

Response to auDA's *.au Licensing Rules and .au Namespace Implementation Policy Consultation - October 2019*

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1 Introduction

Education Services Australia (ESA) is a national, not-for-profit company owned by all Australian education ministers. It was established to support the delivery of national priorities and initiatives in the schools, training and higher education sectors. ESA traditionally delivers digital solutions and services, large-scale technology infrastructure projects, and hosting services.

ESA has provided registrar services for the closed edu.au second level domain for over 15 years. As the edu.au Domain Registrar, ESA is accountable to the edu.au Domain Administration Committee (eDAC), which meets quarterly and includes representatives from the Higher Education, VET and Schools sectors across the States and Territories of Australia. eDAC is in turn accountable to .au Domain Administration Ltd (auDA).

The responses below are submitted by ESA in its capacity as the edu.au Domain Registrar.

2 Responses

2.1 Allocation rules for com.au and net.au names

(2.4.4 of the .au Licensing Rules)

To be eligible for a com.au or net.au domain name you need to be a commercial entity (as specified in the policy definitions). There also needs to be a connection between their corporate entity and their domain name (defined by paragraph 2.4.4 (2)).

This rule aims to protect consumers (you know who you're dealing with) and ensure fair trading (you can't pass yourself off as another brand).

Whilst this does not impact the allocation rules for edu.au directly, ESA supports the allocation rules for com.au and net.au names being retained in line with the original recommendations from the Policy Review Panel¹.

In light of correspondence from the Department of Communications and the Arts to auDA in 2019², ESA also believes that removing the allocation rules in the com.au and net.au spaces could have significant implications for current operation of these name spaces.

In particular, for the primary intended market(s) for com.au and net.au and potential registrants, there is potential for an increase in cybersquatting, domain speculation and warehousing, and aggressive secondary market business practices and unsolicited marketing.

¹ Auda.org.au. (2017). .au Domain Administration Ltd. [online] Available at: <https://www.auda.org.au/index.php/policies/panels-and-committees/2017-policy-review-panel>

² Auda.org.au. (2019). Letter: Proposed new .au Domain Licensing Rules. [online] Available at: <https://www.auda.org.au/assets/Uploads/DOCA-letter-to-Ms-S-Ewart-5.8.19.pdf>

2.2 The ‘public interest test’

(2.17 of the .au Licensing Rules)

auDA regularly gets requests from law enforcement agencies to suspend or cancel .au domains that are used in cyber-criminal activities. The public interest test aims to ensure that these requests are made in the public interest and balances the rights of registrants/private citizens and the interests of law enforcement agencies to protect the community.

ESA supports auDA having the means to suspend or cancel a licence (or take any necessary action), when it is in the public interest and in response to a request from an enforcement body or intelligence agency.

We would just note that the introduction of direct registration may raise some challenges, given the historical and recognised structure and hierarchy of the .au name space. There is the potential for names to be registered at the second level that could either appear to have or unduly imply that they are authoritative, representative, or associated with government departments and agencies or sectors and industries. This by extension could facilitate fraudulent or misleading business practices or phishing or see the misuse/misallocation of names that could otherwise be of national importance.

ESA believes that auDA should also be able to block or reserve names from registration (either proactively or retroactively), with a focus on the second level for which it is proposed that there be no allocation criteria, where it is in the interests of the public and/or the greater internet community. This is especially relevant and important as the .au domain is considered and designated as part of Australia’s critical infrastructure sector³.

We believe that this would align with two of the core functions of auDA as per the current Terms of Endorsement⁴ from the Australia Government Department of Communications and the Arts, namely that, “.au domain administrator will undertake the following”:

- ensure stable, secure and reliable operation of the .au domain space
- promote principles of competition, fair trading and consumer protection

This also aligns to 2.17.3(6) and 2.17.3(9) under the public interest test. However, it is unclear from the wording for 2.17.2 whether auDA can unilaterally act on those two items as per its core functions on the basis of public interest, or if this is only in the event that it also receives a request from an enforcement body or intelligence agency.

