

http://www.



On the verge of change

LEGAL PRACTITIONERS, ESPECIALLY COMMERCIAL LAWYERS, SHOULD HAVE AN UNDERSTANDING OF THE TECHNICAL PROCESSES AND LEGAL RIGHTS UNDERPINNING DOMAIN NAMES.

BY PETER MORAN

What is a domain name?

A domain name is the internet address that is typed into the address line of internet browsing software (such as Windows Explorer or Google Chrome) in order to point the internet browser to a particular website or email address. For websites, the domain name starts with www (and for emails, the domain name starts with @). In the early days of internet use, "http://" was also required to be entered in order to point the browser to an internet server. "http" stands for Hypertext Transfer Protocol and is the protocol that defines how internet messages are formatted and transmitted. However, internet browsers will now generally add the "http://" automatically and most websites are set up so that just the domain name and top level domain can be typed into the browser address in order to find the website (ie, the "www" subdomain generally does not need to be entered).¹

SNAPSHOT

- Changes are afoot in the Australian internet domain name space.
- All lawyers, particularly commercial practitioners, should be aware of the changes and potential impacts on clients (and even their own businesses) to the extent that they own or utilise Australian domain names.
- Any commercial lawyers advising clients who use or derive value from their Australian domain name should have a good working understanding of the Australian domain space and the rules underpinning it.

It is important to note that there are no “freehold” rights with domain names. No one ever actually owns a domain name. Instead, a licence is granted to the user of the domain name by domain name registrars. In Australia, the registrar must be accredited by .au Domain Administration Ltd (auDA). Registrars are the only people who can renew, modify or redelegate the domain name.

All domain names need to be pointed to an Internet Protocol (IP) address which is its unique identifying number. The distribution and management of this list of numbers is operated in Australia by the Asia Pacific Network Information Centre (APNIC).

Top level domains

The different parts of the domain name that follow the “www” are divided into various levels, with the end section being denoted as the top level domain (TLD).

Until recently, TLDs were either country code TLDs (ccTLD) such as .au and .uk or a fixed series of generic TLDs (gTLD) such as .com, .net and .org. In Australia, these gTLDs were then used as a second level domain (2LD) by following the ccTLD: eg .com.au, .org.au and .info.au.

In 2012, the international manager of the domain name system (DNS), the Internet Corporation for Assigned Names and Numbers (ICANN) made the step of opening up gTLDs for broader ownership, initially allowing applications for a further 22 gTLDs. Today, there are more than 1200 privately operated gTLDs including .bible, .shop, .college and .tech. Most of these gTLDs are known as sponsored TLDs and allow private agencies and organisations to manage their own TLD space. A number of cities and large companies have acquired a right to operate these, for example .melbourne, .nyc and .london.

.au Domain Administration Ltd

auDA is the administrator and self-regulatory policy body for the .au ccTLD and performs the following functions:

- develops and implements domain name policy
- licenses 2LD registry operators
- accredits and licenses registrars
- implements consumer safeguards
- facilitates .au dispute resolution policy
- represents .au at ICANN and other international forums
- manages the technical side of the .au zone file
- manages and maintains a secure and stable DNS.

The significance of a .au domain name

Utilising a .au domain name means that the administration of the domain is by a transparent and accountable not-for-profit organisation that ensures a consistent and fair approach to the registration and renewal of domain names. In particular, all .au domains are subject to auDA’s rules. These rules were written to ensure that a domain name licensing system is established in Australia which:

- is transparent, responsive, accountable, accessible and efficient
- improves the utility of the .au ccTLD for all Australians
- promotes consumer protection, fair trading and competition
- provides the protections necessary to maintain the integrity, stability, utility and public confidence in the .au ccTLD
- expresses licence terms and conditions in objective, not subjective, terms
- implements clear, predictable and reliable complaint processes
- preserves the fundamental principles of no proprietary rights in a domain name, first come, first served and no hierarchy of rights.

Second level domains (2LD) in Australia

A second level domain is what comes before the TLD which is generally the country code TLD. (ie “.au”). In Australia there are “open” 2LDs that are open to the general public, subject to eligibility criteria:

- .asn.au – for incorporated associations, political parties, trade unions, sporting and special interest clubs
- .com.au – for commercial entities, such as companies (with an ACN as registered through ASIC) and businesses
- .net.au – for commercial entities, such as companies (with an ACN as registered through ASIC) and businesses
- .id.au – for individuals who are Australian citizens or residents
- .org.au – for charities and non-profit organisations.

There are also closed 2LDs which have a defined community interest and are closed to the general public, eg, .gov.au and .edu.au.

Internet domain names

Main auDA rules

By registering a .au domain name, the licensee agrees to abide by auDA's various policies for the use of .au domain names. Key policies are the Mandatory Terms and Conditions Applying to .au Domain Name Licences, the Domain Name Eligibility and Allocation Policy Rules for the Open 2LDs and the Domain Renewal, Expiry and Deletion Policy.

In applying to register a .au domain name, the licensee (or registrant) warrants:

- that the information provided to register or renew the domain name is true, complete, correct, not misleading and made in good faith
- that they are aware that their entitlement to register the domain name may be challenged by others
- that they are aware that auDA or the registrar can cancel the registration of the domain name if there is a breach of a warranty.

