

Ms Jo Lim
Chief Policy Officer
au Domain Administration

Dear Jo

***Issues Paper, May 2007* released by auDA's 2007 Names Policy Panel**

This submission responds to the public invitation for comments on this *Issues Paper*.

It focuses on the question posed in the *Issues Paper* of whether or not registrants should be allowed to sell their .au domain names. It also provides some background to the emergence of this issue in Attachment A.

I submit that registrants should be allowed to sell their .au domain names.

For the information of some Panel members, I was a member of auDA's 2000 Name Policy Advisory Panel, 2000 Competition Model Advisory Panel and 2002 Code of Committee. I was a policy consultant to the Small Enterprise Telecommunications Centre, a national small business consumer association; and, to a communications advisory group of the Small Business Coalition.

Yours sincerely

Ian Johnston
15 June 2007

Comments on *Issues Paper, 2007* released by auDA's 2007 Names Policy Panel

Introduction

1. As a general principle, I would like to see the adoption a more market-based approach to .au domain name licence regulation and an ongoing commitment to increasing market competition in the long-term interests of end-users.

Issue: Whether or not registrants should be allowed to sell their .au domain names

2. In my view registrants should be allowed to sell their .au domain names. I would also like to see .au domain name licence trading take place in an orderly, open and competitive secondary market. My reasons for this long-held position are set out in this submission.

3. Some background to the emergence of this issue in .au is set out in Attachment A.

4. The Panel may wish to draw on the material in this submission to develop its arguments in favour of allowing registrants to sell their .au domain names (para 17.8).

5. It is heartening that there has been increasing interest and support in recent years for registrants to be allowed to sell their .au domain name licences.

6. The Small Business Coalition (www.smallbusiness.org.au) recently released its policy priorities for 2007-2008 (www.smallbusiness.org.au/sbc/publications/sbc017.pdf). The Coalition is a grouping of 27 industry associations with an interest in small business issues. The Australian Chamber of Commerce and Industry (ACCI, www.acci.asn.au) convenes the Coalition. The following is an extract from this "policy priorities" document:

The SBC supports self-regulation by the .au domain name industry in order to promote economic efficiency. SBC notes that there is a competitive primary market for the issue of .au domain name licences, but that the trading of licences in secondary markets is effectively banned by industry self-regulatory policy which prohibits the transfer of com.au domain name licences between licencees, mainly businesses. Therefore, SBC supports the removal of this prohibition and any other impediments to the development of an orderly and competitive secondary market in .com.au domain name licences.

7. The Coalition's media release, accompanying the "policy priorities" document, notes that the priorities identified should act as an important guide to both the Government and the Federal Opposition as they consider policy options which affect this pivotal economic sector.

8. The Regulation Taskforce, in its 2006 Report to the Prime Minister, concluded and recommended:

Business raised several concerns about domain name governance and regulation. These included the red tape surrounding the prohibition of trading .au domain name licences in a secondary market; and the requirement that an individual or business must have an Australian business number or a tax file number to acquire a domain name with a .com.au extension.

The Australian Government should consider conducting a review of .com.au domain name administration.

9. The Government responded to the Taskforce recommendation as follows:

The Department of Communications, Information Technology and the Arts is examining Australia's domain name administration and policy structures following five years of operation under a self regulatory model. The recommendation on domain names will be considered in the course of this process.

10. There has been an ongoing debate for a number of years within the Australian domain name industry on the related issues of removal of the prohibition, changing the rules regarding transfer of domain name licences, development of a secondary market and the risks of cyber-squatting and other undesirable practices. A significant online debate happened in September 2005 (<http://dotau.org/archive/2005-09>), concluding that it was time to review the rules. I submit that this body of material is worth reviewing.

11. An OECD paper published in 2006 – *The Secondary Market for Domain Names* (www.oecd.org/dataoecd/14/45/36471569.pdf) – makes the following points:

This Paper provides a review of recent developments in the inter-related markets of secondary domain names and Internet search services, both of which are fundamental to identify, locate and access information and services on the Internet and therefore, are elements of considerable importance to the continued successful growth of the Internet.

The paper provides an overview of recent developments in Internet domain name markets, and more specifically, in the market for secondary domain names that is largely driven by Internet advertising on search engines. ...

The primary domain name market appears relatively mature. ...

The secondary domain name market is still undeveloped and its complexities may not be easy to understand by registrants. For example, registrants may not fully appreciate the value of a domain name they either let expire or are not using. At the same time, the needs of registrars serving the secondary market may create different technical demands for some registries, or for other registrars providing a broader range of services.

