.auDA
THE AUSTRALIAN **DOMAIN NAME** ADMINISTRATOR

2007 NAMES POLICY PANEL

Fifth Meeting
10 July 2007, 2.00-5.00pm
Maddocks Lawyers, Melbourne

MINUTES

Present:
Bruce Arnold, Philip Argy, Darrell Burkey, Grace Chu Te, Simon Delzoppo, Peter Firminger, Sally Foreman, David Goldstein, Jo Lim, Andrew McCullough, Jamie Murphy, Holly Raiche, Kartic Srinivasan (proxy for Bruce Tonkin), Tony Steven, Derek Whitehead, Alex Woerndle

Teleconference:
Brett Fenton, Amin Kroll

Apologies:
Kim Heitman, Graham Ingram, Jeff Marr, Bennett Oprysa, George Pongas, Paul Szyndler

Actions:

- DW and JL to draft discussion papers for domain monetisation and secondary market.

Discussion:

1. Discussion of policy rules

a. Illegal and malicious use proposal

The Panel discussed the proposal put forward in the Issues Paper. Whilst “illegal” has a clear and objective meaning, it was felt that “malicious” would be too hard to define. The Panel also noted that a number of other agencies have jurisdiction over different types of illegal online activities (eg. spam, child pornography) and it is the responsibility of those agencies, and not auDA, to determine whether or not a domain name should be deleted for illegal use.

The Panel agreed 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.

b. 2LD taxonomy and eligibility criteria

The Panel noted that there are two options for accommodating more, or different types, of users within the .au 2LD taxonomy:
- change an existing 2LD; or
- create a new 2LD.

The consensus view of the Panel was that that the commercial purpose and nature of the com.au 2LD should not be changed, and the eligibility criteria should not be relaxed to allow non-trading individuals to register com.au domain names.

Some Panel members suggested that consideration be given to changing net.au and/or id.au due to their relatively low take-up and perceived unpopularity, however no specific proposals for change were put forward at the meeting.

The Panel noted that conf.au and info.au are currently inactive, apart from a small number of legacy domain names allocated prior to auDA taking control of .au in 2001.

The Panel agreed 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.

c. Close and substantial connection rule

The consensus view of the Panel was against an “open slather” approach to domain name registrations in .au.

The Panel agreed that the close and substantial connection rule should remain unchanged (subject to further discussion on domain monetisation).

d. Verification of registrant eligibility details

The Panel noted comments by registrars about their inability to automate checks of the ASIC database, and the resulting additional overhead and time delays in processing domain name registrations.

Panel members agreed that it is in everyone’s interest for the registration system to run efficiently and at low cost. However, it was also felt that verification of registrant eligibility details at the time of registration is still necessary and desirable in order to preserve the accuracy and integrity of the .au registry database.

The Panel agreed 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. The Panel also agreed that it would be prudent to strengthen the registrant warranty statement in relation to providing true and accurate eligibility details.

TS, in his capacity as member of the ASIC Business Advisory Council, offered to follow up with auDA regarding registrar access to the ASIC database.

e. Domain name licence periods

The Panel noted that recommendations of the Name Policy Review Panel in 2004 were not implemented because of the current registry licence arrangements.

The Panel agreed 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.

f. Misspellings policy

There was support for the current policy.

g. Domain monetisation policy

Several Panel members expressed concern about the domain monetisation policy. There was also some discussion about the impact of domain tasting.

The Panel will continue discussion of this issue at the next meeting.

h. Reserved list policy

There was support for the current policy and its limited application to words and phrases that are protected under legislation (eg. anzac, olympic, university). The Panel did not consider it desirable to expand the reserved list to include other words and phrases, such as trademarks.

i. More restrictive rules, stronger enforcement

There was no support for the proposition that the policy rules should be made more restrictive. The Panel noted that the trend, both in Australia and internationally, has been towards relaxation of rules.

2. Discussion of secondary market

The Panel held a straw poll on the options listed in the discussion paper (attached), in order to better focus discussion at the next meeting.

Option 1 – no votes
Option 2 – 1 vote
Option 3 – 9 votes
Option 4 – 3 votes
Option 5 – 3 votes

Some Panel members offered equivocal and/or qualified support for a particular option.

Several Panel members expressed concern about the conjunction between domain monetisation and a secondary market. There appeared to be general support for changing the policy to allow the transfer of domain names for consideration in a private transaction, without going so far as to create or facilitate an open secondary market.

The Panel will continue discussion of this issue at the next meeting.

