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24 November 2005

Mr Gary Banks
Chairman
Regulation Taskforce
PO Box 282
BELCONNEN ACT 2616

Dear Mr Banks

SETEL Submission to Regulation Taskforce: Issues Paper

The attached submission responds to the Taskforce's invitation to respond to its Issues Paper.

The Small Enterprise Telecommunications Centre (SETEL) is an independent national consumer organisation representing and advancing the interests of Australian small business telecommunications and electronic commerce consumers. SETEL's members are mainly industry, trade, commerce and professional associations servicing the small business sector. SETEL's membership includes 50 associations, which collectively represent over 600,000 Australian small businesses.

Australia's 1.2 million small businesses[1] are major consumers of telecommunications and Internet-based services, including e-commerce, domain name, web hosting, browsing, content creation and other web services. They stand to benefit significantly from immediate and ongoing regulatory review and reduction by all tiers of government.

SETEL has considerable experience, from a consumer perspective in general and a small business consumer perspective in particular, in regulation of the telecommunications industry and the .au domain name industries in Australia. SETEL has been an active participant in the development of industry self-regulatory arrangements.

I may be contacted on 02 6251 7823 (after 5 December).

Yours sincerely

Ewan D Brown
Executive Director

SETEL Submission to Regulation Taskforce: Issues Paper

Introductory comments

In this submission, SETEL's comments seek to respond to a number of issues relevant to our role of representing the interests of small, micro and home businesses as consumers of telecommunications and Internet-based services, bearing in mind that our perspective seeks to address the capacity of those businesses to derive efficiencies of operation through more effective use of communications services. This includes minimising red tape of any type.

The electronic environment and regulation

SETEL is concerned that the increasing usage of electronics/computerization is creating an expectation by regulatory agencies that information and compliance procedures are easier and quicker to access, and assimilate, by small, micro and home businesses and, that developments in technology are resulting in an increase in regulation and compliance requirements delivered by electronic means. SETEL therefore requests that an investigation be conducted to determine the validity of this hypothesis.

On a similar theme SETEL is concerned that the increased reliance by regulatory agencies on electronic modes of access for lodgement/compliance/information dissemination and retrieval in relation to regulation is unable to be matched by the small, micro and home businesses sectors. SETEL believes that:

- there is still a significant electronic divide between Government/BIG business and the small business sector;
- many small, micro and home businesses are still not able to access broadband services or data speeds necessary to connect effectively to regulators' electronic sites; and
- major problems exist with viruses and malware that inhibit usage of electronic compliance procedures by small business.

The use of electronic technologies has introduced an unwanted timescale factor – the expectation that information is 'instantly' available and thus capable of response or compliance in a very short time frame. Furthermore this technological development has shifted responsibility to the user or business for the downloading and/or printing of forms, regulations and information.

There has been a significant shifting of onus onto the receiver for access, data retrieval and even comprehension. Website navigation capabilities are not of a commonly high standard amongst business users and are generally not of the same level as those of website designers.

SETEL continues to be concerned about the potential problems arising from poor record keeping or records management practices in an electronic environment,

notably where required for compliance services. The issues needing to be addressed include:

- advice on correct procedures provided to businesses;
- the actual capability of businesses to effectively manage electronic records – capture, store, index, search and retrieve such records;
- training of business operators on the need and processes for managing and storing both mandatory and non-mandatory data/records;
- the cost of essential hardware (eg. external storage devices) and software; and
- interoperability issues involving transfer and use of information cross multiple technologies and systems.

Relevance of Regulation

SETEL has been actively involved in the development of self-regulatory measures within the telecommunications and .au domain name industries. In the telecommunications arena a very useful process involves consideration of the necessity for retaining a point of concern as a rule (therefore subject to compliance and possible enforcement) compared with expressing that concern as a guideline designed to foster good practice. In most cases the self-regulatory mechanism applies similar levels of effort to promoting compliance with guidelines as that applied to rules/regulations.

SETEL contends that all regulation be subject to a regular review process to determine currency with existing practices/problems or concerns, possible replication by other legislation (including State processes) and, more importantly, the criticality of components of regulation.

