

24 May 2010

Ms Jo Lim
Chief Policy Officer, auDA
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By email to: jo.lim@auda.org.au

Dear Ms Lim

We refer to the Discussion Paper issued by the Australian Domain Name Administrator New 2LDs Advisory Panel ("the Panel") of April 2010.

The Law Institute of Victoria's Intellectual Property and Information Technology Working Group ("the Working Group") makes the following comments.

SECTION 1A

(a) Comments on the creation of new 2LDs in general

The Working Group generally considers that caution should be exercised in introducing new 2LDs and generally recommends against the proposal to do so at this time. The Working Group considers that the introduction of new 2LDs will provide new forums for opportunists to obtain domain name registrations for purposes such as cybersquatting or phishing and that the potential adverse effects and potential damage to brand owners will outweigh the need for new 2LDs at this time. In this respect, the Working Group comments that:

- Activities such as cybersquatting and phishing are recognised as registration abuse issues by the ICANN community (see Registration Abuse Policies Working Group Final Draft Report dated 17 May 2010). The Working Group's views in relation to potentially harmful activities relevant to the introduction of any new 2LDs is not limited to cybersquatting and phishing, but extends to many of the other types of conduct identified in that final draft report (particularly Front Running; Malicious Use of Domain Names; Gripe Sites; and Deceptive and/or Offensive Domain Names).
- While the risk of activities such as cybersquatting/phishing etc. could potentially be reduced if auDA introduces an early registration period whereby brand owners can register domain names containing their trade marks prior to the general public, such a process may be burdensome to trade mark owners as it compels them to obtain additional domain name registrations, and may be expensive, especially for owners with substantial trade mark portfolios and in circumstances where, at the present time, there is already a proposed release of further gTLD's by ICANN (see www.icann.org) and the present staged release of the .co domain. Further, an additional burden may arise with brand owners to watch or monitor additional 2LD registration activity.

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- Increased instances of such opportunistic registrations are, in the Working Group's view, likely to result in further auDRP complaints being filed. Such complaints can be costly for trade mark owners and other cancellation procedure alternatives have the potential to be futile where opportunists simply re-register the relevant domain name before the trade mark owner has been able to.
- Over the past five years, there has been a general increase in the number of cases of opportunistic registrations. For example, in 2009 WIPO delivered a total of 2107 decisions relating to gTLDs and ccTLDs. In 2008 this figure was 2329. This is a dramatic increase since 2004 when the WIPO delivered 1176 decisions (see "Brands Tackle Cybersquatters in 2009, UDRP becomes Eco-Friendly" (Geneva, March 23, 2010 PR/2010/635) which is available on WIPO's website at www.wipo.int).
- The Working Group considers that it is likely that many existing 2LD domain registrations are defensive (ie have been registered by brand owners to prevent others from doing so in guarding against activities such as phishing and cybersquatting) as opposed to being used for non-defensive purposes ie for commercial, communications, marketing or other purposes;
- There appears to be no evidence to suggest that there exists a need for further 2LDs. Indeed, it may well be that the need for further 2LDs is very low. Some existing 2LDs are already well under used (As the Panel has stated at page 4, paragraph 7 of its discussion paper, 85% of domain names registered in the .au space use the .com.au 2LD) and proposed registrants will soon have the option of multiple new gTLDs as well as .co, which is expected to be popular. A consideration of the real need for new 2LDs should take into account existing similar 2LDs which are capable of serving the same purpose;
- An increase in the types of 2LDs availability is unlikely to increase web content (please see Sections 2B-2C below for further comment).

(b) Comments on auDA's current policy and process for the creation of new 2LDs

The Working Group agrees with the criteria described by the Panel in assessing the need for new 2LDs. The Working Group further submits that in addition to this criteria, specific regard should be made to:

- (a) the interests of brand owners generally (beyond the policy that domain name registrations are not proprietary); the likelihood of activities such as cybersquatting/phishing to occur; and the extent of inconvenience or expense (if any) brand owners are likely to incur in additionally protecting against such activities in the new 2LD space;
- (b) whether the potential adverse effects of activities such as cybersquatting/phishing is likely to outweigh the need for additional 2LDs for lawful uses (which should exclude defensive uses); and
- (c) the practical benefit of any proposed new 2LDs weighed against whether there is a real need for the proposed 2LD when similar 2LDs exist. In this respect, the potential burden and cost to brand owners in securing defensive registrations in the new domain extensions should be regarded.

SECTIONS 2A-2C

The Working Group recommends against the introduction/retention of blog.au, event.au, conf.au and info.au. The Working Group acknowledges the importance of ensuring that the Internet is a resource that can be used across the community, including for communication by individuals or groups that may not wish to present themselves as commercial or formally established entities, as may to an extent be implied by the use of the .com.au or .org.au extensions. However, the Working Group considers that non-commercial and non-organisational use of the Internet is adequately provided for with the use of the .net.au extension at this time.

As appears to have been the case in the past, we consider that it will remain desirable for event organisers and blog developers to continue to use existing common and recognisable existing 2LD's, such as .com.au in seeking to direct the broadest web user audience to their sites.

.blog.au and .event.au domain names

In relation to blog.au and event.au the Working Group specifically considers that in addition to the reasons set out in section 1A above, the present domain names available in the .au space are most likely adequate for use for blogs and events. As appears to have been the trend in the past, the Working Group considers that it will remain desirable for event organisers and blog developers to continue to use existing common and recognisable 2LDs, such as .com.au in seeking to direct the broadest web user audience to their sites and that consequently, it is likely that these two proposed new 2LDs will, like other 2LDs will not enjoy a high usage by parties seeking to do so for lawful and non-defensive purposes.

.conf.au and .event.au domain names

In relation to .conf.au the Working Group, for the reasons set out in Section 1A above; for the reasons above relating to .event.au; and for the reasons identified by the Panel, agrees with the view that it be closed down.

In relation to and info.au, the Working Group, for the reasons set out in Section 1A above and for the reasons identified by the Panel, agrees that it be closed down.

SECTION 3

The Working Group has no further comments to make at this stage.

If you would like to discuss any of the matters raised in the submission, please contact me by phone on (03) 9607 9367 or Michael Hayes, Lawyer, Commercial Law Section on (03) 9607 9382 or by e-mail mhayes@liv.asn.au

Yours faithfully,



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