auDA 2012 Industry Advisory Panel
auDA Board
In Care of: Paul Szyndler
General Manager, International and Government Affairs

RE: DRAFT IAP recommendations, September 12th 2012

Thank you for the opportunity to comment on the IAP's draft recommendations. My comments are restricted to the Panel's observations and recommendations relating to registry services.

I would suggest that the management of tens of millions of dollars a year in monopoly rents (profits) that accrue to a private for-profit entity under auDA's registry outsource model should be a core issue in the organizations search for transparency and accountability to stake-holders.

In my July 22 comments, I argued against outsourcing the monopoly registry function to a private for-profit entity, in favor of a model adopted by most OECD countries running registry services internally. Outsourcing registry services, subordinates social returns to the private profit of the registry operator.

Of the three options available to the auDA board, 1) run the registry internally and use the monopoly rents to fund the auDA foundation an additional 20+ million a year; 2) return an equivalent amount to registrars, resellers and consumers in the way of lower registry fees or, 3) continue to outsource to a private for profit entity without a tender; option three seems to be most inconsistent with the objects of the company.

A for-profit registry extracts and concentrates wealth it does no create it. If tens of millions of dollars a year were retained by the registrars by reducing fees by 70-80% the multiplier effect in terms of job creation and social benefits to Australians would be much greater than it is under the current policy.

As noted in my previous comments, the incumbent's current rates may be equivalent to those in similar economies, however this ignores the fact that in most similar economies the management of these monopoly rents sees them accrue to the community / industry as a whole, not a private-for-profit entity as they do under auDA's current policy.

The draft IAP's recommendations appear somewhat contradictory, that auDA should "retain the competitive registry model" then, in the next sentence abandon competition by "*initiating negotiations with the incumbent for either a 2-3 or 4 year extension"* - and proceed to a tender "*if negotiations fail*".

Given that the IAP has publicly stated that a.) it considers the current fees to be aligned with industry rates, acceptable, and a good value proposition for Australian consumers, and b.) that fees in this range allow incumbent to extract tens of millions of dollars per year in monopoly rents from the society, and c.) the .au registry services contract is the incumbent's core business revenue; it is hard to imagine *any* scenario where "negotiations would fail".

The IAP has noted "*Another concern is that, whilst a poor tender response and absence of competitive registry alternatives would provide auDA with a clearer perspective on the state of the .au marketplace, it could also do the same for the incumbent, affording that party an advantage in renegotiation*."

To be frank, this of all the justifications for cancelling the 2014 tender, is perhaps the most difficult to comprehend. auDA puts registry services to tender; the incumbent sharpens their pencils and responds to the tender.

Even if the incumbent is the *only* respondent, having already priced their services in a formal response to the RFC they would have no "*advantage in re-negotiation*" - why would there be any negotiation of fees post-tender with the incumbent ?. Confusing to say the least.

The notion that putting registry services to tender in 2014 may "lock in the incumbent" (if they win) and possibly reduce completion, so it is best to avoid "locking in the incumbent" and increase the likelihood of future competition by cancelling the tender and awarding them a multi-year extension seems a little odd.

There is no masking the fact that the auDA, a not–for–profit entity that administers the .au domain is outsourcing a core administrative function to a private for–profit company "just up the road" - without tender and at a significant cost to the industry and society as a whole.

As the IAP observed "*A consideration for the Panel is whether the costs of providing competition at each step outweigh the public benefits to be gained."* There is no cost, tangible or intangible, of providing competition at the registry level, or of running and managing the au database internally, that approaches the cost to society (and the Australian domain name industry) of auDA's current registry services policy.

One has to wonder why auDA continues to protect the incumbent from both domestic and international competition when it's policy requires open tenders and competition. Given auDA current focus on accountability and transparency it seems the board should either a) follow its competitive tender policy, or b) publicly abandon it's policy.

Using the cover of an advisory panel convened every 4 years as a mechanism to ignore existing policy seems a handy way to abandon a policy without having to face stake-holder review (and perhaps backlash) over a defacto policy that facilitates the transfer of considerable wealth in the form of monopoly rents from the industry and society as a whole to a private for profit entity.

In my previous response I thought I made a pretty convincing case that the notion that the incumbent had any local infrastructure advantage in Australia (at least one so significant as to make a competitive bid impossible) was dubious to say the least.

I was surprised to see the IAP as the primary justification for abandoning the 2014 tender in favor of re-negotiation with the incumbent. Although I intentionally avoided treading on a key point in my response to the first issues paper, I will do so now.

