

13 December 2006

Don Williams
.au Review Discussion Paper Submissions
Department of Communications, Information Technology and the Arts
GPO Box 2154
CANBERRA ACT 2601

Dear Mr Williams

The ACCC welcomes the opportunity to submit its views on the Department of Communications, Information Technology and the Arts' discussion paper regarding the structural model for, and administration of, the .au Internet domain.

The ACCC notes the .au Domain Administration's role as both the administrator for the .au country code Top Level Domain and authority for development of policies for the domain and its associated second level domains.

The ACCC acknowledges the ongoing assistance that auDA has provided in ensuring the ACCC is able to carry out its regulatory functions.

A brief summary of enforcement actions the ACCC has undertaken with relation to Internet domain names follows at the end of this document (at Attachment A). I also refer to the ACCC's advice to business 'Domain name renewal/registrations—don't get caught' which is available via free download from the ACCC's website www.accc.gov.au.

The ACCC makes the following comments in its capacity in administering the *Trade Practices Act 1974* (the Act). It should also be noted that the ACCC may further consider the issues of industry structure, pricing efficiency and secondary markets, and provide input direct to auDA as part of its planned policy review.

Yours sincerely

Mark Pearson
Executive General Manager
Enforcement and Compliance

Australian Competition and Consumer Commission
Submission to the review of the structure and operation
of the .au Internet domain

Administrative structure of .au

3.1 .au administration

3a In the broadest context, is the ‘domain operator/registry/registrar/reseller’ model the most appropriate for .au in delivering the most efficient and effective administrative structures? —If not, what structural changes could provide greater efficiencies?

To date the ACCC has not received any significant number of complaints regarding the structure of the .au domain name system as described in point 3.1.

However, the ACCC has received complaints regarding ‘domain name facilitators’ that appear to operate outside the domain operator/registry/registrar/reseller model. Such facilitators may not be bound by the same policies, codes of practice and contractual arrangements applicable to traders that do.

Moreover, it should be noted that the registry function has monopoly characteristics that may result in sub-optimal industry outcomes.

These may be aspects of the industry that require further consideration.

3.3 auDA subsidiaries

3c Noting auDA’s not-for-profit nature, are subsidiary trusts such as the auDA Foundation and auCD the most appropriate mechanisms by which to manage and distribute significant revenue streams?

Subject to comments on pricing efficiency, the ACCC does not have any comment on this aspect of the discussion paper.

3.5 auDA Constitution

3f Do auDA’s principal purposes and activities, as codified in the auDA Constitution, fully reflect the needs of the Australian Internet community, and position auDA to best deliver on these needs?

3g How effective has auDA been in achieving these principle purposes?

3h Does the role defined for auDA reflect the expectations Internet users have for the manager of a ccTLD?

The ACCC acknowledges the ongoing relationship it has with auDA. This ongoing relationship is considered by the ACCC to be important in facilitating the objectives of the *Trade Practices Act 1974* within the .au domain name space.

3.6 Transparency and timeliness

3i Are current processes and procedures for the operation of .au sufficiently open and transparent and do they provide for timely, relevant outputs? —If not, what operational changes could help improve openness and transparency?

The ACCC notes that auDA provides relevant documents on its website for viewing and download.

The ACCC also notes that auDA regularly and consistently provides the opportunity for public review of its policies and that auDA has a complaints handling process in place.

3.7 Government role and reserve powers

3j Is the current role of the Australian Government in the administration of .au appropriate e.g. acting as an observer on the auDA board and holding reserve powers under legislation? —Alternatively, what role would you like to see the Australian Government assume in relation to .au?

The ACCC considers that existing legislation provides adequate safeguards for users and providers of domain name services. To date, there have not been any circumstances that have prompted the ACCC to invoke its powers under the *Telecommunications Act 1997*.

3.9 Security and Stability

3m Are there general comments or observations you would like to make regarding the security and stability of the domain name system in Australia?

The ACCC notes that the security and stability of the .au domain name space and its place in e-commerce contributes to the increasing commercial and social importance of the Internet.

The ACCC acknowledges auDA's role in maintaining the security and stability of the .au domain name space.

DNS structure in .au

4.2 Naming structures in other ccTLDs

4a Do you believe auDA's management of the current naming structure for .au has delivered maximum benefit to Australian Internet users? —Please provide reasons for your comments.

