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## Who controls .org.au? Where domain name policy and law collide\*

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### Introduction

The administration of Australia's Internet domain name space - that is, all domain names ending in ".au" - has recently been transferred<sup>1</sup> to the Australian Domain Name Authority Ltd ('auDA'). At the date of the transfer of control of the .au domain from its previous administrator Robert Elz to auDA, Mr Elz remained as the registrar of two of the second level domains that he had created. These were .org.au, which is a space for most non-profit organisations to register domain names, and .id.au,

under which individuals can register domain names for personal purposes.

On 22 October 2001, auDA opened tenders for the operation of a registry or registries to operate seven of the second-level domains<sup>2</sup> originally created by Robert Elz. In doing so it sought the concurrence of each of the incumbent registrars. It obtained the agreement of all of the registrars bar one: Elz himself. Mr Elz has taken the view that, notwithstanding that auDA may possess authority over the .au domain as a whole, this does not also give it the right to redelegate or to

otherwise administer the second-level domains such as .org.au and .id.au that had been created by its predecessor, without obtaining the consent of the incumbent delegate of those second-level domains.<sup>3</sup>

auDA obtained legal advice to the contrary, to the effect that, "the existing delegation held by the delegates will have no further force or effect after ICANN redelegates the .au Country Code Top Level Domains (ccTLDs) to auDA".<sup>4</sup> In reliance on this advice, auDA awarded the tender for operation of a registry to control

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those domains to AusRegistry Pty Ltd on 12 December 2001, and has since withdrawn Mr Elz's ability even to continue to manage the disputed domains during the interim period before AusRegistry commences its operations. On 29 January 2002, auDa announced it has assumed technical and administrative responsibility for the org.au and id.au – the second level domains.<sup>5</sup>

This article briefly investigates the position taken by each party, and attempts to draw a conclusion by the application of relevant principles of domain name law.

### **Domain name management**

The authoritative global root name server continues to derive the content of its directory of root domains from the United States Department of Commerce ('USDC'). Despite its contract with the Internet Corporation

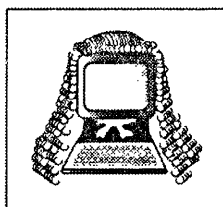
for Assigned Names and Numbers ('ICANN')<sup>6</sup> to administer the domain name system, the USDC, even now, retains policy control over the root domain.<sup>7</sup> Since the domain name system is structured as a hierarchy, every Internet domain name depends upon this authority that the USDC exercises over the root domain.

New top-level domains (whether these be generic or country code domains) may be created only with the sanction of the USDC,<sup>8</sup> and will be administered in the first instance by its delegate, ICANN. ICANN, however, sub-delegates the control of all top-level domains to independent registry operators; in the case of .au, Robert Elz and subsequently auDA.

Once delegation of control of a top-level domain has occurred, there are certain procedures that ICANN follows in revoking that delegation or in redelegating the administration of

the domain. At the time the .au top level domain was created by InterNet Assigned Numbers Authority ('IANA')<sup>9</sup>, which is now an arm of ICANN, the applicable procedures were undocumented, but by March 1994 the procedures had been settled by consensus of Internet stakeholders and had become a set of principles published in the form of a document entitled RFC 1591. RFC 1591 relevantly states:

For any transfer of the designated manager trusteeship from one organization to another, the higher-level domain manager (the IANA in the case of top-level domains) must receive communications from both the old organization and the new organization that assure the IANA that the transfer is mutually agreed, and that the new organization understands its responsibilities.<sup>10</sup>



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An exception is made "in cases where the designated manager has substantially mis-behaved" or "[i]n cases when there are persistent problems with the proper operation of a domain, [whereupon] the delegation may be revoked, and possibly delegated to another designated manager".<sup>11</sup>

The manner in which RFC 1591 is currently administered by ICANN is documented in a policy issued by it in May 1999 entitled ICP-1<sup>12</sup>, which is in effect, similar to RFC 1591. It goes without saying that neither RFC 1591 nor ICP-1 possess any force of law. They are merely policy documents which describe the manner in which ICANN exercises the delegated authority of the USDC over the root domain, in the processes of delegation, redelegation and revocation of top level domain names.

