

auDA comments on the Cross Community Working Group on Enhancing ICANN Accountability's Draft Proposal on Work Stream 1 recommendations

Introduction

.au Domain Administration Ltd (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 the ccNSO.

auDA welcomes the opportunity to provide input to the Draft Proposal of the Cross Community Working Group on enhancing ICANN Accountability (CCWG)¹.

auDA also offers our thanks for the great deal of work undertaken by the CCWG and, specifically, the extensive effort, negotiation and compromise that has been undertaken over the last 18 months. We are very supportive of the transition process and look forward to a successful conclusion.

auDA believes that the current Draft Proposal represents a hard-won consensus, with significant compromises made by many parties. While we note that not all elements of the current draft directly align with auDA's initial positions, it is in this spirit of compromise that we offer comments that focus upon providing constructive input in areas we believe could benefit from improvement and clarification.

Issues relating specifically to ccTLD managers

As a country-code manager and long-standing participant in the ccNSO, auDA's primary focus regarding the transition process and future accountability of ICANN has been the need to maintain the autonomy of ccTLDs and the integrity of Policy Development Processes (PDPs) that the ccNSO undertakes.

Potential effect of accountability changes on ccNSO PDPs

We believe strongly that the development and implementation of policy that relates to ccTLD operations must always remain the exclusive domain of the affected community and must not be subject to veto or objection from non-direct stakeholders.

It is for this reason that auDA has previously raised concerns about the potential impact of the CCWG's proposed processes for the escalation and enforcement of "community

¹ <https://www.icann.org/public-comments/draft-ccwg-accountability-proposal-2015-11-30-en>

powers". The hypothetical scenario we have used previously relates to a ccNSO-initiated PDP that delivers, as part of its final outcomes, a recommendation for changes to the ICANN Bylaws.

Under the existing arrangements, provided that these proposed Bylaw changes directly affect ccTLDs, it is entirely within the powers and scope of a ccNSO PDP to recommend such a change.

However, under reformed accountability formulations proposed by the CCWG, it would be possible for other stakeholders (including other SOs and ACs that would be consulted during the PDP) to effectively veto this advice.

Noting this, auDA previously advocated the explicit exclusion of ccTLD-generated and ccTLD-targeted PDPs from the community veto mechanism. However, auDA now notes that the CCWG-Accountability has recognised these concerns and has proposed a formulation that limits the community's ability to reject proposed Bylaw changes without the explicit support of the organisation that made the initial proposal.

Fundamental Bylaws dealing with rejection of a Bylaw change would require, if the Bylaws change is the result of a Policy Development Process, the Supporting Organization that led the Policy Development Process to formally support holding a Community Forum and exercise the power to reject the Bylaw change. If the Supporting Organization that led the Policy Development Process that requires the Bylaw change does not support holding a Community Forum or exercising the power to reject the Bylaw, then the community power to reject the Bylaw cannot be used.²

We see such a scenario (an SO or AC that developed a PDP supporting the rejection of a subsequent Bylaw change) as extremely unlikely and agree that the principles behind these provisions satisfy our original concerns. As a side-note, auDA recommends that the CCWG may wish to consider a reformulation of the way these newly-added provisions are expressed in order to more clearly express the intention behind them.

Provisions for the rejection of the ICANN and IANA functions budgets and/or strategic and operating plans

auDA appreciates the rationale behind the CCWG's decision to grant the community oversight and veto powers relating to ICANN budgets and plans.³ These are important governance mechanisms that have a significant effect on the operations of ICANN.

² Repeated in Paragraphs 158 and 195 of the Draft Proposal on Work Stream 1 recommendations

³ Paragraphs 142-154 of the Draft Proposal

In particular, the recognition by the CCWG of the importance of having a distinct IANA budget, as well as community input into this process, is a welcome refinement.

However, we believe that it is the direct customers of IANA (the operational community including ccTLDs, gTLDs, IETF and RIRs) that should play the most significant role in commenting upon, or initiating a rejection of, the IANA Budget.

The logic for this is simple – any failure or temporary disruption of IANA services due to budgetary uncertainty would be catastrophic for direct operational customers. While recognising the importance of input from other segments of the community, auDA strongly believes that no rejection (or partial rejection) of the IANA Budget should be contemplated or allowed without the explicit support of the entities that rely most heavily on IANA's stable and reliable operation. This suggestion in no way undermines the intention of ensuring accountability in IANA operations nor lessens the role of other stakeholders, but rather affords a greater degree of protection for most-affected parties.

As an associated comment, auDA also notes that considerable work is still underway to define the nature and details of proposed "caretaker budget" arrangements. Although not as critical to ccTLD managers as the IANA budget, auDA notes that these efforts should be concluded as efficiently as possible (either in WS1 or during the implementation phase) to ensure this doesn't remain an area of uncertainty into the future.

