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(Endnotes)

1 Refer to sections 289-290 of the Telecoms Act. Matching secondary disclosure exceptions (by persons authorised to receive such information under Division 3) are contained in Division 4, sections 296-303A.

2 In Australia, this shift is arguably reflected in various pieces of legislation, for instance the *Anti-Terrorism Act 2005 (Cth)*.

3 See, e.g., the Asia-Pacific Economic Cooperation (**APEC**) Privacy Framework, the Organisation for Economic Co-operation and Development (**OECD**) Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, and the European Parliament and the Council of the European Union (**EU**) Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

4 The opposite scenario could presumably also occur - where a non-Australian operator with activities in Australia could find itself in breach of its own domestic regulations - if it complies with disclosure requirements of Australian law enforcement agencies.

5 See also subsection 6A(4), which states that the National Privacy Principles are not breached by an act or practice required by an applicable law of a foreign country.

6 ALRC Privacy Report, Chapter 71 'Telecommunications Act', paragraphs 71.44 - 71.46.

7 ALRC Privacy Report, Chapter 71 'Telecommunications Act', Id, paragraphs 71.49-71.50.

8 Australian Communications and Media Authority, *Internet Service Providers and Law Enforcement and National Security Fact Sheet*, accessed on 22 July 2007 at http://www.acma.gov.au/WEB/STANDARD?pc=PC_100072

9 Telecoms Act, s 271.

10 Telecoms Act, s 276(1)(a).

11 T Starey, 'Getting the message: law enforcement agencies' access to stored communications' (2005) 10(1) *MALR* 25.

12 Telecoms Act, s 9.

13 Telecoms Act, sub-s 276(2).

14 Telecoms Act, sub-s 276(3).

15 It has recently been argued that the exceptions 'permit uses and disclosures of personal information for a broader range of purposes than the National Privacy Principles' which 'can result in diminished protections for personal information in the telecommunications sector', Office of the Privacy Commissioner, 'Submission to ALRC Review of Privacy', Issues Paper 31 (February 2007), p 396. Available at <http://www.privacy.gov.au/publications/alrc280207.html>

16 Telecoms Act, s 279.

17 Telecoms Act, ss 280 and 297 (secondary disclosure).

18 Telecoms Act, s 284.

19 Telecoms Act, s 289.

20 Telecoms Act, s 290.

21 Telecoms Act, s 291.

22 Telecoms Act, s 292.

23 Similarly, s 313 of the Telecommunications Act (which provides that a carrier is not liable for damages for an act done or omitted in good faith to give reasonably necessary assistance to officers and authorities of the Commonwealth, States, or Territories) applies only in relation to Australian law.

24 Interception Act, section 5. Note that the definition lists a number of Australian enforcement agencies (a) - (m), but also includes '(n) any body whose functions include administering a law imposing a pecuniary penalty.' There is no suggestion however that this would extend to foreign law enforcement bodies.

25 National Privacy Principle 9.

26 Privacy Act, s 13D.

27 See ALRC Privacy Report, paragraphs 72.27 - 72.30. Note that the ALRC has recommended amending sections 280 and 297 to clarify that the exception does not authorise a use or disclosure that would be permitted by the Privacy Act if that use or disclosure would not otherwise be permitted under Part 13 of the Telecoms Act (ALRC Privacy Report, Recommendation 72-1). Interestingly, section 303B provides for the reverse: disclosure or use permitted under Part 13 is taken to be authorised for the purposes of the privacy legislation.

28 See ALRC Privacy Report, paragraphs 39.52 - 39.57, which identifies the telecommunications industry as a 'high-risk sector' due to the large number of ISPs who fall within the small business exception based on a turnover of less than \$3 million per annum.