In too many instances broad catch-all regulation has the impact of affecting all businesses (thus imposing significant regulatory burden on the business sector and the regulator) rather than requiring regulators and enforcers to focus on and be active in controlling illegal or unacceptable practice. Recent SPAM legislation was crafted in a manner that results in the circumstances of just one unsolicited email from a small business being technically constituted as SPAM and thus exposing the business to prosecution. Such an event would be a total waste of resources and extend way beyond the intent of the regulation.

Similar effects are likely to be experienced in relation to the development of regulatory measures to implement a “Do Not Call” body of legislation.

From a small business perspective a significant amount of business-related regulation is simply not scaleable and the provisions too often appear excessively draconian or beyond the scope of comprehension of business operators in a small, micro or home business environment.

SETEL suggests the application of a reality check on regulation as it applies to small, micro and home businesses. Over–prescriptive regulation can actually inhibit good practice. The severity of the remedy must match the detriment due to a breach and not seek to punish merely for the sake of capacity to do so.

Regulation Affecting Not-for Profit Organisations

SETEL notes the work of Monash University's Centre for Corporate Law and Securities Regulation on reforming not-for-profit regulation[2], notably its report on *A Better Framework: Reforming not-for-profit regulation*[3], 19 February 2004. The report notes the significance of the sector:

> The NFP sector plays a vital role in the Australian economy. Australians give $2.8 billion annually to NFP organisations. The most recent official estimates suggest that NFP institutions contribute almost 4.7% of the Gross Domestic Product (GDP). They also make a significant contribution to employment, accounting for 6.8% of total employment in 1999 - 2000. In comparative terms, NFP institutions add more to GDP than the mining industry. Increasingly the sector's importance is being recognised worldwide, but in Australia there has been only limited research into NFP companies. The legal nature of not-for-profit organisations is even more varied than in the 'for-profit' sector. Many, particularly smaller organisations, are incorporated under State based associations legislation. By contrast, many of the large welfare organisations are church sponsored and have no clearly defined identity of their own. Another significant group are incorporated as companies limited by guarantee under the Corporations Act 2001 (Cth). The complexity of the legal forms of NFP organisations has important implications for accountability, governance and regulation, - a key focus of the study.

Many not-for-profit organisations are "small businesses" and some are governed, managed and staffed by volunteers, with limited resources and capacity.

SETEL requests that the impact of regulatory burden on associations, charities and the not-for profit sector be examined. Apart from the obvious issue of the real need for many regulatory requirements the factor of timing needs to be addressed.

In the ACT the Workers' Compensation insurers require audited statements of actual wages to be lodged within one month of the close of the financial year. Few, if any, associations can comply as the normal audit process is rarely completed by that stage or many auditors are not available to commence work (due to peak loading) within that time period. If audit facilities are available then the organization generally has to endure additional cost for a wages audit separate from the later mainstream activity.

In the case of an association incorporated as a public company limited by guarantee, ASIC requires lodgement of audited accounts within four (4) months of the close of the financial year yet does not require the holding of an Annual

General Meeting (at which the audited accounts are presented and approved) until the expiration of up to five (5) months after the close of the financial year. Penalties for late lodgement apply to the former requirement.

In addition to the timing issue, SETEL poses the question why is it necessary for an organization (as in its own case) which is required to comply with rigid compliance and grant acquittal procedures, involving a registered company auditor, to submit ostensibly superfluous financial data to a regulatory authority for no obvious public good purpose.

This case emphasizes the situation affecting many small businesses in relation to the need to comply with regulatory requirements. Why is the general high level of compliance necessary? What alternatives can be implemented? The suggestion of guidelines may provide a way forward. A minimization of rules and regulations may in fact foster better compliance and adoption of good practices.

What regulation is covered?

SETEL notes that:

> For the purposes of this review, the Taskforce is defining regulation to include any laws or other government 'rules' which influence or control the way people and businesses behave. Under this definition, regulation is not limited to legislation and formal regulations; it also includes 'quasi-regulation' (such as codes of conduct, advisory instruments or notes etc). …
>
> As reflected in the Joint Press Release, the Taskforce is to focus on Australian Government regulation.
>
> To be examined by the Taskforce, a regulation may either be directly aimed at business or impose a compliance burden on business. This includes small and family-run businesses, as well as other incorporated or unincorporated businesses.
>
> The primary motivation for the Taskforce is to reduce the regulatory *compliance burden* on business, rather than to reduce regulation per se. Of course, regulation that is clearly redundant should be abolished, and overly complex or burdensome regulation should be simplified or reformed.

