm.com.au (but not wxyz.com.au), unless it could establish an Australian connection another way.

The Panel will also recommend restricting eligible trade mark applications or registrations to word marks. This means that a logo or device trade mark application or registration (even if it includes

letters or numbers in the logo) will not give rise to eligibility to register a domain name where the applicant or owner of the relevant trade mark has no other Australian connection.

The purpose of these changes is to ensure that non-Australian entities who are not otherwise doing business in Australia are unable to register domain names that are unrelated to their Australian trade marks.

The Panel also will recommend that, if the Australian trade mark registration upon which the Australian presence requirement is based is cancelled or removed from the Register, or the Australian trade mark application upon which the Australian presence requirement is based lapses, then there is an automatic loss of eligibility for any corresponding domain name (unless Australian presence can then be established in another way).

The onus will be on domain name holders to ensure that they remain eligible to hold a domain name registration. Subject to the grandfathering considerations set out at paragraph 6.6 below, neither the relevant registrar nor auDA should be responsible for monitoring domain names for continued eligibility.

Summary of recommendations for consultation:

- *For all domain names registered in .com.au, .net.au, .org.au, .asn.au, .id.au and .au, the registrant must be a legal person with an Australian presence;*
- *A consistent Australian presence test should apply to all domain names registered in .com.au, .net.au, .org.au, .asn.au, .id.au and .au; and*
- *The applicant or owner of an Australian trade mark application or registration can rely upon that application or registration to establish an Australian presence, but only in respect of a domain that is an exact match to the Australian trade mark application or registration. This trade mark application or registration must be for a word mark, not a device or logo mark. If a trade mark registration is cancelled or removed from the Register, or if a trade mark application lapses, there is an automatic loss of the Australian presence on this ground.*

3.3 Resale and warehousing

Under the current policies, a registrant is prohibited from registering any open 2LD domain name for the sole purpose of resale or transfer to another entity. See Policy 2012-04, Schedule A.

Further, under the current policies, it is not acceptable for registrants to use the close and substantial connection rule (discussed in further detail below) to engage in domain name speculation or warehousing. See Policy 2012-05, paragraph 10.8.

The current policies appear to have the aim of preventing speculators registering domain names that they do not wish to use, but for the purpose of selling them to others at a later time (supposedly for a profit). Rationales for this rule may include that the Internet community is better off if the Australian domain name space (being a scarce resource) is utilised rather than warehoused in part, and that domain name speculators add little value to the Australian domain name space.

Registering a domain name for resale or warehousing is permitted in a number of domain name spaces, such as .com, but not for Australian open 2LD domain names.

The rules prohibiting resale and warehousing are rarely enforced. This is for a number of reasons:

- The rules use general terms that are open to various interpretations;
- It is difficult to demonstrate that a domain name has been registered for the “sole” purpose of resale; and

- A sophisticated domain name speculator can easily create computer-generated webpages, with advertising, and then assert that the purpose of registering the domain name is for use as a directory website and not resale (The Panel received public feedback that this is in fact occurring).

In circumstances where there is an unenforceable rule or a rule that is easily avoided, there are two choices:

1. Remove the rule; and
2. Strengthen and/or clarify the rule.

Some stakeholders support removing the resale and warehousing prohibition rule on the grounds that the current rules and their administration have not deterred warehousing and resale, and such activities have not undermined the domain space. In other words, the Australian domain name system is working fine with this ineffective rule, so the rule should be removed.

Others argue that even though the rules can be avoided, they have a deterrent effect. It is argued that removing the resale and warehousing prohibition rule would lead to an increase in the number of registrants who register domain names for the purposes of resale.

Many members of the Australian internet community provided comment to the Panel that registering domain names for resale increases the cost of doing business, increases the scarcity of names, and that registering domain names for the purpose of resale adds no real value to the internet name space. They argue therefore that tighter controls are needed to deter warehousing and resale activity.

On balance, the Panel believes that the resale and warehousing prohibition rule should be retained and strengthened.

The Panel is considering the following recommendations:

- The current rule be amended to read: “A registrant is prohibited from registering any open 2LD domain name for the primary purpose of (a) resale, (b) transfer to another entity, or (c) warehousing”; and
- In certain circumstances, the onus of proving that a domain name has not been registered for the primary purpose of resale or warehousing should be on the registrant. If there are indicators that a domain name has been registered for resale or warehousing, then auDA can require the registrant to prove otherwise. Indicators that a domain name has been registered for resale or warehousing include when some of the following factors are satisfied:
 - The registrant, or entities associated with the registrant, own more than 100 Australian domain names that are not substantially identical to trademarks or business names of the registrant or that consist of acronyms, dictionary words, or common phrases.
 - The domain name in question is not being used, or if being used, resolves to a website that is primarily computer generated and does not relate to the registrant, and other domain names owned by the registrant are also not being used or resolve to similar computer generated websites.
 - The domain name in question is listed or advertised for sale or auction, and other domain names owned by the registrant are also listed or advertised for sale or auction.
 - The registrant of the domain name in question solicited the sale of the domain name or offered the domain name for sale to another for valuable consideration in excess of documented out-of-pocket costs directly related to the domain name.
 - In the past six months, the registrant has sold or transferred more than six domain names, other than in relation to the sale of a business.

If the majority of these indicators are satisfied, there will be a rebuttable presumption that the domain name has been registered for resale or warehousing.

In such circumstances, if the owner of the domain name presents clear and convincing evidence to auDA that the domain name was not registered for resale or warehousing, the presumption will be rebutted. auDA should consider all the circumstances before it, and should exercise its discretion in a fair and reasonable manner when making decisions in relation to this issue.

Summary of recommendations for consultation:

- *The resale and warehousing prohibition rules should be retained and strengthened;*
- *Registrants should be prohibited from registering a domain name “primarily” for the purpose of resale or warehousing; and*
- *A list of factors indicating that a domain name has been registered primarily for resale or warehousing should be included in the new Registrant Policy, and if the majority of these factors are met, then the onus should shift to the registrant to demonstrate that the registrant did not register the domain name for purpose of resale or warehousing.*

3.4 Eligibility and allocation – “Close and substantial connection” rule

Allocation rules determine what domain names an eligible registrant can register.

For example, unlike .com, an Australian corporation cannot register any .com.au domain name they wish to use.

There are currently two allocation criteria for the open 2LDs. A person or entity can register a domain name that is:

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

The categories of “close and substantial connection” for each open 2LD are carefully defined in the current policy. See the Guidelines on the Interpretation of Policy Rules for Open 2LDs (reproduced in **Annexure C** of this paper).

Initially, there was only the “exact match” rule. The allocation rules were expanded in 2002 to include the “close and substantial connection” rule (based on a recommendation of the Names Advisory Panel made to the Board in April 2001).

The “close and substantial connection” rule was designed to give registrants more flexibility to register domain names that reflected their core business activities, service delivery, or an abbreviation or nickname of a registrant’s personal name. The Guidelines on the Interpretation of Policy Rules for Open 2LDs state that “this rule NOT intended to be a “free for all”, and the degree of flexibility is limited by the categories of close and substantial connection ... as well as the specific conditions of use outlined in the policy rules.”

3.5 Domain Monetisation

In 2006, and then again in 2012, the “close and substantial connection” rule was clarified (in respect of the .com.au and .net.au 2LDs only) to include as a “close and substantial connection” what has become known as Domain Monetisation. (In 2006, there was much debate as to whether Domain Monetisation should be prohibited or allowed).

The Domain Monetisation Policy allows registrants of .com.au and .net.au 2LDs only to register domain names for monetisation purposes under the close and substantial connection rule. See Policy 2012-04, Schedule C, paragraph 3 and Schedule E, paragraph 3; Policy 2012-05, section 11.

In summary, for the com.au and net.au 2LDs, in addition to the listed categories of the “close and substantial connection” rule (see **Annexure C**), it is permissible to register a domain name under the “close and substantial connection” rule for the purpose of Domain Monetisation.

For further background, see “Domain Monetisation Policy explained”, auDA Blog, 13 May 2011.

Examples of Domain Monetisation include (see Policy 2012-05, section 11):

- Resolving the domain name to a website or landing page containing pay per click advertising links (also known as “parked pages”);
- Resolving the domain name to a website or landing page containing content such as general information, news articles, product reviews, blog posts and images, with the primary intent of generating revenue from third party affiliate or commission programs or pay per click advertising;
- Resolving the domain name to a website that contains directory listings;
- Redirecting the domain name to another domain name under a third party affiliate or commission program;
- Using the domain name to provide featured advertising services; and
- Using the domain name for traffic optimisation purposes.

The following two conditions of use apply to registrations for the purpose of Domain Monetisation (see Policy 2012-05):

1. 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. auDA uses a “reasonableness test” to determine whether the content on the website satisfies this condition; and
2. 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. auDA will take into account whether the domain name is a generic word or may have an alternative meaning which is not related to a specific entity, person or brand.

Additionally, under current Policy 2012-04 and as discussed above, a registrant is prohibited from registering a domain name for the sole purpose of resale or transfer to another entity.

The Panel has received feedback that Domain Monetisation is detrimental to the .au name space. The Panel has heard that the existing Domain Monetisation rules for .com.au and .net.au are difficult to interpret and enforce, and have been interpreted in a way that is likely outside of the original intent of the policy. Under the existing Domain Monetisation rules, some domain name licensees have been able to register and warehouse almost any domain name they desire, and to register domain names for the purpose of resale using Domain Monetisation rules as the cover. The suite of existing policies evidences the intention that domain names should not be warehoused and registered for resale purposes. However, the existing Domain Monetisation rules appear to have allowed some registrants to do so. The Panel notes that Domain Monetisation is the only policy that specifies a particular use for a domain name.

The Panel will recommend that Domain Monetisation be removed from the policies. To be clear, this does not mean that Domain Monetisation will be banned, but of itself Domain Monetisation should not be a basis to meet the close and substantial connection rule.

However, there are some legitimate businesses, such as directory operators, that rely upon Domain Monetisation to meet the “close and substantial connection” rule. If Domain Monetisation is removed, amendments should be made to expand the “close and substantial connection” rule.

