Via Email: policy.review@auDA.org.au

April 9, 2019

Policy Review Panel
c/o .au Domain Administration Ltd.
PO Box 18315
MELBOURNE VIC 3001

Dear Mesdames and Messieurs:

Re: Final Report: Recommendations to the auDA Board: Reform of Existing Policies & Implementation of Direct Registration

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I write to you on behalf of the Internet Commerce Association. Founded in 2006, the Internet Commerce Association (the "ICA") is a non-profit trade organization headquartered in Washington, D.C.

We represent the thriving industry that has developed around the independent value of domain names in this Internet Age, including domain name investors, domain name secondary marketplaces, domain name brokers, escrow service companies, registries, and related service providers. Our members are individuals and businesses located all over the world, including Australia.

The ICA's mission is to assist with the development of domain name related policy, particularly as it relates to supporting, encouraging, and maintaining a viable domain name ecosystem where investment in domain names is respected. Our Comments herein are summarized as follows:

1. auDA should reconsider its approach to domain name investing and should embrace it as a beneficial and important part of the domain name ecosystem;

2. The Panel has found solutions in search of a problem;

3. The Panel has not engaged in evidence-based policy making;

4. Rather than clarifying the policies, the Panel has merely created equally or more unclear policies which are impossible and costly to effectively enforce.

Investment Naturally Exists in Every Marketplace

Although we recognize that auDA's policies have historically acted to discourage rather than welcome domain name investing, we believe that auDA should be aware that there are nevertheless many good reasons for auDA to reconsider its approach to domain name investing.

Whether in land, a catalogue of Beatles songs, or domain names, investing in assets is a natural by-product of a free and open market. Domain registrants use and risk their own money to lawfully purchase generic and descriptive domain names on a first-come, first-served basis and from prior owners and should have the right to do so. Domain name investors range from an at-home mom making a casual investment in a handful of names to professional domain name investors who spend substantial money and efforts on building a portfolio and marketing it to the public. Such business activities involving domain names are entirely legal, expected, and natural. Indeed, Australia is the only country that we are aware of that has such restrictive policies when it comes to domain names. As part of auDA's examination of policy changes pertaining to domain name investing, we would have expected that the experiences of other countries such as the UK, Canada, United States, and New Zealand would have been examined and considered. In each of these aforementioned countries, domain investing contributes positively to the overall domain name ecosystem and helps ensure the success and viability of the registry.

Domain name investors risk their own capital to register or purchase a domain name with no guarantee that they will ever see a return on that investment. Domain investors compete with thousands of other market participants, seeking out desirable domains, and bidding against each other at auctions where the price is set by the market through the combined actions of thousands of participants. Many domain name investors lose money on their acquisitions, as they find that they have overpaid to acquire domain names that others do not regard as an attractive investment or which others do not want.

Investing in valuable generic and descriptive domain names is comparable to investing in vacant real estate. Both investments are made on the basis of an expectation that there will be an appreciation in value upon resale. A businessperson who wishes to open a beachfront café in Sydney would expect that land to be already owned. Similarly, it should not come as any surprise that a valuable domain name already has a registered owner, whether it be a professional domain name investor or another kind of business, and that the owner is prepared to sell it at a market-determined price.

Domain Name Investors Offer a Valuable Service by Providing Liquidity to an Illiquid Market

Domain names are notoriously illiquid investments. The holding period of domain names held by domain name investors can stretch into decades. Yet if an individual or a company wishes to immediately sell a domain name, it is the investor who steps up to provide a ready market and liquidity. If, for instance, a retiring couple who used a valuable generic domain name for their business and now wished to sell it since it was no longer needed has trouble finding an interested end-user buyer, domain name investors will often step in, bid against each other for the right to acquire the domain name, and thereby create a liquid market enabling the couple to quickly convert their domain name into cash. When Yahoo! wished to sell its contests.com domain name, it was put up for auction at a domain investor conference where the winning bidder paid $380,000. Domain name investors allow domain name owners to readily obtain cash for domain names that they no longer need, or may otherwise wish to sell.

