

Key Points

1. Good fences make good neighbours - proverb

- Good fences protect property and reduce possibility of crime against the property and its owners
- Some established business fences are ACCC, ASIC rules to ensure the overlap, confusion or unacceptable actions between business properties are defined and minimized
- The Regulation to protect Sir Donald Bradman's name against "inappropriate commercial exploitation" is key example
- Domain name policy is like a stile to provide third party rights to void the integrity of the fences

2. Domain Name policy is essentially an anti-competitive model

- How is it competitive for one company to be able to deny another company the right to use its name to promote its company?
- Western Spares example
- It can only create victims over time. Too late once you are a victim. Recovery may be unaccessible due to time or costs.

3. auDA Constitution

- The preamble to the auDA constitution reads:
- Taking the view that the Internet Domain Name System is a public asset, and that the .au ccTLD is under the sovereign control of the Commonwealth of Australia, auDA will administer the .au ccTLD for the benefit of the Australian community.
- Exactly what are the limits of sovereign control over domain names? It is unclear, but seems to be that ICANN has global sovereign control, with .au delegated to auDA and limited Commonwealth Government control.
- It is also necessary to determine what ".. for the benefit of the Australian community" actually means.

4. ASIC Rules of Duties of Directors

- Any information you, as a director, get through your position must be used properly and in the best interests of the company. It is a crime to use that information to gain, directly or indirectly, an advantage for yourself or for any other person, or to harm the company. This information need not be confidential; if you use it the wrong way and dishonestly, it may still be a crime.
- The related issues here are the ethics, morality and codes of practice of the company.

5. All that is lawful is not honourable.

LACA Presentation

I refer to the preamble to the Australian Domain Names Administration Ltd (auDA) Constitution. It is important to keep this in mind. I believe it would be instructive for the Committee to find out exactly what this means and to what extent the Commonwealth of Australia has sovereign control, and who exercises it. The preamble states:

Taking the view that the Internet Domain Name System is a public asset, and that the .au ccTLD is under the sovereign control of the Commonwealth of Australia, auDA will administer the .au ccTLD for the benefit of the Australian community.

1. The consequences of domain name policy are described by a fictitious example in the submission. The following example shows how simple it is to achieve this outcome in practice. This information was extracted from the ASIC business names and Whois domain name databases Tuesday 3 September 2002.

Assume a major spare parts retailer based on the east coast wanted to start a new business on the west coast to serve the mining industry there. They wanted to incorporate the name Western Spares Pty Ltd as the business. However, Western Spares is a NSW registered business L0077811. But a check of Whois shows that the domain name www.westernspares.com.au is available. So, they incorporate the company Online Western Spares Pty Ltd. This entitles them to claim and be given the domain name www.westernspares.com.au. Also, they could apply for and be given the domain name www.ows.com.au. But, this is the name of an incorporated company O.W.S. Pty Ltd ACN 100 944 634. The one company has stopped forever the two existing companies having their exact company names as domain names. The consequences of these "stolen identities" should be obvious; but, you should form your own views about the equity of such a situation. This case is extremely likely as, I am sure you are aware of the ABC articles on www.ato.com.au and www.mabo.com.au as well as the Channel 7 Today Tonight articles on identity theft.

It also is unclear how such a scenario, that took about 3 minutes to put together, satisfies the auDA Constitution "... for the benefit of the Australian community." How is it beneficial to the Australian community that company identifiers can be legitimately given to other parties as their identifiers and thereby exclude the original owner of the identity, the use of its identity on the internet. It is counter-intuitive.

You have to have a company name to get a domain name. But, there is no right to have the company name as the domain name. Moreover, your company name can be given to someone else as their domain name. The problem of two businesses having identical names is remote and should be handled by normal legal principles based on equity rather than an ad hoc group of literati.

2. A part of the problem is that our legal systems are not preventive, they are reactive. Although it is quite obvious that either overt or covert actions resulting from a bad faith registration can be foreseen, there is no legal remedy until it happens. That is, an irrevocable victim has to be created before an action can be taken.

3. There is an urgent need for retrospective legislation or regulations to ensure the identity of any business is protected from exploitation by a third party. Self-regulation has failed small business as the auDA domain name policy does not prevent such events, and in fact openly and proudly enables exploitation by a third party. This is not a short term problem, the crime could happen many years from now. The US experience is that it can take up to 14 months to detect an identity crime.

Such regulations or variations to regulation are common and I am sure you know that better than I do. However, I would like to draw your attention to one that is very relevant.

