

TO:

FROM: Mr Ben Hall, 4 March 2018

Policy Review Panel C/O auDA

1. Background and Discussion

2. Up until April 2016, the regulation of domain names in Australia has been harmonious, fair, financially viable and provided a level playing field for businesses to grow their online enterprises.
3. Since the announcement by auDA to allow the registration of .AU TLD, confidence and trading of online business in Australia has been greatly diminished, and the uncertainty of rights has eroded confidence in the .com.au brand. The process used, the supposed consultation, has caused uncertainty and the diminishment of the value of online businesses.
4. For the past two years, no website, domain or bricks and mortar business with an online presence can sell, transfer, invest or value their enterprise without being unable to answer the critical variable of whether their investment in any 2LD .com.au business will automatically include the TLD .AU, or worse, if their right to .au will be given away to a competitor to imitate or compete with their investment, or the business will be forced into litigation, mediation, or held to ransom via an auction process.
5. The fact is, .com.au is too similar to .au to consider it a separate registry to what every .com.au registrant believed they were buying. The .au name is shortening of the 2LD and not a distinctive new registry such as '.social.au'. This is passing off, and infringes .com.au licence rights real and implied.
6. When .net.au ISP/telecommunication category restrictions on domain eligibility were lifted in 2002, this allowed businesses to gain an online presence primarily where there was a crowded market of .com.au registrants.
7. Since .com.au registry was established, Australian businesses have regarded the .com.au as Australia's default TLD, as technically TLD registrations were not made available via auDA policy and it's predecessor. 2LD .net.au was initially a restricted secondary registry for ISP's only, and during these decades the com.au registry established itself as the top level domain registration available and thus millions of Australian businesses have invested in this brand and this continues today.
8. The current .net.au registrant eligibility rules copied the .com.au registrant eligibility rules in 2002 decades after the introduction of .au 2LD's and as a result of pressure to allow a secondary market for open registrations due to .com.au becoming a crowded marketplace for name recognition post the .com boom. It follows that .net.au 2LD is a registry with a legacy of changing eligibility policy to make itself viable and as a secondary market of lower hierarchy via precedent and policy. There are proposals to once again experiment in eligibility requirements to make the .net.au 2LD a viable registry. However, like before, this should not diminish the rights and investment made by 2LD.com.au registrants by allowing general use eligibility as an excuse to exclude .com.au registrants from .au rights.
9. NET.AU registry has once before had its eligibility criteria relaxed to accommodate growth of the .au registries in response to market and consumer needs and its own financial viability.
10. NET.AU has the legacy of being a secondary licence rights market to the primary commercial market of .com.au registry.
11. There never has never been and never will be sufficient awareness by .com.au registrants of the threat that their 2LD .com.au enterprise is about to have a TLD .au competitor appear out of thin air and without any recourse, or be forced into an auction process to defend their

investment, to make defensive domains registrations or embark upon litigation and lobbying.

12. I have been advising my clients (.com.au registrants) since April 2016 not to transfer, sell or invest in any domains until the uncertainty of TLD .au is resolved in their favour. I have also advised them to prepare funds and material for litigation and lobbying should there be an attempt to subjugate their rights and/or diminish their investment in their 2LD .com.au brand. Any registrant I speak to believe their .com.au enterprise is the top level domain as it is the primary commercial registry available at the time of purchase. They regard open registrations of .net.au as recent phenomenon and a failing brand, and believe what they have been sold is the highest available commercial domain and thus automatically entitled to the TLD .au. Had they been given the option to purchase the TLD .au they would have, but this was denied to them via a precedent of policy. While digital business has transformed their enterprise, they are largely still bricks and mortar enterprises and thusly unaware of the threat they may have their life's work usurped by a TLD au.
13. As soon as the uncertainty of TLD au rights being granted to 2LD .com.au registrants is resolved there will be a boom in online business in Australia. If the TLD .au rights are not granted to the current .com.au registrant then the uncertainty and an underinvested market will remain for at least a decade to allow for litigation and lobbying to run its course.
14. No advertising budget is enough to make registrants fully aware of the proposed changes, and as the consultation period has ended, Government intervention and litigation are assured events.
15. Business owners who have transferred domains will be subject to litigation from any buyers for not exercising due diligence by informing 2LD .com.au registrants that a duplicate registry was about to be implemented and greatly diminish the value of their purchase.
16. auDA, the Government, the courts and the legal profession are unprepared and unaware of the litigation that will result if the TLD .au rights were granted to any other registrant than the current .com.au registrant.
17. If the TLD .au rights are not granted to the current .com.au registrant then this registrant and Government Authorities tasked with enforcing corporate laws, must engage in litigation under Australia's Corporation Law to prevent another entity passing off their enterprise as their own.
18. If the TLD .au rights are not granted to the current .com.au registrant then this registrant and Government Authorities tasked with enforcing competition and consumer laws, must engage in litigation under Australia's competition and consumer laws to prevent another entity passing off their enterprise as their own.
19. If the TLD .au rights are not granted to the current .com.au registrant then registrars, as well as any entity that has sold or transferred a business in the last two years (or beyond if the TLD announcement is regarded as not having grandfathered the proposed policy of automatic rights to the TLD .au by the .com.au registrant prior to April 2016).
20. If the TLD .au rights are not granted to the current .com.au registrant then there will be a wave of defensive registrations, which will greatly anger Australian businesses being held to ransom for protecting their enterprise from diminishment.
21. If the TLD .au rights are not granted to the current .com.au registrant then a wave of disputes will arise over eligibility of the TLD .au. Some businesses have invested in a domain that describes their activity, or a category, and thusly will not have automatic rights to the corresponding TLD .au.
22. If the TLD .au rights are not granted to the current .com.au registrant then a wave of opportunistic registrations may occur to acquire TLD .au domains despite attempts to

