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## **auDA response to the NTIA Further Notice of Inquiry on the Internet Assigned Numbers Authority Functions (Docket No. 110207099-1319-02)**

### **About auDA**

.au Domain Administration (auDA) is the industry self-regulatory, not-for-profit manager of Australia's ".au" country code Top Level Domain. auDA is an active participant in ICANN and regularly contributes to deliberations and policy development within ICANN's country code Names Supporting Organisation (ccNSO). auDA has participated in the development of the ccNSO's 29 March 2011 response to the 25 February Notice of Inquiry on IANA, the ccNSO response (currently under-development) to this FNOI, and issued its own submission in support of the ccNSO's NOI position on 31 March 2011.

### **General Comments**

auDA welcomes the opportunity to provide comments in response to the Further Notice of Inquiry issued by the NTIA regarding its contract with ICANN for certain IANA functions.

At the broadest level, auDA welcomes the consultative nature of the NTIA's approach to reviewing the IANA functions contract. This includes NTIA staff's willingness to meet with stakeholders, incorporate their comments on the IANA NOI, and to solicit further community commentary through an FNOI and incorporated draft Statement of Work (SOW).

In particular, auDA welcomes the NTIA's:

- restatement of the US Government's commitment to a multi-stakeholder model for management of the DNS,
- acknowledgment that the needs of users of the IANA functions and the "overall customer experience" are of primary importance,
- commitment to a timeline for improvements to root zone management, including automation and improved procedures, metrics and reporting, and
- undertaking to improve the transparency and security with which the IANA function is performed.

Noting these positive inclusions, auDA would like to raise a number of issues of possible concern with the draft SOW that we believe would benefit from further consideration, clarification and refinement.

### **Reference to “relevant national laws”**

Section C.2.2.1.3.2 of the draft SOW proposes that the Contractor be obliged to “act in accordance with the relevant national laws of the jurisdiction which the TLD registry serves”. auDA strongly agrees that the IANA function should always be executed in accordance with the needs and rights of all stakeholders, including governments and the local Internet community in each jurisdiction. Such a position accords with long-held and widely-supported principles of subsidiarity and national sovereignty in the operation and management of ccTLDs.

However, auDA would encourage further consideration and redrafting of this language as the issue of the “relevance” or “applicability” of national laws is incredibly complex in regard to ccTLDs.

Given the wide variety of contexts in which ccTLDs were awarded, the tremendous structural, legal and political diversity in ccTLD management models, and the lack of clarity associated with early delegations, auDA cautions against the adoption of a “one-size-fits-all” approach in the SOW. As such, it would be appropriate to acknowledge delegation and re-delegation requests should be approached on a case-by-case basis.

Moreover, the Contractor must not be placed in the untenable position of having to determine which laws are relevant and applicable, and the requirements of the SOW must be crafted to ensure that they cannot operate to deprive a stakeholder (such as a ccTLD manager) of their due process rights or circumvent domestic legal and appeal processes.

Given these observations, auDA believes that it is important that the phrasing in this section of the SOW be extremely clear and precise so as to avoid increased frustration and confusion with regard to the applicability of local laws. Given the complexity of this matter, and the relatively tight timeframes for response prescribed in the FNOI, we have refrained from proposing textual edits to this part of Section C.2.2.1.3.2, though would welcome the opportunity to contribute further to the development of suitable language.

Finally, auDA also notes that this clause of the draft SOW currently refers to “TLDs” in general and would therefore include gTLDs. Given their generic, global and cross-jurisdictional reach, it would be impractical to determine which jurisdiction is served by many current – and potentially many more future – gTLDs. Accordingly, auDA recommends further consideration of the drafting language to reflect this.

### **Alignment between SOW requirements for standardised documentation and current multi-stakeholder work**

Section C.2.2.1.3.1 of the draft SOW requires IANA to develop standardised user documentation for root zone changes. Section C.2.2.1.3.2 also calls on the Contractor, as part of the IANA functions contract, to develop a process for documenting the source of the policies and procedures and how it has applied the relevant policies and procedures, such as RFC 1591, to process requests associated with TLDs. auDA welcomes these provisions and

strongly supports the development and use of clear, consistent and standardised documentation and processes in the execution of the IANA functions.

However, auDA notes that, over the last year, community representatives – including ccTLDs and governments – have undertaken considerable work in this area via the Delegation and Redefinition Working Group (DRDWG) and subsequent Framework of Interpretation Working Group (FOIWG). Given this multi-stakeholder effort, auDA urges NTIA to ensure that the SOW for the IANA Functions Contract does not pre-empt the outcomes and recommendations of these processes under way to better manage one of the most critical and contentious aspects of IANA services and believes that the task of adopting standardised documentation must be informed by the output of the DRDWG and the ongoing deliberations of the FOIWG.

### **Reporting and approval requirements**

A number of sections of the draft SOW outline areas where Contractor reporting and “Contracting Officer’s Technical Representative” (COTR) approval will be required. From the explanatory text in the FNOI, it is unclear whether an expansion in reporting requirements and the COTR’s responsibilities and powers beyond those traditionally associated with the oversight of the IANA functions, is intended. If it is not, auDA cautions against the use of language that could be interpreted as such.

For example, C.2.2.1.3.2 of the draft SOW requires the Contractor to demonstrate that delegation requests for new gTLD strings have consensus support and meet the global public interest. However, the ICANN community has developed and approved mechanisms (through the new gTLD Applicant Guidebook) to ensure new strings fulfill these criteria – as well as many others.

A number of processes – including opportunities for objection and specific “early warning” mechanisms for governments - were developed in consultation with stakeholders and have been codified in the final Applicant Guidebook. To require further documentation from the Contractor that confirms two specific criteria have been met could be interpreted as rating these as more important than all other criteria and, more importantly, as a lack of faith in the multi-stakeholder model.

While recognising and supporting the need for ensuring that new gTLDs have consensus support and are consistent with the global public interest, auDA suggests that the IANA contractor’s role should simply be to verify that ICANN has followed the Guidebook process and that all the evaluation criteria (not just the two referred to) have been met.

As another example of prominent reporting and approval requirement, C.6.2 of the draft SOW states that the IANA functions contract “does not authorise the Contractor to make material changes in the policies and procedures developed by the relevant entities associated with the performance of the IANA functions”. Read literally, the provision prohibits ICANN from implementing policy changes without the prior approval of the U.S. government. auDA urges NTIA to clarify whether this provision is intended to apply to policies that are properly and appropriately developed through ICANN policy development processes or policy-related process.

### **Separation of policy development and operational roles**

auDA welcomes NTIA's recognition of the importance of structural separation between policy-related activities and the purely operational nature of the management of the IANA functions. The IANA function should, at all times, follow due process based on agreed consensus policies and, in the absence of policy, IANA must seek clarification from affected stakeholders, rather than developing policy itself. Further, auDA believes this tenet must be very clearly stated in the SOW.

However, as currently worded, C.2.2.1.1 of the draft SOW could be interpreted to mean that IANA staff would be completely precluded from engagement or any discussion on applicable policies. auDA does not believe that such a complete prohibition on participation by IANA staff in policy development and policy-related activities would serve the best interests of the community.

Rather, auDA believes that IANA staff engagement during these processes – for the provision of information, advice and suggestions – would facilitate better communication between the community and staff, inform and improve the outcomes of policy processes and facilitate a smoother transition to staff implementation of policies.

As such, auDA would welcome reconsideration of the drafting of C.2.2.1.1 to more accurately codify the delineation between policy-development and operations, while also acknowledging the appropriateness of IANA staff participation in certain aspects of policy development.

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