The Panel will recommend that the “close and substantial connection” rule be retained, with amendments to add the following additional ground:

“an online directory or online informational service that the registrant provides, that is not primarily computer generated, and that specifically and predominantly relates to subject matter denoted by the domain name”

The Panel will also recommend that a registrant of a domain name must meet the “close and substantial connection” rule on the date of registration, or if that is not possible (for example, the relevant business is a start-up and yet to commence operations) within 6 months of first registration of the domain name, and then continuously from that date.

Summary of recommendations for consultation:

- *The “close and substantial connection” rule be retained and expanded to recognise online directories and informational services that specifically and predominantly relate to the subject matter denoted by the domain name;*
- *Domain Monetisation should no longer be a basis to meet the allocation criteria to register a domain name in the .au name space; and*
- *A registrant should have a six months grace period from first registration to meet the close and substantial connection test.*

3.6 Eligibility and allocation – Grandfathering considerations

The recommended policy changes set out above in paragraphs 4.1 to 4.3 above are designed to tighten existing policy rules. This means that some existing registrants may no longer meet the eligibility and allocation rules for a registered domain name, where they would have met with the rules prior to these changes.

There are a number of options for consideration when policy rules are tightened:

- Existing registrants that do not satisfy the revised eligibility and allocation requirements will have their domain name licence automatically cancelled immediately once the updated policies come into effect;
- Existing registrants that do not satisfy the revised eligibility and allocation requirements will have their domain name licence cancelled once the updated policies come into effect, if a complaint is made to and verified by auDA;
- Existing registrants will retain their registrations until the end of the current registration period, but will not be able to renew their registration, unless they meet the updated eligibility and allocation rules at the time of renewal; and
- The revised eligibility requirements will not apply to existing registrants. Such registrants will be able to continue renewing their domain names for as long as they wish, provided they continue to comply with the current rules.

When the policies have changed in the past, sometimes existing registrants are grandfathered. For example, it is stated in current Policy 2012-04 at paragraph 1.3:

“The policy rules set out in this document do not have retrospective effect. Domain name licences that were granted before implementation of this policy will be ‘grandfathered’ and

the registrant will be entitled to renew the licence provided that there has been no change in the registrant's circumstances that affects their eligibility to hold the domain name licence. For example, if the registrant of a com.au domain name no longer holds the registered business name that they used as a basis for licensing the domain name in the first place."

In contrast, the current Mandatory Terms and Conditions set out in Schedule A to Policy 2008-07 require that the registrant meets, and will continue to meet, the eligibility criteria prescribed in auDA Published Policies for the duration of the domain name licence.

The Panel endorses current policies that make it clear that there are no proprietary rights in a domain name, and that the domain name is held under a limited license.

Currently, the Panel's preferred approach is that existing registrants retain their registrations until the end of the current registration period. This will give domain name registrants who meet the current rules, but who will not meet the revised rules, time to deal with non-compliance. A key reason for this is that the changes to the policy discussed above are to close unintended loopholes or to more clearly implement original policy intents.

The Panel seeks further consultation on the issue of grandfathering of existing registrations.

The Panel seeks further consultation regarding the grandfathering of existing domain name registrations that will not meet the revised eligibility and allocation criteria.

3.7 Licence conditions – Licence transfer

The Panel has considered whether the transferee of an existing domain name licence should receive the benefit of the remainder of the existing licence period. For example, when a domain name licence is transferred from the registrant to another person who becomes the new registrant.

Currently, when a registrant transfers their domain name licence to another party, the transferee is issued with a new domain name licence and does not receive the benefit of the remainder of the licence period. For example, if the domain name licence is for five years, and the registrant transfers the domain name licence to another registrant after one year, on transfer the licence period will reset to the period that the new registrant selects. The new registrant will have to pay for the entirety of the new licence period (and will not receive the benefit of the remaining four years of the previous licence period).

This issue is of greater significance following the introduction of variable domain name registrations of one to five years. Previously, only two year registrations were available in the .au name space.

The Panel considers that any pre-payment of the registration fee should go to the benefit of the transferee, provided that the proposed transferee meets the relevant eligibility and allocation requirements prior to the transfer. For example, if the domain name licence is for five years, and the registrant transfers the domain name licence to another registrant after one year, the new registrant will have the benefit of the remaining four years of the licence period. This approach is consistent with international practice and ensures that only one fee is paid for the duration of the licence period. Registrars can decide if they wish to compensate for any potential costs by charging a transfer (COR) fee.

The Panel will recommend that a process be created which allows a domain name transferee to receive the benefit of any remaining licence period.

Summary of recommendations for consultation:

A process be created to allow transferees of existing domain names to receive the benefit of the remainder of the licence period.

3.8 Licence conditions – Licence suspension and cancellation

The Panel considered the circumstances, if any, in which auDA should have the power to suspend or cancel a domain name licence.

Under section 6 of the current Mandatory Terms and Conditions Applying to .au Domain Name Licences 2008-7 (1 June 2008), auDA may cancel or revoke a domain name licence in the following circumstances:

- Where the registrant breaches any auDA Published Policy (.i.e.. the existing policies listed in **Annexure A**);
- In order to comply with a request of a law enforcement agency, or an order of a court, or under any applicable law, government rule or requirement, or under any dispute resolution process; or
- To protect the integrity and stability of the domain name system or the .au registry.

The Panel is of the view that the finality of cancellation may cause significant harm in a circumstance where an incorrect determination is made by auDA. At present, the affected registrant has no ability to appeal the cancellation of its domain name licence. In order to minimise this potential harm, the Panel considered whether auDA should also have the ability to suspend a domain name licence in the circumstances listed above.

In addition to auDA's ability to cancel a domain name licence, the Panel will recommend that auDA have the power to suspend a domain name licence (i.e. prevent the domain name from resolving to the DNS) in the three circumstances listed above. Also, during the period of suspension, the domain name cannot be updated, renewed or transferred.

The Panel recommends a suspension period of three business days if an informal request is received for suspension from a law enforcement agency, and a suspension period of one month if the factors in paragraph 6.2 of Policy 2008-07 are met. During the period of suspension, the registrant of the suspended domain name licence would have the ability to appeal the suspension, and have the domain name returned to the registrant's control. Details of the process to appeal such a decision will be outlined in the new Complaints Policy.

The Panel considers that auDA's power to cancel a domain name licence in order to comply with a "request of a law enforcement agency" needs to be clarified. (Currently, this is paragraph 6.2 of Policy 2008-07). At present, registrars have no guidance as to what constitutes a "law enforcement agency". Further, there is no requirement that the relevant request be lawful or enforceable. Similarly, the term "government rule or requirement" is vague and could refer simply to a policy or wish of a government department.

The Panel recommends that "law enforcement agency" have the same meaning as this term has in relevant legislation, such as the Crimes Act 1914 section 15K or has the same meaning as "criminal law-enforcement agency" in the Telecommunications (Interception and Access) Act 1979, section 110A.

The Panel will recommend that paragraph 6.2 of Policy 2008-07 be redrafted to read:

"in order to comply with (a) a lawful and enforceable request of a Law Enforcement Agency, (b) a valid court order issued by an Australian court, (c) a valid ruling made in a dispute resolution process in which the registrant took part, or (d) any Australian law."

Summary of recommendations for consultation:

- *In addition to auDA's ability to cancel a domain name licence in defined circumstances, auDA will have the power to suspend a domain name licence. The period of suspension should be limited;*
- *During the period of suspension, the registrant of a suspended domain name will have the ability to appeal the suspension under the new Complaints Policy; and*
- *The ability to cancel or suspend a domain name licence to "comply with a request of a law enforcement agency, or an order of a court or under any applicable law, government rule or requirement, or under any dispute resolution process" will be clarified as set out above.*

3.9 Prohibition on misspellings

The current Prohibition on Misspellings Policy (2008-09) prohibits the registration of domain names that are misspellings of entity, personal or brand names, where the registrant has deliberately registered the misspelling in order to trade off the reputation of that entity, person or brand. The policy also sets out the process that auDA follows in dealing with prohibited misspellings.

In most cases, misspellings are registered to divert users that intended to go to the website at the correctly spelt domain name. This practice is commonly referred to as "typosquatting".

Under the current policy, a name will be regarded as a misspelling if it falls into any of the following categories:

- the singular version of a plural name, or the plural version of a singular name (eg woolworth.com.au, safeways.com.au);
- a name with missing letters (eg yhoo.com.au);
- a name with additional letters (eg quantas.com.au);
- a name with transposed letters (eg goolge.com.au, wetspac.com.au);
- a name with letters replaced by numbers, or numbers replaced by letters (eg 9msn.com.au);
- a hyphenated version of a name (eg e-bay.com.au, micro-soft.com.au);
- a name prefixed by "www" (eg wwwseek.com.au); or
- any other name that auDA determines is a deliberate misspelling, having regard to the surrounding circumstances.

auDA maintains a list of names that have been determined to be prohibited misspellings. Currently, the list contains approximately 2,000 names. The list is published and is available on the auDA website.

The current policy operates on a complaints-made basis. Any person can make a complaint to auDA that a domain name is a prohibited misspelling. If auDA determines that the name is a prohibited misspelling, it will contact the registrant and ask them to provide evidence within seven days to show that the domain name is not a prohibited misspelling. If the registrant is unable to demonstrate that the domain name is not a prohibited misspelling, or does not respond to auDA's request for information, auDA will instruct the registrar to delete the domain name. See paragraph 5 of current policy 2008-09.

The following issues were considered by the 2010 Names Policy Panel and then by this Panel in relation to the Prohibition of Misspellings Policy:

- **Protection of “brand names”:** The current policy protects entity, personal and brand names. Entity and personal names are straightforward and objectively defined. The application of the policy to “brand names” is more complicated. 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 originally drafted to protect well known, trademarked brands (eg Google, Telstra, Apple, Westpac). The Panel has been advised that while these brands make up the majority of the list, auDA is receiving an increasing number of complaints from SMEs and sole traders that their “brand name” is being misspelt. auDA is required to address each of these cases individually. This raises issues around the subjective nature of the current policy, whether it is appropriate for auDA to recognised brand names that are not recognised at law, and whether it is even auDA’s job to protect brand names. The 2010 Names Policy Panel noted that most trade mark owners have the resources to enforce their own rights (for example, through lodging a complaint under the auDRP) and should not have access to an additional free enforcement mechanism via auDA;
- **Blocking:** The 2010 Names Policy Panel considered the proactive blocking of “obvious” brand names. It was felt by that panel that such a practice would be subjective and unfair to other businesses who also may claim to have a well- known brand;
- **Repeated re-registration:** Currently, when auDA finds that a domain name is a prohibited misspelling, it will instruct the relevant registrar to delete the name. The domain name will enter “serverUpdateProhibited” and “serverHold” status for 14 calendar days, then it will be dropped from the registry database. Other registrants are then able to register the domain name. This results in repeated re-registration of domain names that are prohibited misspellings; and
- **Administrative issues:** The current policy requires that auDA regularly audit the registry database to check whether any of the names on the Prohibited Misspelling List have been re-registered. With over 2,000 names on the list, this is administratively burdensome for auDA. It is also likely that parts of the list are out-of-date (e.g. through companies ceasing to trade or rebranding).