29 Telecoms Act, Schedule 1.

30 ALRC Privacy Report, Recommendation 72-2.

31 Telecoms Act, ss 289 and 290.

32 Microsoft Online Privacy Statement: <http://privacy.microsoft.com/en-au/fullnotice.aspx>

33 Google Privacy Policy: <http://www.google.com/privacypolicy.html>

34 Yahoo!7 Terms of Service: <http://au.docs.yahoo.com/info/terms/> and Yahoo!7 Privacy Policy: <http://info.yahoo.com/privacy/au/yahoo/>

35 Interception Act, s 108.

36 Interception Act, s 5.

37 Refer to the CDPP website page on 'international work': <http://www.cdpp.gov.au/Practice/International.aspx>. The formal mutual assistance regime relies on a network of international relations, and the goodwill of countries to assist each other in the investigation and prosecution of criminal matters. It is governed by the Mutual Assistance in Criminal Matters Act 1987. The United States has a 'Treaty with Australia on Mutual Assistance in Criminal Matters'. The formal regime runs parallel with a less formal system of international cooperation between investigating agencies.

Australian Domain Name Policy

Rebecca Sadleir discusses the new auDA policy and the relaxation of rules on transferring .au domain name licences

auDA, the Australian Domain Name Administrator, has introduced a policy which removes most of the restrictions which previously applied to the transfer of .au domain name licences from one person to another. The procedure for transferring .au domain names has also been simplified. The Transfers (Change of Registrant) Policy (2008-08) (**Policy**) came into effect on 1 June 2008.

auDA is the government-endorsed policy authority and industry self-regulatory body for the .au domain space. It is responsible for developing and implementing policies in relation to the .au domain space, as well as accrediting and licensing domain name registrars and facilitating the .au Dispute Resolution Policy. auDA also represents

Australia at ICANN – the Internet Corporation for Assigned Names and Numbers, the organisation which co-ordinates the naming systems for the internet – and other international forums.

Background

There are no proprietary rights in a .au domain name, and it is not strictly possible to 'sell' a domain name. This is because a registrant does not 'own' the name itself; instead, it holds a licence to use the domain name for a specified period, subject to certain terms and conditions. However, it is possible to transfer a domain name licence in certain circumstances, and it is this which is addressed by the new auDA Policy.

Historically, both the registration and transfer of domain name licences in the .au space have been subject to strict controls. Although restrictions have gradually been eased over the last few years, the rules were (and indeed still are) significantly more stringent than those for domain names in many other countries and, for example, in the .com space.

Before the implementation of the Policy, transfer of a .au domain name licence was permitted only in specific, limited, circumstances. For example, it was not possible to transfer a domain name from one entity to another for purely commercial reasons, unless in the context of a wider business sale. In addition, the transfer process was relatively cumbersome and, amongst other things, required the transferee to make a statutory declaration confirming that the circumstances of the transfer complied with the relevant rules.

The new policy

On 1 June, after several months of public consultation, auDA introduced the Policy. As a result, subject to certain conditions which are discussed below, the holder of a domain name can now offer its domain name licence for sale, and may transfer it to another eligible entity for any reason.

The auDA 2007 Names Policy Panel, which undertook two rounds of public consultation and produced an issues paper and recommendations prior to implementation of the new policy, identified a number of policy objectives for the *.au* domain:

- to maintain the Australian identity of the *.au* domain space;
- to enhance the usability of the *.au* domain space;
- to preserve the integrity of the *.au* domain space; and
- to facilitate economic benefits flowing from the *.au* domain space.

The Policy attempts to strike a balance between these various objectives, with the emphasis on enhancing usability and facilitating economic benefits.

Relaxation of transfer rules

Under the Policy, subject to one prohibition which is discussed below, the holder of a domain name registration may:

- offer its domain name licence for transfer (or 'sale') to another eligible entity, by any means; and
- transfer its domain name licence to another eligible entity, for any reason.

The result of this is to permit a secondary market in *.au* domain names, such as has existed for many years in the *.com* space. However, it is intended that the restrictions described below will operate to prevent that secondary market from becoming a 'free for all', and ensure that the system is in line with the policy objectives outlined above.

