

19 October 2012

auDA Industry Advisory Panel
By email only: paul.szynkler@auda.org.au

2012 Industry Advisory Panel, Draft Recommendation Response

We are solicitors for and are making this submission on behalf of our client, CoCCA Registry Services (NZ) Limited of Auckland, New Zealand ("CoCCA").

CoCCA thanks the Industry Advisory Panel for the work it has undertaken in producing the Draft Recommendations (September 2012) and for giving interested persons the opportunity to respond to Draft Recommendations.

This response is directed to Draft Recommendation 1A only.

CoCCA expresses serious concern in relation to Draft Recommendation 1A, and does not support this recommendation.

auDA has contracted one of its key functions, being the operation of a registry, to a third party for-profit company. Although auDA's accounts must be audited, and can be reviewed by auDA Board Members, the accounts of the current third party for-profit registry operator are kept secret and are not open to scrutiny. Shareholders of the third party for-profit registry operator receive a commercial gain, including through dividends and capital gains. This gain could be extremely large, and out of proportion to the work carried out, the service levels provided and the level of risk undertaken by the third party for-profit registry operator. Internet users (and auDA Board Members) have no information as to whether the profit of the third party for-profit registry operator is fair and reasonable, because it is not made public.

auDA's right to manage the .au domain stems from a Commonwealth Government endorsement and thus compels auDA to manage the .au domain space in "in the public or common interest". From a public policy and corporate and internet governance viewpoint, it is extremely important that the market be tested at regular intervals, through a public tender process, to ensure that the fees charged for the services provided by the third party for-profit registry operator are fair and reasonable.

The last tender process was in 2004. Draft Recommendation 1A could allow the current operator to continue until 2016 or 2018 without having to retender. That is, the proposed period between public tender and the next testing of the market will be 12 to 14 years. For a contract for a monopoly service, this is an extremely long period of time in which the market is not tested, and leads to a number of undesirable outcomes as discussed below.

A tendering process has a number of advantages:

- Awards the contract in a transparent way that is consistent with the management of a public resource by auDA.
- Is likely to minimise the cost of obtaining a desired level of service.
- Reduces monopoly rents and discourages rent-seeking behaviour.
- Encourages innovation.

The NSW Government Tendering Manual (2010) has a clear statement as to the advantages of tendering, which is applicable here:

“Seeking open tenders is an important way of obtaining best value for money, particularly in the absence of accurate market price knowledge or clear knowledge of all the competent potential tenderers available. It increases competition and gives all potential tenderers the chance to compete for Government business.”

If a profitable monopoly contract is renewed without a tender process, there is a significant risk that the decision maker could be seen not to be acting in the best interests of the public. The perception is created that some ulterior motive could have impacted the decision not to retender. If, in the extreme case, it is later discovered that there was corruption or some illegal conduct in relation to the renegotiation of the contract or the decision not to retender, even by a single person, then all involved in the process have put their reputations at risk and will be subject to scrutiny.

For this reason, Recommendation 1A puts the Board of auDA at risk, if the Board implements Recommendation 1A.

This issue is of further importance in light of the following. As we understand it, an auDA board resolution (5 June 2000) prevents Directors of auDA from being on advisory panels as they may be conflicted in both providing advice to the Board and then voting on that advice (“Motion carried that board members are not eligible to be members of Advisory Panels”). This is a sensible resolution. There was discussion at a 2006 auDA board meeting of changing this rule, but as far as we can tell from public record, the prohibition has not been formally reversed. The current Industry Advisory Panel appears to have five auDA directors as panel members, which raises the concerns expressed by the June 2000 board resolution. Moreover, it appears that one board member is an employee of the current third party for-profit registry operator, which again raises significant legal and corporate governance issues.

(Questions also arise from the June 2012 auDA board meeting, where the minutes state: “Adrian Kinderis-CEO and Maggie Whitnall-Client Services Manager-.au, attended from AusRegistry and gave a presentation on achievements over the past 10 years of AusRegistry’s operations.” Questions may arise as to whether the current operator was improperly trying to influence the Board or members of the Industry Advisory Panel who were at that Board meeting while this current review process is ongoing. At a minimum, the presentation to the auDA Board by AusRegistry should be made public.)