4b Is auDA's process for introducing new 2LDs appropriate? —Please provide reasons for your comments.

4c What do you believe would be the benefits and drawbacks of introducing registrations directly at the top level—e.g. *www.dcita.au*?

4d Similarly, what do you believe would be the benefits and drawbacks of introducing more 2LDs?

The ACCC notes that the structure of the DNS hierarchy has significant impact on the ability to satisfy demand for domain names. The larger the number of 2LDs, the easier it is for registrants to register a name with which they have a close association. Conversely, a flatter structure that allows names to be registered in the ccTLD may have the effect of constraining the number of names that are available to registrants. Such constraint may directly impact the number of disputes over particular names.

It may be appropriate for this issue to be considered in view of the level of competing demand for domain names.

Policy development and enforcement

5.2 Policy reviews

5c As with the policy development process, are these mechanisms appropriate, taking into account the changing Internet environment and needs of stakeholders? —If not, in what ways could these policy mechanisms be improved?

5d Should all auDA policies have formal review periods?

The ACCC does not consider it appropriate to comment specifically on auDA's policy development other than to note that it is preferable that policy development be consistent and in keeping with current accepted policy procedures, including taking account of competition and consumer protection policy and legislation.

5.3 Policy enforcement

5e Are the current policy enforcement mechanisms appropriate, and are they consistently enforced?

The ACCC notes the comment that auDA works collaboratively with the ACCC. The ACCC would also add that this collaboration follows current accepted laws and practices for information sharing.

The ACCC also acknowledges auDA's ongoing contribution and timely responses.

The comments made at Point 3.1 regarding 'domain name facilitators' should also be noted here.

Domain names policies

6.1 Competition

6a Have measures to introduce competition in the .au space been successful?

6b Does the current structure ensure a competitive market and the best value for consumers? —If not, what further mechanisms could be introduced to increase competition?

The ACCC has not received significant numbers of complaints about competition in the .au domain. However, as noted above, the registry function exhibits monopoly

characteristics which may allow the registry operator greater than normal profits. It may also be that subsequent tenders for the registry operator are influenced by strong first mover advantages accruing to the incumbent, thereby potentially reinforcing any existing market power and foreclosing opportunities for competitive entry.

6.2 Consumer protection

6c Are the rights of domain name consumers sufficiently protected by current mechanisms? —If not, what further measures could be taken?

As previously noted in the response to item 3.1 the ACCC has received complaints regarding ‘domain name facilitators’ that appear to operate outside the domain operator/registry/registrar/reseller model. Such facilitators may not be bound by the same policies, codes of practice and contractual arrangements that apply to traders that do.

This may be an aspect of the industry that requires further consideration.

6.3 Dispute resolution

6d Are the current mechanisms for dispute resolution efficient and effective? —If not, what alternative measures could be implemented?

The ACCC supports the development and introduction of alternative dispute resolution mechanisms that are consistent with local and international developments.

6.4 Pricing efficiency

6e Given auDA’s policy oversight responsibilities, operational expenses and ongoing commitment to reducing wholesale domain name costs as efficiencies are realised, do you believe the current structure delivers maximum pricing efficiency to Australian Internet users? —If not, what changes could be considered?

6f Given auDA’s functions and related operational expenses, do you consider that the current \$4.95 auDA domain name fee is appropriate?

6g Following the introduction of competition to the .au space, do you consider that the average retail fee of .au domain names is appropriate?

In the absence of legislated responsibility to set wholesale prices, the ACCC does not consider it appropriate for auDA or any other body to set the prices to be charged by service providers in domain name markets, or otherwise unnecessarily influence the pricing decisions of firms in the .au domain name industry.

The ACCC makes no comment on the level of fees nor on the current pricing structure. These are decisions more appropriately left to the market participants.

6.5 Domain name eligibility and allocation

6h Are the current mechanisms for the development of eligibility and allocation rules for the .au domain appropriate, responsive and open to input from stakeholders?

6i Is there any evidence that current policies restrict business opportunities for stakeholders in the domain name marketplace? —Is this restriction positive, or negative?

6j Could a relaxation of these rules facilitate meaningful growth in .au, or could it lead to inappropriate name registration and hoarding practices?

The ACCC does not have any comments about eligibility and allocation policies but notes that the question of rights of use of domain names is not specifically considered by the discussion paper.