Prohibition on transfer within six months of registration

It is a fundamental rule of *.au* domain name registration that a person may not register a domain name for the sole purpose of resale or transfer to another entity. This basic rule is not altered by the new Policy.

In order to support this principle, and in an attempt to minimise cybersquatting, scams and misuse of domain name registrations, the Policy prohibits a registrant from transferring its domain name licence within the first six months after registration. This prohibition applies to newly registered domain names only, and not to renewed or transferred domain names.

A registrant may apply to auDA for authorisation to transfer its domain name licence within the first six months after registration. Any authorisation will be at auDA's discretion. The policy provides that circumstances in which auDA may authorise a transfer include:

- where a competent arbitrator, tribunal, court or legislative body orders the registrant to transfer its domain name licence to the proposed new registrant, eg in the case of a proceeding under the *.au* Dispute Resolution Policy; or
- where the registrant and the proposed new registrant belong to the same corporate group, such as where a parent company transfers its domain name licence to a subsidiary.

Eligibility and allocation rules

As noted above, two of the considerations which auDA took into account in formulating the Policy were the desire to maintain the Australian identity of the *.au* domain space, such that *.au* registrants have an association or nexus with Australia; and the need to preserve its integrity by minimising cybersquatting and other misuse of *.au* domain name registrations, and reduce conflicts and disputes.

Those considerations are addressed by the relevant eligibility criteria, which must be met by any person wishing to hold a domain name licence, including a transferee under the Policy. These are not altered by the policy, and are set out in auDA's Domain Name Eligibility and Allocation Policy Rules for Open 2LDs (2008-05).

To be eligible to hold a *.com.au* domain name, the registrant must be 'Australian'. This means that it must be either an Australian registered company; trading under a registered business name in Australia; an Australian partnership or sole trader; a foreign company licensed to trade in Australia; the owner of, or applicant for, an Australian trade mark or application; an association incorporated in Australia; or an Australian commercial statutory body.

In addition, domain names in the *.com.au* domain must be either an exact match, abbreviation or acronym of the registrant's name or trade mark, or otherwise must be 'closely and substantially connected' with the registrant. There will be a 'close and substantial connection' if, for example, the domain name is the name of a product that the registrant manufactures or sells; a service it provides; or an event that it organises or sponsors.

In a further development in the direction of relaxing the rules governing *.au* domains, the Domain Monetisation Policy (2008-10) issued on 30 June 2008, clarifies that 'domain monetisation' falls within the cat-

egory of 'a service which the registrant provides'. Domain monetisation is registering a domain name in order to earn money from a 'monetised website', that is, a website or 'landing page' which has been created for the purpose of earning revenue from advertising, including monetised domain parking pages.

There are other, similar (but generally more restrictive) eligibility criteria for other *.au* second-level domains, such as *.org.au*, *.asn.au* and *.net.au*.

Procedure and effect of transfer

The Policy sets out standard wording that a domain name licence transfer application must now contain. This includes short declarations from both the transferor and transferee as to their authorisation to submit the form, to transfer the domain name and, in the case of the transferee, that it is eligible to hold the domain name under the eligibility rules. This replaces the previous, more burdensome procedure, which involved providing documentary evidence of the transfer, as well as a statutory declaration by the new registrant detailing the circumstances of the transfer.

As before, a transfer will result in a new two-year domain name licence being issued to the proposed new registrant. The previous registrant is not entitled to be reimbursed for the unused portion of its domain name licence. Parties to a transfer may be asked to disclose the sale method and price, on a voluntary and confidential basis, so that auDA can collect aggregated statistical data.

The auDA policy review panel recommended that the Policy be reviewed after two years. It remains to be seen whether these changes will result in a significant increase in domain name trading; it should at least make life easier for those wishing to sell their domain name for legitimate reasons.

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