

**auDA Issues Paper
Industry Competition Panel
1 October 2008**

This Issues Paper addresses comments made in an email from Melanie Rainey of the Communications Group of the Australian Competition Consumer Commission (**ACCC**) dated 11 September 2008 to the members of auDA's Industry Competition Advisory Panel (**Panel**).

The ACCC considers that two recommendations of the industry panel's draft report may raise competition law issues under Part IV of the *Trade Practices Act 1974* (**TPA**).

Those issues are that:

- draft recommendations (1 to 3) regarding the method of selection/appointing a registry operator may raise the possibility, depending upon its terms, that such a contract could potentially amount to a contract arrangement or understanding (or a provision of such a contract arrangement or understanding) that has the purpose or is likely to have the effect of substantially lessening competition in a market for goods or services in Australia or a state, territory or region of Australia in contravention of section 45 of the TPA;
- draft recommendation 4 requiring overseas registrars to be required to register with ASIC to trade in Australia may potentially amount to third line forcing in contravention of sections 47 (1) and (6) of the TPA.

This Issues Paper does not express a concluded view but is intended to provide the Panel's members with an analysis of the ACCC's comments for their consideration.

1. Appointment of Registry Operator – Section 45 concerns

- 1.1 Section 45 of the TPA prohibits a corporation from, in trade or commerce, entering into or giving effect to a provision of a contract arrangement or understanding that has the purpose or is likely to have the effect of substantially lessening competition.
- 1.2 auDA considers that it is highly unlikely that the current registry agreement between auDA and the current registry operator AusRegistry Pty Ltd, would amount to such a contract, arrangement or understanding in contravention of section 45.
- 1.3 auDA holds this view because, whilst AusRegistry Pty Ltd is appointed as the sole registry operator for the registry of .au Domain Names for a fixed period and as a result of a competitive tender process, it is unlikely that the service of providing a registry database of .au Domain Names constitutes a discrete market for goods and services.
- 1.4 Rather, auDA believes that the appropriate market to be considered re Section 45 includes computerised registry services generally, such as for other ccTLD and gTLD domains, share registries, and other outsourced statutory registries such as the Do Not Call Register.
- 1.5 However, there is a risk that as the size of the .au domain name space increases and thus the potential revenue available to such an operator increases that it may be found that such a discrete market does exist, in which case there would be a risk that section 45 could be contravened.
- 1.6 Under Division 1 of Part VII of the TPA a corporation who proposes to engage in conduct which otherwise may contravene section 45 may seek an authorisation for that conduct from the ACCC.

- 1.7 The ACCC applies a public benefit test in determining whether the authorisation should be granted. That is, whether the proposed benefit to the public of the proposed conduct outweighs any anti-competitive detriment of the proposed conduct.
- 1.8 Authorisations are regularly granted in respect of conduct in natural monopoly situations. That is, where due to economies of scale or scope a single facility can satisfy all the demand for services in a market at a lower cost than two or more facilities. In this context cost is not simply the dollar price but the economic cost of disruption to the economy that may be brought about as a result of two or more firms supplying the services.
- 1.9 Due to the requirements for the integrity, security and stability of the domain name system it is strongly arguable that the high risk of disruption to the domain name system and thus the efficient functioning of the internet should there be more than one authoritative registry database of domain names, would mean that the registry database of domain names services is a natural monopoly and therefore it is to the public benefit that authorisation be granted.
- 1.10 In such situations it is a common condition of the authorisation that the monopoly operator be regularly market tested, such as by way of a public tender, to ensure a competitive outcome.

2. Overseas Registrars be required to register with ASIC - Third Line Forcing Concern

- 2.1 Section 47(1) of the TPA prohibits a corporation from engaging in the practice of exclusive dealing in trade or commerce. Subsections 47(2) to (9) define different types of conduct which amount to exclusive dealing.
- 2.2 Subsections 47(6) and (7) define a category of exclusive dealing conduct commonly referred to as third line forcing, which is the supply of goods or services on condition that the acquirer also acquire goods or services from a third party or, conversely, refusing to supply goods or services because the potential acquirer has not agreed to acquire goods or services from a third party.
- 2.3 Services are defined in section 4 of the TPA to include any rights, benefits or privileges that are provided, granted or conferred in the course of trade.
- 2.4 The rights granted by auDA to a registrar under the Registrar agreement may be such services, but they are arguably not granted by auDA in the course of trade or commerce.
- 2.5 However even if they were, registration to trade as a foreign company by ASIC under the *Corporations Act 2001* are not rights granted by ASIC in the course of trade.
- 2.6 Accordingly, auDA considers that it is very unlikely that by auDA granting a registrar the rights under a Registrar Agreement on condition that it became registered by ASIC (or refusing to grant those rights for the reason that it was not so registered) is unlikely to amount to exclusive dealing under sections 47(6) or 47(7) of the TPA.