SETEL notes that there are functions of the Commonwealth of Australia that have been devolved/delegated to industry self-regulatory bodies, which have developed and implemented 'rules' which also influence or control the way people and businesses behave. In SETEL's view some of these 'rules' have not been in the interests of consumers in general and small, micro and home business consumers in particular.

Code Regulation

Though SETEL has no particular expertise in the area of "code regulation" it

considers that the subject is of sufficient importance to draw it to the Taskforce's attention because of the longer-term implications of this form of regulation for the Australian economy in general and Australian small business in particular. Code regulation is pervasive and is not widely known about, nor understood.

What is code regulation? In a submission in Dec 2003, Dr Eugene Clark, then Professor of Law, University of Canberra, writes[4]:

> Stanford's Lawrence Lessig in the Code and Other Laws of Cybserpace (1999) and The Future of Ideas (2001) suggests that the very nature of the software and hardware that make the Internet possible, also work to provide a form of 'regulation' regarding what is possible and how things are structured. This is a new sense of 'code" and new form of 'regulation'.

Dr Clark gave a presentation to Business Enterprise Point (BEP) Consultative Forum in early 2004, in which he distinguishes "code regulation" from other forms of regulation. From his presentation:

Forms of Regulation

- traditional government regulation, for example by legislation and courts;
- international agreements;
- trans-national Judicial Dialogue
- self-regulation by industry, by contract
- code regulation

Code: Lessig - that "human behavior is regulated by a complex interrelation between four forces, namely law, markets, social norms and architecture" (p. 83). While the first three forces are well known, the fourth is less so.

Code 1: The design of software and hardware constituting a network and the communication protocols allowing these elements to interact with each other. The design of the code has a significant influence on human behaviour given architecture is one of the major forces and it influences whether certain activity is easy or hard or even possible.

Code 2: Accordingly a code can do much of the work (in terms of control and regulation) that law used to do. Further, law will increasingly be replaced by code and sovereignty will give way to software. (pp 94-95)

Industry Self-Regulation

SETEL has had considerable experience over the last few years with co-regulation and/or self-regulation:

- co-regulation of the telecommunications industry by the Australian Communications Industry Forum (ACIF) <www.acif.org.au>, Australian

Communications and Media Authority (ACMA) <www.acma.gov.au> (and its predecessors) and the Australian Competition and Consumer Commission (ACCC) <www.accc.gov.au> since 1997.

- co-regulation of the .au domain name industry by au Domain Administration Ltd <www.auda.org.au> and the ACCC since 2000.

Lessons of self-regulation

Some key lessons from SETEL's experience of the last eight years include:

- Self-regulation by its very nature creates conflicts of interest.
- Self-regulation does not necessarily result in industry 'codes', 'rules' and 'policies' that best serve Australia's interests, or the interests of Australian small businesses.
- Self-regulation, like government regulation, also imposes costs on business and disproportionately so on small business, but with little or no obligations to consider the impact on small business.
- The process of developing self-regulatory, including effective enforcement regimes, can take many years of negotiation to achieve schemes that ensure consumer protection for Australian small businesses, major consumers of goods and services.
- Representation of Australian small businesses in these processes is severely restrained by resources available to organisations such as SETEL.
- Dominant or powerful industry interests can operate to substantially determine the extent and coverage of voluntary codes of practice.
- Each industry sector requires a body to promote and monitor compliance with code and guideline provisions within that sector.
- Relevant regulators must have sufficient powers, resourcing AND resolve to effectively enforce code rules.
- Mechanisms need to be developed to ensure that the smaller industry participants are aware of self-regulatory code development processes, are given the opportunity to contribute and are fully appraised of the need to comprehend the context and impact of relevant codes.
- Government needs to maintain a 'paternal' overview of self-regulatory mechanisms to address concerns of imbalance in the interests of affected parties.
- Ongoing promotion of code coverage, updates and associated code/regulatory development is essential to cover changes in each industry.

- After significant input from industry and consumer sectors, self-regulatory processes substantially lessen the administrative burden on regulatory authorities.

- Self-regulatory mechanisms can offer scope for faster review and upgrade processes than formal regulation or legislation.

- Self-regulatory processes can engender an attitude of ownership of an issue plus appropriate remedies, rather than acceptance of an externally imposed set of criteria.