The IAP has created a narrative based on an IANA RFC1591, namely that RFC1591 "requires the registry be run in the country", working from this assumption the IAP has then concluded that no prospective potential competitor has the infrastructure in-country, and the costs of establishing that infrastructure are so burdensome that nobody will be able compete. Therefore, the tender should be cancelled and competition "put on ice". In my reading of RFC1591 is not as clear on the issue as has been suggested by the IAP.

There are two relevant clauses in RFC 1591:

"There must be an administrative contact and a technical contact for each domain.

For top-level domains that are country codes at least the administrative contact must reside in the country involved."

On the issue of technical function (registry operations) RFC1591 seems very clearly to allow for the individual (or entities) who perform core technical functions to reside outside Australia. While this may not be ideal for a variety of reasons - it is clearly permissible.

It is also interesting to note that ICANN ICP-1, the ICANN document drafted in 1999 that clarifies and RFC1591 confirms that only the Administrative contact [auDA] need reside in country *"There must be an administrative contact and a technical contact for each domain. The administrative contact must reside in the country involved for ccTLDs. "*.

The second applicable clause in RFC1591 offers little support for the IAP's interpretation of RFC 1591 and auDA's outsource policy:

"*The key requirement is that for each domain there be a designated manager for supervising that domain's name space. In the case of top-level domains that are country codes this means that there is a manager that supervises the domain names and* ***operates*** *the domain name system in that country."*

If one were to literally interpret RFC1591 it also requires that the "designated manager" (auDA) also "*operate the domain name system*". By choosing to outsource and not "operate the .au domain system" auDA seems to places itself in breach of a key requirement of RFC1591.

As the IAP notes, auDA considers it "*desirable to maintain a clear separation of policy and operations, to ensure that auDA's ability to act as an independent industry regulator is not compromised."* and therefore has chosen to disregard this be a *key requirement* of designated managers in RFC1591.

As noted in my July 22nd response, given that auDA already sets the policy, prices, technical and security standards, decides who can participate In the industry and on what terms, resolves disputes etc it is unclear how adding to these core competencies the day-to-day management of the .au domain database (directly or by a subsidiary entity) in any way compromises it's ability to act as an "independent industry regulator".

The reputation of auDA is today established, and there is little doubt that running registry services would not hamper its capacity to act as an independent and effective regulator.

In any case, continued reliance on RFC 1591 on this particular issue, (and many others) is not particularly instructive or helpful, RFC1591 should not form the basis of recommendations by the IAP to pre-emptively dismiss the commercial viability of all prospective local or international competitor to the incumbent.

Even if future auDA policy, legislation or RFC1591 required the technical function to be run in Australia, any prospective local or international competitor could locate physical infrastructure (servers, the master DNS) in Australia and utilize administrative existing or new customer service, registrar support, technical services that are located outside Australia - and be in a position to both meet the perceived "local infrastructure" requirements in any tender and perhaps have a competitive advantage over the incumbent.

This is no different than Telstra or Qantas or any number of any Australian entities outsourcing certain IT services or customer service functions offshore, while having a local footprint of some sort.

The desire to “keep it local” ignores the fact that the current practice of outsource without tender has a high social and economic cost to the domestic industry - easily measured in the tens of millions of dollars a year. One could instead “keep it local” by putting it to tender and allowing other *domestic players* to either win the tender or put downward pressure on prices, reducing monopoly rents an benefitting society and the industry as a whole. Pretty simple really.

In order to maintain the stability and interoperability of the AU domain with the rest of the Internet the entity running the registry must simply ensure compliance with internationally developed standards, the key requirement of a registry services provider is therefore competent implementation of agreed international standards in the management of a database.

There is no risk-reward equation, infrastructure spending, or research and development expense that justifies the accumulation of monopoly rents by private entity under the auDA “not for profit” model.

It is also worth noting that the incumbent regularly responds and has been successful in responding to international tenders from other governments or quasi government entities looking for registry providers. As auDA would be aware the incumbent has a direct history (and track record) of responding to tenders to “operate” other counties ccTLD’s “in country”.

As noted before a registry is not a manufacturing facility, mine or other labor-intensive endeavor, it is a database hosted on servers that less than 50 entities (registrars) connect to. There simply is *no massive* infrastructure, currently in place (or required), nor is there any significant research and development expenditure required that would make it impossible for a competitor to justify the return on investment even for a short four year contract.

For the reasons noted above and in my earlier response I find the consensus view of the IPA that the incumbent has such as significant local infrastructure advantage that it would be impossible for any competitor to compete, that there is no merit in putting it to tender to be tenuous at best.