prevent this a legitimate business can start using a 2LD and challenge or imitate a current 2LD registrant.

23. None of the proposed TLD .au models adequately address the diminishment of the investment made by .com.au registrants in their brand.
24. None of the proposed TLD .au models provide sufficient funds for litigation and complaints.
25. None of the proposed TLD .au models provide sufficient funds or time for registrants to understand the issues.
26. None of the proposed TLD .au models make concessions for businesses started or transferred since the TLD .au announcement who are most likely unaware of the potential loss of registrant rights.
27. The consultation process has not engaged sufficient numbers of stakeholders and ignore the likely litigation and rights of current .com.au registrants.
28. **Something more, something less.**
29. The introduction of a TLD .au namespace can provide something more, but not by diminishing the rights of the current top level commercial domain registrants. It is something more in that it presents an international brand to the world of Australian enterprises. This international branding is a misfit with 'general purpose' eligibility. There is one commercial namespace, 'com.au' and the addition of 'net.au' is a recent policy change and not a basis of ignoring the rights of .com.au owners.
30. The same mistakes made that caused .net.au to become unviable is being implemented with imposing a misguided eligibility requirement on a new registry. General purpose use eligibility can already be registered in .id.au, and if a registered organisation a .org.au. If there is to be any general purpose eligibility this could be applied to all commercial domain spaces so it is not necessary to be a prerequisite of a TLD, or a new domain 2LD to address this need, but not be used an excuse to deprive current .com.au domain registrants who bought into the highest level domain available only to find their investment to be passed off and diminished with a TLD that was previously denied to these registrants.
31. Allowing the TLD .au namespace to be a 'general purpose' will inhibit growth and harm the brand due to domains being registered and used solely for purposes that do not have any international focus or marketing. .com.au registrants such as a bank or large business, could have their international brand diminished with a general purpose registrant.
32. The need for 'something more' is wrongly being conflated with the potential need for a general purpose eligibility requirement. This matter should be addressed separately to TLD registrations and not bamboozle current .com.au registrants with this red herring eligibility requirement and circumvent their rights to their corresponding TLD domain.
33. Weakening eligibility requirements for .au or even .com.au (the commercial namespaces) may undermine confidence in the legitimacy of domain registrants and their published website material. Presently .com.au is one of the most trusted namespace brands in the world due to strict commercial eligibility rules and other policies that prevent misuse. Weakening eligibility as an experiment with a new registry, using that as a reason to deny inherent domain rights and diminishing the rights of .com.au owners is not coherent policy or path.
34. Granting 2LD .com.au domain registrants automatic rights to their corresponding TLD .au does not create a simply replicate existing functionality. It will uphold the rights of .com.au registrants and allow the market to sort out how .au is developed and instantly create a new marketing outlet for millions of Australian businesses and will be a credit to auDA.

35. It is a mistake to assume stricter allocation rules result in more domains being available. This is something the market should determine and will be circumvented if applied – as history has proven many times such policies are failures.

