Cross-Community Working Group on Naming-Related Functions Public Consultation on Draft Transition Proposal, 1 December 2014

Response from au Domain Administration

au Domain Administration (auDA) is the registry for the .au country code. auDA has been participating in ICANN since 2000. We are a member apTLD, of CENTR and of the ccNSO.

General Comments

As a threshold issue, we note the enormous and complex task that the CWG is currently undertaking and the difficulties associated with successfully fulfilling its responsibilities within the tight timeframes that have been prescribed. However, we also note that the presence of imminent deadlines should not negate the opportunity for appropriate levels of consultation and community input. We welcome the CWG's efforts to clearly identify and define the functions in the current IANA contract, and propose mechanisms that address each. However, we note that the existing draft transition proposal outlines a complex and multi-faceted solution. This complexity means that the community will require considerable time to assess, digest, exchange views and provide considered input. Because of this we recommend that both the CWG and the ICG deadlines be extended to allow the various parts of the community to discuss the issues at ICANN 52 in Singapore.

Fundamentally, significant change should only be implemented where absolutely necessary, given that, as the CWG itself states:

> *The current operational performance of the IANA Naming Functions is generally satisfactory to its direct customers, and the community generally believes that the current NTIA oversight arrangement has been successful in ensuring the accountability of the IANA Functions Operator in that role.*

As some CWG members have noted in previous discussions, we believe that the final framework that is selected and implemented needs to be both extremely transparent and as "lightweight" as possible. The risk of attempting to address each of the current IANA functions with their own structure is that an excessively-complicated solution may be arrived at. The principles of simplicity and efficiency should remain paramount.

Arrangements relating to the NTIA's current function

The CWG has developed a proposal to replicate existing arrangements, with a formal contract between the IANA Functions Operator (currently ICANN) and an independent entity.

It has been assumed by the CWG, as reflected in its proposal, that the contract manager must be an "entity" in a legal sense, a new construct and operate completely outside of ICANN.

The other alternative, as mentioned in the introduction to the CWG's proposal but not expanded upon, is a mechanism that is based within ICANN, but is protected by Bylaw provisions and other structural changes. As can be seen for our alternative proposal below, we favour this approach.

An independent new organisation as contemplated in the CWG's proposed model is of significant concern to us. We believe that ICANN is the right body to fulfil the role, a role for which it was specifically created. For the CWG's proposal to be workable, significant and complex issues of jurisdiction, structure, scope and the avoidance of "capture" would need to be resolved. They are not addressed in the current draft proposal.

The current document from the CWG proposes a hierarchical and multi-tiered model for the future management of the administrative functions relating to the IANA contract. Notably, many of the proposed functions of a "Multistakeholder Review Team" and "Customer Standing Committee" either overlap or feed into each other. As we have said above, we believe it is possible for registry customers to be directly empowered to oversee the current contract-related IANA functions. We believe this also holds true for administrative functions.

Customer Standing Committee

We agree that the establishment of a committee that will specifically deal with the service level agreements and performance indicators associated with the execution of the IANA function is essential.

The development and management of performance metrics is a critical role that is equally important to ccTLD customers and gTLD customers and these registry operators must compose the majority of the committee's membership. As the CWG notes, it is possible that liaisons from other SO/ACs may participate in the committee's work, however they should not represent a significant proportion of the its structure.

Independent Appeals Mechanism

We agree that a system to address appeals relating to the execution of the IANA function is absolutely critical. We note that recently, in a survey of ccTLD operators, 94.4% supported the establishment of such a mechanism – at least in principle. However, it is equally important to note that the structure, scope and

powers of the proposed Independent Appeals Panel (IAP) need to be extremely carefully developed and enforced.

The current recommendation from the CWG states that:

> *… all decisions and actions (including deliberate inaction) of the IANA Functions Operator that affect the Root Zone or Root Zone WHOIS database be subject to an independent and binding appeals panel.*

This is very broad wording which could, upon first reading, infer that the IAP would hold binding powers with regard to ccTLD delegations and re-delegations. This is, of course, out-of-scope for the CWG and needs to be addressed in a separate forum.