On the issue relevant experience the IAP seems to be interested in waiting for the outcome of the new gTLD exercise to gauge the relevant skills of prospective competitors, it is unclear why this is relevant. When the auAD board convened a similar panel in the past it recommend that it must be put to tender in 2014 when the gTLD program did not exists.

In 2001 auDA selected the incumbent who had no experience over the then operator of the com.au zone (Melbourne IT). In 2014, like in 2001 any prospective competitor would have to meet and demonstrate a capability to meet the rigid technical and security standards required in RFP. There would be no technical or stability to the .au name space in changing registry providers or bringing registry services in-house.

The current operator does not run any gTLDs and auDA’s own expertise shows that an operator operating from inside AU with $1/10^{th}$ the number of domains currently in the .au register is economically viable and can deliver world class registry systems to the au market - without any revenue from other TLDs or registry operations. The

revenue from the .au name space alone is enough to make any registry operation economically viable.

It seems to this respondent that the IAP is simply providing cover for the boards defacto policy of simply rolling over the incumbents registry contract in perpetuity at "industry standard rates" unless there is a persistent or recurring problem in the operation of the .AU registry - or unless there is a public or stake-holder outcry against the management of the monopoly rents under this policy.

This policy is fine if stake holders are happy with it, but a little more candor (and transparency) would seem to compel the board to be more clear about what is going on to reflect the boards desires, only then would the board and other interested parties be in a position to gauge if the stake holders are ok with the arrangements.

The IAP notes *"that there is currently an absence of stated industry dissatisfaction with the current registry provider. This conclusion is based upon the collective .au market experience of Panel members and auDA's advice that it has not received any registry-related complaints. The Panel notes that potential competitors would consider this when assessing their chances in the tender process."*

Given that the auDA board (should they follow the IAP advice in the current draft recommendations) would be acting on the consensus advice of a panel that includes representatives of the three Commonwealth agencies ACCC, ACMA, DCBE *that any individual or entity would likely raise concerns with* it is not surprising that people have not raised issues in the past, and makes it less likely that they would in the future.

This use of an IAP with laden government representatives to sanction ignoring existing policy would seem to raise some rather obvious governance issues. For the IAP to send a "warning shot" across the bow of prospective competitors that everybody, including government is happy with the current "arrangement", and that prospective competitors should consider this before deciding if there is merit (point) in responding to a theoretical an RFP is inappropriate.

On a side note, auDA does not publish the registry contracts online, which given its value is in the tens of millions of dollars a year seems rather odd decision.

To conclude, there is no debate that both auDA and Ausregistry perform their respective administrative and technical roles well. If the defacto auDA policy is to simply to rollover the registry services contract unless there are unresolved technical issue or industry complaints, the board may want to simply formally abandon the existing non-implemented tender policy.

As it stands the industry is headed by a not for profit entity endorsed by Government that routinely employs former regulators (and provides lucrative consulting contracts to companies owned by former regulators) that is outsourcing the principle function it was established to mange (the .au database) to a private-for-profit company without tender and at a cost to society that can easily be measured in the tens of millions of dollars a year.

Only by abandoning the charade of "competition at the registry level" and managing the AU database in-house or alternatively putting AU registry services out to tender can auDA avoid having any reasonably well informed observer conclude that regulatory capture / failure has taken hold in the au name space.

Private sector management of public resources is often fertile ground or regulatory capture by commercial interests; this is especially true when there is a natural monopoly as in the case of the .au database.

My view is that the stated objects of the company would be best met by publicly abandoning the charade of a “competitive registry model” and discontinue the practice of outsourcing registry services and either a.) give the auDA foundation the ~20 million a year in profits the registry will soon make at the current rates, or b.) reduce fees to registrars by 80-90%.

If there is no desire to run the registry internally on the part of Board, put registry services to tender. If the IAP is correct and nobody in Australia or internationally would respond because a) the establishment costs are prohibitive, or b) because everybody including government is happy with the arrangements (there is consensus RFP is fixed, regulatory capture has taken hold), then the incumbent wins and there is no reputational damage to auDA.

Putting registry services to tender would more than likely put downward pressure on registry fees since even the threat of competition would cause the incumbent to look very closely at their fee structure.

Thank you for the opportunity to comment.

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Thursday, October 4, 12Administrative Contact, .CX ccTLD (Christmas Island)
Administrative Contact, .CC ccTLD (Cocos Keeling Islands) 1997-2001
Director, Council of Country Code Administrators Incorporated (CoCCA)