- The development of policies, rules and codes of practice by self-regulatory bodies and there advisors should have regard to good public policy and governance developed over decades by governments.

Self-regulation of the .au domain name system (DNS)

The DNS functions as an electronic address system for the Internet. It is a public resource managed in the public interest by the private sector. The DNS is strategically and economically important – it is "critical infrastructure". Privatisation of the DNS necessitated fundamental regulatory reform. Australian has undertaken that reform since 2000 and has developed a regulatory regime that is held up in some quarters as world-best practice. Reform has challenged traditional DNS governance and Internet community values, creating uncertainty for and tension between public institutions and private interests.

Development and implementation of DNS regulatory reform in Australia by auDA has been progressive, relaxing and removing regulatory controls. Implementation of the new regulatory scheme and competition model has lowered domain name retail prices and increase demand for domain name licences, generating significant network effects and overall welfare gains.

The responsibility for the administration of the .au domain name space resides with the industry self-regulatory body, au Domain Administration Ltd (auDA) <www.auda.org.au>. The Australian Government endorsed auDA in 2000 as the appropriate entity to hold the delegation of authority from ICANN for administration of the .au ccTLD[5]. ICANN entered into a ccTLD Sponsorship Agreement for .au with auDA on 25 October 2001[6&7].

In 2000-01 SETEL was involved in the development by policy panels of auDA (a) a policy-regulatory framework governing the availability and eligibility .au domain names, and (b) a competitive model for the .au domain name industry.

Key recommendations of these panels were adopted by the auDA Board. However, when it came to implementation of these recommendations there were significant departures from key recommendations. Some key recommendations were implemented without input from SETEL, a major representative of

Australian small business – see <www.setel.com.au/membership/members.htm>.

Since the panels reported, auDA has implement many policies <www.auda.org.au/policies/policy-index> through contracts between participants in the .au domain name industry. There are contracts between the regulator (auDA), a monopoly registry (AusRegistry <www.ausregistry.com.au>, accredited registrars <www.ausregistry.com.au/registrars.htm> (eg MelbourneIT) and their many resellers and registrants (domain name licence holders or end-users).

Elements of these policies have been implemented through a complex web of "contracts" and through "code regulation" for example:

- availability of .au domain name: search "whois" database managed by monopoly registry - ausRegistry <www.ausregistry.com.au>

- eligibility of applicant for .au domain name registration: administered by registrar <www.auda.org.au/registrars/accredited-registrars>

- referral by ausRegistry to a randomised list of auDA accredited registrars <www.ausregistry.com.au/registrars.htm>.

In SETEL's view there is an ongoing need for ongoing development and independent review of DNS regulation in the .au namespace.

Scope for regulatory reduction in .au domain name industry

The domain name system (DNS) functions as an electronic address system for the Internet and is a foundation of e-commerce in Australia and elsewhere. It is a public resource managed in the public interest by the private sector. The DNS is strategically and economically important – it is "critical infrastructure".

SETEL is concerned that some auDA policy has inhibited competition, imposed costs on business and resulted in a less than economically efficient allocation of .au domain name resources. Over 550,000 .au domain name licences have be issued in the primary market by Registars and their Resellers[8], but they can not be traded.

Specifically, auDA regulation effectively prohibits trading of these licences and, so, no secondary market has development. E-bay marketing of .au domain names is swiftly dealt with by auDA.

The transfer of domain name licences between licencees (registrants) is prohibited by auDA policy, except in very limited circumstances – see: Transfers (Change of Registrant) Policy (2004-03) <www.auda.org.au/policies/auda-2004-

03> and Clarification of Domain Name Licence - Prohibition on Sale of Domain Name (2005-05) <www.auda.org.au/policies/auda-2005-05>.

SETEL raised this prohibition issue in a letter to the Chairman of auDA in mid-2002 <www.setel.com.au/publications/public/policy/001b.pdf> and forwarded a paper[9] recommending the removal of the prohibition and development of an orderly, open and competitive secondary market in .com.au domain name licences.

As a general statement, the elimination of anti-competitive regulation can deliver significant community benefits including, but not limited to:

- increased consumer choice
- lower prices for consumers in the primary market
- innovation
- new business opportunities
- a reduction in 'red tape'
- a more economically efficient allocation of resources, including in upstream and downstream markets.

