



21 January 2011

Ms. Lujia Chen
Policy Officer
.au Domain Administration Limited
114 Cardigan Street
CARLTON VIC 3053

Per Email: lujia.chen@auda.org.au

Dear Ms Chen,

The Law Institute of Victoria (LIV) is pleased to have the opportunity to comment on the Discussion Paper issued by the 2010 Names Policy Panel (Panel) in November 2010.

The LIV's comments in relation to questions contained in the Discussion Paper are set out below.

SECTION 1A – Registrants must be Australian (or registered to trade in Australia)

- a. *Should the restriction on registrants being Australian (or registered to trade in Australia) remain in place?*

While it is noted that foreign entities wishing to create a website directed at Australia are currently unable to do so, those interested in providing goods or services in Australia can register a trade mark or business name and register .com.au or .net.au domain names, under the current domain name eligibility and allocation policy rules. As such, the LIV believes that the present restrictions are appropriate and should remain in place.

SECTION 1C – Policy enforcement

- a. *Are current enforcement mechanisms in the .au domain space adequate and effective?*
b. *If not, how could they be improved?*

The LIV considers that improvement could be made to the current enforcement mechanisms dealing with complaints lodged in respect of domain name registrations, without needing to increase .au Domain Administration Limited's (auDA) workload or the workload of registrars.

Rather than deciding cases once they come to hand, the LIV suggests that complaints could be dealt with by amending the .au Dispute Resolution Policy (auDRP) to include the default decision process outlined below (Default Decision Process). This process could then in turn be used to amend other auDA policies involving merit-based decision making.

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The Default Decision Process proposed by the LIV would provide for a notice of intention form (Notice of Intention) to be lodged by complainants which would include basic information relating to the complainant, the respondent, the nature of the complaint and the remedy the complainant is seeking. If the remedy the complainant seeks is a transfer of the domain name, the complainant should be required to verify that they meet the eligibility criteria to support this transfer. A disclaimer should also be included, which requires the complainant to verify that the complaint has not been filed for an improper purpose and that there are no legal proceedings on foot. Once completed, the Notice of Intention would then be filed with auDA together with an administration fee.

Once a Notice of Intention has been received by auDA, the LIV recommends that the domain name be "locked" while the Notice of Intention, together with a notice of response form (Notice of Response), is served on the respondent's email or physical address. Once served, the respondent should be provided with 28 days to file the Notice of Response. Information included with the Notice of Response should advise the respondent of the need for the Notice of Response to be accompanied by eligibility information to support their case, and that failure to submit a Notice of Response within the specified time may result in a default decision being made against the respondent without a decision on the merits being made.

The LIV believes that there are many advantages to the Default Decision Process outlined above. These include:

- providing cost effective means for complaining may reduce dangerous forms of abusive registration, such as phishing. It is highly unlikely that organisations who engage in such actions will verify their identity, which may lead to an increase in confidence of the .au domain space.
- decision makers, including auDA, will only be required to decide cases where there appears to be a bona fide dispute, rather than spending time deciding uncontested matters.
- the process of filing a Notice of Intention and Notice of Response is not onerous, and therefore could be completed simply and cost effectively. Consequently, respondent's acting in good faith should not be burdened.
- as the process is a variation to the concept of default judgment, it is an established process in civil court jurisdictions which operates effectively to maximise the use of court resources and access to justice. The .NZ Domain Name Commission has included a mediation process into their dispute resolution policy, and as such, the above suggestion would not be a radical change within the industry.
- improving the effectiveness of the auDRP, may result in less need for auDA to create further policies involving merit-based decision making.

SECTION 4 – Prohibition on Misspellings Policy

- a. Should the restrictions on prohibited misspellings remain in place?*
- b. If so, what types of names should be protected?*
- c. How should a prohibition on misspellings be enforced?*

The LIV believes that the restrictions on prohibited misspellings should remain in place as the prohibition on misspellings policy (Misspellings Policy) provides an inexpensive and direct means of dealing with straight forward cases of bad faith registration. However, the LIV also recognises that in its current state, the Misspellings Policy does not provide any recourse for brand owners who believe their rights have been infringed. In this sense, there is no remedy available which enables brand name owners that are the subject of a deliberate domain name misspelling, to be securely transferred the misspelt domain name. Under the current system, the misspelt domain name is simply cancelled. Consequently, if the brand name owner fails to secure the misspelt domain name through a successful back order, the misspelt domain

name may easily end up back in the hands of another cyber-squatter giving rise to the same problems.

To address this void, the LIV considers that the Default Decision Process set out above may provide some means for brand name owners to lodge a complaint and seek to have the misspelt domain name transferred.

If you would like to discuss any of the matters raised in the submission, please do not hesitate to contact me or Angela Gidley, LIV Commercial Law Section Lawyer, on (03) 9607 9382.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Caroline Counsel', with a large, sweeping flourish at the end.

Caroline Counsel
President
Law Institute of Victoria