The core eligibility criteria for registering a .au domain name are:

- the domain name will be allocated on a "first come, first served" basis and it is not possible to pre-register or reserve a domain name
- the registrant must be Australian
- the domain name must be at least two characters long, contain only letters, numbers and/or hyphens and start with a number or letter
- to be for a licence that is no longer than five years and no shorter than one year
- may not be registered for the sole purpose of resale or transfer to another entity.

There are then more specific eligibility criteria for the various open 2LDs.

Direct registration

Direct registration will allow domain name owners using the Australia ccTLD to register a domain name without any of the usual second level domains that have to date been a requirement of using a .au domain. For example, www.realestate.au or www.telstra.au.

Applying for a direct .au domain

Applications will be on a first come, first served basis and the only eligibility criteria will be that the person applying must have an "Australian presence".

Having an Australian presence includes being an Australian resident who is an Australian citizen or permanent resident visa holder or a company registered under the *Corporations Act 2001* (Cth) or an entity registered or incorporated under a variety of other Australian statutes such as the *Australian Charities and Not-for-Profits Act 2012* (Cth) or the *Commonwealth Electoral Commission Act 2012* (Cth).²

Having an Australian presence also includes, even where the person is not an Australian resident or

registered/incorporated entity, owning an Australian trademark application or registration that includes a word mark and the .au domain name is an exact match of that word mark.

There will be a process for resolving priority disputes where there are multiple applications for the same domain.

Resolving priority disputes for existing domains

There is no sunrise phase for trademark owners (ie, no priorities will be granted to mere trademark owners who wish to register their mark as a domain). However, owners of existing Australian domain names will be able to make a priority status claim for the .au domain name that exactly matches their existing Australian domain name, other than as regards the 2LD.

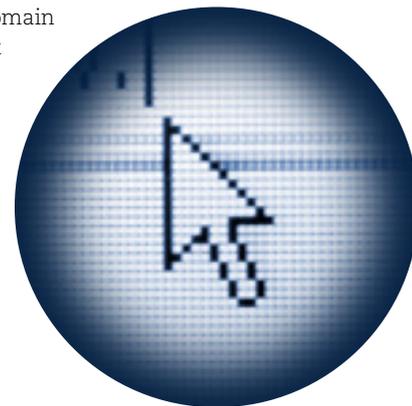
.au domain names that have already been registered with an open 2LD will grant a priority interest to the licensee. The priority rights will be divided into two categories – Category 1 for domain names that were created before a certain date (called the cut-off date) and Category 2 for domain names created after the cut-off date but before the commencement date of the .au namespace. The domain must also have a current registration as at the date of the application for priority status (ie, if the domain name registration has lapsed then no priority benefits will be afforded to a former licensee).

The cut-off date was initially proposed as 4 February 2018 but has now been revised pending confirmation of the commencement date of the .au namespace. It is expected that the cut-off date will be 24 months prior to the commencement date but that has not yet been confirmed by auDA.

To obtain the benefit of the priority allocation, domain owners need to make an application for priority status within 180 days of the commencement date of the .au namespace. If they fail to do so, then the name will be deemed available for general registration on a first come, first served basis and anyone with an Australian presence will be able to procure a licence of the domain name.

Also, to be eligible for priority status, the domain licensees must also be eligible to hold the domain licence under existing auDA policies and not be subject to a dispute resolution or court proceeding in respect of the licence.

Where licensees of the same domain name (ie, not including the 2LD: for example www.realestate.com.au and www.realestate.net.au) both apply for a direct .au domain name (eg www.realestate.au) then priority will be granted to the domain name that was created before the cut-off date.



Where licensees with the same priority status (ie, both Category 1 or both Category 2) make an application for a direct domain with the same exact match (eg www.realestate.au) then the parties will be required to negotiate with one another to reach agreement as to who should be permitted to the licence. Where agreement is not reached, an annual application renewal fee will be payable and the application will lapse when a person either fails to pay the fee or no longer satisfies the eligibility and allocation criteria or is no longer eligible for a licence in the .au namespace.

Conclusion

Increasingly, domain names are becoming more and more valuable and important assets for businesses. This is because large amounts of marketing and branding of businesses revolves around web addresses. Frequently, that is the key point of contact between businesses and new customers. Social media marketing, such as Facebook and LinkedIn, also attempts to drive traffic back to their main home page. Additionally, the search engine optimisation (SEO)/link-juice for websites that is built up for searches by people using search tools like Google also

revolves, in large part, around the domain names and links to those names. Businesses invest significant resources in building up internet traffic and SEO that is directed to those domain addresses. Therefore, commercial and other lawyers advising clients around the use, compliance, protection, enforcement, sale, purchase, valuation and various other actions involving domain names need to, as part of providing that advice, have a working understanding of the regime and technologies underpinning the legal rights and responsibilities regarding those domain names. ■

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This article explains the technical processes that work in tandem with the regulations regarding Australian domain names. The *LLJ* will publish a follow-up article when the new regime commences, providing more detail on the finalised direct registration processes and updated rules.

1. There is also now a concept of “https://”: the “s” stands for secure and means the website uses the Secure Sockets Layer (or SSL) protocol to transport data, which makes it a more secure way of transporting data than merely using http.
2. Rule 1.4, definition of “Australian Presence”, .au Namespace Implementation Policy, auDA, published 17 June 2019.

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