On 12 October 2000 the Prime Minister released a statement to protect the name of Sir Donald Bradman. The opening part of the statement is:

"I am pleased to announce that the Governor-General has made amendments to the Corporations Law Regulations to protect Sir Donald Bradman's name from inappropriate commercial exploitation."

I recognise that Sir Donald Bradman may have been a well know cricketer. But, should his name receive any more protection from "inappropriate commercial exploitation" than any other business? In my view this is an absolute insult to any small business (regional or city) working to build and protect its business.

4. As further evidence that this matter is of great concern to small business, I have been working this issue with the Council of Small Business Organisations (COSBOA) and with the Micro Business Network (MBN). I understand the MBN has already made a submission to the Senate Committee into Small Business and Employment. That submission also identified the need to address this problem. I suggest that the Committee seek comments from these two groups on this issue.

5. In an era when we seek portability in everything from our working software tools (e.g. standard business activities and the internet would not work without them), telephone numbers, etc; it seems totally ridiculous that we cannot have portability of our business names as of right across those services that are instrumental to our businesses. The role that the internet has in our daily business activities is as critical as the telephone system. In all reality it now has an "essential service" status. So, why then has Government abdicated this critical business function to self-regulation without so much as an Ombudsman to hear complaints? I am sure you would be very well aware of the uproar that would take place if Telstra decided to auction-off someone's phone number they had held for many years.

6. By way of another example I teach a unit in reliability engineering by off-campus learning with a major university. I have students from many parts of the world (UK, Middle East, Africa, USA, Asia, New Zealand, etc). I receive most of my enquiries and assignments from them via email. They might not be aware of the finer points of auDA policy; but, should their privacy as a student be put at risk? Would you want for yourself or for your student child to have assignment information, grades, personal information or explanations, etc using a system that could be easily compromised without either them or a teacher knowing? Besides, it is quite possible that such an activity may contravene the laws of their country. Then who is liable? Has the Government and/or auDA failed in its duty of care?

7. Similar discussion could take place on the need for security of taxation and other personal information. These are described in the submission.

8. The submission, and this presentation, has shown how this is a general problem. In the submission I also describe the specific case of my company.

As the decision in my case is without any defensible explanation by either MelbourneIT or auDA lacks any sensible logic, it would be quite reasonable for a more cynical person to form the view that some kind of conspiracy or other ulterior motive was involved to deny me my company name as my domain name.

The advice of my business associates and solicitor is that I should shut down Logistics Pty Ltd as an operating company immediately www.logistics.com.au is allocated to another company as I would be unable to afford the continuous threat of litigation, identity problems, etc. My fear is that this domain name registration to another party will lead with almost certainty to internet related crimes as described in the submission. This fear is well founded based on current known experiences. Thus, closing down my 15 year old small business is the only practical option to prevent internet related crimes against it. Tomorrow morning on September 10 at 9AM my legitimate company name goes up for auction as a domain name, and at 11AM Wednesday morning on September 11th I will know if I have to close my company. So, this might be the last time I make a presentation as Managing Director of Logistics Pty Ltd. In other words, death by bureaucracy.

9. In the language of criminologists on crime prevention, the Guardian must step-in quickly to prevent crimes against any business through exploitation of its name or identity by a third party. You represent the Guardian with sovereign control in the Commonwealth of Australia - Parliament. Refer back to the auDA constitution preamble.

Lord George stated early last century that the business of war was too important to be left to the military. The analogy in this century is that the importance of cyberspace is too important to be left to its literati.

I appreciate that this is a complex problem with many issues to be considered. But it needs to be solved by a rationale that is to the benefit of the Australian community. I do not think it should be solved by a cheque-book as is the current method.

The Australian Securities and Investment Commission requires, amongst many other rules, a director:

1. You have to be honest and careful at all times, and you have to know what your company is doing.
2. You must act in the company's best interests, not just your own interests.
3. Any information you get through your position must be used properly and in the best interests of the company. It is a crime to use that information to gain, directly or indirectly, an advantage for yourself or for any other person, or to harm the company. This information need not be confidential; if you use it the wrong way and dishonestly, it may still be a crime.

I am trying to be honest, careful and protect the company's best interests by trying to prevent a range of crimes against it that will happen under the current domain name policy. But, I can't do that.

Point 3 actually raises a very interesting issue. Say, your company was made aware that it could obtain the name of another company as its domain name. The problems of cybersquatting, typosquatting, bad faith registrations, etc are all well known. Would taking the name of another company as your domain name violate this rule as a director? Is it a harm to the company to put it at risk of prosecution for bad faith registration of a domain name?

