19 October 2007

Dear Ms Lim,

Attached is my submission to the Draft Recommendations of the auDA Review of the .au Domain Name Policy Framework.

Yours sincerely,

John Selby
Lecturer

Submission in response to the Draft Recommendations released in September 2007 by the auDA Review of the .au Domain Name Policy Framework

John Selby

Lecturer
Department of Business Law
Division of Law
Macquarie University

and

Research Associate
Centre for Cyberspace Law & Policy
University of New South Wales

Email: john.selby@law.mq.edu.au

1. Introduction

The 2007 Names Policy Panel requests comments on its Draft Recommendations which were released in September 2007. My responses to those recommendations are:

1) I agree with this recommendation - .au should not be opened up to direct registrations.
2) I oppose draft recommendation 2a, am unable to support recommendation 2d, but support the remaining recommendations subject to the caveats mentioned below.
3) I support Proposal 3a; strongly oppose Proposal 3b and reserve judgment on Proposal 3c until more complete details are released.

More detailed explanations for these responses are set out below.

2. Submissions

2.1 Draft Recommendation 1:

The Panel recommends that .au should not be opened up to direct registrations at this time.

Response to Draft Recommendation 1:

I agree with this recommendation. As outlined in my submission of 15 June 2007, the introduction of direct registrations would limit auDA's policy flexibility, destroy the multi-billion dollar investments made by Australian domain name owners over the past twenty years and be highly redistributive.

2.2 Draft Recommendation 2a:

The Panel recommends that the .au domain name licence conditions should allow auDA to suspend a domain name without notice at the request of an Australian regulatory or law enforcement agency

Response to Draft Recommendation 2a:

I am opposed to this recommendation as currently drafted because it lacks sufficient mechanisms for accountability, due process and procedural fairness, and because its current drafting is ambiguous.

<u>The effect of "suspending a domain name"</u>

Suspension of a domain name would presumably involve either removing its entire entry from the registry or removing the IP address entry connected to that domain name from the registry. Either of these changes would effectively remove the presence of the website or other Internet services hosted at that domain name unless an Internet user already knew the IP address of the relevant server computer. This is the functional equivalent of a seizure of that domain name by auDA at the behest of a government department or law enforcement agency.

However, this loss of Internet presence for the suspended domain would not be instantaneously effective upon the suspension occurring due to DNS caching and the availability of website archiving services such as www.archive.org.

Due process, procedural fairness and accountability

A self-regulatory body such as auDA should not be a vehicle for enabling government departments and law enforcement agencies to bypass the legal checks and balances imposed upon them by law, particularly the requirement for the issuing of a warrant prior to any seizure.

In 2004, the Federal Minister for Justice and Customs released "A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers" ("The Guide")[1]. The Guide states at p73,

> "Seizure is a significant coercive power and the Commonwealth has consistently taken the approach that it should require authorisation under warrant…. The Commonwealth has taken the view that Ministers, Justices of the Peace and departmental officers should not have warrant issuing powers. The greater independence of magistrates and the fact they are not responsible for enforcement outcomes ensures appropriate rigor in the warrant issuing process."

Further support for these due process requirements can be found in the conclusions and recommendations of the 2006 Senate inquiry into Entry, Search and Seizure Provisions in Commonwealth Legislation[2], which stated,

> "In the case of legislative intrusions upon personal rights they may generally be framed in simple terms: if there is justification for a power of this nature to be granted or exercised, what protection must follow. The protections in this case are all accountability mechanisms, for instance:
>
> - judicial scrutiny through a warrants process, through review of administrative actions and through the courts;
> - administrative scrutiny through internal audits, implementation of appropriate training and standards of performance for relevant personnel, implementation of procedural and policy requirements in guidelines and manuals; and
> - Parliamentary scrutiny of agencies' operations via reports to Parliament."

Procedural fairness requires that a person affected by a decision have the right to know the reasons why that decision affecting them was made and the ability to challenge that decision before an impartial tribunal[3]. As currently drafted,

---

[1] Minister for Justice and Customs, (2004), A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers, available at: http://www.ministerjusticeandcustoms.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~ConsolidatedGuideFebruary2004.pdf/$file/ConsolidatedGuideFebruary2004.pdf (last accessed 19 October 2007).

[2] Senate Scrutiny of Bills Committee, (2006), Inquiry into Entry, Search and Seizure Provisions in Commonwealth Legislation, available at: http://www.aph.gov.au/Senate/committee/scrutiny/entrysearch/report/ (last accessed 19 October 2007). Chapter 5 of that inquiry's report contains its conclusions and recommendations.

[3] See, for example, Jarvis, D.G., (2007), Procedural Fairness as it applies in the Administrative Appeals Tribunal, available at:

this Proposal 2D would deny those rights to the registrant of a suspended .au domain.

As a self-regulatory body, auDA needs to accountable to its members, the Australian government, the Australian Internet community and the Australian public. auDA risks damaging its reputation if it is seen to act capriciously or without a sufficient degree of accountability. Without further oversight, suspending .au domains without notice upon the mere "request" of a government agency or law enforcement body would place auDA at risk of acting in an unaccountable manner.

Ambiguity

The statement "without notice" within the draft recommendation is also ambiguous. Does the Panel intend it to mean that a domain name could be suspended instantaneously and secretly on the receipt of a request by a government agency, or that auDA/the registrar would not have an obligation to contact the registered licensee of that domain name after its suspension to notify them of the reason for the suspension?