³ Communications.gov.au. (2018). Review of the .au Domain Administration. [online] Available at: https://www.communications.gov.au/file/35916/download?token=5B0FX_oO

⁴ Communications.gov.au. (2018). Review of the .au Domain Administration - Terms of endorsement. [online] Available at: <https://www.communications.gov.au/documents/review-au-domain-administration-terms-endorsement>

2.3 Sub-leasing/sub-licensing of .au domains

(2.11.11 of the .au Licensing Rules)

Currently, you can't sub-lease a .au domain to another person, unless that person is a related body corporate. The prohibition on sub-leasing aims to maintain the integrity of the .au domain by ensuring the rules around eligibility can't be circumvented and the WHOIS data accurately reflects who is in control of a domain name.

ESA agrees that sub-leasing of .au domain names should be prohibited. This will help maintain the integrity of the .au domain space's eligibility and allocation rules, and ensure the data returned by the WHOIS service accurately reflects who is operating the services at that associated domain name.

We note that as per 2.2.10 that the related body corporate provisions only apply to licences in the .au, com.au and net.au namespaces, and support that it does not apply to edu.au. Under current edu.au policy and procedures, neither the eligibility criteria nor the allocation criteria can be inherited, transferred or otherwise met via a related entity.

While we appreciate that there may be some applications for this in the primarily commercial com.au name space in ESA's experience as the edu.au registrar where the approval requires manual assessment, a Person seeking to register a licence on behalf of a related body corporate or related entity is often seeking to circumvent eligibility and allocation rules they themselves could not otherwise meet directly.

For example: a subsidiary that is registered or accredited with a government education authority looking to register on behalf of a parent company which is not, or a parent company which has national interests and responsibilities trying to register at the third level on behalf of a single state-based subsidiary. auDA may want to consider the potential enforcement issues with allowing this practice in the .au, com.au and net.au name spaces.

Side note – with respect to sub-leasing and domain monetisation

ESA would also like to note that while 2.11.11 prohibits sub-leasing, the definition provided for Domain Name Monetisation includes “for the purpose of... leasing... the applied for domain name to generate revenue”, with leasing further defined with an example of “where the domain name is rented to advertisers or other interested parties” – this appears to be counter to 2.11.11, or at least be open to abuse or attempts to circumvent 2.11.11.

The Explanatory Guide Licensing Rules regarding Domain Name Monetisation also states that “the no resale prohibition has not been included as there is no proprietary interest in a domain name nor licence within the .au domain - a Person cannot sell a licence as it is a personal interest”. However, the definition states that Domain Name Monetisation “means an application for a licence by a Person with the sole purpose of selling... the applied for Domain Name to generate revenue” and provides the further example “domain purchasing and resale where a domain name's value can increase over time and it is sold once its value has increased”, seemingly expressly allowing sale, counter to what is stated in the guide.

On this basis, ESA believes that it would be beneficial to expressly state in the rules that a Person cannot sell a licence as it is a personal interest (for example, as part of the definition of Licence) and the definition of Domain Name Monetisation be updated to reflect this.

2.4 Use of sub-domains

(2.11.9 of the au Licensing Rules)

Registrants can create sub domains of their .au domains e.g., the registrant of forexample.com.au can create shoes.forexample.com.au. When sub-domains are used for unlawful activity or in breach of the auDA rules, currently auDA can only act if the registrant of the third level domain is ineligible to hold the domain to which the subdomains are attached.

The new rules hold the registrants of a .au domain responsible for activity conducted on any sub-domain and give auDA the power to act as the result of activity on a sub-domain.

While ESA agrees that registrants can create sub-domains of their .au domain names (and that auDA should have the power to act as the result of activity on a .au domain name, irrespective of the level at which it is occurring), we have concerns regarding 2.11.9.1 implying that a party other than the registrant of the domain name may use a sub-domain, even with 2.11.9.3 prohibiting the sale or leasing of sub-domains.