Alternative Proposal

As with the CWG's draft proposal, our alternative is intended as an attempt to develop a high level, over-arching framework for the future of the IANA function.

Assumptions:

1. In a limited number of circumstances (such as 'gross incompetence' or 'material breach') there should be an option for the IANA function to be transferred from ICANN to another operator - The Nuclear Option.

2. There should be an enhancing of the current functional separation of the IANA function from the rest of ICANN - Functional Separation.

3. There should be a TLD registry operator centric standing committee to liaise with and oversee the IANA functions operator on administrative and service level functions - The Customer Standing Committee.

4. There should be an independent, binding arbitration mechanism to handle certain disputes - Appeals.

5. The policy for and implementation details of any review mechanism or appeals process that pertains to the re-delegation of a ccTLD is a matter for the ccTLD community.

6. The Cross Community Working Group (CCWG) on Enhancing ICANN Accountability will deal with ICANN wide accountability recommendations (for example a mechanism to replace the Board) and that such matters are best dealt with there. This alternative proposal seeks to deal solely with IANA matters. It is clear that any fully formed transition proposal from the CWG has to be inextricably linked to the work of that Accountability WG and therefore the timing of the work of the groups needs to become aligned.

Proposal:

1. The Nuclear Option - Where the IANA functions operator is grossly negligent or incompetent or in material breach of its obligations under agreed service level commitments or performance indicators, it needs to be possible for the IANA function to be moved to a new operator.

This can be achieved by the creation of a 'Golden Bylaw', similar to the concept that exists in the corporate world of a golden share (http://en.wikipedia.org/wiki/Golden_share).

The Golden Bylaw would give the TLD registry operators the right, in certain circumstances, to require ICANN to put the IANA function out to re-bid. The Golden Bylaw would set out at least:

a) the requirements to trigger the re-bid process - FOR EXAMPLE a vote of over 75% of ccTLD registry operators and 75% of gTLD registry operators

b) what would need to happen to trigger the TLD registry operator's vote - FOR EXAMPLE a petition by more than 15% of TLD registry operators or a super majority vote in the gNSO or ccNSO

c) the composition of a 'Re-Bid Committee' that would oversee the vote and the subsequent re-bid and decide who the successful bidder was. The Re-Bid Committee could, FOR EXAMPLE, comprise of 20 registry operators (split between ccTLDs and gTLDS) plus a number of representatives from each of the GAC, ALAC, SSAC and RSSAC

d) the basis upon which the Golden Bylaw itself could be changed - FOR EXAMPLE only by a vote of over 75% of ccTLD registry operators and 75% of gTLD registry operators

e) the other aspects of this proposal set out below.

2. Functional Separation - The current levels of functional separation of the IANA function from the rest of ICANN should be enhanced as part of the transition in a number of ways including:

a) the IANA department having its own discrete budget

b) the IANA department having its own legal advisors and independent legal advice.

3. Customer Standing Committee - This committee would provide the day-to-day liaison between the IANA functions operator and the TLD registry operators. It could be made up of an equal number of ccTLD and gTLD registry operators plus representatives from the GAC, ALAC, SSAC and RSSAC. It would perform, at least, the following tasks:

a) work with the IANA functions operator to agree service levels and performance indicators

b) review and re-negotiate the service levels and performance indicators at agreed intervals

c) receive reports on and monitor the IANA functions operator's performance with respect to the service levels and the performance indicators

d) conduct a regular IANA functions operator budget review.

4. Appeals - To deal with disputes that arise in respect to matters covered by 3 above there should be a binding arbitration mechanism utilising the services of an independent arbitration organisation.

5. The ccNSO Framework of Interpretation WG report contemplates the possibilities of a process review mechanism and an appeals function in respect to ccTLD 're-delegation' matters. These are matters that the ccTLD community will work on over time and it is not intended the appeals mechanism set out in 4 should fulfil that role.