A combination of consensus policies and market forces could progressively assuage the above-mentioned issues in the secondary market for domain names, as the market matures. Several recent developments point in this direction. First of all, the ICANN community has started to identify and examine issues and solutions. Secondly, a recently created market-based open exchange that provides access to aggregated information by registrants could help them benefit from typical supply and demand forces, though it will need to gather a critical mass of secondary domain name service providers and registrars.

12. Secondary domain name markets – such as those created by Pool.com (GDNX, www.gdnx.org) and Sedo (sedo.com) – have an important role to play in international commerce and the efficient allocation of domain name resources.

13. I submit that it is strategically important for Australia to develop an orderly, open and competitive secondary market in .au domain name licences. The market should ensure a more efficient allocation and reuse of domain name resources by facilitating transfers of domain name licences. I suggest that any delay in the development of such a secondary market, would not be in Australia's economic interests.

14. I acknowledge that domain names are a public resource that should be managed in the public and national interest by auDA. A domain name is globally unique – a pure private good. Domain names are first and foremost electronic addresses, but they are used for purposes for which they were not originally intended. They are and are seen to be intrinsically and commercially valuable. Regulatory regimes that suppress the commercial and economic value of domain names in a global economy serve no good purpose, least of all the interests of end-users. The way is open for auDA to implement a new framework to would facilitate the establishment of an orderly, open and competitive secondary market in domain name licences.

Specific comments

15. I support the arguments in favour of allowing registrants to sell their .au domain names, advanced in paragraph 7.18 of the *Issues Paper*. This is an excellent summary and includes many of the arguments advanced in public discussion in recent years.

16. With regard to paragraph 17.9, *Arguments against allowing registrants selling their .au domain names*, I am unconvinced by a number of arguments made therein. My concerns are addressed in the next five paragraphs.

17. In relation to the statement that "... it is unclear why there is a need for a more liberalised secondary market", I submit that any market is not a "liberalised" market and falls well short of the concept of an open and competitive secondary market. There is little or no transparency to any secondary market transactions. The need, public benefits and value to the broader community of a secondary market are well documented in the *Issues Paper*, and this and other Submissions.

18. Contrary to the argument advanced in the second first dot point under paragraph 17.9 (radio-frequency), spectrum licences are tradeable (www.acma.gov.au/WEB/STANDARD//pc=PC_1620). Licensees can be negotiate in the open market with others to buy and sell spectrum space as the need arises, or authorise third parties to use their spectrum space. Spectrum licences can be combined or sub-divided to form new licences. Furthermore, the rights of use of particular Smart Numbers – alpha-numeric telephone addresses analogous to domain names – can be traded (www.smartnumbers.com.au/app/action/tradingNumbers).

19. A secondary market should ensure that many good .au domain names would become available, for purchase by those who value them most. The market should ensure an efficient allocation and reuse of domain names and do so in the long-term interests of end-users. The primary market generics auction did indeed result in some domain names being sold for tens of thousands of dollars, but I understand that the average price was a few thousand. Some generic domain name licences held by sole traders and small business have lost value for a variety of reasons including by virtue of the tight restrictions on trading of licences. There are no incentives for licensees to surrender generic and other domain names and so incur financial losses. There are regulatory barriers to their sale and therefore more efficient use.

20. Any risk associated with cybersquatting or domain speculation may be effectively managed by an appropriate regulatory regime.

21. The cost of any transitional and ongoing regime should be funded, on a fully commercial basis, by "selling" and "acquiring" licensees, eg by a sellers and/or buyers premium.

12 June 2007

Attachment A: Background to Issue

1. In a paper I wrote in June 2002 - *Domain Name System Reform International and Australian Developments: Some Public Policy Perspectives* (www.infobrokers.com.au/masters_final.pdf) - I concluded that transfers of .com.au domain name licences between licence holders should be allowed, thus enabling the development of a competitive secondary market in licences.
2. The following is an extract from this paper:

Prohibition on transfers of domain name licences between registrants

The old DNS regulatory scheme effectively prevented the *trading* of domain name licences and, therefore, the development of a competitive secondary market in licences. In so doing, it has suppressed the market value of many thousands of .com.au licences.

The scheme prohibited the transfer of com.au domain name licences between domain name holders (INWW, 2001a & 2001b).

A key rationale for maintaining the prohibition on transfer was that removal would encourage further domain name cybersquatting, hoarding and other forms of undesirable conduct and thus cause harm. Ironically, the longstanding practice of selling commercially attractive domain name licences at fixed prices, below their market value, has been a major factor contributing to and encouraging such behaviour. The risks of financial losses for speculators are small by contrast with the financial gains. Auctioning of commercially valuable domain name licences and removal of the prohibition trading of licences can be an effective way of dealing with such undesirable market conduct.