Two further provisions of RFC 1591 and ICP-1 are of relevance to the legal positions taken by auDA and Robert Elz. These are, from RFC 1591, the statement that:

Most of these same concerns are relevant when a sub-domain is delegated and in general the principles described here apply recursively to all delegations of the Internet DNS name space.<sup>13</sup>

The commentary of ICP-1 on this issue is as follows:

There are no requirements for management of subdomains of TLDs, including subdelegations, beyond the requirements for TLDs stated in this document and RFC 1591. In particular, all subdomains shall be allowed to operate their own domain name servers, providing in them whatever information the subdomain manager sees fit, as long as it is true and correct.<sup>14</sup>

From these documents it appears that the policy of the root domain administrator as applied by ICANN, is that the delegation, redelegation and revocation of domain names at the second level should be conducted pursuant to the same policies that govern those activities at the top level; in other words, that redelegations should only be undertaken with the agreement of both parties, except in

the case of malfeasance or incompetence.

### **Transfer of .org.au and .id.au domains**

The process by which the .org.au and .id.au domains were dealt with by auDA does not appear to comply with the procedures laid down in RFC 1591 nor ICP-1, which, as we have seen, are said to apply "recursively" to delegations below the root. In fact, far from the transfer being "mutually agreed" as RFC 1591 specifies, Robert Elz has stated that the .org.au domain is "not going to be any part of auDA's [near] future", and described auDA's conduct in seeking to redelegate the domain as "inappropriate".<sup>15</sup>

The argument that Mr Elz makes, when analysed in legal terms, is that the terms of auDA's licence of the power to administer the .au ccTLD by ICANN do not incorporate an implicit grant of the same power over the subdomains .org.au and .id.au, notwithstanding the hierarchical arrangement of those domains. The contrary position taken by auDA is that the delegation of control over a domain does incorporate a delegation of control over all its subdomains, and that upon the redelegation of the head domain to auDA, the previous delegations of subdomains within the head domain will have no further force or effect and may be overridden by the new head delegate at will.

Whether Mr Elz's or auDA's analysis is correct depends on analysis of the terms upon which a delegation of authority over a ccTLD is made, and in particular, an interpretation of the original delegation of the .au ccTLD by IANA to Mr Elz in 1986. RFC 1591 makes no mention of what a country code administrator may or may not do with subdomains that have already been delegated by a previous appointee. The agreement between ICANN and auDA is little more instructive. Clause 4.1 of that agreement<sup>16</sup> states:

The Sponsoring Organization [auDA] shall cause the authoritative primary and secondary nameservers for the Delegated ccTLD to be operated and maintained in a stable and secure manner, adequate to resolve

names within the Delegated ccTLD, and any sub-domains over which the Sponsoring Organization retains administrative authority, for users throughout the Internet.

Clause 4.5 of the agreement requires in effect that auDA "abide by all ICANN policies ... that concern ... the operational capabilities and performance of the ccTLD operator", which of course includes RFC 1591.<sup>17</sup> The final provision that is of relevance is clause 6.3 which sets out the consequences of a termination of the agreement by ICANN. It relevantly states:

In particular, the Sponsoring Organization shall ensure the transfer of all relevant Domain Name Service ("DNS") and registry data to the specified successor, subject only to the successor's commitment to use the data in a manner consistent with the Sponsoring Organization's prior written commitments made to data subjects regarding the use of their personal data.

This suggests that upon the transfer of the ccTLD from one registry operator to another, the newcomer is obliged to receive and maintain all data from the previous incumbent (subject only to appropriate privacy undertakings being made). Clause 4.1 further indicates that there might be expected to be some subdomains within the ccTLD over which the operator does not retain administrative authority.

Whilst these provisions offer some threads of support for Mr Elz's position, it is fair to say that the terms of the delegations of control over the .au ccTLD to Mr Elz and auDA are in themselves inconclusive. Perhaps greater assistance in assessing the correctness of Mr Elz's model of domain delegation - that is, that subdomain delegations are not subsumed within the delegation of a higher-level domain - may be obtained by reviewing prevalent industry norms. Mr Elz himself claims:

No-one seriously believes that [a change of control of a higher-level registry will effect an automatic revocation of domains registered at a lower level] - if they did it would mean that all the agreements that

auDA is currently making with the other 2nd level domains [are] very suspect - after all, ICANN could next year, or something, simply take the AU domain from auDA and hand it to someone else (that part is certainly true I think) and by so doing, render all of the domains currently existing in AU void. Note the question isn't whether they would, or whether they could find ways to avoid that, but whether they could if they wanted to.<sup>18</sup>

This logic persuasively suggests that the authority granted to a ccTLD delegate does not incorporate the authority to cancel or redelegate pre-existing subdomains, or at least not except in accordance with the provisions of RFC 1591; in other words not unless those subdomains are surrendered, or lapse due to misconduct or incompetence or because the conditions of their delegation (for example, as to payment of registration fees, if applicable) are not satisfied.