The Panel recommends that the Prohibited Misspellings List be retained. The Prohibited Misspellings Policy is a fast and efficient way to deal with typosquatting and to preserve the integrity of the Australian domain space.

There are solid consumer protection justifications for the policy, such as avoiding consumer confusion, preventing phishing scams, and, more broadly, protecting the integrity of the .au name space. The Panel notes that many of the names on the current list belong to major banks or well-known government agencies or programs (e.g. ATO). There is a strong public interest in minimising the risk of consumers mistakenly visiting a fraudulent government website.

The Panel will recommend refinements to the Prohibited Misspellings Policy as follows:

- **Publication of the Prohibited Misspellings List:** The Prohibited Misspellings List should remain publicly available on the auDA website, but further details should be added to the published list. The list should include the date that the domain name was added to the misspelling list, the person or entity that lodged the complaint, and the rights that the complainant was relying on (e.g. what entity name, personal name or brand name was relied upon as the basis for the complaint);
- **Not Just “Big Brands”:** The Prohibited Misspellings List is intended to capture misspellings of entity names, personal names and brand names. There is no requirement that the brand name be a popular or well-known brand name, although some feedback was received by the Panel that there was a belief that only “big” or well-known brands could be used as the basis to add a prohibition to the list. The Panel wishes to emphasise that this is not the case, nor should it be a requirement; and

- **Block not delete:** Once a domain name is added to the Prohibited Misspellings List, that domain name should be cancelled and then should be unable to be re-registered. The Panel recommends that domain names identified as prohibited misspellings should be treated in the same manner as names on the Reserved List (see below). Prohibited misspellings should be completely blocked from registration, unless a potential registrant can demonstrate that it has legitimate grounds for use of the domain name.

If this recommendation is accepted, then the audit process in paragraph 6 of current policy 2008-09 will not be necessary.

Blocked in all name spaces: Once a domain name is added to the Prohibited Misspellings List, that domain name should be blocked across all name spaces. For example, the list should specify “westpack” and not merely “westpack.com.au”, and thus also apply to “westpack.net.au” and “westpack.au” for example. Paragraphs 5.2 and 5.3 of the current policy should apply in this regard.

3.10 Unblocking domain names on the Prohibited Misspellings List

The Panel recognises that a domain name that appears to be a prohibited misspelling may not in fact be a prohibited misspelling given the particular circumstances of the case (e.g. where two registrants have very similar entity, personal or brand names).

For example, westpack may be regarded as a misspelling of Westpac, but there exists a packaging company called Westpack (see westpack.com) that would have a legitimate entitlement to assert that westpack.com.au was not a prohibited misspelling in respect of its own use.

The Panel will recommend that auDA have the discretion to unblock the prohibited misspelling and remove a domain name from the Prohibited Misspellings List. The person or entity wishing to register the prohibited misspelling will need to prove it has legitimate grounds for use of the domain name. The normal eligibility and allocation criteria rules must also be satisfied.

The Panel will also recommend that auDA conduct a periodic (e.g. bi-annual) review of the entries on the Prohibited Misspellings List to ensure that they continue to meet the current policy requirements.

Summary of recommendations for consultation:

- *The Prohibited Misspelling List be retained;*
- *The list remain publicly available on the auDA website. The following details will be disclosed on the published list: the blocked domain name, the date the domain name was blocked, the person or entity that lodged the complaint, and the rights the complainant relied on. The misspelling should be blocked in all relevant name spaces;*
- *Prohibited misspellings will be blocked from registration, unless a potential registrant can demonstrate that it has legitimate grounds for use of the domain name; and*
- *auDA will have the discretion to unblock the prohibited misspelling if the potential registrant can demonstrate that it has legitimate grounds for use of the domain name.*

3.11 Reserved names

auDA currently maintains a Reserved List of the following words, phrases, acronyms and abbreviations which are unavailable for registration. See the Reserved Listed Policy 2014-06. The Reserved List currently contains the following:

- Words and phrases that are restricted under Commonwealth legislation (e.g. Commonwealth, Federal, ANZAC, Red Cross, Olympic Games);

- Names and abbreviations of Australian states and territories and the name “Australia”; and
- Names that may pose a risk to the operational stability and utility of the .au domain, such as generic top level domains, ISO Country Codes, and two letter words.

The complete Reserved List is not published.

The Reserved List is held in the Registry database, and all applications for domain name registrations are cross-matched against the list. A domain name that exactly matches a name on the Reserved List will be blocked from registration unless consent is provided from the relevant governing body, with the exception of “Commonwealth” and “Federal”, where a total restriction applies.

Words and Phrases Restricted Under Commonwealth Legislation

According to the current Reserved List Policy (2014-06), Schedule A to the policy should list words and phrases that are restricted under Commonwealth legislation, and the consent required for their use. However, in recent times, auDA has added words and phrases to this list that are restricted under State legislation but are not restricted under Commonwealth legislation. Moreover, the Schedule A list does not include the source of the consent required for the use of the reserved names on that list. A note was recently added to Schedule A by auDA to state that the list is “non-exhaustive”.

Names and Abbreviations of Australian States and Territories

The name or abbreviation of an Australian State or Territory, and the name Australia, are reserved from general use.

If a person has written authority from the relevant State or Territory government, and otherwise meets the relevant eligibility and allocation rules, the name may be released from the list to that person.

The abbreviations AUS and AUST are not currently on the Reserved List. The Panel notes that the domain name aus.com.au is currently registered to a business called Advanced User Systems Pty Ltd and aust.com.au is used by Australia Post.

Names that May Pose a Risk to the Operational Stability and Utility of the .au Domain

This list is not published. Any decision to place a name on the Reserved List on this basis must be approved or ratified by the auDA Board.

Issues

The following have been identified as challenges in maintaining the Reserved List and blocking the registration of exact matches at the Registry:

- **Scope:** The current Reserved List contains words or phrases whose use is restricted under Commonwealth legislation but not under other legislation. State and Territory legislation may also prohibit the use of words, abbreviations, acronyms, or phrases in certain circumstances or in certain parts of Australia. For example, the Australian *Grand Prix Act 1994* (Vic) prohibits the use of words, such as “grand prix”, “formula one”, “formula 1”, and “albert park circuit” in the course of trade or business, except with the consent of the Grand Prix Corporation;
- **Comprehensiveness:** The Reserved List contains words whose use is restricted under Commonwealth legislation. A search of the Australian Legal Information Institute database discloses other words, phrases, acronyms and abbreviations whose use is restricted, and such restrictions may apply to the registration or use of the restricted term in a domain name;

- **Currency:** The Commonwealth, State and Territory Parliaments and instrumentalities pass a significant volume of legislation, legislative instruments, regulations and Ministerial directions each year. This makes it difficult to ensure that the Reserved List is up to date and accurate;
- **Application:** The Reserved List is a blunt instrument that is unable to accommodate the nuances of the legislation. For example, the Defence Regulations 2015 prohibit the use of AMF as a standalone word or as a composite word (amfexample.net.au) in connection with a trade, business, calling or profession, except with Ministerial consent. Currently, only “AMF” (and not “amfexample”) is included on the Reserved List and so amfexample.com.au would not be blocked; and
- **Reliance:** The existence of a Reserved List may create a reasonable impression that it is an exhaustive list of names and that a user may rely on the list when applying to register a domain name.

The Panel believes that the Reserved List continues to be relevant and effective in maintaining the integrity of the .au domain space, and that it should be retained. However, greater clarity is required around the composition of the Reserved List, the process for adding names to the list, and the process for unblocking a reserved domain name where a registrant has legitimate grounds for use of a reserved domain name, can prove that such use will not compromise the integrity of the .au name space, and has obtained the necessary consents.

3.11.1 Composition of the Reserved List

The Panel has considered words, phrases, acronyms or abbreviations which should be unavailable for registration as domain names on the following grounds:

- Use is restricted under Australian law (both Federal and State laws);
- Use is not in the public interest (see further discussion below);
- Use poses a risk to the operational stability and utility of the .au domain;

or

- For direct registrations in the .au name space only, use as potential future 2LD name spaces (see further discussion below).

The Panel also considered Reserved List issues with respect to:

- Culturally important names;
- Names of cultural significance to Aboriginal and Torres Strait Islander peoples;
- Names which have the potential to cause offense; and
- Geographical names and abbreviations.

The Panel notes that auDA has a mandate to ensure its policies promote consumer protection and fair trading. Any names added to the Reserved List, or which are blocked at the second level, must reflect this principle.

The Panel will not recommend that the Reserved List be expanded to include a general public interest test.

The Panel will recommend that only the following categories of names should be reserved on the Reserved List:

- Words, phrases and acronyms prohibited by Australian law. This category would include words and phrases restricted under Commonwealth and State legislation;
- Names and abbreviations of Australian States and Territories and the name “Australia”;
- Names that threaten the integrity and stability of the .au name space; and
- Names for use as future 2LDs (reserved for direct registrations in the .au name space only).

The Panel considers that names that threaten the integrity and stability of the .au name space include the 11 gTLDs (com, edu, gov, net, int, mil, org, biz, info, name, pro, aero, coop, and museum).

The Panel recommends retaining the policy that only exact matches to the Reserved List be blocked from registration. The Panel's view is that any broader application of the Reserved List, such as to misspellings of listed words, would be administratively burdensome for auDA.