This is an issue that auDA may wish to consider separately.

6.6 Secondary markets

6k Does the current prohibition on the resale of domain names best serve the Australian Internet community, or do the benefits of a relaxed policy regime outweigh potential impacts upon registrants and registry operators?

6l Is there a need for affirmative action in facilitating and developing secondary markets, or will it occur naturally?

6m If a secondary market were introduced for .au domain names, what would be the most appropriate framework through which it could be regulated?

The ACCC notes that the introduction of a secondary market(s) for .au domain names could only occur after revision of all eligibility and allocation policies. Moreover, it is likely that such a review would require a review of auDA's objectives for the .au domain.

At a broader level, the ACCC notes the advantages and disadvantages of such an outcome outlined in the discussion paper. The ACCC also considers that the question is closely related to the rights of use issue (see comments in response to 6.5). If registrants are to have any rights in a domain name, either through a close association with that name or through pre-existing use, then the introduction of secondary markets is likely to increase the difficulty and cost of registering that name. It may be that such an increase in cost will detract from certainty that users have in their ability to register/retain their chosen domain name. Lack of certainty may adversely affect confidence in the DNS, in electronic commerce, in the development of content, and therefore in the Internet as a whole.

6.7 Education and awareness

6n Is there a need for increasing the general community's awareness of the mechanisms that operate in the administration of au?

6o Who should be responsible for funding awareness raising and education efforts?

6p Given that registrars and resellers are the primary point of contact for consumers, are their advertising campaigns sufficient in promoting .au?

The ACCC receives numerous complaints regarding domain name issues, for example those regarding unsolicited mailouts advertising domain name registrations.

Discussion with complainants has indicated that there is a lack of understanding of the domain name system by some registrants, for example, not all understand that the various domain name levels are not interchangeable i.e. '.com.au' is not the same as '.com'.

This lack of understanding appears to be due to a number of factors including isolation and lack of time, rather than a lack of available information.

Introduction of secondary markets for the supply of domain names is also likely to impact on the need for and cost of public awareness campaigns.

COM. AU. REGISTER

In 2001 the ACCC began proceedings in the Federal Court against COM.AU.REGISTER. The ACCC alleged, amongst other things, that the COM.AU.REGISTER sent businesses and organisations a facsimile that was likely to mislead recipients into believing that COM.AU.REGISTER was responsible for registering Internet domain names where it did not and could not provide that service.

The Federal Court declared that conduct by Mr Stephen Henry Wayt, the proprietor of COM.AU.REGISTER breached the fair trading provisions of the *Trade Practices Act 1974*. Mr Wayt consented to court orders which required him to send corrective facsimiles and display a corrective notice on the COM.AU.REGISTER Internet site.

Internet Name Protection Pty Ltd (Internet Name Group or 'ING')

In 2002 the ACCC began proceedings in the Federal Court against Internet Name Protection (formerly trading as Internet Name Group or ING) and its directors Mr Sasha Sudakov and Mr Mark Spektor alleging, amongst other things, that the company had breached the *Trade Practices Act 1974* by sending out unsolicited invoices to small businesses seeking payment for domain name services including the registration and renewal of domain names.

The Federal Court made orders by consent against Internet Name Protection and its directors which include injunctions restraining them from engaging in conduct that is misleading or deceptive, or is likely to mislead or deceive, in connection with Internet domain names.

Domain Names Australia Pty Ltd

In 2003 the ACCC began proceedings in the Federal Court against Domain Names Australia and its sole director, Mr Chesley Paul Rafferty alleging, amongst other things, that the company had breached the *Trade Practices Act 1974* by sending out misleading or deceptive notices inviting the recipient to register a particular internet domain name. In many cases the name referred to in the notice was similar to the recipient's existing internet domain name.

The Federal Court found that Domain Names Australia breached the Act and made orders restraining the company and Mr Rafferty for a three year period from engaging in future offending conduct of this nature.

Internet Registrations Australia Pty Ltd

In 2002 the ACCC began proceedings in the Federal Court against Internet Registrations Australia after receiving consumer complaints and inquiries about unsolicited domain name 'renewal advice' notices which looked like invoices for payment.

The ACCC accepted court enforceable undertakings by Internet Registrations Australia to provide refunds to consumers, and the Federal Court made orders against Internet Registrations Australia for making false or misleading representations regarding registration and renewal of Internet domain names.