Domain Name Pricing and Availability Would be Little Different Even in the Imagined Absence of Domain Name Investors

Domain name investors do not set the market value of aftermarket domain names nor do they determine which domain names are desirable — the operation of a competitive marketplace does. Prices and desirability are dictated by the market. If the asking price is set too high, a buyer can choose from a variety of similar domain names available at a range of prices. If a domain name is desirable, it would have been registered long ago even in the absence of domain name investment. Even if professional domain name investors vanished, high-quality domain names would not be sitting unregistered and the owners of these domain names would seek the market value for them.

Based on our familiarity with domain name investors, our view is that the likely impact on the .au name space due to the activities of domain name investors, is that a quasi-scarcity of marginally valuable domain names may result from domain name investors registering these domain names in bulk. The bulk registration of marginal domain names is often a triumph of hope over experience, as it is rarely profitable for the domain investor.[1] The reason is in part that for the possible end-user buyer there is almost always a comparable domain name sitting unregistered, such that the domain investor has no pricing power and finds it challenging to sell the desired domain name at a price that compensates for building the domain name portfolio and for the time value of the money invested. The primary beneficiary of the optimism of domain investors who register in bulk domain names that would otherwise sit unregistered is auDA itself. auDA likely receives millions of dollars in revenues from such registrations and renewals. From a public policy perspective, the question arises as to what harm is caused by the optimism that results in the bulk registration of otherwise unregistered domains when balanced with all the worthwhile initiatives that auDA could fund with the revenues from such registrations and renewals.

Accordingly, we believe that contrary to the apparent assumption embedded in auDA's current policies and especially in the new proposed policies, there are good and important policy reasons for taking a different course entirely, and instead welcoming domain name investors to the

[1] See https://moz.com/blog/is-buying-domain-names-profitable

Australian namespace. This would increase value amongst existing registrants, make Australia an attractive market for investors, increase liquidity for registrants including individuals and business who wish to divest of their valuable domain names, and ultimately increase the overall attractiveness and value of Australian domain names.

Non-Evidence Based Policy Making; A Solution in Search of a Problem

Notwithstanding these good and important policy reasons for welcoming domain name investment, we recognize that auDA currently discourages domain name investment with its current policy which prohibits registration "for the sole purpose of resale or transfer". This auDA's policy has to-date, permitted some licensees to nevertheless register domain names and resell them in full compliance with existing auDA policy.

The Panel however stated in the Final Report, that "on balance" it "believes that the resale and warehousing prohibition should be retained and strengthened". From our review of the Final Report however, it is entirely uncertain and undocumented as to what extent there is any genuine "problem" existing in the Australian namespace arising from the current rules as drafted, rather than an assumption by the Panel.

We note that for example, the Panel commissioned two reports to assist it with its fact-finding mission namely the Consumer Sentiment report, prepared by Omnipoli, and the Economic Impact Assessment, prepared by ACIL Allen Consulting. These aforementioned two reports were obviously crucial for the Panel in making determinations in its Final Report on other issues. Actual data-gathering and evidence-based policy making is, of course, crucial to developing sound policy, and surely a major change to the eligibility requirements warrant studies and surveys as much as other important changes to auDA policies that the Panel considered.

Instead, however, it appears that the Panel made an assumption that there was a problem with the existing rule based upon possibly anecdotal evidence alone, without any solid evidentiary basis. For example, how many domain names have been registered for resale or have actually been resold? Is there any evidence of "warehousing" of domain names at all? If the proposed new rules were not retrospective, how many domain names would be affected? Are we talking about a virtual handful of domain names or a widespread practice? What actual and tangible effect has this had on the namespace to-date? Is resale a net benefit or net detriment to the namespace? What would the economic impact be on the registry if everyone ceased registering domain names for resale? Would the proposed draft rule have any effect on the number of registrations or the namespace or would it be negligible? How many people are for or against the resale of domain names based upon actual survey evidence? What policy arguments exist in favour of permitting resale? What is the experience in other ccTLD registries, such as Canada, where there is no prohibition whatsoever on registering a domain name for the sole purpose of resale?

