

2015 Names Policy Panel: Issues Paper, April 2015

SUBMISSION



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Introduction

In April 2015, the .au Domain Administration Ltd (**auDA**) called for comment on the question of opening up the .au domain to direct registration (and other related issues). The Law Institute of Victoria (**LIV**) welcomes the opportunity to respond to these questions. Our comments are informed by the LIV's Technology and the Law Committee.

The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing 18,000 members. We advocate on behalf of our profession and the wider community, lead the debate on law reform and policy, lobby and engage with government and provide informed and expert commentary.

1. Direct Registrations

The .au domain should be opened up to direct registrations.

Direct registration will encourage use of the .au domain by Australian website owners. Greater use of the .au domain will lead to increased control by an Australian organisation of a large part of Australia's use of the internet and will help keep revenue from internet registration fees in Australia.

Domain disputes can also potentially be dealt with swiftly and efficiently through an alternative dispute resolution process such as the [.au Dispute Resolution Policy](#) (auDRP).

The LIV has identified some further potential benefits of direct registration:

- It may open up registration of domains to parties previously excluded;
- It may counter the use/cost of using generic top level domain names (gTLDs);
- It may provide a more flexible system which recognises that in many cases multiple parties have a desire to use the same domain name; and
- It gives a new avenue for Australian IT entrepreneurs to offer email/domain name services.

A move to allow direct registration recognises that the domain name space is always in flux and needs to continue to expand to cope with demand.

If it resolves to introduce direct registrations, the LIV asks auDA to be mindful of the risks, particularly in any transitional stage when direct registrations are first introduced. To address these risks, the LIV has suggested some potential policies and transitional rules.

2. Direct Registration Policies

The LIV believes that there needs to be policies governing direct registration.

1. The "close and substantial connection" rule should be retained for direct registrations. This is an important protection for genuine rights owners as against opportunists and fraudulent activity.
2. Direct registration should not unnecessarily increase the cost of doing business. A rule could require that, if an exact domain is already registered under an existing second-level domain (2LD),

then the direct registration of the same domain can only be by the licensee of the 2LD domain or with the written consent of the licensee of the 2LD domain. This could also just be a rule for a transitional period rather than an ongoing requirement. An alternative and less restrictive approach is that a domain applicant could be required to either have some other registered right to the name (e.g. a legal entity name, business name or a registered trademark) that is the same as the proposed direct domain name.

3. auDA might also consider a registration cancellation mechanism if the .au domain is registered and then simply parked. For example, a three year period of non-use similar to trade marks giving rise to the ability for an aggrieved party to seek to have the registration cancelled. The more efficient this process is, the more likely it is to be used. Such a process also needs to be sufficiently robust to avoid harsh outcomes to genuine users.

The LIV does not otherwise submit there should be further rules for direct registration, such as a hierarchy of rights or the 2LD eligibility criteria. Of particular importance is removing the business name requirement to achieve the potential benefit of opening up domain registrations to parties previously excluded from doing so.

3. Demand for direct registration

The LIV is not aware of specific market demand for direct registration.

4. What type of registrants and users would benefit from direct registration?

The following types of registrants or users might benefit from direct registration:

- Those currently ineligible for domain registration due to 2LD policies.
- Businesses wanting an alternative to gTLDs domains which generally have very high costs attached.
- Personal users and those marketing to overseas markets where direct registration is more common.
- Entrepreneurs who want to offer an Australian based personalised email/website solution.
- Australian headquartered multinationals who want to set up a global email/domain architecture within their organisation.
- Manufacturers who want to emphasise their “made in Australia” branding.
- Australian companies who want to have a clearly visible and easy to remember domain name architecture to differentiate their pricing or goods/services on a country by country basis while still coming under an Australian address.
- Australian businesses wishing to have the shortest, simplest domain possible, particularly where the .com domain is not available.
- Overseas businesses that see value in having their domain within the auDA’s purview, for example, because of the effectiveness of the auDRP and/or see value in targeting the Australian market.

5. Implementation Process

The impact on the existing 2LD system and existing 2LD registrants should be the main priority in the implementation process. auDA has an obligation to its existing registrants and must ensure that that obligation is maintained. For example, the risk of cybersquatting and competitors registering their competitor's domain through a direct registration and redirecting to their site is significant. One way to mitigate this risk is the level of publicity given to direct registration. The more that existing registrants are made aware of the opportunity for direct registration the lower the risk of existing owners being caught out. It would also be desirable to provide low cost registration options.

Further, any auction system that is used needs to be structured to avoid purchasers being trumped by a rival with a higher internet speed: e.g. an automatic 10 minute extension of the auction period after the last bid once the deadline has been reached. Finally, auDA may wish to consider whether priority should be given to holders of "well known marks" as defined in the *Trade Marks Act 1995* (Cth).

6. Existing 2LD eligibility and allocation policy rules

The eligibility and allocation rules for .asn.au, .com.au, .id.au, .net.au and .org.au should not be changed.

7. Domain licence period

The LIV does not believe that the two year licence period should be altered. The short licence period allows opportunity for eager owners to step in where registrations lapse. Ultimately, a domain licence is not a source itself of intellectual property rights other than evidencing use of marks and intellectual property rights. Intellectual Property rights holders wishing for longer term protection of domain names can register a trade mark.

A short term licence is in line with the short term nature of many goods and services sold via domain names and the existing reminder and renewal system works well to ensure those who want to extend their licence period do so when required and those who don't lose their rights through inactivity.

8. Should the principles of "first come, first served" and "no hierarchy of rights" be retained?

The LIV believes that these principles should be retained. The "first come, first served" and "no hierarchy of rights" system recognises that the domain space is a finite commercial resource, so the only fair system to allocate a resource which is insufficient to meet demand is on a first come, first served and no hierarchy of rights system. As .au direct registrations will be seen to be more valuable than existing 2LDs, there should be a priority registration period allowed exclusively for existing 2LD registrants to have first right to register the equivalent .au direct registration.

9. Is the "close and substantial connection" rule desirable?

The LIV believes that the "close and substantial connection" rule be retained, although the rule that is not necessarily well known or understood. The establishment of a definitive list of what satisfies the test could be useful for the .au community.

10. What changes are required to address the new practice regarding business name registrations?

The LIV suggests that domains could be de-registered, after fair warning given, to the extent that business name registrations lapse.

In the event that business names details are out of date or cannot be verified by the registrar due to the ASIC takeover of business names, the fairest system would be to have that flagged by auDA and make it a requirement of the next renewal of the domain licence that those details are updated by the registrant and confirmed by the registrar before the licence will be renewed.