On the other hand, if the authority of the .au domain delegate (in this case, auDA) does not incorporate rights over the existing delegated subdomains such as .org.au and .id.au, from what does the continuing force of those delegations derive? On auDA's argument, it cannot be derived from the authority of the previous .au domain delegate, Mr Elz. Mr Elz did not have power to delegate the control of .org.au and .id.au indefinitely, he only had the power to delegate them for so long as his own .au delegation subsisted.

This, however, overlooks the fact that since Mr Elz's pre-existing delegations do not form part of the grant of authority to auDA for the reasons stated above, there is no inconsistency in those delegations remaining in force beyond Mr Elz's tenure as .au domain administrator. The delegations made by Mr Elz enjoy a separate legal force to the delegation of the balance of the .au ccTLD from ICANN, such that the former can survive the termination of Mr Elz's authority over the latter, just as the authority of a .com.au domain registrant over its third-level domain will survive the transfer of authority

over .com.au.

### Conclusion

There is good reason to take the view that in unilaterally transferring control over the .org.au and .id.au subdomains away from Robert Elz, auDA has acted beyond the scope of its power over the balance of the .au ccTLD.

This fact does not, however, necessarily have any immediate legal consequences. The scope of authority granted by ICANN to auDA is a matter solely between ICANN and auDA. If it is accepted that auDA may override prior sub-delegations of the .au ccTLD either not at all, or alternatively only in compliance with RFC 1591, then its failure to do so may be a matter which puts it in breach of its agreement with ICANN but does not provide a remedy to any affected sub-delegate save to prevail upon ICANN to cancel auDA's delegation.

At least, this is so unless domain names can be characterised as a property right. If they can, then although auDA may purport to redelegate a subdomain such as .org.au, and although ICANN may raise no quarrel with auDA doing that, there may be a cause of action against auDA in conversion at the suit of the party previously in possession of that domain, whose chain of title passes through Robert Elz to IANA to the United States Department of Commerce. Likewise, if domain names are proprietary in nature and a superior right of possession were claimed by an original delegate against a new registry operator, that registry operator might have a cause of action against auDA in breach of contract on the ground that auDA had purported to deal in property that it did not own.

The question of whether such proprietary rights in fact subsist in domain names - and more particularly whether they subsist in domain names at the top level (in respect of which RFC 1591 tells us that "[c]oncerns about 'rights' and 'ownership' of domains are inappropriate") or the second level - remains an open and contentious question, which will have to be the subject of another paper.

In any case, auDA's assumption of control over the .org.au and .id.au subdomains, and its assertion that it is entitled to redelegate those subdomains against the wishes of the manager to whom they were previously delegated, is a bold assertion indeed. Whilst it may be in the end that auDA is entitled to do as it claims, it is the writer's view that auDA places a great stake on very uncertain odds.

\* This is an abridged and slightly updated version of an earlier paper of the same name published in full at <http://dnsaction.terminus.net.au/dnsarticle.html>.