These questions are not mere curiosities, as the Panel may very well be proposing a severe policy change that could have an unintended negative effect on the registry as a whole. If, for example, this policy change resulted in hundreds of thousands of domain names being dropped, it would have a significant impact on the registry's revenues, the value of domain names already licensed to registrants, and also possibly cause hardship to registrars and the registry manager.

Alternatively, if this proposed policy change would have no or little impact at all, then there could be little point in changing the policy at all.

We therefore believe that it would have been prudent for the Panel to have engaged in data gathering when it comes to any assessment as to whether the current rule should be strengthened or eliminated. Otherwise, it appears that at best the Panel has possibly found a solution in search of a problem, and at worst has proposed policy without any satisfactory evidence or data, thereby risking significant unintended and uninvestigated consequences for the registry.

Replacing One Ineffective Rule with Another One

The Panel has proposed a policy change which it apparently believes will "strengthen" the existing rule. The Panel opined that the current rule was "unenforced" because it was; a) "use[s] general terms that are open to various interpretations"; b) "it is difficult to demonstrate that the domain name has been registered for the sole purpose of resale"; and c) "a sophisticated domain name speculator can easily create computer-generated webpages" and thereby "assert that the domain name was registered is for actual "use" and not "resale". Accordingly, the Panel proposed a new rule which ostensibly would avoid the aforementioned obstacles that purportedly arise from the current rule. The problem, however, is that the Panel has not made things clearer or more enforceable, but rather has created a new rule which shares all of the same characteristics as the current rule.

For example, the Panel proposed new wording which prohibits registration when the "primary purpose is resale, transfer to another entity, or warehousing". What the Panel did here, was essentially propose changing the words "sole purpose" to "primary purpose", ostensibly because that clears upon any confusion as to what the required threshold is. In our respectful view, this does nothing of the sort, and merely continues the vagaries of the current rule. Indeed, "primary purpose" may actually be a more uncertain term than "sole purpose". For example, a registrant may register a domain name for several purposes, and resale is but one of them, making it not the "primary purpose".

The Panel however must have appreciated that its proposed new rule would inevitably lead to uncertainty as well, so it ostensibly proposed some "indicators" which could be used to help determine what the "primary purpose" of the registration was.

For example, the Panel proposed that if a registrant or an entity associated with the registrant has licenses for more than 100 Australian domain names, that could mean that the "primary purpose" was for resale, warehousing, or transfer. Such an "indicator" would likely result in registrants intent on avoiding this indicator, merely establishing another legal registrant to hold domains so as to avoid the 100 domain rule. Ostensibly, then auDA would need to investigate related entities in order to connect the dots, and even if it did so, could be met with the defense that resale, warehousing, or transfer, were not the "primary purpose" but merely one of many purposes for the registration.

The Panel also proposed as an indicator whether the domain name in question resolves to a website that is "primarily computer generated". Any registrant intent on avoiding this purported

indicator would likely not rely upon computer generation or would mix it with non-computer generation so as to avoid this indicator. The question then would become what constitutes "primarily" computer generated material, and ostensibly an auDA compliance officer would be required to investigate this and draw some conclusions based upon evidence submitted by the registrant and possibly by an outside expert.