I, and many other small businesses, need to have legislative or regulatory processes in place so that we can take all necessary steps to prevent crimes against the most critical element of our businesses – our names and identity.

Small businesses urgently need to have their names protected against exploitation that could make them innocent victims of internet related crimes. I urge you to move quickly to start the prevention process before more small businesses are turned into victims. It is quite possible that in the time I have spent here so far that businesses have been disadvantaged by this anomaly and their status as victim could take months to years to be known.

There is an old proverb that states that "Good fences make good neighbours". In the context that we want good fences to define our property from another person's property, then similarly we need good legislation, regulations and policies as fences to protect our business property in all of its forms. Before the internet we knew the identity risks that we normally had to contend with. However, it is unbelievable that Government actually enabled the self-regulated internet group to introduce policies that significantly increased the risk of crime rather than reduce it.

Adrian Stephan

From: Adrian Stephan [adrian.stephan@logistic.com.au]
Sent: Thursday, January 31, 2002 12:46 PM
To: Policy; ceo@auda.com.au
Subject: Notice of Intent to Arbitrate - logistics.com.au Rejected Application

I have reviewed this matter, and it seems as if all possible administrative efforts to resolve the matter of approving my application for logistics.com.au have been exhausted.

Therefore, I have decided to refer the matter to arbitration as it is the only remaining course of action available under the Policy.

I have approached the Australian Commercial Disputes Centre Ltd, Sydney, Ph: 02 9267 1000 www.acdcltd.com.au with the intention of appointing them as arbitrators.

In order to avoid further possible complications I require that logistics.com.au be removed from the current processes until advised by the arbitrator.

Notwithstanding my clear intention to go to arbitration on this matter, I will co-operate in any formal review if either the MelbourneIT or auDA Boards wish to conduct a review, subject to mutually acceptable terms and processes.

Regards

Adrian

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Adrian Stephan
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Adrian Stephan

From: Argy, Philip [Philip.Argy@malleasons.com]
Sent: Tuesday, September 03, 2002 6:07 PM
To: Chris Disspain
Cc: Adrian Stephan
Subject: RE: logistics.com.au
Importance: High
Sensitivity: Confidential

Mallesons Stephen Jacques Solicitors
Confidential Communication

Chris

Given that I have still not received a copy of the missing email you promised to send me, nor has Craig returned my phone call, I strongly suggest that the proposed auction of logistics.com.au be cancelled. I believe our client would have a classic promissory estoppel case against auDA based on your exchange of emails with me, not to mention a more conventional section 52 cause of action.

Although the Dispute Resolution Working Group has not been asked to prepare anything for the purpose, I note that auDA's constitution does envisage a proper alternative dispute resolution mechanism being implemented to deal with disputes of this kind. Our client would like to pursue that course, even if necessary having a panel of three auDRP panellists (obviously excluding anyone from our firm and from Maddocks) to determine what should happen with the domain name.

Our client has also made a submission to the House of Representatives Standing Committee on Legal & Constitutional Affairs explaining his grievances with auDA. The Committee has invited Mr Stephan to appear to give evidence in a public hearing. You should consider carefully the appropriateness of auDA's pursuing any proposed auction or other conduct that would be harmful to our client pending the giving of his evidence and the Committee's final report being delivered.

Finally, for the record, we dispute auDA's right to remove notices bona fide posted to the Stuff auction site on behalf of our client - the consequences of interfering in our client's legal rights in this way could be very serious for auDA.

Regards

Philip

Philip N Argy
Senior Partner
Technology, Communications & Intellectual Property Group
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Philip.Argy@malleasons.com
http://www.malleasons.com/our_people/5486445W.htm

Adrian Stephan

From: Argy, Philip [Philip.Argy@malleasons.com]
Sent: Wednesday, September 04, 2002 4:14 PM
To: craig.ng@maddocks.com.au
Cc: Joe@joe hockey.com; richard.alston@dcita.gov.au; Pauline Cooper; Adrian Stephan
Subject: FW: auDA and Logistics Pty Ltd

Importance: High



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From auDA to P Argy,
MSJ (M002...

Malleasons Stephen Jaques Sydney office

Confidential Communication

Thanks for your letter of earlier today, Craig.