Alternative

Instead of the Draft Recommendation, I propose the following alternative:

> *"The .au domain name licence conditions should be amended to allow auDA to suspend a third-level .au domain name upon the presentation by an Australian regulatory or law enforcement agency of a properly-issued judicial warrant requiring the seizure of that domain name. Within 24 hours of the suspension of the domain name, auDA will:*
>
> 1. *notify the registered licensee of that domain name of the grounds on which the registration was suspended;*
> 2. *provide to registered licensee an uncensored, complete electronic copy of the judicial warrant; and*
> 3. *offer to lift the suspension of the domain name within 24 hours of receipt of an order of an Australian court returning the right to use the domain name to the registered licensee."*

This proposal ensures that auDA only acts on the basis of a properly constituted warrant requiring the seizure of a domain name and provides a clear notification process to the registered licensee of the domain which will enable that person to know the reasons why the domain was suspended and to have the ability to challenge in court the grounds on which the suspension occurred.

---

http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/AATMembers/docs/JarvisProceduralFairnessApril2007.rtf (last accessed 19 October 2007).

2.3 Draft Recommendation 2b:

The Panel recommends that the eligibility criteria for existing 2LDs should remain unchanged, but that auDA should consider re-launching info.au as a "catch-all" 2LD for users who do not fit within the current 2LD taxonomy.

Response to Draft Recommendation 2b:

I agree with this draft recommendation.

2.4 Draft Recommendation 2c:

The Panel recommends that registrars should continue to be required to verify registrant details at the time of registration, by automated check if possible but otherwise by manual check.

Response to Draft Recommendation 2c:

I agree with this draft recommendation.

2.5 Draft Recommendation 2d:

The Panel recommends that the registrant warranty statement should be strengthened in relation to providing true and accurate eligibility details at the time of registration.

Response to Draft Recommendation 2d:

There is a tension between the need for domain name operators to be contactable as a means of encouraging responsibility for the content of information and services available from that domain and the right to privacy of registrants. I am unable at present to support this recommendation because it is unclear how exactly the Panel proposes that the warranty statement be "strengthened". I encourage the Panel to identify the specific changes it proposes to make to the registration warranty statement and to then seek further public comment on those proposed changes.

2.6 Draft Recommendation 2e:

The Panel recommends that registrants should be able to license domain names for 1, 2 or 3 year periods, but that implementation be delayed until the new registry licence commences in 2010.

Response to Recommendation 2e:

I agree with this draft recommendation. However, I am concerned at whether the ability to register domain names for a 1-year period at lower costs than currently available may facilitate the hoarding of domain names by speculators.

2.7 Draft Recommendation 2f:

The Panel recommends that the close and substantial connection rule should remain unchanged, but the clarification policy relating to domain monetisation should be strengthened to provide additional protection to brand names.

Response to Draft Recommendation 2f:

I agree with this recommendation.

2.8 Response to Issue 3:

I support Proposal 3a.

I strongly oppose Proposal 3b. As discussed in my 15 June submission, such a development would not further the Australian identity, usability or integrity of the .au domain name space. This proposal would re-distribute of significant wealth away from the broader Australian internet community purely because of the recurrent lobbying of a very small number of speculators[4].

I reserve judgment on whether to support Proposal 3c until a more concrete and complete proposal is submitted for public comment. I am concerned about whether this proposal would be practical given the creativity shown by speculators when attempting to game regulatory structures in other domains (eg: the 74 000 domains cancelled after the flawed .eu registration process[5]). The procedures for the operation of a centralised secondary market would need to be very carefully scrutinised to ensure the appropriate balance of incentives and the conflicting interests of a very diverse group of stakeholders were all taken into account.

A restriction on the total volume of domain names sold by "related entities[6] of a registrant" within a time period would be a useful curb on abuse, but it would require significant investigatory resources to implement (i.e. the "monitoring fee" would be quite high). Without a significant increase in its existing low staffing levels and recurrent costs, auDA would be unlikely to have capacity to effectively perform such monitoring internally.

---

[4] "There are probably only 15 domain portfolios in the world that own more than 100,000… It goes down relatively quickly… Buy an Australian domain, you have to register it for two years, I believe; and typically, they're $30, $40 for that registration, which for a domain you can't expect any traffic to come in on it, people don't typically type in .com.au's very much at all. You don't have the traffic base, you don't have the rent to actually hold up and pay for the registration cost because your main cost in owning them is actually the registration per year. I've got 550,000 domains, you can do the math, that times 6.25 is the amount of registration cost I have per year; that's my land tax, and then I have to pay it. The basic calculation is traffic revenue plus aftermarket domain sale revenue minus land tax, which is registration costs, equals profits." – Transcript of 5 June 2007 interview by Dan Skeen with self-professed "domainer", Dan Warner, published at: http://blog.danskeen.com/2007/06/05/dan-warner-interview/ (last accessed 19 October 2007).

[5] See for example, http://www.theregister.co.uk/2006/07/24/eu_domains_suspended/ and discussions at: http://www.bobparsons.com/EULandrushFiasco.html and http://www.cressive.com/domains/eudomainrelease (last accessed 19 October 2007).

[6] The definition of "related entities" in s9 of the Corporations Act could be a useful starting point. See http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s9.html (last accessed 19 October 2007).