Next meeting:
Tuesday 14 August, 2-5pm in Sydney

2007 NAMES POLICY PANEL

POLICY RULES – FOR DISCUSSION ON 10 JULY

1. Illegal and malicious use proposal

The Issues Paper included the following proposal:
- The policy rules should include a clear process and authority for the deletion of a domain name for illegal or malicious use. Such uses would include, but are not limited to, disseminating spam, hosting a "phishing" site, malware hosting and distribution, capturing stolen personal information and access credentials, hosting child pornography, and recruiting individuals to launder or transfer stolen funds.

AusCERT supported the proposal, and further recommended that:
- resellers with termination authority for a domain are listed in WHOIS data; and
- the same policy rules that apply to registrars also apply to resellers and that registrars should have more control over and accountability for the action of resellers.

Roger Clarke and John Selby supported the proposal, and also suggested that parking and monetisation be included as grounds for deletion of a domain name.

ISOC-AU supported the proposal in principle, subject to the following qualifications:
- auDA is given authority to suspend or delete the domain name
- there is a process to suspend a domain name pending investigation
- there is a process for auDA to satisfy itself on reasonable grounds that the domain name has been so used, based on a clear and well understood standard of proof as to what is "illegal" or "malicious"
- that the registrant has a recognised right of appeal against suspension or deletion
- that the forum for the decision to suspend or delete domain names is accountable and transparent.

Melbourne IT supported the proposal, based on the model of the auDRP. An independent panel would evaluate whether a domain name should be deleted for illegal or malicious use. The panel would need appropriate expertise in evaluating the relevant type of illegal or malicious use, and a complainant would need to provide appropriate evidence of such use. If some form of rapid take-down approach is used, then the complainant may need to provide some form of guarantee against any damages to the registrant's business for a false claim.

The Domain Industry Association (DIA) argued that the cancellation of domain names for illegal or malicious content should be subject to due legal process.

The Panel needs to consider in broad terms whether this provision should exist and if so, how this process would take place, who would be involved (and who would not be involved) and what safeguards would be in place.

2. 2LD taxonomy and eligibility criteria

Each 2LD within .au has a specific purpose and intended group of users –
- com.au/net.au for commercials
- asn.au/org.au for non-profits
- id.au for individuals
- gov.au for government

- edu.au for education
- csiro.au for CSIRO

For each 2LD the eligibility criteria exist to preserve the purpose of the 2LD. For example, com.au is for commercial purposes, therefore registrants must provide evidence that they are registered to trade in Australia in order to be eligible for a com.au domain name (eg. ACN, ABN, RBN, TM). Under the current policy rules it is not possible to register a com.au (or net.au) domain name without providing one of the specified official identifiers.

The DIA argued that there is a large number of disenfranchised users who do not fit within any of the existing 2LD taxonomy. In particular, it claimed that id.au has proved to be unattractive for individual users who want to register a domain name for personal use, eg. projects, mailing lists, affinity groups. This point has also been made in discussion at Panel meetings.

The DIA, Jeff Marr and Gert Van Tonder argued that the eligibility criteria for com.au should be either relaxed or removed in order to allow non-trading individuals to register domain names for their own purposes.

Aristedes Maniatis proposed that net.au should be restricted to its original purpose for IT/networking companies, to more usefully differentiate it from com.au, and to avoid disputes between com.au and net.au registrants.

It has also been suggested that info.au, which is currently largely un-used, might be used for the purpose of providing an all-purpose 2LD.

3. Close and substantial connection rule

Refer to Jo's email to the Panel mail list, 21/06/07, for an explanation of the close and substantial connection rule and how it is enforced.

Jeff Marr and Dean Shannon proposed that the close and substantial connection rule be relaxed or removed to allow registrants to register any domain name they like, subject to existing restrictions on misspellings etc. The DIA suggested that the close and substantial connection rule be replaced with a "good faith" policy.

4. Verification of registrant eligibility details

Under auDA's Registrar Agreement, registrars must use "reasonable endeavours" to verify the information provided in a domain name application. The Guidelines for Accredited Registrars on the Interpretation of Policy Rules for the Open 2LDs (2005-02) specify the ways in which registrars must verify that information, including checking ACNs on the ASIC database and ABNs on the ABR database.

Registrars have requested that this requirement be removed, due to difficulties associated with automating a check of the ASIC and ABR databases via a public web interface.

5. Domain name licence periods

Since 2002 there has been a fixed 2 year licence period for all .au domain names.

Campbell Hicks proposed that com.au domain name licences should be 2-5 years, and Andrew Young proposed that all domain name licence periods should be 1-5 years.