36. Correction of common misinformation of the .au namespace

37. The most common complaint to auDA is that a domain registrant is ineligible because the complaining entity wants the domain, usually for free, and seek to abuse policy process to acquire it. The claim that a tighter eligibility should be applied so new registrants can get their desired domain is nonsense. These complaints are typically persons who do not have the funds to start a business anyway, they are seeking a valuable, highly memorable, search engine friendly name to kickstart their business idea despite the fact they were not the first-in, best dressed – so they seek to benefit from the foresight and planning of another registrant’s investment – effectively trying to steal someone’s property because they believe they deserve it more. It is not the business of auDA to interfere in the market to determine from a pool of prospective registrants which one is the most deserving. As history has shown, tight restrictions on domain names is an interference in the open market and if implemented is circumvented with a wave of Trademark registrations, Business Name registrations, Trusts and company structures, and website designs solely to satisfy the rules. I recommend auDA does not repeat these mistakes and give credence to failed past policies.
38. auDA policies are highly effective due to largely self-regulating registrants, and auDA needs to ensure this continues. Issues such as exact name eligibility, or using an ‘intention to register a Trademark’ for registrant eligibility shouldn’t be up to auDA to manage outside its portfolio. It is the registrant that is responsible for this task and the current rules allow for eligibility complaints to remedy – allowing time for the registrant to remedy or for the domain to go into policy delete following a legitimate complaint challenging a registrant’s eligibility via the policy.
39. While .com.au registrants are technically licences, they are also very real property with monetary value and this is the motivation behind violating .com.au registrant rights to the TLD .au.
40. Subjugation of .com.au registrant rights to their corresponding TLD .au via policy is a form of reverse hijacking. There simply is no easy way to make the TLD .au registration differentiated or viable without granting these rights to the corresponding .com.au registrant without a tsunami of litigation, damaging the .au brands, or intervention.

41. Proposed TLD Registry framework and Policy changes

42. TLD .AU Internationalised Instant Registry Model (auIIRM)

43. TLD .au presents Australian businesses an excellent opportunity to create an international brand for their .com.au enterprise. Current .com.au registrants have invested billions of dollars and decades of effort in marketing and developing the .com.au domain brand. They are largely unaware of the TLD .au proposal, and have made these investments with assurance that their .com.au 2LD was the top level domain they can possibly register for commercial enterprises within Australia. Any attempt to diminish their investment would be

cataclysmic to the confidence and value of their enterprise. There are lessons to be learned from the multiple failures of other TLD introductions which focussed on short term gain, dubious marketing and vested procedural influences.

44. The auIIRM model is automatic registration of TLD .au domain name granted to the .com.au registrant on the date of introduction of TLD registrations with a two year introduction period.
45. auDA can seamlessly integrate a TLD .au system if it adopts a policy to grant automatic rights to current 2LD .com.au registrants up to the end of the introduction period.
46. Upon first registration whois information for TLD .au is duplicate of .com.au registrant and DNS records.
47. Eligibility rules for TLD .au and .com.au registry remain identical as they are both open registries for commercial purposes only.
48. The initial wholesale registration fee of \$0 for the TLD .au is for the introduction period only so current registrants will have the TLD .au registration immediately upon the introduction date, and subsequent \$0 renewal fee to coincide with the date of their corresponding 2LD.com.au renewals for the first two years of the introduction period. This is to synchronise renewal dates so there is no loss of TLD .au domain registrations due to registrant being unaware of changes to the .au namespace during the introduction period, so there isn't a surge in registrations on the anniversary of the introduction date, and so registrants have one billing period to notice the allocation of TLD .au registrations. During the introduction period renewals of 2LD .com.au wholesale prices remain unchanged, and TLD .au registrations are at \$0 meaning subsequent renewals of both TLD .au and 2LD .com.au will fall after the two year introduction period for up to the following two years (up to four years after introduction date) of registration, and will need to be at a new wholesale rate.
49. New registrations within the first two years automatically include the TLD .au with any .com.au 2LD registration as described earlier. Due to the cost of TLD .au registrations being \$0, only 2LD .com.au registrations can be accepted during the introduction period (and subsequently allocated the TLD .au) except those TLD .au domains that are deleted after the introduction of TLD .au auIIRM which become freely available according to the current domain policies.
50. Registration fee is funded by a \$0 registration fee added to the wholesale .com.au registrant fee. This is to prevent consumer backlash over registrars double dipping on fees, particularly those whose fees are already exorbitant.
51. After registration the registrant has the same rights and obligations and may transfer, delete or alter DNS records as they wish.
52. After the introduction period registration and fees for 2LD .com.au and TLD .au would become independent. The additional potential revenue to auDA from a greater total number of registrations will require a reduction in the wholesale cost of both .com.au and the introduction of a cost for TLD .au. I suggest a wholesale cost of \$9.00 for each registry to be reviewed each year based on total registrations revenue.
53. Registrars will need to be monitored that they do not seek to damage the TLD and 2LD brands with additional fees during the introduction period. Their fees should also be monitored after the introduction period when the wholesale prices are adjusted. This is to protect the brand, as well as to ensure no activity breaches consumer or corporate laws.
54. These changes allow .com.au registrants time to learn and understand the possibilities with their TLD .au registration not just through official channels, but mainly through experiential