The "facts" of the matter set out in your letter are not agreed at all. The original problem was our client being told that a domain name was limited to 8 characters, resulting in its application for "logistics.com.au" translating to a licence being granted in respect of "logistic.com.au". The second problem was Jan Webster telling our client that by the time the 8 character limit response had been found to be incorrect, the word was now regarded as generic. Our client has never claimed that the word logistics had ceased to be generic English word. What our client claims is that, by virtue of its use since 1987 of the company name Logistics Pty Ltd, it would be impossible for anyone else to operate a competitive business using the domain name logistics.com.au without risking infringing our client's intellectual property rights.

The deferral to which you refer in paragraph 4 in your letter did not relate to the auction at all. In early June Chris Disspain informed me that the name would not be put to auction but would simply be "released" for registration at the end of the auction process in the same way as those names for which no applications had been received. We informed our client of that and our client then took steps to communicate with newly accredited registrars to secure its position pending release of the name. Absent the expected written confirmation of that course being followed, I chased up Mr Disspain in my 24 June email. His response was that formal written confirmation that the name would not be going to auction would be forthcoming after his return from the ICANN meeting and the 1 July commencement of the new regime. No mention that the information provided was incorrect or that auDA had changed its mind. Subsequent emails were consistent with that position and inconsistent with what is now being asserted.

Had the letter dated 2 July 2002 copied to me this morning ever been received, you can assume that more strident communications would have been forthcoming. Please furnish us with evidence of the communication having been sent as contended.

On Monday Mr Disppain assured me that, considering that we had never received his 2 July letter, deferral of the auction would be appropriate and implemented. Your letter suggests that the auction will commence today. We assume that to be an error but the stuff.com.au website still suggests that it will commence tomorrow. Please confirm that the auction will be deferred so that our client can have a proper opportunity to pursue other redress. You will appreciate the consequences of auDA's deliberately foreclosing our client's options.

So far as postings to the auction site are concerned, auDA is bound to disclose to prospective purchasers our client's contentions in order to have a properly informed auction. For auDA to remove our client's legitimate attempts to put other bidders on notice of its contentions is disgraceful and is not the proper disinterested role that auDA should be adopting. If it is intended to improve the bid price for the name then auDA has a conflict of interest and for that reason should not be interfering either.

It is a matter for auDA whether it conducts itself in a way that is deferential to a matter now the subject of consideration by the House of Representatives Standing Committee on Legal and Constitutional Affairs or whether it takes action which could pre-empt the Committee's views of the dispute and effectively foreclose our client's rights. We see no compelling reason for the auction to proceed immediately given what has occurred and urge your client to re-consider what in our submission is an inappropriately intransigent stance.

Regards

Philip

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http://www.mallesons.com/our_people/5486445W.htm

Adrian Stephan

From: Pauline Cooper [ccounci3@bigpond.net.au]
Sent: Monday, September 09, 2002 10:16 AM
To: adrian.stephan@logistic.com.au
Subject: FW: Logistics Pty Ltd

-----Original Message-----

From: Pauline Cooper [mailto:ccounci3@bigpond.net.au]
Sent: Wednesday, 4 September 2002 12:44 PM
To: 'ceo@auda.org.au'
Cc: 'Joe@joe hockey.com'; 'richard.alston@dcita.gov.au'; 'Philip.argy@msj.com.au'
Subject: Logistics Pty Ltd

Att: Chris Disspain
CEO, AUDA

Dear Chris

I would like you to bring to the notice of all your Board members the concern that my member Adrian Stephan, Managing Director of Logistics Pty Ltd has raised with me. He has reported to us that their company name is about to be auctioned as a domain name. COSBOA strongly believes that it is inconceivably wrong that the domain policy precludes any business having its name as a domain name, as a right. Small Business is being encouraged by Government to becoming "E" Businesses and if they cannot get their domain name for their business then it is an injustice for small business. In reviewing the fact of Logistics Pty Ltd they have been denied natural justice in the way the domain policy has applied to them. I cannot see how you can auction a name off when they have applied for it and you have not given it to them.

We request the responsible Ministers regulate to protect the names of Small Business as domain names as a matter of urgency

We further request that the auction process be stopped until the necessary changes are in place to protect the names of Small Business

The Council of Small Business Organisations of Australia Ltd (COSBOA) is the peak body for Small Business. We will watch this matter with great interest and will strongly act in support of any small business genuinely disadvantaged by domain name policy

Yours sincerely

Mike Potter
CEO
Council of Small Business Organisations of Australia Ltd
Tel: 02- 6242-7339
Mob: 0418 860 519

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