By contrast with .au domain names, secondary markets in gTLD domain names have (e.g. in .com) developed in the U.S. and elsewhere. Market participants competitively offer domain names for sale, lease and auction. Domain name registries, registrars, brokers, domain name designers and creators (who avoid breaching cybersquatting laws) openly compete in global markets, facilitating transfers of domain names to those who value them most. *The Anticybersquatting Consumer Protection Act* (U.S.) makes it a civil offence to seek to profit in bad faith from another's trade mark by registering, trafficking in or using a domain name that is identical or confusingly similar to a trade mark (Omond, 2001).

The prohibition on transfers of com.au domain name licences has, it is argued, resulted in a substantial lessening of competition in a secondary market for domain names licences. It discouraged registrars and resellers from competitive marketing and sale of licences. It effectively prevented those who value domain name licences most from acquiring them.

Transfers of .com.au domain name licences between licence holders should be allowed under the new scheme, thus enabling the development of a competitive secondary market in licences ...

3. SETEL made the following points in a submission in 2005 to the Prime Minister's Regulation Taskforce (<http://www.setel.com.au/site.php?id=257>), chaired by Mr Gary Banks (Chairman of the Productivity Commission):

Scope for regulatory reduction in .au domain name industry

The domain name system (DNS) functions as an electronic address system for the Internet and is a foundation of e-commerce in Australia and elsewhere. It is a public resource managed in the public interest by the private sector. The DNS is strategically and economically important – it is “critical infrastructure”.

SETEL is concerned that some auDA policy has inhibited competition, imposed costs on business and resulted in a less than economically efficient allocation of .au domain name resources. Over 550,000 .au domain name licences have been issued in the primary market by Registrars and their Resellers, but they can not be traded.

Specifically, auDA regulation effectively prohibits trading of these licences and, so, no secondary market has developed. E-bay marketing of .au domain names is swiftly dealt with by auDA.

The transfer of domain name licences between licencees (registrants) is prohibited by auDA policy, except in very limited circumstances – see: Transfers (Change of Registrant) Policy (2004-03) ... and Clarification of Domain Name Licence - Prohibition on Sale of Domain Name (2005-05) ...

SETEL raised this prohibition issue in a letter to the Chairman of auDA in mid-2002 and forwarded a paper recommending the removal of the prohibition and development of an orderly, open and competitive secondary market in .com.au domain name licences. As a general statement, the elimination of anti-competitive regulation can deliver significant community benefits including, but not limited to:

- increased consumer choice
- lower prices for consumers in the primary market
- innovation
- new business opportunities
- a reduction in ‘red tape’
- a more economically efficient allocation of resources, including in upstream and downstream markets.

Cybersquatting, warehousing, hoarding of domain name licences are often advanced by those opposed to lifting of the prohibition. Such issue may be effectively dealt with by auDA regulation.

A significant regulatory control remains in place. SETEL recommended to the auDA Board in August 2002 that:

- it remove the prohibition on transfers of com.au domain name licences between registrants;
- ensure that there are no auDA regulatory impediments to transfers of com.au domain name licences between registrants; and

- encourage, or at least not discourage, the development of an orderly, open and competitive secondary market in .com.au domain name licences.

4. SETEL's recommendations were not adopted, but have facilitated public debate on auDA's prohibition on an industry-based mailing list. It is heartening to see that in recent weeks Registrars, Resellers and others have been pressing auDA for, at least, a review of the policy of prohibition.

5. The Taskforce's 2006 Report – *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business: Australian Government's Interim Response* – included the following conclusion and recommendation:

Reviewing '.com.au' domain name extensions

The Australian domain name system is critical infrastructure in the context of modern e-commerce. Responsibility for administering the .com.au extension resides with the industry self-regulatory body, au Domain Administration.

Business raised several concerns about domain name governance and regulation. These included the red tape surrounding the prohibition of trading .au domain name licences in a secondary market; and the requirement that an individual or business must have an Australian business number or a tax file number to acquire a domain name with a .com.au extension.

The Taskforce did not have time to examine these concerns, although it acknowledges that *prima facie* there may be issues which warrant a review.

Recommendation 5.59

The Australian Government should consider conducting a review of .com.au domain name administration.

6. The Australian Government responded to this *Recommendation* as follows:

The Department of Communications, Information Technology and the Arts is examining Australia's domain name administration and policy structures following five years of operation under a self regulatory model. The recommendation on domain names will be considered in the course of this process.