3.11.2 Reservation of future 2LDs

The merits of introducing new 2LD name spaces are outside this Panel's Terms of Reference. However, in considering the composition of the Reserved List, the Panel has considered the reservation of names for use as future 2LD name spaces.

The Panel recognises that to continue to develop the utility of the .au domain, it may be necessary to reserve certain names for future use as 2LD name spaces, such as “courts” and “parliament”. These names would not be available for direct registration in the .au domain name space.

The Panel will recommend that the following names be reserved for use as future 2LDs:

- parliament.au;
- parl.au;
- court.au;
- courts.au;
- royalcommission.au;
- police.au;
- mil.au; and
- military.au.

3.11.3 Publication of the Reserved List

Currently, the published Reserved List only sets out the words and phrases that are restricted under Commonwealth legislation.

The Panel recommends that the published Reserved List include all reserved names (i.e. within all categories set out above). The Reserved List should also set out the relevant contact for consent to register the listed word or phrase (see further discussion of unblocking below).

With the exception of names that cannot be published for security reasons, the Panel recommends that the Reserved List be published on the auDA website, and regularly updated.

3.11.4 Adding to the Reserved List

The Panel recommends that the onus be on the relevant government department to notify auDA of any words or phrases that should be added to the Reserved List.

auDA will be responsible for determining whether a name may pose a risk to the operational stability and utility of the .au domain and adding such names to the Reserved List in accordance with existing procedures and auDA Board approval or ratification.

3.11.5 Unblocking domain names on the Reserved List

In relation to registration of words, phrases or acronyms prohibited under Australian law, the Panel recommends that the process be as follows:

- The person or entity wishing to register the reserved domain name must contact the relevant Minister (as listed on the Registered List published on auDA's website). The person or entity will need to prove it has legitimate grounds for use of the reserved domain name and that such use will not compromise the integrity of the .au name space. The normal and allocation criteria rules must also be satisfied; and
- The relevant Minister will have the discretion to consent to the unblocking of the domain name. The potential registrant will provide auDA with the Minister's written consent as part of its application for registration.

Summary of recommendations for consultation:

A Reserved List will be retained and comprised of:

- *Words, phrases and acronyms prohibited by Australian law, including both Commonwealth and State law;*
- *Names and abbreviations of Australian states and territories and the name "Australia";*
- *Names that threaten the integrity and stability of the .au name space; and*
- *Names for use as future 2LDs.*

The Reserved List will be published in its entirety on the auDA website (except for names that cannot be published for security reasons)

4. Implementation of Direct Registration

4.1 Overview

Direct registration is registration of domain names directly before the dot au, for example, yourexample.au. In this paper, such a domain name is called a second level domain name or SLD. At present in Australia, there is only one domain name registered for an organisation at the second level, being csiro.au. The intention is to open up direct registration of domain names at the second level to all Australians.

Section 4.3 summarises the Panel's preferred model for the implementation of direct registration.

Following its initial round of public consultation (as set out in **Annexure D**), the Panel has prepared a draft Direct Registration Policy (see **Annexure E**). In this paper, the Panel is consulting stakeholders in respect of the draft Direct Registration Policy.

In this paper, a domain name registered at the second level (such as yourname.au or johnsmith.au) is called a Second Level Domain or **SLD**.

4.2 Panels views on direct registration

The Panel considers that some of the key benefits of direct registration in the .au name space are as follows:

- **Choice:** Direct registration will provide consumers, businesses, not-for-profit organisations and new entrants to the Australian domain name space with more choice.
- **Fewer restrictions:** The Panel proposes that .au would be an unbounded space. The Panel proposes that domain names directly registered under .au will have no eligibility or allocation criteria, other than an Australian presence requirement. This will allow users to define their own purpose for their domain name, rather than being constrained by the eligibility and allocation rules of the current spaces.
- **Desirability:** Shorter, snappier domain names are generally considered more desirable as they are easier for consumers to type and remember, and more convenient for social media. Domain names directly registered under .au will be shorter than an existing 2LD counterpart.
- **Trustworthy:** The existing 2LDs in the .au name space are considered highly trustworthy. They signify a uniquely Australian source, which is subject to Australian regulation, jurisdiction and enforcement. Domain names registered directly under .au will also have a strong Australian connection.
- **Competitiveness overseas:** Direct registration may help to promote the .au brand outside of Australia. This assists Australian businesses who market or supply their goods and services outside of Australia.
- **Value to existing 2LDs:** The existing 2LD, name spaces (such as .com.au) in the .au name space each have a defined purpose. This aspect of existing 2LDs will not change with the introduction of direct registration. Having fewer restrictions associated with domain names registered directly in .au (see above) will make the purpose of the existing 2LDs clearer. The expectation is that registrants who do not neatly meet eligibility or allocation requirements of an existing 2LD space will instead choose to register a domain name directly under .au.
- **Stronger Australian connection:** A domain name that has fewer elements may focus attention on the .au. This may more strongly signal the Australian connection. With the broader choice now available through new generic top level domains, Australians may wish to opt for a stronger statement of their Australian connection through direct registration.

The Panel's aim is to recommend an implementation process that achieves these benefits as best as possible.

As with any change, there are possible negative impacts. Some possible harms include:

- **Additional costs for defensive registrations:** A business may feel the need to register SLDs to prevent others registering them, even if the business has no need for the SLDs;
- **Confusion:** The public may not understand the meaning or significance of SLDs;
- **Fraud:** New SLDs could be registered that give the impression of being an official government website, and then be used to defraud or confuse the public; and
- **Uncertainty during implementation:** During the pre-implementation and implementation phases, there will be uncertainty for businesses, including uncertainty as to how SLDs will be allocated and uncertainty as to the benefit of SLDs.

The Panel has received many submissions from various stakeholders that unfair implementation of direct registration would cause serious damage to an existing business with an existing domain name (e.g. within .com.au or org.au), or to its brand or marketing. These submissions were reinforced by feedback provided at the public forums.

The Panel recognises that a fair allocation method is critically important to the success of the implementation of direct registration. The Panel has spent significant time on this issue.

The Panel wishes to devise an implementation model which reflects the possible benefits of direct registration while at the same time protects existing domain name registrants from unnecessary harm. The Panel has aimed to devise an implementation procedure that does "no harm" to existing registrants. The Panel acknowledges that this is a key concern for many stakeholders and, despite a lack of evidence regarding harm that may be caused, the Panel has taken this into account developing the Direct Registration Policy.

Additionally, the Panel strongly believes no existing domain name licensee should be required to give up or stop using their existing domain name because of the existence or implementation of direct registration. No existing domain name licensee should be forced to migrate to a new domain name or to take up a direct registration domain name.

4.3 Key principles of proposed implementation model

The Panel proposes an implementation model. The proposed implementation model has the following key features:

Timing

- The implementation process should not be drawn out. Ideally, the implementation process should be completed in less than a year.
- If there are no competing claims for a SLD, then that SLD should be able to be registered and used immediately upon launch.
- The Panel has reviewed the timeframes of international implementations, some of which have taken over three years and are still ongoing. The Panel has also reviewed the submissions of, and spoken with, members of the Australian internet community who were concerned that they may be looking down the barrel of a long period of uncertainty. The Panel is of the view that a prolonged period for formally resolving conflicting rights would not produce positive outcomes for the Australian internet community.

Access

- Government and educational bodies, charities, community organisations, individuals and business all should have access to domain names at the second level.
- No existing domain name licensee should be required to give up or stop using their existing domain name because of the existence or implementation of direct registration.
- No existing domain name licensee should be forced to migrate to a new domain name or to take up a direct registration domain name.
- There should be no hierarchy of rights. For example, a registered trademark does not confer any better entitlement to a SLD than a business name.
- This principle extends to the rights of existing domain name registrants. There will be no hierarchy within spaces (e.g. between `yourexample.com.au` and `yourexample.net.au`) or between levels (e.g. between `yourexample.nsw.gov.au` and `yourexample.org.au`).
- Where there are no competing claims, domain name licences in the .au space will be allocated on a 'first come, first served' basis.
- The only eligibility rules for domain names registered at the second level should be that the registrant is a legal person and has an Australian connection.
- There should be no allocation rules or restrictions for domain names registered at the second level. For example, the name match rule and the close and substantial connection rule should not apply to domain names registered at the second level. The space should be an open space for all Australians.
- Thus, provided that the relevant eligibility rules are satisfied (i.e. that there is an Australian connection), and subject to the conflict resolution process outlined below, the first applicant to apply for a particular SLD will be permitted to license that domain name.
- Where there is no person or entity with an equivalent domain name licence registered at a lower level, the .au domain should be open for general registration as soon as possible. Persons and entities who want to use the new space should be able to do so immediately upon launch. This will also allow for the development of use cases.

Priority allocation where there is no conflict

- The owner of a domain name license at a Contestable Level should have priority to register the corresponding SLD. (What is and is not a Contestable Level is discussed in section 4.9 below).
- The priority period is six months from the Launch Date. For example, where there is no conflict, for six months from the Launch Date, the holder of `yourexample.com.au` is the only person who can register `yourexample.au`.
- Thus, where there is only one person or entity with a corresponding domain name at a Contestable Level, the holder of the existing registration will have a six month priority registration period in which to register the .au equivalent.
- Following this priority period, if the SLD is not registered by the existing holder of the corresponding domain name, the domain name will be available on a 'first come, first served' basis.

Allocation rules where there is conflict – the “lock down” model

- Where there is more than one corresponding domain name at a Contestable Level, the corresponding SLD will be locked.

- During the six month priority registration period referred to above, the persons or entities with existing registrations will be able to acquire a token to indicate that they wish to obtain the corresponding .au registration. (A token is not a real object, but an entry in a registry.)
- If only one person acquires a token, this indicates that there is in fact no conflict, and the token holder will be entitled to the SLD.
- However, if more than one token is issued in respect of a SLD, that SLD will remain locked indefinitely while the conflict remains (that is, while multiple tokens exist).
- The token will be associated with an existing corresponding domain name. The token is transferred if the corresponding domain name is transferred. The token expires if the corresponding domain name registration is not renewed or is cancelled.
- The lock on the SLD will be lifted once there is only one token in existence in respect of the .au domain name. This may occur, for example, if the tokens held by all but one of the persons or entities with existing rights expire or are cancelled, or if one person acquires all domain names to which the outstanding tokens are linked.

