

# Review of Australia's .au management

Submission by .au Domain Administration Limited  
December 2017

**.auDA**  
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# 1. Introduction

The Department of Communications and the Arts (DOCA) is undertaking a full review of the governance arrangements for .au, Australia’s top-level domain (TLD). Specifically, the review is examining whether the .au TLD, is being managed consistent with Government, business and community expectations.

This submission is the response by .au Domain Administration Limited (auDA) to the Discussion Paper published by DOCA<sup>1</sup>.

The structure of this submission is as follows:

1. Introduction
2. Overview of auDA
3. Context for change
4. Existing Responses to Identified Issues
5. Governance Framework Options
6. Board Remarks

## Annexure A Section 3 of the Constitution of .au Domain Administration Limited

auDA welcomes the review by the Commonwealth, stating in its media release of 19 October 2017 that it is “critical that [auDA] have the best possible model for managing the domain, and that [auDA’s] risk and mitigation strategies are among the best in the world.”

auDA has administered the ccTLD safely and securely for the past 17 years. The .au domain name space has grown and remains a trusted and secure space which is integral to Australia’s growing digital economy. auDA shares the view that there have been significant changes to the digital landscape since the Australian Government’s endorsement of auDA in 2000. It is vital to ensure the .au domain name space remains relevant and that its governance is fit for purpose.

auDA has initiated a number of processes to reform its governance as articulated in this submission. This review provides an opportunity to critically examine auDA's corporate model and to create a sustainable and responsive organisation to “administer the .au ccTLD for the benefit of the Australian community”.<sup>2</sup> Given the short period for preparation of submissions, auDA has not had an opportunity to consult with its stakeholders and members, and this will be an important and necessary part of further discussions and reforms.

auDA submits this paper on the basis that it acts to promote and encourage further debate and analysis of the options described. It is imperative that auDA receive extensive feedback from its stakeholders and members and ensures that any future reform process is managed collegiately. auDA commits that any future reform is conducted through comprehensive stakeholder and member engagement, informed by the findings of this Review.

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<sup>1</sup> Review of Australia’s .au domain management, Discussion paper, Department of Communication and the Arts, November 2017 (available at: <https://www.communications.gov.au/have-your-say/review-australias-au-domain-management>)

<sup>2</sup> Preamble of auDA’s Constitution

## 2. Overview of auDA

### Overview of auDA and its regulatory framework

auDA is the administrator of and self-regulatory policy body for the .au country code top-level domain (ccTLD). auDA's principal purposes and objects are set out in Article 3 of the auDA Constitution, which is included as Annexure A for reference.

In December 2000, the Australian Government formally endorsed auDA as the appropriate body to administer the .au domain space. This endorsement was made subject to several conditions including that auDA must recognise that the management and administration of the .au ccTLD is subject to the ultimate authority of the Commonwealth of Australia.

The Government retains certain reserve powers in relation to electronic addressing under the *Telecommunications Act 1997* and the *Australian Communications and Media Authority Act 2005*.

In October 2001, the Internet Corporation for Assigned Names and Numbers (ICANN) recognised auDA as the suitable operator for .au under a Sponsorship Agreement.

As part of that sponsorship agreement, auDA is responsible for the management of the .au zone file, ensuring it is accurate, up to date and continuously available. auDA achieves this through the technical management of the primary and (multiple) secondary name servers that make up part of the .au Domain Name System infrastructure.

auDA oversees and deploys new technologies and initiatives in the .au name space, which include:

- Domain Name System Security Extensions (DNSSEC)
- auDA Information Security Standard (ISS) (auDA is ISS compliant)

Australia's policy goal on internet governance and cooperation has recently been reaffirmed in the Department of Foreign Affairs and Trade's Cyber Engagement Strategy document, which states Australia's policy goals are:

*"[a]n open, free and secure Internet, achieved through a multi-stakeholder approach to Internet governance and cooperation.*

*To achieve this goal Australia will:*

- *Advocate for a multi-stakeholder approach to Internet governance that is inclusive, consensus-based, transparent and accountable*
- *Oppose efforts to bring the management of the Internet under government control*
- *Raise awareness across the Indo-Pacific of Internet governance issues and encourage engagement of regional partners in Internet governance and cooperation discussions.*"<sup>3</sup>

### auDA's members and governance structure

As a company registered under the Corporations Act, auDA's governance framework is set by the Corporations Act and auDA's Constitution. By reason of the *Corporations Act 2001* (s.140), auDA's Constitution has effect as a contract:

- a. between the company and each member; and
- b. between the company and each director and company secretary; and

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<sup>3</sup> Australia's International Cyber Engagement Strategy, Department of Foreign Affairs and Trade, October 2017 (available at: [http://dfat.gov.au/international-relations/themes/cyber-affairs/aices/pdf/DFAT%20AICES\\_AccPDF.pdf](http://dfat.gov.au/international-relations/themes/cyber-affairs/aices/pdf/DFAT%20AICES_AccPDF.pdf))

- c. between a member and each other member,

under which each person agrees to observe and perform the Constitution and rules so far as they apply to that person.

auDA currently has two membership classes:

- a. **Supply Class Members** of which, presently, there are approximately 50; and
- b. **Demand Class Members** of which, presently, there are approximately 250.

auDA's purposes are set out in its Constitution (extracted in Annexure A).