In 2004 the Name Policy Review Panel considered this issue and recommended measures which would provide increased flexibility in the periods for domain name registration, without fully deregulating the period of registration.

6. Misspellings policy

The misspellings policy is a clarification of the domain name licence conditions – ie. it clarifies auDA's enforcement of the licence condition that "the registrant must not deliberately register misspellings of another entity's company or brand name in order to trade on the reputation of another entity's goodwill".

Since the policy was first introduced in July 2005, auDA has found over 700 domain names to be prohibited misspellings of company or brand names.

Netfleet argued that "the misspelling policy should be scrapped as it is too hard for auDA to manage. It should be left to brand name holders to contest if they feel that a domain name has been registered in bad faith. Determining whether a particular domain name is a deliberate misspelling of a company's name is nigh on impossible to prove with certainty."

Dean Shannon suggested that the misspellings policy helps to keep integrity in the .au system by not allowing anything that could be deemed as passing off on other people's brands.

7. Domain monetisation policy

The domain monetisation policy is a clarification of the close and substantial connection rule – ie. it clarifies that domain monetisation is an acceptable "service" under the close and substantial connection rule.

The policy places two limitations on domain monetisation:
- the content on a monetised website must be related specifically and predominantly to the domain name; and
- the domain name must not be an entity name, personal name or brand name in existence at the time the domain name was registered.

Karl Schaffarczyk called for policy provisions that permit domains registered for monetisation purposes to be removed, due to increasing numbers of "garbage" registrations and the "amount of crap" in the .au namespace.

Dean Shannon suggested that not allowing the registration of trademarks or in general anything that could be deemed as passing off on other people's brands (as per the monetisation policy) helps to keep integrity in the .au system.

8. Reserved list policy

This policy has not yet been raised by a Panel member or in any of the submissions, but it is listed for review by the Panel in the Terms of Reference.

The Reserved List Policy (2007-01) prohibits the registration of domain names containing words and phrases that are restricted under Commonwealth legislation, unless the registrant has permission from the relevant authority.

Possible issues for discussion include:
- whether the principle of a Reserved List is still appropriate within the .au policy framework, given that words on the list are covered by legislation

- whether the Reserved List should still be confined to words/phrases restricted under Commonwealth legislation, or should be expanded to include other types of words/phrases.

9. More restrictive rules, stronger enforcement

Betfair Australia, Jason McKenzie and Karl Schaffaczyk argued that the current rules, and/or the enforcement of the current rules, are not strong enough to prevent cybersquatting and other bad faith activity.

2007 NAMES POLICY PANEL

SALE OF DOMAIN NAMES (SECONDARY MARKET) – FOR DISCUSSON ON 10 JULY

This paper sets out the current situation, and identifies a range of options along the regulatory spectrum for the Panel to consider.

Current policy

The .au domain name licence conditions state:

- the registrant must not, directly or indirectly, through registration or use of its domain name or otherwise, register a domain name for the purpose of selling it
- the registrant must not in any way transfer or purport to transfer a proprietary right in any domain name registration.

To enforce these conditions, auDA published the Clarification of Domain Name Licence – Prohibition on Sale of Domain Name (2005-05), which says that a registrant cannot "sell" their domain name, and must not advertise their domain name for sale.

However, under the Transfers (Change of Registrant) Policy (2004-03), a registrant may transfer their domain name licence to another eligible party under one of the following circumstances:

- the registrant sells part or all of their business operations or assets to the proposed new registrant, and the Deed of Sale includes the transfer of the domain name licence;
- the registrant assigns part or all of their intellectual property rights to the proposed new registrant, and the Deed of Assignment includes the transfer of the domain name licence;
- where the registrant is a legal entity, the registrant is liquidated or enters into administration and the liquidator or administrator authorises the transfer of the domain name licence to the proposed new registrant;
- the registrant and the proposed new registrant are legal entities belonging to the same group of related entities, eg. where a parent company transfers its domain name licence to a subsidiary;
- the registrant is holding the domain name licence in their capacity as an agent of the proposed new registrant, and at the time of registration the registrant had entered into an agreement to transfer the domain name licence to the proposed new registrant at a future date, eg. where a web designer, ISP, lawyer, accountant or other service provider registers a domain name on behalf of a client;
- where the registrant is an individual, the registrant dies or becomes insane and the executor or power of attorney authorises the transfer of the domain name licence to the proposed new registrant;
- a competent arbitrator, tribunal, court or legislative body orders the registrant to transfer their domain name licence to the proposed new registrant, eg. in the case of a proceeding under the .au Dispute Resolution Policy (auDRP);
- the registrant has entered into an agreement to transfer their domain name licence to the proposed new registrant in settlement of a dispute between the parties, and the Deed of Settlement includes the transfer of the domain name licence, eg. where a trade mark infringement dispute is settled out of court.