Application of auDA Policies to SLDs

- All auDA Published Policies will apply to SLDs. In particular, the .au Dispute Resolution Policy (“**auDRP**”) will apply to all SLDs.
- Names on the Reserved Names List will not be available for registration, unless the name is on the list due to a requirement of law and the applicant can demonstrate that it meets all of the legal requirements.
- Moreover, the general policy settings that prevent domain names being registered for the purposes of resale and the warehousing of domain names will apply to SLDs.

4.4 Discussion of implementation issues

A substantial part of the Panel's discussions, and feedback received and considered by the Panel, have focussed on the process to allocate SLDs where there presently exists more than one domain name having the same name at lower levels. For example, if Company X owns `yourexample.com.au` and Charity Y owns `yourexample.org.au`, and both wish to register `yourexample.au`, who should be allocated `yourexample.au`?

However, this is only one aspect of the implementation of direct registration. More generally, the Panel's proposed implementation model takes into account allocation of domain names registered directly at the second level in circumstances where:

- there is no relevant existing registration (for example, where there is no corresponding domain name registered at other levels in the Australian domain name space);
- there is one relevant existing registration (for example, in respect of `yourexample.au`, where there is an existing domain name licence for `yourexample.com.au`, but no other corresponding domain name registered at the other levels in the Australian domain name space); and
- there are two or more existing 'conflicting' registrations (for example, in respect of `yourname.au`, where there are existing domain name licences for `yourexample.com.au`, `yourexample.gov.au` and `yourexample.org.au`).

At an international level, many ccTLDs when launching direct registration have granted existing domain name registrants priority to register the matching SLD. However, there has not been a uniform approach to resolving competing claims. Each country has developed a process that reflects the size, history, usage and structure of their relevant domain name space and the socio-

economic, political and legal environment. This has meant that the processes adopted in other countries may not be the most suitable for an Australian context.

4.5 Possible models for resolving conflict as to allocation

A number of implementation models have been considered by the Panel where there are two or more existing 'conflicting' registrations. These models include:

- **Order of priority:** Priority could be given to existing domain name registrants of conflicting names based on an order of priority taking into account the existing 2LD (or some other factor). For example, under this model, the registrant of the corresponding com.au domain name at the cut-off date may have priority over the registrant of the corresponding net.au domain name at the cut-off date. There is some stakeholder support for an order of priority model favouring com.au registrants. The Panel has decided against the order of priority model because:
 - It is difficult to determine a fair and logical order of priority. Even if it is agreed, for example, that a .com.au registrant should have first priority, what then is the priority order where there is no .com.au? For example, should .edu.au have priority over .gov.au? Should .org.au have priority over .net.au? Should Commonwealth Government domain names have priority over State Government domain names? More generally, who should come first in the priority list, and why? (Registrants in each space put forward arguments why they should be first if this model was implemented.) The Panel was unable to provide logical and equitable answers to these questions;
 - Each order of priority devised may cause harm to registrants lower down the priority list;
 - The same eligibility rules apply to more than one existing 2LD (for example, com.au and net.au), so it would be difficult to justify giving priority to one over the other; and
 - This model contradicts the no hierarchy of rights principle, which says that no person or rights holder has a better entitlement to a domain name than any other person.
- **Longest continuous registration:** Competing claims could be resolved in favour of the longest continuous registration (oldest creation date) of a domain name. This would prioritise registrants of legacy domain names. However, this model disadvantages recent market entrants. For example, this model would give priority to the owner of a long registered but inactive domain name over a more recent well-known and actively used domain name. Further, it is not certain that creation date data in the registry for some of the oldest domain names is accurate.
- **Longest continuous registrant:** Priority could be given to the registrant who has held the domain name licence for the longest period of time. This approach assumes that registrants who have continuously held a domain name licence may have invested significant resources in their online presence. However, this approach would disadvantage registrants that have recently acquired a domain name licence on the secondary market or through the purchase of a business, and new market entrants.
- **Consensus approach:** Persons or entities with competing claims to the matching .au name could agree amongst themselves who should have priority. If there is no agreement, then a more formal dispute resolution process could be undertaken. This model was initially regarded as attractive by the Panel, and to some extent, has been built into the current preferred model in an informal way. It is noted that this model, if implemented incorrectly, could result in a slow and possibly costly process. It was also considered to be potentially unfair to less sophisticated domain name licensees, who may be taken advantage of or not understand the consequences of decisions being made.
- **Auction:** Registrants with conflicting names could bid at auction for the matching SLD, with the highest bidder winning the right to register the SLD. This would favour registrants with

the 'deepest pockets'. This model could disadvantage charities, government bodies and educational institutions.

- **Lottery / Random:** This model allocates the SLD on a random basis. For example, a lottery system would require registrants interested in registering the SLD to obtain a lottery ticket. A registrant would be able to obtain a lottery ticket for each domain name licence held by them. For example, the Australian Broadcasting Corporation would be able to obtain a lottery ticket for abc.net.au and abc.com.au. The winner of the lottery would have the right to register the SLD. Where only one registrant purchased a ticket for any given lottery that registrant would automatically be given the right to register the SLD. The benefit of this approach is that all registrants who obtain a lottery ticket will have an equal chance of winning the lottery.

A version of this model was proposed as a 'straw person' model at public forums, and received some support, but also harsh criticism. Accordingly, the Panel has decided against this model because:

- Although a lottery is perceived to be fair, many domain names may not be allocated to the 'best' or most logical owner of the domain name;
- Across the space as a whole, a holder of a large portfolio of inactive domain names would have more chances (and thus be allocated more SLDs) than a business that actively uses a single domain name; and
- The Panel noted suggestions raised at the public forums that an appropriate system for the implementation of direct registration would be 'least harm for maximum benefit'. The Panel notes concerns that the lottery approach for contested domains may create 'random harm'.

It is important to note that dealing with conflicts is only one aspect of the implementation process. Evidence suggests that there will be fewer than 90,000 possible conflicts, out of over 3 million domain names registered.

4.6 Panels preferred model for resolving conflict as to allocation

The Panel proposes the "lock-down" model where there is conflict as to who should be entitled to an SLD. This model is summarised above in section 4.3 and set out in detail in the draft Direct Registration Policy (**Annexure E**).

A key part of the model is to determine if a real conflict actually exists. If there is conflict, which is expected to be the case in respect of fewer than 90,000 SLDs (<3% of the total names registered within .au), the licensees involved can try to resolve the conflict themselves in their own time and their own way; but until the conflict is resolved, then no one can use the corresponding SLD. Thus, in conflict situations, the status quo is preserved, there are no winners or losers, and importantly no one is harmed.

The Panel has received feedback in focus groups broadly supportive of the lock-down model, provided that the lock-down period is indefinite and remains in place, subject to the rules set out in the draft policy regarding the lifting of the lock. Feedback was received that it would not be helpful to change these conflict resolution rules at some time in the future so that domains that are locked then become unlocked. There is benefit of certainty in the proposed approach of an indefinite lock-down period.

In short, the Panel considers that (even in the worst-case scenario of the most possible unresolved conflicts) it is acceptable to indefinitely lock-up a maximum of around 90,000 SLDs to protect existing domain name licensees, while allowing the rest of the space to be used thus possibly benefiting many more than 90,000 new licensees of SLDs. Thus, there is possible benefit and no harm. It is expected that in fact there will be fewer than 90,000 SLDs locked, and over time, the locks will be lifted as conflicts are resolved.

The Panel considers that it would be appropriate to have one review period that takes place approximately two years after the lock-down period commences. During the review period, each

token holder must confirm that they wish to continue to hold the token. If confirmation is not received during the review period, then that token expires.

Note that where there is no conflict, the SLD domain name will be able to be registered and used at the earliest possible stage.

4.7 Eligibility and Allocation Rules

The 2015 Names Policy Panel recommended that the same eligibility and allocation rules which apply to the open 2LDs should also apply to direct registrations; that is, the domain name must be an exact match, abbreviation or acronym of the registrant's name or trademark, or there must be a close and substantial connection between the registrant and the domain name.

This Panel intends to make a different recommendation to the auDA Board.

As stated above, and in the Interim Report to the auDA Board, the Panel proposes that .au would be an unbounded space. The Panel proposes that domain names directly registered under .au will have no eligibility or allocation criteria, other than an Australian presence requirement. This will allow users to define their own purpose for their domain name, rather than being constrained by eligibility and allocation rules of the current spaces.

This will allow for many different use cases, ranging from large international organisations with an Australian connection to small businesses, local charities, hobbyists, families, and bloggers.

There are two key reasons for this recommendation:

- If the eligibility and allocation requirements for SLDs are the same as the .com.au and .net.au space, then the rationale for implementing direct registration is less clear. A person who is unable to register in .com.au now would not be able to register a SLD.
- It is not logical, and too restrictive, for eligibility and allocation requirements that were designed for commercial registrants in the .com.au and .net.au space also be applied to government and education registrants, and to individuals, who may wish to register a SLD. It is also difficult to apply the close and substantial connection rule to registrants who are individuals.

Australians who do not neatly meet eligibility or allocation requirements of an existing 2LD space will instead choose to register a domain name directly under .au.

Feedback was provided to the Panel that having .au with lesser eligibility and allocation rules will allow cybersquatters to flourish and increase costs to business. The Panel notes that auDRP will apply to domain names registered directly under .au. Moreover, with the recent introduction of a large number of gTLDs by ICANN, many of which have no eligibility or allocation rules, the incremental policing and monitoring cost increase due to the introduction of direct registration in Australia is likely to be low.

Feedback was also provided to the Panel that the proposed rules may allow registrants to register "official" looking domain names, which could confuse the public. An example was given of healthadvice.au. However, even if the same eligibility and allocation rules as .com.au were applied to .au, these rules would not prevent the registration of healthadvice.au. The panel notes that healthadvice.com.au is a currently registered domain name. Existing laws regarding trade mark infringement and misleading conduct are best used to prevent the misleading use of domain names, not auDA policies.

The Panel intends to recommend that the only eligibility rules for domain names registered at the second level should be that the registrant is a legal person and has an Australian connection, and that there should be no allocation restrictions.