It is unclear how allowing a party other than the registrant to use or operate services via a sub-domain does not create the same issues that were the grounds for prohibiting sub-leasing of the domain name itself – the need to maintain the integrity of the .au domain by ensuring the rules around eligibility can't be circumvented and that the WHOIS data accurately reflects who is in control of a domain name (or in this case, a host name that includes that domain name).

These significant risks, along with the greater potential for the creation of unofficial or private registries from the use of sub-domains in this way, were cited in the Policy Review Panel's Issues Paper: Registrant Policy: *Enabling Australia's Digital Economy and Society*⁵, but do not appear to have been addressed in either the Panel's *Final Report*⁶ or auDA Management's subsequent *Review of and Responses to the Panel's Recommendations*⁷.

ESA believes that it would be both a consumer protection and expectation that when accessing a service at a .au domain name, at a host name using a .au domain name, irrespective of whether it is the domain name directly or any level of sub-domain, that the service being accessed is being provided by the entity being returned by the WHOIS lookup for the domain name, and that this speaks to one of the reasons why .au is trusted over other extensions within Australia.

For example, given:

- www.auda.org.au
- whois.auda.org.au
- my.storefront.auda.org.au

Consumer expectation would be that each of the above would resolve to a service being provided by or on behalf of .au Domain Administration Ltd. It could reasonably be argued that it is not appropriate for a party other than auDA to be operating a storefront using the last host name, given what is inferred by it containing auda.org.au.

In addition to this, the existing edu.au child zones of schools.nsw.edu.au, catholic.edu.au and eq.edu.au, exist and were migrated into the .au registry system on the mandate of auDA. It was cited that while these jurisdictions had been operating under sub-domains of each of these zones prior to the establishment of

⁵ Auda.org.au. (2018). Registrant Policy: Enabling Australia's Digital Economy and Society. [online] Available at: <https://www.auda.org.au/assets/Policies/PRP-Issues-Paper-Registrant-Policy-January-2018.pdf>

⁶ Auda.org.au. (2019). auDA Policy Review Panel Final Report: Recommendations to the auDA Board: Reform of Existing Policies & Implementation of Direct Registration. [Online] Available at: <https://www.auda.org.au/assets/Uploads/Final-Paper-Reform-of-Existing-Policies-Implementation-of-Direct-Registration-Mar2019.pdf>

⁷ Auda.org.au. (2019). auDA Management Review of and Response to PRP Recommendations [Online] Available at: <https://www.auda.org.au/policies/panels-and-committees/2017-policy-review-panel>

auDA, to ensure the integrity of the .au name space each needed to be recorded in the .au registry database going forward. This resulted in the edu.au Unofficial Registries Policy.

As such, ESA believes that sub-domains should be restricted to use by, or on behalf of, the registrant of the base domain only. In the event of an unofficial registry being identified at the second level, auDA should assess whether there is a need or demand for the creation of a new 2LD based on that name and either add it as a child zone (public suffix) in the .au registry system, or require the registrant to cease operating the unofficial registry – as auDA has required of edu.au registrants.

This is in line with the current principles of the edu.au Creation of New Child Zones Policy⁸.

We note that under the proposed rules a registrant would be responsible for the activity on a sub-domain. However, where allowing other parties the use of a sub-domain, this would still be a case of a registrant effectively allocating names within the .au space. This activity would be conducted without the requirements and responsibilities of an accredited registrar also allocating names in the .au space, simply at a different level and without the protection afforded by being recorded in the official registry.

2.5 Internationalised domain names

(2.8 of the Licensing Rules)

The .au Licensing rules allow for names in the following scripts to registered at the second level only:

- (1) Chinese (Simplified);*
- (2) Korean;*
- (3) Japanese;*
- (4) Arabic; and*
- (5) Vietnamese.*

ESA recognises that the introduction of internationalised domain names would likely be appealing to education and training providers interested in promoting their organisation to international students and is supportive of initiatives to improve accessibility in the .au ccTLD.