The Panel also proposed that if a domain name was advertised or listed for sale or auction along with other domain names belonging to the registrant, that would be an indicator that the "primary purpose" was resale, transfer, or warehousing. This ostensible presumptive indicator would however, not alone be determinative of the "primary purpose", as again, there may be other equal or more important purposes besides the resale, transfer, or warehousing. Moreover, commonly domain names are listed for possible sale not by the registrant itself, but by third parties without authorization, such as is commonly the case with many registrars who consistently advertise that a particular domain name may be for sale. Similarly, the Panel's other purported indicator, of soliciting a sale, would likely result in bona fide and lawful registrants fearing any attempt to sell their domain name thereby unfairly restricting their ability to sell their domain name, or even registrants facing malicious or misguided complaints by prospective purchasers who attempt to use solicitations to get coveted domain names for free. Lastly, the supposed indicator of offering a domain name for sale for more than "documented out of pocket costs directly related to the domain name" is entirely unclear and exceedingly difficult to police, as; a) this would not necessarily prevent someone reselling a domain name for the substantial sum that the registrant had originally paid for it; and b) there is no way of knowing in advance, which domain names are being offered for more than they were purchased for, therefore potentially opening up the floodgates to innumerable challenges to every domain name offered for sale, everywhere. This will have the effect of depreciating the value of all domain names and prejudicing bona fide registrants who have complied with all existing policies.

The last purported indicator proposed by the Panel for determining the "primary purpose" of the registration is whether more than six domain names were sold or transferred during the previous six months except in relation to a business. What constitutes a business? Who investigates how many domain names were sold or transferred by a registrant? How does the registrant prove that the domain names were transferred for a bona fide reason?

Accordingly, not only is "primary purpose" as unclear or more unclear than "sole purpose", but the purported indicators make things even more unclear, and crucially, incredibly burdensome not only on the registrant who bears the ostensible onus of disproving the allegation of "primary purpose", but in auDA itself. Has the Panel turned its mind to the potentially impractical burden on auDA to enforce compliance under the new proposed rule? Has the Panel made any assessment of the potentially substantial additional costs of investigation and conducting fair hearings when a registration is impugned? Is a tribunal going to be established along with rules of procedure and evidence? What safeguards will be in place to prevent malicious actors from foisting an investigation onto an innocent registrant based merely on a complaint to auDA about a particular domain name?

One of the biggest questions arising from the proposed rule, is what happens to existing registrants? Grandfathering only until the end of the current registrant period would be an

egregious change to the existing registrants who relied upon the current rule and would certainly be aggrieved and possibly have legal recourse. The damage and upheaval caused by such an ill-advised action would be severe. First, law abiding Australians who investing their hard-earned money and in some cases their life savings in domain names in compliance with all existing auDA policies, stand to lose their entire investment as their domains are cancelled pursuant to the proposed new policies. Young people, families, students, retirees, and business people who legitimately purchased domain names will be struck an egregious blow should such policies be enacted.

We have been advised by a director of multiple Australian companies that due to the proposed policies that he may be forced to resign as a director of these companies lest his association with these companies, whose combined domain registrations total in excess of 100 domains, make all the domains owned by these companies eligible for deletion. Moreover, should a couple of companies with which a director is associated, dispose of six or more domain names in a given six month period, that could apparently put at risk every domain registered to any company for which he is a director. This is but one identified unintended collateral harm of an overly broadly written policy. One can expect many more such unintended negative repercussions to be revealed if the policies are put into place, which would result in a spotlight shining on the auDA's role in disrupting legitimate business activities.

Ultimately, the Panel's efforts to clear up the language has resulted in more questions, more issues, more costs, and less clarity, thereby begging the question of precisely what is being accomplished with this new proposed rule? Is it causing more harm than good and is it even necessary?

Domain Monetisation

Domain Monetisation is permitted under the current rules, and again, there is no apparent actual evidence presented in the Final Report beyond anecdotal evidence, such as evidence upon formal study or investigation which would have shed light on whether monetisation is even an issue worth revisiting again. Is this such a widespread problem that it needs to be addressed or is this merely another solution in search of a problem? Moreover, if the new proposed policy is to be grandfathered indefinitely, would it make any appreciable difference on the number of domain names being monetized? And if it is not to be grandfathered or grandfathered only until the end of the current registration term, would the aggrieved existing registrants have legal recourse arising from the new policy?