- 1 See the ccTLD Sponsorship Agreement entered into between ICANN and auDA at <http://www.auda.org.au/docs/au-agreement-31aug01finl.pdf> (accessed 18 February 2002).
- 2 Namely, .com.au , .net.au , .asn.au , .org.au , .id.au , .gov.au , .edu.au
- 3 Mackenzie, Kate. "auDA won't get .org.au: Elz", *The Australian*, 6 November 2001, see: <http://australianit.news.com.au/articles/0,7204,3196733%5e15306%5e%5enbv%5e,00.html> (accessed 18 February 2002).
- 4 Point 1.3 of part 2 of its Request for Tender. See: <http://www.auda.org.au/rft> (accessed 18 February 2002).
- 5 Press release, "auDA Assumes Responsibility for ORG.AU". see: <http://www.auda.org.au/about/news/2002012901.html> (accessed 18 February 2002).
- 6 <http://www.icann.org/>
- 7 Froomkin, A Michael. "Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution", (1999) 50 Duke L J 17, 106.
- 8 See clause 12.3 and 12.5 of ICANN's contract with the Department of Commerce at <http://www.icann.org/general/iana-contract-09feb00.htm> (accessed at 18 February 2002), which supersedes the Memorandum of Understanding cited above.
- 9 IANA is a central coordinator for the assignment of unique parameter values for Internet protocols, see: <http://www.iana.org>
- 10 RFC 1591: Network Working Group Request for Comments: 1591, clause 3(6). See: <http://www.isi.edu/in-notes/rfc1591.txt> (accessed 18 February 2002).
- 11 RFC 1591, clause 3(4).
- 12 ICP-1: Internet Domain Name System Structure and Delegation (ccTLD Administration and Delegation). See: <http://www.icann.org/icp/icp-1.htm> (accessed 18 February 2002).
- 13 RFC 1591, clause 3.
- 14 ICP-1 at (g).
- 15 Mackenzie, Kate. "Domains move inappropriate: Elz". *The Australian*, 13

November 2001: <http://australianit.news.com.au/articles/0,7204,3236063%5e16123%5e%5enbv%5e,00.html> (accessed 18 February 2002).  
16 The ccTLD Sponsorship Agreement, dated 9/3/2001. See also Attachment F to the agreement  
17 See also Attachment F to the agreement  
18 Private correspondence, 6 November 2001 between Mr Elz and the writer.  
which restates much of the effect of RFC 1591 and ICP-1.

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## Generic .com.au domain names

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Almost 10,000 applications were received when a list of 3,000 previously withheld generic .com.au domain names was released to the Australian public in January this year<sup>1</sup>. The applications are now being reviewed. Where there are multiple applicants for a generic domain name, these applicants will participate in a private online auction for that domain name. The most popular choice has been [computers.com.au](http://computers.com.au) which received 76 applications.

The release of these domain names follows a review of the policy governing the .au domain last year by au. Domain Administration Ltd (auDA)<sup>2</sup>. The previous policy disallowed the registration of generic words as .com.au domain names on the basis that to do so would give the registrant an unfair advantage over its competitors in that industry. A reserved list of some 3,000 generic words was established over the years.

High profile sales of generic domain names in the .com domain (such as those for [sex.com](http://sex.com), [business.com](http://business.com), and [engineering.com](http://engineering.com)) have fuelled interest in generic words as domain names. Generic domain names such as these have the advantage that they are easily

remembered, and owners further hope to receive a greater amount of traffic from internet users making an intuitive guess — for example that [computers.com.au](http://computers.com.au) would connect to a site selling computers.

On the other hand, established businesses that obtain a new generic domain name will then have the cost of educating the public about the connection between that new generic domain name and their company, money that could instead be spent promoting the core brand of the business. It is also doubtful that the owner of a generic domain name will ever be able to build up sufficient use so as to obtain exclusive proprietary rights. For this reason, it may not be possible for such an owner to stop other businesses using similar domain names, for example the domain name [computers.com.au](http://computers.com.au) may be affected by the use by others of [computer.com.au](http://computer.com.au), [ecomputer.com.au](http://ecomputer.com.au), or [computersales.com.au](http://computersales.com.au). Companies seeking to establish a new business in connection with a domain name may therefore find it makes more sense in the long run to select a domain name which is more distinctive and therefore more likely to indicate an exclusive association with the owner.

These factors will affect the price that an applicant is prepared to pay in an auction for a generic .com.au domain name. Applicants that find themselves the sole applicant for a domain name will have an easier decision - whether to outlay the \$110 reservation fee<sup>3</sup>. A significant number of domain names on the reserved list will not have been taken up by any applicants. Those names, and other generic domain names not appearing on the reserved list, will be available on a first come first served basis once the new .au policy is introduced later this year (the date is yet to be announced).<sup>4</sup>

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- 1 See <http://www.auda.org.au/>.
  - 2 auDA is a government approved, not for profit body that has been delegated control of the .au domain.
  - 3 The application process is described in the link from <http://www.auda.org.au/about/news/2002013101.html>.
  - 4 Ibid.