methods such as seeing businesses advertise their new TLD .au, renewals information and networking.

55. auIIRM would create an instant registry with as many registrations as the highly successful .com.au registry with minimal disruption to registrants, minimal changes to educate consumers and maximise the marketing opportunity of the an internationally recognisable brand of .au without diminishing the brand of .com.au.
56. .com.au registrations are the backbone of Australia's internet branding and registry funding. The auIIRM model allows .com.au registrants to not have their investments diminished by a copycat passing off TLD .au registry, and other 2LD registrants don't get to advance their secondary 2LD rights over the precedent set with .com.au 2LD precedence via decades of policy and marketing by the industry. This ameliorates the certainty of litigation, digital interruption, Government intervention, consumer confusion, corporate responsibility and any illegal diminishment of current rights holders.
57. TLD .au is not a duplication of the .com.au registry, but it is the international brand for Australian businesses. Those who do not want the internationalised brand are free transfer or delete the registration licence.
58. The proposal shows there is no long term replication of existing functionality but a expansion of existing registrants online marketing potential. For example News websites would benefit greatly by shortening their name for an international audience but a mowing business grasscuttter.com.au might let the .au expire.
59. Current .com.au registrants have clear rights to the TLD .au and will protect those rights. They were sold the highest level commercial domain namespace and it was policy only that prevented them from acquiring the TLD when they made their purchase. Thus they can expand their internet presence with the TLD and let the market sort out which registrants prefer the .com.au and not some arbitrary or co-opted procedure.

60. The second .NET.AU registrant eligibility improvement to save the .NET.AU 2LD

61. auDA is considering closing the net.au registry which will cause great disruption and financial losses to current registrants and their businesses. There is no need or cause to do this except if it is intended to use this as a machine to subvert .com.au rights to the TLD .au and gain a subsequent windfall from auctions and litigation.
62. The current .net.au registrant eligibility rules are recently copied from the .com.au registrant eligibility rules in 2002, decades after the introduction of .au 2LD's and as a result of pressure to allow a secondary market for open registrations due to .com.au becoming a crowded marketplace for name recognition. It follows that .net.au 2LD is a registry with a legacy of changing eligibility policy and as a secondary market in hierarchy via precedent and policy, and that has experimented in eligibility requirements to make the .net.au 2LD a viable registry.
63. NET.AU registry has once before had its eligibility criteria relaxed to accommodate growth of the .au registries in response to market and consumer needs.
64. NET.AU has the legacy of being a secondary licence rights market to the primary commercial market of .com.au registry.
65. .net.au infers networking so it lends itself very nicely to general use eligibility.
66. The initial vision of .net.au registry was to be exclusively limited ISP's etc, turned out to be redundant and thus were changes to copy the eligibility requirements of the open .com.au registry so were not first in, best dressed for rights to TLD .au. This change in policy cannot legally diminish the value of .com.au registrations.

67. **Allow Personal Registrations.** Add an exception to the eligibility requirement .NET.AU to allow the .net.au registry to be used like the .id.au registry where individuals can register, but not having the disadvantage of an the id.au extension, allowing a wider variety of names to be registered that are not restricted by being a person's exact name, a registered organisation (.org.au), a business with an abn, or a trademark.
68. Via the precedence of domain policy, .com.au registrants have a hierarchical right to the TLD .au, so as .net.au is a secondary registry it is better positioned for growth if the eligibility rules were relaxed again to allow any Australian entity to register .net.au for personal use notwithstanding other polies as defined by auDA.
69. Future policy reviews might better define general use registrations eligibility and expand this to all TLD and 2LD namespaces in many years to come. Testing this on the .net.au namespace would prevent the registry from being a failure before general use eligibility becomes available, that will likely make the registry viable
70. End.