Removal of Board Directors (with specific reference to ccNSO-appointed Directors)

auDA welcomes and supports the proposed community powers relating to the removal of individual Board Directors⁴. We agree that this, along with the power to recall the entire Board, is a vital component of ICANN accountability. Noting this, auDA recommends that the CCWG strive for absolute clarity, transparency and openness in developing guidelines for the execution of these powers. The involvement of the relevant SO / AC Chair in a preliminary "dialogue" is a welcome inclusion, but the whole process should have clear steps of escalation and be underpinned by a clear, agreed rationale from the affected community for the proposed course of action.

Exclusion of delegations and revocations from the IRP

On a final note, auDA re-states its support for the exclusion of ccTLD delegations and revocations from the CCWG's proposed Independent Review Panel process⁵. We do not believe this has been a point of contention in recent deliberations and applaud the CCWG for recognising the principle of subsidiarity relating to ccTLD operation and policy development.

⁴ Paragraphs 174-5 and Annex 4 of the Draft Proposal

⁵ Paragraph 234 of the Draft Proposal

General comments and suggestions

Timeframe and consultation process

As previously noted by a number of members of the CCWG, the condensed nature of the current public comment period (21 days, and shorter still for stakeholders that require translation) is a sub-optimal arrangement for such a significant reform process.

auDA recognises that the both IANA transition and accountability processes are working to a nominal timeline that requires resolution by 31 September 2016, the date when current arrangements between ICANN and the US Government expire.

However, auDA cautions against prioritising the need for expediency and timeliness over the need to ensure that current deliberations under undertaken thoroughly and draw the considered and full support of affected communities.

The input of governments (both individually and through the auspices of the GAC) is a particular area for concern, given their need to consult extensively with domestic stakeholders and the generally slower nature of inter-governmental deliberations.

While auDA is not lodging an explicit complaint regarding currently-proposed timelines, we do emphasis the need for due process and careful consideration that adheres to the adage of "do it once, do it right".

Mission Statement

auDA notes that, within the CCWG, deliberations regarding ICANN's Mission Statement have drawn significantly varying opinions and perspectives. Over time, the draft language proposed by the CCWG has changed significantly from that in ICANN's current Statement, through the first and second versions of the Working Group's proposal and once again in this most recent draft.

This is a key issue. A great deal of importance and influence flows from any changes that are made to ICANN's Mission Statement.

auDA supports the key principles of the CCWG's proposed edits:

- That ICANN's mission is limited to developing and implementing policies for the operation of the DNS, incorporating values of security, stability, openness and interoperability;
- ICANN's Mission doesn't include regulation of services or content; and
- ICANN's powers are "enumerated" – that is, any roles and responsibilities not explicitly mentioned in the Bylaws are out of scope for ICANN.

However, there is ongoing debate about the precise language of the proposed changes, the possible (mis)interpretation of language, the semantic meaning of Domain Names and the effect of revisions on existing contracts and agreements.

Although auDA is not currently proposing precise alternative language, we do emphasise the need for careful agreement and clarity regarding any proposed text, in order to avoid ongoing opacity regarding ICANN's role and future accusations of "mission creep".

Sole Designator Model

As with proposed changes to ICANN's Mission Statement, auDA notes there has been much deliberation, change and revision regarding the model that will facilitate community empowerment. Over the last 18 months, member-based and multiple designator models have been considered, each with their respective positives and disadvantages.

The ccWG's current proposal for a "Sole Designator" model appears to be an acceptable compromise - a construct that delivers enhanced accountability while not changing the fundamental structure and "DNA" of ICANN.

auDA notes that the model refers to the "empowered community" and clearly outlines the community's role and paths for escalation and enforcement. However, the mechanisms regarding precisely *how* the entity will be created, how it will operate, and who will participate are not mentioned. To be clear – auDA understands the concept of an "empowered community" and its role in ICANN's future accountability. What we believe is missing from both the main CCWG proposal and its annexures is the specific detail of how the community will be "activated" and convened, should circumstances require it.

In part, this is a matter of implementation and one for participating Supporting Organisations and Advisory Committees to consider. However, it seems surprising that the CCWG would remain completely silent on the topic. auDA believes this is a significant gap, given that the powers and operations of the community have been debated and revised in such great detail.

Further, there is a significant unanswered question regarding "decisional participants" and a lingering assumption within the CCWG that all five identified participants will engage, when required. Most importantly, all of the CCWG's proposed thresholds for agreement, support and escalation have been based on this assumption. From auDA's perspective, this gives rise to an uncomfortable gap in planning by the CCWG. Again, this is partly an issue for the participants themselves, but there is little preliminary guidance from the CCWG regarding possible alternative thresholds.

While auDA notes that a sub-group of the CCWG looked at this topic, only one paragraph has been included in the draft proposal to partially address this.⁶ That entry notes that in:

". . . a situation where use of a Community Power only attracts a decision to support or object to that power by four Decisional SOs or ACs, and the threshold is set at four in support (for community powers to block a budget, approve changes to fundamental bylaws or recall the entire ICANN Board), the power will still be validly

⁶ Paragraph 61 of the Draft Proposal

exercised if three are in support and no more than one objects. This decision has come about considering the considerably extended escalation process now proposed before any use of the Community Powers, and to avoid the risk of powers being un-useable (especially the risk of making changes to ICANN's Fundamental Bylaws effectively impossible."