However, we note that there are significant logistical challenges that would make the implementation of internationalised domain names challenging, especially the resourcing and effort required to monitor internationalised domain names, particularly in relation to:

- allocation criteria and complaints where there would be a requirement to translate and examine the meaning of internationalised domain names to assess their adherence to .au policy or to facilitate auDRP proceedings.
- the potential for using internationalised domain names to circumvent the principles of the current Prohibition on Misspellings Policy through the use of the expanded character set to register deceptively similar domain names.

Given the potential for the abuse of such names, we believe that the prohibition of registering deceptively similar domain names under section 2.5.2 may need to be expanded to expressly take this into account, to ensure that auDA can act in the event of this occurring. We believe that this would offer a necessary protection to both existing registrants and to consumers and end users.

⁸ Domainname.edu.au. (2015). 2015-04 edu.au Creation of New Child Zones Policy. [online] Available at: https://www.domainname.edu.au/pdf/policies/child_zones.pdf

2.6 The cut-off date determining .au priority category

(1.6.1 of the .au Namespace Implementation Rules)

When second level .au domain names launch, existing registrants of .au domains will be able to apply for priority to register the exact match of their third level domain at the second level. For example, Tina holds the licence for getyour.com.au and can apply for priority to register getyour.au In the small number of cases where there are multiple applications for the same name (known as contested names), registrants of names created on before a 'cut-off date' (currently proposed to be 4 February 2018) are given priority over registrants whose names were created after.

The priority cut-off date aims to mitigate situations of profiteering by parties registering third level domain names that would be attractive to buyers at the second level.

Factors influencing the choice of 4 February 2018 as the date were:

- *the originally planned launch date for second level names of 1 July 2019*
- *the size of the pool of potentially contested names*

A cut-off date set too far in advance of the launch may adversely affect new businesses, especially those that are unaware that direct registration is coming.

ESA notes that the selection of 4 February 2018 will mean several registrants in edu.au domain space (and possibly gov.au) will currently be ineligible to participate.

In the case of edu.au, the creation of the new education.tas.edu child zone was deliberately delayed (in consultation with the former registry operator, the new registry operator and auDA) to coincide with the transition to the new registry system in July 2018. While the number of potentially contested domain names in this new zone are minimal, ESA believes it would be unfair to penalise the Tasmanian Department of Education for this, when the creation of the education.tas.edu.au child zone was approved by eDAC in November 2017, prior to the proposed cut-off date.

The associated host names had already been operating as sub-domains prior to this date and had been brought into the official registry under the edu.au Unofficial Registries Policy and the edu.au Creation of New Child Zones Policy.

However, we recognise that the selection of 4 February 2018 as the cut-off date will prevent domain name investors and those most familiar with the proposed implementation from having an advantage over potential registrants who may not be aware of the proposal.

This, combined with the proposed two-tier category system to minimise adversely affecting new businesses that have registered domain names in the interim, we would be happy to support the proposed date. However, we reiterate that we would like to see education.tas.edu.au and relevant gov.au domains that have been brought into the official registry system in the interim treated as an exception.

ESA would also like to note that endorsement of the cut-off date of 4 February 2018 is based on the current proposed timeline for the launch of direct registration of the first half of 2020. Given the launch will already be over two years after the proposed cut of date of 4 February 2018, if this is further delayed, the impact of this cut-off date should be reassessed.

2.7 The .au ‘lockdown’ model

(1.9.5 to 1.9.13 of the .au Namespace Implementation Rules)

When second level domains (e.g. getyour.au) launch in 2020, existing registrants will be able to apply for priority access to the exact match of their domain name at the second level. (e.g. Registrant of getyour.com.au can apply for getyour.au)

It’s possible that there will be multiple applicants for the one name and so we divide applications into priority categories (1&2) based on the domain name creation date.

Where there are multiple category 1 applicants for a second level name, the second level name is only allocated when agreement has been reached between the applicants.