4.8 Cut-off date for eligibility to participate in the priority allocation and conflict resolution process

A cut-off date for eligibility as a priority applicant is important as it affects the following:

- the number of conflicting domain names;
- the risk of industry insiders profiteering from the launch of direct registration; and
- registrants who register a domain name after cut-off.

The Panel believes that a cut-off date is sensible because there is some (limited) evidence that existing domain names have been registered primarily for the purpose of obtaining a preference in relation to any conflicting names process that this Panel may recommend.

However, a cut-off date prevents new businesses that are established after the cut-off date from receiving the benefits of the priority registration and conflicting names process.

The Panel is also conscious that a cut-off date in certain circumstances gives preference to older registrations over new registrations.

The Panel originally proposed a cut-off date of 18 April 2016. This was when the auDA Board announced its approval of, and intention to implement, direct registration. This is the approach that was adopted in the United Kingdom and New Zealand.

However, if direct registration is not implemented until late 2019 or 2020, there is then a long period of time between the cut-off date and the launch date. This may unacceptably hurt a significant number of new businesses, especially those that are unaware that direct registration is coming.

Following discussions with the public, the Panel accepts that a more recent date may be appropriate. Dates that were considered include the date of the release of the first issues paper by this Panel and the date the Panel convened for the first time.

After much discussion, both within the Panel, and with the public, the Panel has determined that a cut-off date of 4 February 2018 is appropriate. This is when the Panel began its public consultations in relation to the implementation of direct registration, and first publicly discussed the Panel's views as to various implementation models.

However, if direct registration is not actually implemented until later than currently anticipated by this Panel, then the Panel recommends that the auDA Board revisit the 4 February 2018 cut-off date.

The Panel will also recommend safe-guards to protect new business entrants and others who register a domain name at a Contestable Levels after the cut-date. This only applies where, at the cut-off date, there are no corresponding domain names a Contestable Level. In such circumstances, the first person to register a domain name at a Contestable Level after the cut-off date will be given priority to register the corresponding SLD.

4.9 Contestable Levels

The Panel has considered which existing domain name holders should be entitled to participate in the priority allocation process and the "lock down" process discussed above.

The Panel intends to recommend that holders of the following domain names can so participate:

- All domain names registered at the cut-off date at the third level in the .au space, being .com.au, .net.au, .org.au, .edu.au, .gov.au, .id.au and .asn.au.
- All domain names registered at the cut-off date at the fourth level in the official registry for .edu.au or .gov.au.

In the draft Direct Resolution Policy, these are called the Contestable Levels.

The official registrars for the .edu.au or .gov.au domains are found at domainname.edu.au (administered by Education Services Australia Limited) and domainname.gov.au (administered by the Digital Transformation Agency), respectively.

The Panel notes that the Tasmanian and Northern Territory governments have elected not to have their .gov.au domains administered by the official registry. As such, at the present time, fourth level domain names in the .tas.gov.au and .nt.gov.au spaces will not be eligible to participate in the priority and conflicting names process discussed above.

The Panel considered whether to include all domain names at the fourth level and domain names at the fifth level in this process. Panel members had differing views as to this issue. Few submissions were received from the public in respect of this issue. There was only limited discussion in relation to domain names at the fourth and fifth levels during the public forums.

The Panel has determined that this issue will primarily affect some schools and some government agencies, and seeks further public consultation in this regard.

Domain names registered at the fifth level and domain names in non-Australian spaces (e.g. myname.com, myname.xyz, myname.de, myname.co.uk) will not be eligible to participate in the priority allocation process or the “lock down” process discussed above.

4.10 Other comments regarding direct registration

- **Fees and Costs:** The Panel has no jurisdiction to set or determine fees or costs. However, the Panel’s view is that any fees charged in relation to the implementation of direct registration (for example, to acquire a token) should be on a cost recovery basis only. Consideration should be given to capping the cost of tokens for registrants who own a significant number of domain names.
- **Awareness:** Similar to the recommendation of the Names Policy Panel, this Panel strongly recommends that there must be a widespread education and awareness campaign leading up to the release of direct registrations. Such a campaign should also publicise the details of the priority registration and conflicting names process.
- **Undue Marketing by Registrars:** The Panel recommends that auDA consider rules that prevent undue or misleading marketing by registrars regarding the implementation of direct registration. One suggested implementation rule is that a token can only be acquired from the registrar who is managing the associated domain name.
- **Further Public Consultation:** The Panel is undertaking further public consultation in respect of the priority registration and conflicting names process that is discussed in the draft Direct Registration Policy. This paper is part of that process. The proposed model may change as a result of such consultation.

5. Topics for Discussion

5.1 Reform of Existing Policies

5.1.1 Eligibility and Allocation – the Australian presence requirement

For all domain names ending in .au, it is proposed that the registrant must be an Australian citizen or permanent resident or entity established under Australian law. It is recommended that where an applicant is relying on a trade mark registration or application to establish an Australian connection, the trade mark must be an exact match to the domain name.

- What are your views on the recommendation to introduce a single, simple Australian presence test for all domain name registrations in the .au name space (i.e. at the second and third levels of .au)?
- Should the ground of satisfying the Australian connection requirement be retained for holders of Australian trade mark registrations and applications that may be held by legal persons outside of Australia?
- If so, should this ground be limited to instances where the domain name is an exact match to the trade mark registration or application (e.g. Nike Innovate CV could hold a trade mark for the word Nike and register nike.com.au, but not be allowed to register runningshoes.com.au that does not match their trade mark)?

5.1.2 Resale and warehousing

It is proposed that stricter controls be put in place to ensure that domain names are not being registered solely for the purpose of resale or warehousing (ie. holding a large collection of domain licences for future resale when they become more valuable).

- What are your views on the recommendation to retain and strengthen the resale and warehousing prohibition rule?
- What are your views on the proposal to strengthen this prohibition by introducing a list of factors indicating that a domain name is likely to have been registered primarily for resale or warehousing, thereby shifting the onus to the registrant to demonstrate that is not in fact the case? What factors should the Panel recommend be used?

5.1.3 Eligibility and Allocation – “Close and Substantial Connection” Rule

The “close and substantial connection” rule means the domain licence must be:

- a product that the licence holder manufactures or sells; or
- a service that the licence holder provides; or
- an event that the licence holder organises or sponsors; or
- an activity that the licence holder facilitates, teaches or trains; or
- a venue that the licence holder operates or a profession that the licence holder's employees practise.

It is proposed that this rule be expanded to recognise online directories (e.g. lawyer.com.au) and informational services that specifically relate to the subject matter denoted by the domain name. It is also proposed that Domain Monetisation (ie. the use of a website which is automatically generated with paid advertising matching the subject of a domain licence e.g. books.com.au) no longer be a basis to meet the allocation criteria to register a domain name.

- Should the close and substantial connection rule be retained?

- What are your views on the recommendation to replace the current Domain Monetisation test as a basis for establishing a close and substantial connection with a narrower test (recognising online directories and informational services that specifically and predominately relate to the subject matter signified by the domain name)?
- Should it be permissible to register a domain name under the close and substantial connection rule for the purpose of Domain Monetisation?

5.1.4 Eligibility and allocation – Grandfathering considerations

It is proposed that grandfathering provisions be introduced for existing licence holders.

- What are your views on the recommendation to grandfather, or apply new policies from the point in time when the domain licence is renewed, rather than applying them with immediate effect?
- Should another grandfathering approach be used, and if so, why?

5.1.5 Licence conditions – licence transfer

It is proposed that if a domain licence is sold, the new licence holder should receive the benefit of the remaining licence period. (Currently, when a licence is sold a new licence period is created for one, two, three, four or five years and any remaining licence period is lost.)

- What are your views on the recommendation to allow new licence holders to receive the benefit of the remaining licence period when a domain name is transferred?

5.1.6 Licence conditions – licence suspension and cancellation

It is proposed that a process be developed to allow for the suspension of a domain name licence, rather than cancellation of a domain name licence, where there is a breach of a policy.

- What are your views on the recommendation to clarify the definition of “law enforcement agency”?
- What are your views on the recommendation to create a procedure to allow auDA to suspend a domain name licence (as an alternative to cancellation)?
- Should the maximum period of suspension be set, and if so, should it be capped at one month or some other period of time (and should it be renewable)?

5.1.7 Prohibition on Misspellings

It is proposed that the Prohibition on Misspelling List be retained. This is important to prevent typosquatting – the deliberate registration of a domain name that is a misspelling of a brand name, entity or person for the purpose of misleading users of the misspelt domain name. Such names can be monitored for compliance with the registration rules or blocked from registration.

- Should the Prohibited Misspellings List be retained?
- What details should be published on the Prohibited Misspellings List? Should they include the date it was blocked, the identity of the complainant, and the rights that the complainant relied upon?
- What are the processes that auDA should implement to ensure that the Prohibited Misspellings List remains current, including dealing with complaints and requests to unblock a name on the list?

5.1.8 Reserved names

It is proposed that the Reserved Names List be retained, and revised to include additional categories. Currently, the list contains words and phrases restricted under Commonwealth legislation (e.g. ANZAC that are blocked from registration at the central registry).

- What are your views on the recommendation to retain and publish the Reserved Names List?
- Do you agree that the Reserved Names List should be expanded to include words and phrases that are restricted under State and Territory laws?
- Is it appropriate that the onus should be on the relevant government department or agency to notify auDA of any words or phrases that are restricted by law and should be added to the list?

5.2 Implementation of Direct Registration

5.2.1 Priority Allocation Period

It is proposed that the holder of a domain licence at the third level of .au (e.g. telstra.com.au) will have priority to register the corresponding domain name at the second level of .au (e.g. telstra.au) for a six-month period from the Launch Date. There may be registrants at the third level with corresponding domain names.

- Is it appropriate to have a priority allocation period for the registration of new second level domain names to give priority to the registrants of existing domain names in .au?
- Is a six-month priority allocation period fair to both existing registrants and potential new registrants?

5.2.2 Conflict Resolution Process

It is proposed that if more than one corresponding domain name exists at the third level, it would be reserved or locked down from registration. For example, bsmc.com.au is used by a group of entrepreneurs and bsmc.net.au is used by a medical practice in Woodend, Victoria. In this scenario, the matching .au domain name (bsmc.au) would be locked down and both parties would receive a token. Token holders could negotiate with each other for the release of the .au domain name. If agreement could not be reached, then the .au domain name would remain reserved indefinitely and would not be made available for registration.