While this partial clarification is welcome, auDA still has concerns about some ambiguity in the CCWG's language around thresholds and SO / AC participation.

For example, the CCWG notes that:

The thresholds presented in this document were determined based on this assessment. If fewer than 5 of ICANN's Supporting Organizations and Advisory Committees agree to be Decisional Participants, these thresholds for consensus support may be adjusted. Thresholds would also have to be adjusted if ICANN changes to have more Supporting Organizations or Advisory Committees

The possible "adjustment" of thresholds, with little clarity on how this would work, is auDA's primary concern. If the CCWG wishes to propose the identified thresholds as absolute rules (i.e. escalation does not proceed, under any circumstances, if they are not met), then this should be clearly stated. If flexibility of process is intended, these alternative situations should be considered and addressed, in order to avoid confusion and uncertainty when the time comes to exercise Community Powers. auDA notes that in its most recent submission to the CCWG, the ICANN Board expressed⁷ similar concerns and proposed the use of a percentage-based model, should participation levels change in future. auDA believes this may be a viable proposal and should be considered by the CCWG as a matter of priority.

Accountability reviews of SOs and ACs (Annex 10)

auDA supports the CCWG's proposal that SOs and ACs should be reviewed to ensure that they themselves are accountable to their communities. Accountability and representation are key themes for the CCNSO and the CCWG's focus on ensuring these values continue to be met (for all SOs and ACs) through independent structural reviews and the Accountability and Transparency Review process is welcome.

However, auDA also recognises that the CCWG itself noted the need to avoid "infinite loops" and agrees strongly with this sentiment. Review processes must be efficient and effective. They cannot be overly burdensome and all-consuming. Organisational paralysis must be avoided at all costs. There should also be clarity on what would happen should an SO or AC fail an accountability review.

Although these are issues that can be addressed in WS2, auDA believes it is vital that the CCWG and all affected stakeholders are clear and agreed on the core principles listed above at this current point in deliberations.

⁷ <http://forum.icann.org/lists/comments-draft-ccwg-accountability-proposal-30nov15/msg00013.html>

Human Rights

In principle, auDA supports the concept of including a recognition of Human Rights by ICANN. We note that a significant body of work relating to this topic is proposed for Work Stream 2, including the development of a Framework of Interpretation.

However, as noted in auDA's comments on the second draft proposal of the CCWG, we question the risk associated with accepting this principle without defined language. ICANN stakeholders should not underestimate the effort required to arrive at agreed language on Human Rights. It is an issue that has long challenged governments and Intergovernmental Organisations.

Every effort must be made to ensure the scope of ICANN's mission is not effected, and to develop a deep understanding of how the recognition of Human Rights will interact with ICANN's other functions and, in particular whether there could be any impact upon ICANN – GAC relations.

Stress Test 18 – interaction between ICANN and Governments

Generally, auDA welcomes the significant amount of work that the CCWG and sub-groups have undertaken with regard to "stress testing" proposed accountability mechanisms. This has been an important exercise, helping both the CCWG and stakeholder community analyse and understand the effect changes will have on ICANN's future operations and accountability.

However, auDA notes that "Stress Test 18" regarding interaction between the ICANN Board and GAC (and the status of GAC advice) is still an area of significant debate and uncertainty. auDA supports the current language proposed by the CCWG which would require full GAC consensus and provides a clear definition of what the term "consensus" means in this context.

Although this is predominantly an area for consideration by the GAC, this proposed amendment to the ICANN Bylaws has significant repercussions for broader principles of accountability.

GAC is still at the early stages of deliberating this and that the outcome reached over ST18 could have wide-ranging implications for the rest of the delicate accountability / representation structures that have been constructed throughout the rest of the Draft Proposal. It would be inappropriate for ICANN to move forward with improved mechanisms relating to the empowerment and participation of all other elements of the community without finalising similarly effective safeguards regarding the role of governments.

Reflection on auDA's previous input and final comments

Finally, auDA would like to note that we have previously raised a number of concerns in response to earlier drafts of the CCWG proposal.

In general, our main concerns related to the CCWG's earlier drafts having far too little detail in key areas of WS1 and the tendency of the WG to push too much work off to WS2. In other words, we felt that the CCWG had not achieved an appropriate balance between timeliness and detail.

auDA would like to note that many of these concerns have since been addressed. These include the provision of additional detail on the Independent Review Process and far greater clarity on the formation, roles and powers of the Community Forum.

However, as outlined above, we still have significant concerns in other areas such as the relationships and delicate "power balance" between SOs and ACs and how this is addressed by the "Empowered Community" model, thresholds within the process and outstanding matters such as ST18. Uncertainty around a Bylaw for Human Rights is also a point of concern.

On the whole, auDA believes the CCWG has made tremendous progress since its second draft proposal and invites the Group to address these remaining areas of opacity and lack of detail before finalising their recommendations. auDA notes that, while the CCWG and the whole ICANN community are facing timeframe-related pressures, we believe it is important for the future success of ICANN that transition planning and underpinning accountability reforms are "done right" rather than "done as well as they can be in the time allowed".