Electronic Frontiers
AUSTRALIA

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Policy Review Panel
C/O .au Domain Administration
PO Box 18315, Melbourne VIC 3001

Via email to policy.review@auda.org.au

10th November 2017

Dear Mr Swinson,

Re: development of an implementation policy for direct registration

Electronic Frontiers Australia (EFA) appreciates the opportunity to provide this submission in relation to this inquiry. EFA's submission is contained in the following pages. EFA is happy to provide further information, if required.

About EFA

Established in January 1994, EFA is a national, membership-based non-profit organisation representing Internet users concerned with digital freedoms and rights.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties in the digital context. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of digital communications systems.

Yours sincerely,

Jon Lawrence - Executive Officer
On behalf of EFA's Policy Team

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Submission

1. What date should be chosen as the cut-off date for determining registrant eligibility for priority registration of the second level domain name, and why?

In order to prevent unnecessary speculative registrations, the cut-off date for determining registrant eligibility for priority registration of corresponding second-level domain names should be set as soon as practicable.

2. Should registrants of domain names at the fourth level within edu.au and gov.au be eligible for priority registration? If so, what rules should apply?

Priority registration of corresponding second-level domains should apply only to existing third-level registrants, with each corresponding third-level registrant having equal standing. Fourth-level domains within state.edu.au and state.gov.au should not receive any priority to register second-level domains.

3. What process should be implemented to resolve competing claims to the same au name and why? Should registrants whose claim is unsuccessful be given priority to register another second level domain name?

Section 2.3 of the Domain Name Eligibility and Allocation Policy Rules for the Open 2LDs should apply, namely 'there is no hierarchy of rights in the DNS.' As such, all existing third-level registrations should be treated equally in relation to any priority for registering the corresponding second-level name.

This principle also requires that other registrations such as company names, business names or trademarks, do not in themselves provide any right to priority in the registration of second-level domains.

Once the eligibility cut-off date has passed, all potential contention sets (ie where there is more than one corresponding third-level domain with separate registrants) should be identified and the corresponding second-level domain reserved.

Where there are un-contended third-level names, or where there are contending third-level names that share the same registrant, the registrant of such names should be given priority to register the corresponding second-level name.

Where there is contention with multiple registrants, the contending parties should be provided with an opportunity to come to an agreement as to which party should be able to register the corresponding second-level domain. This period should last for three to six months and should precede the release of any second-level domains for registration.

Where an agreement can be reached, the second-level domain should be registered to the successful party as part of the general release of second-level domains.

Where an agreement cannot be reached, the second-level domain should be reserved pending the completion of a mediation or dispute resolution process.

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Strong consideration should be given to providing such mediation services to registrants for free, or at as low a cost as possible. The free mediation services provided by Nominet for second-level .uk contentions should be considered as a helpful template in this regard.

Where a contending party believes it has a cause for complaint against another contending party, the existing .au Dispute Resolution Policy should apply, and the corresponding second-level domain name should remain reserved while the complaint is processed.

Should any mediation or dispute resolution process be unsuccessful in resolving the contention, the second-level domain should remain reserved indefinitely, until such time as the contention set is resolved through agreement, mediation, litigation, or the non-renewal and deletion of contending names.

There should not be any priority given to third-level registrants for second-level domains which do not directly correspond to their third-level domain, under any circumstances.

4. How much time should priority registrants have to exercise their right to register the matching second level name before it is made available to the public for registration?

Any period for priority registration should exceed the minimum licence period for existing .au domain names, ie two years.

5. Should certain names be reserved for future use as 2LDs? Please indicate which names and why they should be reserved as future 2LDs?

Prior to the release of second-level domains, applications should be accepted from suitably-qualified entities to reserve potential future 2LDs. Such entities should include government and representative bodies.

6. Are there names whose use is not prohibited at law that should be reserved?

The reserved list should be based on the existing Reserved List Policy for the open 2LDs, and should include names prohibited by law, state and territory identifies, and names that provide a risk to the operational stability and utility of the .au domain.