Cybersquatting, warehousing, hoarding of domain name licences are often advanced by those opposed to lifting of the prohibition. Such issue may be effectively dealt with by auDA regulation.

A significant regulatory control remains in place. SETEL recommended to the auDA Board in August 2002 <http://www.setel.com.au/publications/public/policy/001a.htm > that:

- it remove the prohibition on transfers of com.au domain name licences between registrants;
- ensure that there are no auDA regulatory impediments to transfers of com.au domain name licences between registrants; and
- encourage, or at least not discourage, the development of an orderly, open and competitive secondary market in .com.au domain name licences.

SETEL's recommendations were not adopted, but have facilitated public debate on auDA's prohibition on an industry-based mailing list. It is heartening to see that in recent weeks Registars, Resellers and others have been pressing auDA for, at least, a review of the policy of prohibition.

The lifting of the current prohibition on transfer of domain names by auDA has the potential to deliver significant benefits to the Australian community, notably the Australian small business community.

While such action may not be sufficient to ensure the development of an orderly, open and competitive/efficient secondary market in .au domain name licences, auDA could facilitate the development of an orderly, open and competitive secondary market in .au domain name licences.

As a general point SETEL would like to see the Productivity Commission undertake a general review of the domain name industry in Australia and DNS governance and regulation, notably of the auDA regulatory scheme which regulates the .au domain namespace.

Endnotes

[1] Australian Bureau of Statistics, Main Features - Small Business in Australia, 2001, October 2002 (accessed 23 Nov 2005)

[2] <http://cclsr.law.unimelb.edu.au/go/centre-activities/research/reforming-not-for-profit-regulation-project/index.cfm> (accessed 23 Nov 2005)

[3] <http://cclsr.law.unimelb.edu.au/index.cfm?objectId=017B1CA1-B0D0-AB80-E29B8B41F029F841> (accessed 23 Nov 2005)

[4] Clark, Options Paper: Web Seals of Approval, Submission to E-commerce Working Party Consumer Affairs, Victoria, Standing Committee of Officials of Consumer Affairs, E-commerce Working Paper, Dec 2003 (accessed 23 Nov 2005) <www.consumer.gov.au/html/Web_options/submissions/eugene_clark.pdf>

[5] Alston, R., Letter to Chairman of au Domain Administration from Minister for Communications, Information Technology and the Arts, December 2000, <www.auda.org.au/pdf/auda-govt-endorse.pdf> (accessed 23 Nov 2005)

> From this letter:
>
> ... After considering auDA's report and the information contained therein, it gives me great pleasure to communicate to you the endorsement of the Commonwealth of Australia (the Commonwealth) of auDA as the appropriate to hold the delegation of authority by the Internet Corporation for Assigned Names and Numbers (ICANN) for administrative authority of the au country code top level domain (ccTLD).
>
> The Commonwealth's endorsement of auDA as the appropriate entity to hold the delegation of authority for administration of the au ccTLD is subject at all times to auDA operating within the provisions of its company constitution and to the fulfilment by auDA of the following conditions:
>
> - Given that the Internet naming system is a public resource in the sense that its functions must be administered in the public or common interest, auDA recognises that the management and administration of the au ccTLD are subject to the ultimate authority of the Commonwealth of Australia; ...

[6] Internet Corporation for Assigned Names and Numbers (ICANN), Announcement: ccTLD Agreement Signed with auDA <www.icann.org/announcements/announcement-25oct01.htm> (accessed 23 Nov 2005)

[7] Internet Corporation for Assigned Names and Numbers (ICANN), ccTLD Sponsorship Agreement (.au), 25 October 2001 <www.icann.org/cctlds/au/sponsorship-agmt-25oct01.htm> (accessed 23 Nov 2005)

[8] au Domain Administration Ltd, 550,000 com.au and net.au domain names registeredauDA Media Release 15/09/2005, <www.auda.com.au/news-archive/auda-15092005> (accessed 23 Nov 2005)

[9] Small Enterprise Telecommunications Centre, Transfers of domain name licences between Registrants: Submission to the Board of au Domain Administration Limited (auDA), SETEL Public Policy Paper: No 1, 19 July 2002 <http://www.setel.com.au/publications/public/policy/001.htm> (accessed 23 Nov 2005)