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# Names Policy Panel paves the way for a secondary domain name market

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The Board of .au Domain Administration Ltd (**auDA**), the body responsible for administering the .au domain space, has accepted the final recommendations of the 2007 Names Policy Panel (the **Panel**). The Panel was established by the auDA Board in February 2007 to review the .au policy framework and provide recommendations about changes to the framework.

The Panel considered three issues:

- whether the .au domain space should be opened up to direct registrations (e.g. domainname.au);
- whether the policy rules for certain second level domains (**2LDs**), namely **asn.au**, **com.au**, **id.au**, **net.au** and **org.au**, should be changed; and
- whether registrants should be allowed to sell their .au domain names.

The Panel received almost 50 submissions in response to an Issues Paper released in May 2007 and a further 25 submissions on its Draft Recommendations released in September 2007. The final recommendations of the Panel were presented to the auDA Board in November 2007 (the **Report**). This article briefly describes the Panel's views and recommendations on the three issues listed above.

## **Issue 1 - Should .au be opened to direct registrations (e.g. domainname.au)?**

The .au domain is arranged into various 2LDs, such as **asn.au**, **com.au** and **id.au**, and people are currently required to register domain names as third level domains, such as **domainname.org.au**. It is not possible to register a domain name directly under .au.

The Panel considered a number of arguments in support of allowing direct registrations under .au, such as the fact that domain names would be shorter and easier to remember. Arguments in opposition included that the existing structure works well and that the value of third level domain names may be diminished if .au is opened to direct registrations.

According to the Report, the majority of submissions received by the Panel were opposed to the opening of .au to direct registrations and there was little likelihood of agreement amongst those who supported the change on a method of execution. The Panel therefore rejected opening up .au to direct registrations.

## **Issue 2 – Should the policy rules for **asn.au**, **com.au**, **id.au**, **net.au** and **org.au** be changed?**

The Domain Name Eligibility and Allocation Policy Rules for Open 2LDs (2005-01) set out general policy rules that apply to all 2LDs, and the eligibility criteria and allocation rules that apply in each 2LD. The types of domain names people can register are also regulated by auDA policies prohibiting the unauthorised registration of words and phrases restricted under Commonwealth legislation, and the registration of misspellings of company and brand names.

The Panel reported that, "overall, the current 2LD policy rules strike an appropriate balance between allowing people to register the domain names they want whilst protecting the integrity and usability of the .au domain". However, the Panel recommended some ways in which the policy rules might be improved, including that:

- auDA should be able to suspend a domain name without notice at

the request of an Australia regulatory or law enforcement agency;

- **info.au** should be relaunched as a catch-all 2LD name for users who do not meet eligibility criteria in the other 2LDs, to accommodate more or different types of domain name users;
- registrars should continue to verify registrant details at the time of registration, including checks of the ASIC database (whether automatic or manual checks);
- the registrant warranty statement should be strengthened in relation to providing true and accurate eligibility details at registration;
- from 2010, registrants should be able to license domain names for 1, 2 or 3 years; and
- auDA's clarification policy relating to domain monetisation should be strengthened to protect brand names when they are included in compound domain names (e.g. domain names like **telstraphones.com.au** or **safewaysupermarket.com.au**). Domain monetisation essentially means registering a domain name in order to earn revenue from a monetised website (a website created for the purposes of earning revenue from advertising). The content on a monetised website must be related specifically and predominantly to the domain name.

## **Issue 3 – Should registrants be allowed to sell their .au domain names?**

The current .au domain name licence conditions prohibit registrants from selling their domain names. A registrant does not own their domain

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name; rather, they hold a licence to use it. auDA's Transfers (Change of Registrant) Policy (2004-03) allows a registrant to transfer their domain name licence to another eligible party in specified circumstances where there are legitimate commercial or legal reasons, such as where the registrant sells their business operations or assets to the other party, or in settlement of a dispute.

The Panel reported no clear consensus of public opinion on the "resale" of (or, in legal terms, the transfer of) .au domain names. Arguments in favour of relaxing the transfer policy included that a secondary market would facilitate the reuse of domain names and that there is no policy reason to stop someone who is willing to pay a secondary market price for a domain name from paying it. Arguments identified against the resale included fears that a secondary market in domain names may artificially increase demand and lead to increased

prices, and that allowing people to register domain names for the purpose of selling them would effectively legitimise cyber squatting.

Members of the Panel agreed that:

- regardless of why a domain name licence is transferred, the new registrant must satisfy applicable eligibility criteria as if they were registering the domain name for the first time; and
- the transfer process should be changed to reduce the administrative burden and costs on registrars and registrants.

There was agreement among Panel members for relaxing the transfers policy however no agreement was reached on the way in which the new transfers policy should be implemented. Accordingly, the Panel simply recommended that the policy be relaxed to allow a registrant to transfer their domain name to another

eligible party for any reason. The rationale cited in the Report for this recommendation is to give people access to domain names that would not otherwise be available and to allow transfer of domain names to those who have best use for them. The Panel also recommended that auDA conduct a two year review of the new transfers policy.

auDA is currently working on implementing the Panel's recommendations in 2008. Until then, all current auDA policies continue to apply. The relaxation of the current domain name transfer policy is one of the most significant changes recommended by the Panel. It will be interesting to see how this change works in practice and whether concerns expressed about relaxing the policy will be realised.

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## The Acquisition of Next Generation Broadband on 'Just Terms': A recent High Court Challenge

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### Introduction

In November 2007 Telstra, Australia's largest telecommunications company, mounted a constitutional challenge in the High Court claiming that it has not been properly compensated for being forced, under trade practices legislation, to give internet competitors access to its national broadband network.

The judgment, to be handed down in 2008, will be a landmark decision in a number of respects. It will be the first time the High Court will consider how Part XIC of the *Trade Practices Act 1974* (Cth) ('TPA') accommodates the rapidly evolving technology of next

generation broadband. It will also be an opportunity for the Court to once again explore the limits of s 51(xxxi) of the Australian Constitution: the power of the Commonwealth to 'make laws with respect to the acquisition of property on just terms from any State or person...'. This note briefly examines the High Court hearing in the context of recent Part XIC regulatory developments.

### The Nature of the High Court Challenge

In *Telstra Corporation Limited v Commonwealth of Australia & Ors*<sup>1</sup> Telstra argues that under the provisions of Part XIC of the TPA it is

being forced to allow its competitors to access its copper network infrastructure at a price that is significantly undervalued. Telstra claims that this is comparable to having its property, the copper infrastructure, compulsorily acquired without 'just' compensation. Section 51 (xxxii) of the Australian Constitution provides:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:...