Options

1. **Tighten up the current transfers policy and prohibition on offering a domain name for sale**

It has been widely acknowledged that it is possible to disguise a “sale” of domain name under one of the accepted transfer circumstances (usually sale of business or business assets or the settlement of dispute). This has the effect of penalising those who play by the rules (or don’t know how to get around them).

An option would be to tighten up the policy requirements to prevent registrants from selling their domain names in contravention of the licence conditions. Stronger enforcement measures may also be required, for example requiring all transfers to be authorised by auDA, and automatically deleting domain names which the registrant has offered for sale.

2. **Retain the current transfers policy and prohibition on offering a domain name for sale, but streamline the administrative requirements**

One of the criticisms made of the current policy is the heavy administrative burden placed on registrants and registrars in processing a transfer, with the associated high fees.

An option would be to retain the current policy in terms of acceptable transfer circumstances, but remove the requirement for registrars to obtain supporting documentation and a statutory declaration before processing the transfer.

3. **Modify the current transfers policy to include more transfer circumstances, but maintain the prohibition on offering a domain name for sale**

The Panel has identified the following transfer scenarios which are not allowed under current policy:

- Example 1: “Pernell’s Plumbing” is the registrant of pernells.com.au and decides they no longer need the domain name for their business so they will transfer it to “Pernell’s Mercedes” car dealership – a transfer from one eligible registrant to another eligible registrant. The registrant is not selling their plumbing business to the car dealership, so under current policy the transfer would not appear to be permitted.
- Example 2: A registrant fails to renew their domain name (their own fault, or the fault of their registrar or reseller) and when it expires it is registered by another party. The new registrant is willing to give the domain name back to the old registrant (with or without consideration), but under current policy the transfer would not be permitted.
- Example 3: A partnership owns a domain name and dissolves with an agreement the domain will be transferred to one of the parties from the partnership using a new registrant entity.
- Example 4: (1) Small business registered their business name sometime ago and registered a domain name that matches that business name; (2) Small business obtains a generic name that relates to their business through the auDA generic names auction process; (3) Small business is happy with the domain name obtain in (1) above, and doesn't feel it is getting the full value from the domain name registered in (2) above; (4) A second small business would like to use the generic name that was registered in (2) above; (5) The small business would like to sell the generic name, but is not simply prepared to cancel the name as the small business does get enough traffic from the name to justify its renewal cost.

- Example 5: (1) Company-A registers a “memorable” domain name with the intention to create a brand/business; (2) Things don't work out; (3) Company-A continues to hold onto the name and decides to monetise it; (5) Company-B notices name is not “used” and wants the name for a new brand/business - and does not want to register an alternative name or use another TLD; (6) Company-A is willing to part with the name only for a consideration.
- Example 6: A large multi national corporation is regularly buying businesses within its market sector. From the time of purchase to the finalising of the business going forward could take up to 12 months. The resulting problem of finding the old owner to sign over a statutory declaration has proven difficult although the sale has settled and the new owners have the password and the finalised sale documents.

An option would be to modify the current transfers policy to include provisions relating to the above examples (and any others agreed by the Panel), while still maintaining the prohibition on offering a domain name for sale.

4. Modify the current transfers policy to include more transfer circumstances, and remove the prohibition on offering a domain name for sale

Another option would be to modify the current transfers policy to include provisions relating to the examples listed in option 3 (and any others agreed by the Panel), and remove the prohibition on offering a domain name for sale pursuant to an accepted transfer circumstance. In other words, it would be possible for a registrant to advertise their domain name for sale, but only in circumstances that would be allowable under the policy, and only to another eligible registrant.

5. Relax the current transfers policy and allow an open secondary market

The final option would be to relax the transfers policy to allow transfer under any circumstance in an open secondary market.

There are a number of ways that a secondary market could be implemented. It is not the Panel’s role to recommend an implementation method, however it is open to the Panel to make some suggestions.

Possible methods, with increasing degrees of regulation and transparency, include:

- Registrants may use whatever selling method they choose (eg. auction sites, domain brokers, newspaper advertising, direct marketing, etc) and the transfer is processed by the registrar of record.
- Registrants may use whatever selling method they choose, the transfer is processed by the registrar of record and details notified to auDA.
- Registrants must use an auDA authorised/approved domain broker, the transfer is processed by the broker and details notified to auDA.
- Registrants must use a centralised secondary marketplace (eg. auction site) run by auDA.