- Is the lock down process a fair process to resolve conflicts when there are competing claims at a contestable level?
- Will you be harmed by the lock down process, and if so, how?
- Should the lock down period be: a) six months b) one year c) two years d) indefinite?
- If the lock down period is finite, what should happen to resolve any outstanding conflicts at the end of the lock down period?

5.2.3 Cut-off Date

A cut-off date of 4 February 2018 is proposed, as this is when the Panel began its public consultation.

- Is 4 February 2018 a fair and reasonable cut-off date for eligibility to participate in the conflict resolution process and the lock down process?
- If not, why?

- And if not, what date would you suggest and why?

5.2.4 Contestable Levels

It is proposed that holders of domain licences stored in the central .au registry at the third level (e.g. ato.gov.au) and fourth level (e.g. dpc.nsw.gov.au) can participate in priority allocation and conflict resolution for direct registration (e.g. ato.au and dpc.au). The Tasmanian and Northern Territory Governments regulate their own domain names, which sit outside the central .au registry.

- Is it appropriate to exclude domain names registered at the fifth level from participation in the priority allocation process and the lock down process (e.g. images.dpc.nsw.gov.au)?
- Is it appropriate to exclude domain names registered at the fourth level that are not registered in the central .au registry from participation in the priority allocation process and the lock down process (e.g. justice.tas.gov.au)?

5.2.5 The Draft Policy

See the proposed Draft Policy attached as Annexure E to this paper.

- Is the wording of the draft Direct Registration Policy clear and understandable?
- Does the draft Direct Registration Policy correctly reflect the intent set out in this paper?
- Do you believe that you will benefit from Direct Registrations if implemented in accordance with the Direct Registration Policy?

6. Next steps

6.1 Further public consultation

The Panel will review the submissions received and finalise all policies and supporting papers.

6.2 Report to the auDA Board

The Panel's final report to the auDA Board will make recommendations in relation to the issues discussed in this paper and the development of an implementation policy for direct registration.

The final report is due to be provided to the auDA Board in the first half of 2019.

Annexure A

List of published policies

No	Title
2015-01	Complaints Policy
2014-09	Reseller ID Application Form
2014-08	DNSSEC Policy and Practice Statement (DPS) for the .au Domain
2014-07	WHOIS Policy
2014-06	Reserved List Policy
2013-05	Registrar Accreditation Application Form
2013-04	Registrar Accreditation Criteria
2013-03	auDA Information Security Standard (ISS) for Accredited Registrars
2013-02	Transfers (Change of Registrar of Record) Policy
2012-04	Domain Name Eligibility and Allocation Policy Rules for the Open 2LDs
2012-01	Registrant Review Panel Rules List of auDA Review Panellists
2011-03	Transfers (Change of Registrant) Policy
2010-07	Registrant Contact Information Policy
2010-03	Registrar Review Panel Rules List of auDA Review Panellists
2010-01	Domain Renewal, Expiry and Deletion Policy
2008-09	Prohibition on Misspellings Policy
2008-07	Mandatory Terms and Conditions Applying to .au Domain Name Licences
2008-04	Policy Rules and Guidelines for Community Geographic Domain Names (CGDNs)
2007-02	Interim Policy on Use of Wildcard DNS Records in .au
2004-01	Complaints (Registrant Eligibility) Policy
2002-29	Domain Name Password Policy
2013-01	Clarification of Auto-Renewal Services under the Code of Practice
2012-05	Guidelines on the Interpretation of Policy Rules for the Open 2LDs
2008-11	Clarification of Permissible Own Use Registration by Registrars
2002-16	Registrar Agreement - Meaning of Reseller
2002-15	Registrar Agreement - Clarification of Clause 14.1.7

Annexure B

Eligibility requirements

2LD	Requirement
.asn.au & .org.au	<p>To be eligible for a domain name in the asn.au 2LD, registrants must be non-commercial organisations as follows:</p> <ul style="list-style-type: none"> (a) an association incorporated in any Australian State or Territory; or (b) a political party registered with the Australian Electoral Commission; or (c) a trade union or other organisation registered under the Fair Work (Registered Organisations) Act 2009; or (d) a sporting or special interest club operating in Australia; or (e) a charity operating in Australia, as defined in the registrant's constitution or other documents of incorporation; or (f) a non-profit organisation operating in Australia, as defined in the registrant's constitution or other documents of incorporation.
.com.au & .net.au	<p>To be eligible for a domain name in the com.au 2LD, registrants must be:</p> <ul style="list-style-type: none"> (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.
.id.au	<p>To be eligible for a domain name in the id.au 2LD, registrants must be:</p> <ul style="list-style-type: none"> (a) an Australian citizen; or (b) an Australian resident.

Annexure C

“Close and substantial connection” rule

2LD	Categories
.asn.au & .org.au	<ul style="list-style-type: none"> (a) a service that the registrant provides; or (b) a program that the registrant administers; or (c) an event that the registrant organises or sponsors; or (d) an activity that the registrant facilitates, teaches or trains; or (e) a venue that the registrant operates; or (f) a profession that the registrant's members practise.
.com.au & .net.au	<ul style="list-style-type: none"> (a) a product that the registrant manufactures or sells; or (b) a service that the registrant provides; or (c) an event that the registrant organises or sponsors; or (d) an activity that the registrant facilitates, teaches or trains; or (e) a venue that the registrant operates; or (f) a profession that the registrant's employees practise.
.id.au	<ul style="list-style-type: none"> (a) a name that includes, or is derived from, one or more words of the registrant's personal name; or (b) a name by which the registrant is commonly known (i.e. a nickname). <p>It is also permissible, under the close and substantial connection rule, to register an id.au domain name that refers to a personal interest or hobby of the registrant.</p>

Annexure D

The Policy Review Panel

Purpose and role of this Panel

The Constitution of .au Domain Administration Ltd (the “**auDA constitution**”) enables the auDA Board to appoint advisory panels, like this Panel. The auDA constitution clearly sets out the possible functions of such advisory panels. Clause 24.8 of the auDA constitution provides that the Directors may provide an advisory panel with ‘*a brief to investigate, analyse and advise or report to the Directors regarding a particular issue or objective*’.

Under the auDA constitution, an advisory panel is not a decision-making body. The auDA Board may accept and implement the recommendations of the Panel, in whole or part. The purpose of this Panel is to provide recommendations to the auDA Board.

Among other things, the Panel has been asked by the auDA Board to recommend an implementation policy for direct registration following the decision of the auDA Board to accept the recommendation of the 2015 Names Policy Panel to implement direct registration. The Panel is not revisiting the merits of direct registration.

The Panel in performing its functions must have regard to the 2015 Names Policy Panel Final Report recommendations as well as the following matters:

- establishing mechanisms to ensure auDA is responsive and accountable to the supply and demand sides of the Australian internet community;
- promotion of fair trading;
- promotion of consumer protection; and
- adopting open and transparent procedures which are inclusive of all parties having an interest in use of the domain name system in Australia.

In executing this task, the Panel strives to represent the interests of all members of the Australian internet community and, more broadly, of all Australians. An important objective of the Panel’s ongoing stakeholder engagement process, which comprises both written submissions and public consultation, is to ensure that the Panel is serving the interests of all Australians.

Establishment of this Panel

In April 2016, the auDA Board announced that it had accepted the recommendation of the Names Policy Panel and would introduce direct registrations in .au. It did so following the completion of some independent market research which auDA commissioned to test the Names Policy Panel’s assertions regarding the likely level of market demand for direct registration. According to the auDA Board, the independent market research supported the feedback received by the Names Policy Panel. The auDA Board decided to accept the Names Policy Panel’s recommendation on this basis.

As stated above, this Panel is tasked, in part, with recommending an implementation policy for direct registration. It is important to keep in mind that it is not within this Panel’s terms of reference to revisit the recommendation made by the Names Policy Panel. That is, this Panel is not considering whether to implement direct registration, but is considering how to implement direct registration.

Early in its discussions, this Panel decided that if direct registration could not be implemented in a fair and efficient manner, then the Panel would make this clear in any recommendation it made to the auDA Board. The Panel unanimously believes that implementation of direct registration in a fair

and efficient manner is possible. This does not mean that the Panel or its individual members agree or disagree with the recommendation made by the Names Policy Panel, or with the decision of the auDA Board, to implement direct registration. That decision is not within the scope of this Panel's remit.

To inform the Panel's discussions on the best way to implement direct registration, the Panel has considered the purpose and benefits of direct registration to Australians. The Panel wishes to ensure that any implementation policy it recommends fully captures those benefits.

Public Consultations

The Panel has conducted extensive public consultations to date, as summarised below.

First Issues Paper and written submissions

The Panel released its first Issues Paper titled 'Implementation of Second Level Domain Name Registrations (Direct Registration)' in October 2017. Submissions in relation to the paper closed on 10 November 2017.

The Panel received 51 public submissions in response to this issues paper. Submissions were received from a broad range of stakeholders, including registrars, registrants, consumer and end-user representative organisations, and the education sector.

Second Issues Paper and written submissions

A second Issues Paper titled 'Registrant Policy: Enabling Australia's Digital Economy and Society' ("**Registrant Policy Issues Paper**") was released in January 2018. Submissions in relation to the paper closed on 13 March 2018.

This Registrant Policy Issues Paper considered many issues, including issues relevant to the registration of domain names at the second level, including issues around the structure of the .au name space, reserved or prohibited domain names, and eligibility for and allocation of domain names including what rules should apply to direct registration of .au domain names.

The Panel received 60 public submissions in response to this issues paper. The Panel also received some confidential submissions. Submissions were received from a broad range of stakeholders, including registrars, registrants, consumer and end-user representative organisations, and government agencies.

Public consultations

The Panel has held four full-day public forums. The public forums were held in Perth (5 February 2018), Sydney (9 February), Melbourne (14 February) and Brisbane (16 February).

At least three Panel members attended and actively participated in each public forum.

Approximately 85 people attended the public forums, broken down as follows: Melbourne (34), Perth (12), Brisbane (19) and Sydney (20). The attendees came from a wide range of backgrounds, with different levels of knowledge regarding the current policy framework.