7. Should names that are potentially confusing or misleading when registered at the second level be reserved (ie not available for registration)?

As a general principle, subjective determinations about the reservation of any names at the second-level should be avoided. There should be a transparent process involved in the reservation of any names due to being potentially confusing or misleading, and there should be an application process available for organisations that wish to provide evidence of a legitimate basis for registering any such reserved name.

In particular, we do not believe that formal government (or inter-governmental) use of a name, in the absence of legislation protecting that use, should be regarded as misleading. This is especially relevant in the case of acronyms, which may of course refer to a range of entirely legitimate organisations. As an example, the World Health Organisation should not have any priority right to register who.au, nor should the Australian Securities and Investments Commission have any priority

right to register asic.au over the registrant of asic.net.au, which is used to promote the 'Aviation Security Identification Card'.

8. Should names that are a deliberate misspelling of the existing 2LDs be prohibited from being registered at the second level?

The Prohibition on Misspellings Policy should apply. So deliberate use of a misspelling for domain monetisation etc should not be regarded as legitimate, and may be rejected by auDA, however simply being close to the spelling of an existing registration should not preclude registration if there are other legitimate connections to the name (including personal names).

An example would be 'edi.au' - while this is arguably a deliberate misspelling of '.edu.au', it would also be a legitimate registration by an organisation such as that which has a registered trademark for the term 'EDI'. The default approach should be for these names to be reserved, however an application process should be available for organisations that are able to provide evidence supporting such a registration. The existing provisions for auDA to reject or audit such domains, and also the provisions on when and how such domains may be part of an auDRP, should be retained from the existing policy.

9. Should direct registration be implemented in .au using a staged process or concurrent reservation and open availability process, and why?

As discussed in point five, a period for applications to reserve potential future 2LDs should occur first, followed by a period for negotiation between contending third-level registrants, as described in point three. This should be followed by general availability, with certain names reserved, as described above.

10. Should other registrants or rights holders be given priority during the landrush or reservation period to register a second level domain name (trademark owners)?

No. The existing mechanisms for the protection of trademarks and other rights are long-established and sufficient. Where a trademark holder has chosen not to register a third-level domain that corresponds to their trademark, there is no case for them to be given any priority in relation to second-level registration.

Fourth-level State-based domain names

After eleven years of operation, there are currently 199 Community Geographic Domain Names registered as third-level domains under the the various .state.au 2LDs. A number of these names appear to be non-contended by other 3LDs and would therefore be able to migrate to the corresponding second-level domain name.

Given the small number of names involved, this is arguably an inefficient use of these state.au name spaces, and EFA therefore recommends that auDA consider abandoning the Community Geographic Domain Names program and allocating the state-based 2LDs (.act.au, .vic.au etc) to the relevant state and territory governments.

This would allow state and territory government entities to migrate to shorter domain names - eg ‘treasury.vic.au’ instead of ‘treasury.vic.gov.au’, or in the case of a local council, ‘moreland.vic.au’ instead of ‘moreland.vic.gov.au’.Commonwealth entities would then have exclusive use of the .gov.au space.

Migrating state-based educational entities to the state-based 2LDs would have a minor impact - ie they would likely change from school.nsw.edu.au to school.edu.nsw.au, although smaller jurisdictions such as the NT and ACT would have the option of allowing school.nt.au. Such a change may however simplify somewhat the administration of the .edu.au name space, with that becoming exclusive to nationally-accredited institutions.

Clearly, the rights of existing CGDN registrants would need to be carefully-considered. In many cases, such as where there is not a corresponding local council name, there would seem to be no reason for the CGDN to change. Where there was a corresponding local council name, a suitable alternative name for the CGDN would need to be provided, possibly at the second-level.

A significant transition period, of at least two, if not up to five, years, would likely be needed to ensure the disruption of any such changes was minimised. During such a transition period, redirects should be in place from the old to the new names.