The existing policy makes some sense, as if monetized domain names are specifically related to the subject matter of the domain name, there is little reason to prohibit them as they provide bona fide advertising related to key words that the visitor is looking for. Indeed, in the United States, UK, Canada, and New Zealand, monetisation is permitted with no significant adverse consequences and with numerous benefits. Advertising on the Internet, including via monetised domain names is a substantial business the world over and advertisers pay for the service because it works, resulting in sales for the advertiser. Domain name owners who provide the service to advertisers are engaging in what is a lawful and beneficial business.

Moreover, the revenue derived from such monetisation indirectly goes to auDA. Registrants who use a domain name for advertising receive some compensation which assists them in paying for the renewal. If this funding was eradicated it would likely lead to fewer renewals and therefore less revenue for auDA and for registrars and the registry operator. Even registrars rely upon monetisation as a revenue stream for unused registered domain names. Accordingly, any discussion about further restricting or eliminating monetisation as a bona fide use of a domain name should only occur once the economic effects have been studied, and this has simply not been done. Accordingly, the Panel's recommendations may result in serious and unintended consequences for the domain name ecosystem and namespace.

In any event, the proposed new policy is again so vague and unjustifiable that it appears unfit even for the purposes for which it was intended. The Panel proposes that an online directory or online information service ought not to be "primarily computer generated". If the website has custom graphics and some custom text along with advertisements selected by Google based upon the visitor's interests, is that prohibited because it is computer generated, or is that not sufficiently computer generated? And what tests should be applied to determine if the content is closely enough related to the domain name? What about a generic term such as "red"? Must every advertisement be related to something red? With such complications and issues it would seem to make more sense to simply allow the current rule to continue rather than attempt to create even more restrictions on monetisation. Even the Panel itself notes that further work and consultation may be required when it comes to monetisation and accordingly, this should be taken as a clear indication that the proposed policy change may be unworkable, impractical, or unwarranted in the circumstances.

Panel's Proposal on Direct Registration Is Unfair to Registrants

Our first concern is the definition of "Contestable Level" as it unnecessarily edu.au and .gov.au, when in our view it makes more practical sense to only enable .net and .com registrants to contest a direct registration so as not to compel educational and governmental institutions to participate in the contest. Moreover, confusion within the namespace will only increase if governmental and educational instiitutions commence using a .au domain name instead of their well-identified and distinctive current suffixes.

Furthermore, the Panel proposed that after a six month "priority period", anyone can register an SLD on a 'first come first served basis'. What this means in effect, is that existing registrants will be compelled to register the corresponding SLD at their expense or face a new entrant who will undoubtedly create confusion with the SLD registration. Moreover, once this confusion is sowed, the confusion will remain entrenched in relation to that particular domain name indefinitely into the future, even when the registrants change. This clearly prejudices existing registrants and devalues their domain names and the Australian namespace overall. In other countries where SLD's were released, it was significantly earlier on. For example, in Canada SLD's were released in 2000, in the UK in 2014, and in New Zealand in 2013. From the report, it doesn't appear that the experience in these other countries has been adequately examined in order to see what effects and issues would arise from a release of SLD's at this time under the proposed procedure.

In the view of many registrants, they registered their domain names on the basis and understanding that auDA would not create untold opportunities for confusion in connection with their existing licenses, and accordingly we strongly object to the introduction of SLD registration under the proposed procedures. All existing registrants should be entitled to at their option, either decide to not register and be able to prevent the registration of their corresponding SLD domain name, or at any time choose to register it.

In conclusion, our familiarity with the global domain industry counsels an approach that recognizes domain investing as a vital and welcome part of the Internet economy. Domain investors should respect intellectual property rights, and Australia already has appropriate rights protection mechanisms in place. The attempt to stamp out domain investing will create a multitude of unintended collateral harms. The effort will either be ineffective or will entrap those who are not primarily domain investors in an overly broad net. The supposed harms the policy is attempting to address are largely illusory while the actual harm created by the proposed policies, if enacted, will be deep and widespread.

Yours truly,
INTERNET COMMERCE ASSOCIATION

Per:
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