The purposes for the public forums were:

- Educational, regarding the operation, history and current policy issues for the Australian domain name space;
- Informational, regarding the issues that the Panel is considering, and the process that the Panel is following to devise new policies;
- Consultative, to gain feedback in relation to the implementation of direct registration and broader domain name policy issues. The Panel proposed a 'straw person' implementation

model at the public forums – that if there were conflicting applications for a domain name directly registered under .au then the conflict should be resolved by a random draw – and obtained constructive and helpful feedback as a result; and

- The Panel also held a closed consultation forum with Federal and State government domain name management representatives.

Focus Groups

The Panel arranged for four focus groups to review a draft version of this paper and the recommendations of the Panel in relation to the implementation of direct registration. Phil Martin, a professional and independent facilitator, ran the focus groups. The focus groups met in September and October 2018, and Mr Martin provided a report to the Panel at the end of October, which was considered by the Panel. As a result of the focus group report, modifications were made to this paper.

The focus groups comprised representatives from registrars, the registry operator, small and large business, industry bodies, education, government, and domain investors.

The importance of consultation and the success to date of such consultation

The Panel desires input and feedback from as many Australians as possible, particularly those Australians who believe they will be affected by any of the topics or proposals in the two issues papers.

The Panel wants this to be a real and meaningful consultation process. It has sought to achieve this through providing options for stakeholders to engage with the process, either through written submissions or by attending the public forums. It has offered public forums in as many capital cities as logistically possible, given time and cost constraints and the availability of the panellists.

During the public forums, the Panel has met people with real concerns regarding some of the changes that have been discussed or proposed. The Panel acknowledges the issues raised and has engaged in constructive dialogue with the relevant individual, or individuals. Through these conversations, the Panel has been alerted to issues it had not previously considered, and has updated and refined its proposals to incorporate its learnings. For example, in relation to competing claims for a .au domain name, the Panel proposed a lottery model as a 'straw person' for discussion in the public forums. In response to the Panel's conversations with concerned individuals during public forums (as supplemented by the concerns expressed in written submissions), the Panel has now changed its proposal to a 'lock-down' model discussed in section 4 above and **Annexure E**.

Annexure E

Draft Direct Registration Policy

Policy 2019 – xx
Second Level Domain Name
Registrations (Direct Registration)

Part A: Introduction

1 Background, purpose of this Policy, and definitions

- 1.1 The Australian domain names space uses the terms in the box below to describe different levels of domain names.



- 1.2 Currently, Australian domain names are registered in the third level or below (eg, *yourname.com.au*).
- 1.3 This Policy is about the registration of domain names in the second level (eg, *yourname.au*).
- 1.4 The Policy is divided into 4 Parts:
- *Part A* (clauses 1 to 3): **Introduction**;
 - *Part B* (clauses 4 to 13): **Registration Rules**;
 - *Part C* (clause 14): **Reserved Names List**; and
 - *Part D* (clauses 15 to 16): **Definitions and Interpretation**.
- 1.5 Certain terms in this Policy have defined meanings, indicated with initial capital letters (eg Contestable Level). The definitions are contained in clause 16.

2 When does the direct registration process start?

- 2.1 The direct registration process starts on the Launch Day.
- 2.2 The auDA Board decides what day that is.

3 Basic conditions for direct registration

- 3.1 Anyone can register a domain name at the second level of the Australian domain names space in accordance with this Policy, but only if at the time of registration:
- they qualify under this Policy;
 - they satisfy the Australian connection test in Policy 2019–01;
 - registration of the domain name is not contrary to law;

- the domain name is not restricted (see further, clause 14);
- they pay the registration fee.

3.2 There are no other eligibility and no allocation rules for second level domain names. That is, unlike other name spaces such as com.au or asn.au, registrants do not need to meet specialised criteria for registration of a second level domain name.

Part B: Registration Rules

4 If there is no corresponding domain name at Contestable Level on Launch Day

4.1 If, on the Launch Day, there is no exactly corresponding domain name at a Contestable Level, then any person can register the second level domain name on and from the Launch Day on a first-come-first-served basis (provided they meet the conditions for registration in clause 3).

4.2 auDA will provide a tool to look-up whether there is a domain name at a Contestable Level.

5 If there are one or more corresponding domain names at Contestable Level on Launch Day

5.1 If, on the Launch Day, there are one or more exactly corresponding domain names at a Contestable Level, then:

- the *second* level domain name is locked from registration, and
- the right to register the second level domain name is determined by clauses 6 to 12 and the Schedule.

6 What is the Priority Application Period?

6.1 There is Priority Application Period of 6 months.

6.2 It starts on the Launch Day and ends six months later.

7 If there is one corresponding domain name at Contestable Level on Launch Day

7.1 If there is only one exactly corresponding domain name at a Contestable Level on the Launch Day, then during the Priority Application Period the second level domain is available for registration only by the person holding the domain name at the Contestable Level (provided they meet the conditions for registration in clause 3).

7.2 If that person does not register within that time, then any person can later register that second level name on a first-come-first-served basis (provided they meet the conditions for registration in clause 3).

7.3 In these circumstances, the lock on second level domain name is lifted when either:

- the person holding the domain name at the Contestable Level applies to register the second level domain name during the Priority Application Period; or
- the Priority Application Period expires.

8 Who qualifies as a Priority Applicant?

8.1 A person qualifies as a Priority Applicant if:

- on the Launch Day, they hold an Australian domain name licence for a domain name at a Contestable Level, and

- they *can* show that the licence has been registered continuously since the **Cut-off Date** (4 February 2018), either in their name or in the names of one or more persons in unbroken succession.

9 What is a Token?

- 9.1 During the Priority Application Period (but no later), auDA may, on application, allocate tokens for second level domain names ("**Tokens**"), in accordance with this clause.
- 9.2 auDA may only allocate Tokens to persons who are:
- Priority Applicants; or
 - deemed Priority Applicants under clause 13.
- 9.3 A Token is not needed if clause 7 applies.
- 9.4 A person may only apply for a Token for a second level domain name that corresponds exactly with a domain name they hold at a Contestable Level.
- 9.5 An applicant for a Token must meet the conditions for registration in clause 3 when applying for the Token.
- 9.6 A Token does not give its holder any proprietary rights, whether in the Token or over any domain name.
- 9.7 The auDA Board determines the processes and fees (if any) for allocating Tokens.
- 9.8 A person may apply for a Token for each domain name at a Contestable Level held by that person.
- 9.9 A person must not apply for a Token using a proxy or privacy service or primarily for the purposes of resale. If they do, auDA may cancel the Token in accordance with the Complaints Policy (Policy 2019–3).
- 9.10 A person to whom a Token is allocated:
- is taken to have consented to the allocation being made public; and
 - must ensure that their name and contact details are correct in WHOIS for the domain name on which the Token is based; and
 - must provide a current and correct contact email or telephone number; and
 - is taken to have consented to that contact email or telephone number being made available to every other person who acquires a Token for the same second level domain name.

Example. A Priority Applicant who owns both *myname.com.au* and *myname.net.au* can apply for one Token for *myname.au* on the basis of *myname.com.au* and another Token for *myname.au* on the basis of *myname.net.au*.

10 No dealing with Tokens

- 10.1 The holder of a Token must not deal with the Token in any way (including, without limitation, by transfer, assign, mortgage or lease).
- 10.2 If the domain name licence on which a Token is based is transferred, the Registry Operator will transfer the Token to the new licensee of the underlying domain name.

11 Cancellation and expiry of Tokens

11.1 The holder of a Token may cancel it.

11.2 A Token automatically expires if:

- the *domain* name licence on which the Token is based is not renewed or is cancelled; or
- the holder of the Token ceases to exist (eg, if the holder is a company and is deregistered).

11.3 If a Token is cancelled or expires, the holder relinquishes any priority for registration of the corresponding second level domain name (unless the holder has another Token for the same second level domain name).

12 Schedule resolves completing claims

12.1 The **Schedule** sets out how competing claims to the right to register second level domain names are resolved.

13 Registrations After the Cut-off Date

13.1 Under this clause, a person who is not in fact a Priority Applicant, may take advantage of the Priority Registration Period.

13.2 This occurs where, after the Cut-off Date but before the Launch Day, one or more persons acquire a domain name licence at the Contestable Level, for which there was no exactly corresponding domain name at the Contestable Level at the Cut-off Date.

13.3 That person (if only one), or the first of such persons (if more than one), is treated as having priority registration rights during the Priority Registration Period and clause 7 applies in respect of that person.

Example:

Assume that, at the Cut-off Date (4 February 2018), there was no domain name for johnsmith at a Contestable Level (e.g. no johnsmith.net.au or johnsmith.com.au etc.)

On 5 February 2018, Eric registers johnsmith.net.au.

On 8 February 2018, Frank registers johnsmith.com.au.

On the Launch Day, Eric can immediately register johnsmith.au.

If Eric fails to do so within 6 months after the Launch Date, then anyone (and not just Frank) can do so.

Part C: Reserved Names List

14 Reserved Names List

14.1 The Reserved Names List is set out in Policy 2019-01.

14.2 Names on the Reserved Names List are not available for registration as second level domain names.

14.3 However, paragraph 14.2 does not apply if:

- the name is on the Reserved Names List due to a requirement of law; and
- the applicant meets, and can demonstrate to auDA that they meet all legal requirements for holding the domain name licence.

Part D: Definitions and Interpretation

15 What are the official registries?

- The **Official Registry** for the *edu.au* domain is domainname.edu.au. It is administered by Education Services Australia Limited; and
- The **Official Registry** for the *.gov.au* domain is domainname.gov.au. It is administered by the Digital Transformation Agency.

16 Meaning of defined terms

- **Contestable Level** means:
 - the third *level* of a domain name in the Australian domain name space; or
 - if the *domain* name is registered in the fourth level of the Official Registry for .edu.au or .gov.au (eg health.qld.gov.au) — the fourth level of a domain name in the Australian domain name space.
- **Cut-off Date** means 4 February 2018 (being the date on which the Policy Review Panel began in- person consultation about implementing direct registration).
- **Launch Day** — see clause 2.
- **Priority Applicant** — see clause 7.
- **Priority Application Period** — see clause 6.
- **Reserved Name List** – see clause 14.
- **Token** — see clause 9.

Examples

Examples are illustrative only, and do not control the meaning of the text to which they relate.

Schedule