If no agreement is reached the second level name remains locked. Applicants are required to maintain their application via a yearly renewal.

When there is only one applicant left the name can be allocated. This system is known as the ‘lockdown’ model. This system attempts to protect the interests of existing registrants in .au, but as a result may negatively affect new entrants to the domain.

ESA believes the lock down process is the fairest of the methods explored by the Policy Review Panel and those raised and discussed during the public consultation periods to resolve contested domains.

However, we believe the lock down process can only be implemented if the lock-down period is indefinite. If the period is not indefinite, and another method for resolution will still be required at the end of the lock down period, the lock down will be redundant – simply delaying the need to use one of the less favourable, less fair methods or models.

We agree that those that apply for contested domains should be required to confirm that they still wish to contest the domain on a regular basis – subject to their continuing to be eligible for the existing domain name that is the basis of their application – with the name only being allocated once one applicant remains.

While ESA would be supportive of auDA providing mediation or engaging providers of such services with the aims of facilitating this process and reducing the number of contested domain names, we would not want to see this used as a justification for removing or as an alternative to the indefinite lock if not agreement can be reached.

2.8 Correction to Registrant Details and Transfer of Registrant

While not part of the key consultation issues, and ESA broadly supports the processes in the proposed Licensing Rules with regards to transfer of registrant or corrections to registrant detail requests, we note that there are additional criteria under the edu.au Registration Policy allowing corrections to be processed as a result of machinery of government changes. We also have general concerns regarding the practicality of the newly imposed time restrictions being placed on such requests.

With over 8,000 domain names registered to government schools alone, the edu.au domain space likely has the highest number of domain name licences issued to State, Territory and Commonwealth government entities across the .au ccTLD. With it not being uncommon for government entities to be renamed, or for the transfer of one government entity’s functions to another, and caretaker provisions, ESA believes that how such changes would be handled under the new Licensing Rules needs to be clarified – or existing correction provisions under the edu.au Registration Policy maintained.

In addition to this, the time restrictions whereby:

- 2.13.4 - A Registrant must request a transfer of the licence to a Person within 28 calendar days from the date that a contract or agreement for the transfer of the licence is entered into by the parties, unless that contract or agreement specifies otherwise.
- 2.13.6 - Failure to transfer the licence in accordance with paragraph 2.13.4 will result in the cancellation of the licence.
- 2.18.4 - Any request (to correct information relating to the Person recorded as the Registrant in the Registry data) must be made within 14 calendar days of the licence being recorded in the Registry data.

We note from the Explanatory Guide the latter restriction is intended to reduce the number of disputes. However, based on previous experience with processing such requests, a percentage would not meet these requirements, which could potentially unfairly penalize the intended registrant, and in the case of 2.18.4, does not specify what action can/should be taken in the event that a request is received after the 14 calendar day period.

While under the current edu.au Transfer (Change of Registrant) Policy⁹, the registrant is required to provide documentation in support of the circumstances of transfer, no such requirement is present in the proposed Licensing Rules. Therefore, it is unclear how 2.13.4 could be enforced or what would occur in the event that a transfer was processed and later found to have been outside the allowed window.

With regards to processing corrections to registrant details, particularly in the event that the domain name has been registered by an agent or reseller, the intended registrant is often not aware of the error initially, and the rules do not specify what happens in the event that a request is received after this date – is the licence allowed to continue with incorrect details? Is the licence cancelled? In either scenario the intended registrant is disadvantaged – potentially through no fault of their own.

ESA proposes that these restrictions instead be replaced by a clause allowing auDA to cancel a licence in the event that a registrant is unable to provide the sponsoring registrar with chain of custody - either establishing the circumstances of the transfer or the allowed circumstances for a correction under 2.18.3 - where who the legal holder of the licence is otherwise cannot be confirmed.

⁹ Domainname.edu.au. (2015). 2015-04 edu.au Transfers (Change of Registrant) Policy. [online] Available at: https://www.domainname.edu.au/pdf/policies/child_zones.pdf