In certain cases, there may be sufficient reasons not to retender. The two main reasons given in the relevant literature are (a) that no other provider can provide the service at the time of renewal; and (b) unavoidable disruption to service. Neither of these reasons has been demonstrated in this instance.

At the time of renewal, e.g., in 2014, there is a strong likelihood that there will be other service providers who will be able to provide the service. The IAP has already had formal expressions of interest from two. In fact, even today, there are a number of other domestic and international service providers who could easily provide this service from Australia. Indeed, it would not be controversial to say that other existing registry operators could provide the required service from Australia, using better technology, and providing equal or higher service levels than currently provided by the incumbent for-profit registry operator. There are 16 TLDs currently either run in Australia or run by Australian entities, the incumbent runs one. Rather than being in its infancy, the market is perhaps the most mature anywhere.

By not having a tender process, the market is not truly tested to determine this issue. Moreover, and importantly, by not going to tender, and by cancelling planned tendering processes, this signals the international marketplace that firms should not make an investment in Australia today, because (based on

past experience) it is unlikely that the contract will be put to tender, or if put to tender, new entrants will be given a fair chance.

The Industry Advisory Panel, and the auDA Board, need to give strong and clear signals to the market that a regular tender process will take place, will not be cancelled, and that establishing operations in Australia today could lead to real opportunities tomorrow. By not doing this, the marketplace is cynical as to auDA's intentions, thus leading to less investment and likely future competition. This is of significant detriment to the Australian Internet community.

There is no suggestion that the transfer of operations from the current provider to a new provider will result in unavoidable disruption to service. So this reason not to retender is inapplicable.

The Draft Recommendation Response of the Industry Advisory Panel suggests that a reason not to go to tender is that there is currently no stated industry dissatisfaction with the incumbent. With respect, this is an irrelevant factor when determining whether or not to go to tender.

Moreover, even if registrars are happy with the service provided to them, the real customers of the registry provider are not registrars but domain name owners. Registrars may receive a good level of service, but registrars are not paying for this – the cost is being passed on to domain name owners in full. There is no clear evidence as to whether domain name owners are satisfied with the services provided by the current third party for-profit registry operator, and any complaints are likely to be made to a registrar and not passed on to auDA or the registry.

There is anecdotal evidence to suggest:

- The current provider may be overservicing registrars, but underservicing domain name owners and the general public.
- The current provider may be under-investing in innovation and new ideas.
- The current provider may be charging monopoly rents, as it has little fear of having to test its pricing in a competitive tender process.

Current registrars are more likely to support the status quo because the cost of a domain name registration or renewal is not borne by registrars, and any change to the status quo may lead to a switching cost for these registrars. However, from an Internet user's viewpoint, a change to the status quo may lead to an overall decrease in price, an increase in service, and new innovation.

It is noted that large banks, telecommunication companies, mining companies and government departments outsource key IT and business processing services to third party providers. It is common for such contracts to be five years or less, for tenders to occur at the end of each contract period, and for there to be a change of service providers at regular intervals.

Accordingly, for the above reasons, CoCCA has strong views that the registry contract should be retendered every five years, and that a timetable for the tender process for the next 25 years be established and not varied.

Regardless of the final IAP's recommendations, CoCCA suggests the following:

- Any registry contract should include strong provisions in relation to the provision of disengagement services by the current provider to assist in the transfer of services to a new provider (if a new provider is selected in the tender process).
- The current service provider be required to publish on its public website its audited financial accounts for the past three years.

- All officers, directors and senior management of auDA provide a statutory declaration as to no conflict of interest or direct or indirect financial benefit in relation to the contract or the AusRegistry business.
- The Registry Services contract should be published online and be available for public inspection.

auDA supports and implements a competition model, but if the current recommendations are implemented, then there will have been no competition in relation to selection of the registry operator for more than a decade. This is not a competition model.

In these times, it is difficult to believe that a registry operator selected many years ago is providing leading edge services today at competitive prices. If that is in fact the case, the current operator should welcome a competitive tender to demonstrate its value propositions.

Yours sincerely



John Swinson
Partner
T +61 7 3244 8050
M +61 408 220 513
john.swinson@au.kwm.com