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Ms Jo Lim
Chief Operations and Policy Officer
auDA
By email only: jo.lim@auda.org.au

Dear Ms Lim

Response to 2015 Names Policy Panel Issues Paper

I am making this submission in my personal capacity. The views expressed below are not necessarily the views of my law firm (King & Wood Mallesons) or any client on my law firm. As you know, I am a panellist for WIPO, and I decide disputes under auDRP and the UDRP. The views expressed below are not the views of WIPO.

Thank you for the opportunity to address the issues raised in the 2015 Names Policy Panel Issues Paper (**Paper**). I do not address all the issues that are raised in the paper.

Direct registrations under .au

As the Paper has identified, auDA currently enjoys "*a strong international reputation as a comparatively well-regulated and trusted space*". It is important to ensure that this reputation is maintained. Considerable criticism has been directed at ICANN since the new gTLDs were first proposed. Among other things, the necessity of the new gTLDs has been questioned and trade mark law issues have been raised. If direct registrations under .au are allowed, auDA will be susceptible to similar criticisms. As such, well articulated and sensible policy rationales for direct registration, and a clear and fair implementation process which captures those rationales, are essential.

I am of the view that .au should only be opened to direct registrations if: (a) this will level the playing field for legitimate potential registrants who have been unable to secure other domain name registrations, and (b) the rights of trade mark owners are adequately protected.

I address the specific questions raised in the Paper below.

Do the new gTLDs pose a threat to the .au brand?

The Paper states that: "*It is suggested that unprecedented competition from new gTLDs requires .au to be more responsive to global market forces.*" Possibly, this overstates the significance of the new gTLDs as competitors with the .au brand. The new gTLDs were introduced to, among other things, increase competition with the powerful .com domain, not with ccTLDs. Another stated objective of the new gTLDs was the creation of niche markets (for example, .music for recording artists and online music sellers). Allowing direct registrations under .au will not necessarily serve to create discrete markets.

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Is there evidence of any market demand for direct registrations?

I am not aware of any evidence of market demand for direct registrations under .au.

What types of registrants/users would benefit from direct registrations?

This is an important question. The answer depends on how the direct registrations would be implemented.

Legitimate potential registrants who have been unable to secure other domain name registrations in the .au space would benefit if the registrations were on a "first come, first served" basis. These potential registrants would only benefit if there were no automatic reservations for existing domain name holders, or any other preferential treatment of existing domain name holders.

By way of example, the dingo.com.au domain name is legitimately owned and used by Dingo Australia, a company that makes small digging machines. Australian software company Dingo Software Pty Ltd has been unable to obtain an Australian domain name registration for "dingo", despite owning an Australian trade mark registration for "DINGO". It would provide no benefit if Dingo Australia was given preferential treatment in relation to the registration of the dingo.au domain name.

As another example, my law firm, King & Wood Mallesons, is a legitimate organisation that has been unable to secure a .com.au registration for <kwm.com.au> because it is registered by another legitimate organisation, KWM Financial Consultants. As a result, my email address is a contorted @au.kwm.com.

If the .uk or .nz implementation model was adopted, the current .com.au registrants would be offered direct registrations at first instance. In most cases, one would expect that these historical registrants would take up this offer. Legitimate potential registrants, including individuals, would have no advantage under such a model.

The Paper identifies that individuals are not well served under the current regime, as they are only able to register in the relatively unpopular .id.au domain. The "first come, first served" approach outlined above would also advantage these individuals (provided that direct registrations were made available to individuals).

One would question the need for direct registrations if the implementation of the system results in a mirror the existing domain space, thus causing existing registrants additional costs without benefit, and without providing opportunities for legitimate potential registrants who have missed out under the current system.

There is an argument that brand owners will be advantaged by direct registrations, through the availability of greater options for targeting consumers. However, this greater availability also means more opportunities for cybersquatters. This issue has been prevalent in the roll-out of the new gTLDs. Many trade mark owners have invested substantial resources in defensive registrations (perhaps most famously, Taylor Swift in the .porn domain).

What policy rules should apply to direct registrations?

I am of the view that direct registrations under .au should have a local presence requirement. This is in line with the requirements of most ccTLDs.

As is contemplated by the Paper, I agree that the policy should provide that direct registrations cannot be used to operate private or closed second-level domains. How this will operate in practice, and where a line can be drawn between what is permissible here (e.g., selling sub-domains to employees, customers, club members, franchisees, etc) and what is not, will be a difficult task.

As discussed above, the registrations should be on a "first come, first served" basis. However, if it is the case that the current average number of domains per customer is 1.6 (see paragraph 4.6 of the Paper), it would appear that the is little demand in the community for a system that allows one registrant to own a very large number of domains. Thus, consideration should be given to limiting the number of direct registrations per registrant, to provide the opportunity for more businesses and people to obtain registration of their most desired domain. It would not necessarily benefit the Australian community to have few register most.

What issues would need to be taken into account as part of the implementation process?

Consideration of potential implementation mechanisms for opening up .au to direct registrations is outside the scope of the Paper. At a high level, the following would need to be considered: the application process (including whether there would be a registration stage), cost of registrations, the process for resolving trade mark issues and the dispute resolution procedure (presumably the auDRP).

It would be desirable to provide low cost registration options.

Should .au follow the example of other ccTLDs like .uk and .nz?

My view is that the aim of direct registrations should be to level the playing field for legitimate potential registrants, while protecting the rights of trade mark holders. For the reasons set out above, if the .uk or .nz models are followed, this will **not** be achieved.

2LD eligibility and allocation policy rules

In my view, the “close and substantial connection” rule provides little benefit, is open to various interpretations, and can be applied inconsistently (and possibly vindictively). Decisions made by auDA in respect of this requirement are not published, and accordingly, are not transparent.

It is also unclear how the “close and substantial connection” rule interacts with the auDRP. There appears to be varying views as to the impact of this eligibility requirement in respect of the second and third elements of the auDRP.

In my option, the “close and substantial connection” rule should be abolished.

Eligibility criteria in relation to.org.au

I understand that auDA is currently undertaking an audit of the .org.au domain space, due to an increase in the number of complaints received about ineligible entities registering in this space. These ineligible registrations could be avoided in the future by amendments to the Policy and the relevant guidelines.

Currently, eligible non-commercial organisations include “sporting or special interest clubs operating in Australia” (Schedule F, paragraph 1(d) of the Policy). The relevant guidelines provide that such clubs are required to warrant that they are a club (if they do not have an Australia Business Number). In practice, it appears that auDA can requires further information in addition to a warranty (for example, details of the club's formation, its location, a member list and meeting minutes).

A registration based on a warranty is inconsistent with paragraphs 5.1 and 5.2 of the guidelines, which state that domain name registrants have to be legal entities and provide what appears to be an exclusive list of “legal entities” (being a registered company (proprietary or public), an individual, an incorporated association and a statutory body). This does not appear to allow for the registration of an unincorporated special interest club based on a warranty.

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I suggest that the Policy and guidelines (as applicable) be amended to clarify that “sporting or special interest clubs” are legal entities for the purposes of registration and outlining what, if any, supporting information must be provided to support a club's warranty, if so requested by auDA.

Thank you for the opportunity to respond to the issues raised in the Paper and hope that my comments will be helpful moving forward.

Yours sincerely

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