A copy of auDA's Constitution is available on the [auDA website](#).

### auDA's Board

Presently, clause 18.2 of auDA's Constitution provides for the Board to comprise:

- up to four persons elected by Supply Class Members – a "Supply Class Member" is any legal person that is a Registry Operator (currently AusRegistry Pty Ltd), an auDA accredited Registrar, or a reseller appointed by an auDA accredited Registrar, in the .au name space, or an association whose membership comprises a majority of such legal persons, qualifies to be a Supply Class Member (Clause 9.4);
- up to four persons elected by Demand Class Members – any legal person that does not qualify for Supply Class membership may apply to be a "Demand Class Member" (clause 9.5);
- the CEO, as a non-voting member of the Board; and
- up to three Independent Directors appointed by the elected Directors for terms not exceeding two years. An "Independent Director" is a director appointed by the elected Directors who:
  - i. holds no posts in, or is otherwise associated with, auDA, the Registry Operator or any Registrar; and
  - ii. does not have any relationship with auDA or any other person that could, in the opinion of the elected Directors, materially interfere with: (i) the exercise of objective, unfettered and independent judgement by the person; or (ii) the person's ability to act in the best interests of auDA.

Directors are elected as individuals. They are not elected as representatives of any organisation (clause 18.3). Each Director must act in the best interests of auDA as a whole and with due regard to the furtherance of auDA's objectives (clause 21.4; *Corporations Act* 2001, s.181). They must also comply with their other statutory and fiduciary duties as directors.

Questions arising at any meeting of Directors are to be decided by a majority of votes (clause 24.5). Each Director (not including the CEO) has one vote and a determination by a majority of the voting Directors will for all purposes be deemed a determination of the Directors. In case of an equality of votes at a meeting at which a quorum is present, the Chairperson has a second or casting vote in addition to a deliberative vote. For a meeting of the Directors, until otherwise determined, six (6) Directors constitute a quorum provided at least one Director elected by each of the Membership Classes is present (clause 24.1).

### Constitutional Provisions for Constitutional Change

To change the arrangements as set out in auDA's Constitution, the support of auDA's members is required. To change the Constitution, it would be necessary for auDA's members to pass a special resolution (*Corporations Act*, s.136). A special resolution is a resolution that is passed by at least 75% of the votes cast by members entitled to vote on the resolution (*Corporations Act*, s.9).

Additionally, because of provisions in auDA's Constitution, a special resolution of members will only be taken to be carried if there is an affirmative vote in each and every class of members of more than 75% of members present and entitled to vote (clause 16.2).

### 3. Context for change

There are four specific areas that auDA has identified where significant challenges exist that warrant attention by auDA's management and Board:

#### 3.1. Changing Domain Environment

- Total Domains Under Management (TDUM) will peak and start to decline, reducing revenues and placing commercial pressure on the .au domain name space.
- Changes in technology and consumer behaviour favour mobile apps, social media and other commercial platforms over traditional web presences.
- Growth has slowed progressively since 2007 following widespread adoption of the smartphone platform. Re-directions from .au TLDs to platforms such as Instagram, Amazon, Facebook and eBay are increasing at around 20 per cent per year, albeit off a small base. auDA expects that widespread adoption of new human machine interfaces, such as voice activation, will drive further reduction of TDUMs.
- Other ccTLDs managers around the world are factoring in 'steady decline' in growth in their revenue forecasts for domain name growth.

#### 3.2. Critical Infrastructure Assessment

- As cybersecurity threats intensify against Australian citizens and businesses, the Commonwealth Government is reviewing what is critical infrastructure in the context of access to Australian web properties.
- Critical Infrastructure Centre recommendations may impact auDA and require it to review its controls, processes and organisational and governance capability.
- auDA, and the .au cc TLD, enjoy a favourable cybersecurity record to date, and has recently significantly invested in security enhancements in the .au DNS and this will remain an ongoing area of focus and challenge.

#### 3.3. Fit-for-Purpose Governance in a Changing World (See Box 1 below)

- auDA's governance framework and organisational arrangements must represent best practice to ensure auDA can achieve its purposes efficiently and effectively in this challenging environment.
- In auDA's view, there can be tension between the current ownership model (and the resulting Board composition) and the purposes set out in auDA's Constitution, which largely reflect internet governance principles/ICANN obligations/Government expectations.
- As key stakeholders, members have every right and expectation to participate in policy development, however, it does not necessarily follow that Board representation for the classes of members as set out in the existing Constitution is an appropriate or even preferred governance structure.
- In addition, the skills required to ensure the purposes of auDA are met, both on the Board and within the organisation, have changed since auDA was established. Specifically, a broader mix of skills than narrow technical competence is required.

#### 3.4. Inability to Borrow Funds

- auDA has cash holding equating to around 1.5 years operating costs. However, this is insufficient for the company to make some key strategic decisions as exercised by other ccTLDs. For example, auDA's cash holdings might not be sufficient for it to survive a significant shock in its business environment, such as a complex legal case or a sustained cyber attack.

- The practical inability to borrow funds stems largely from auDA's indirect link to its principal revenue source owing to the sponsorship agreement with ICANN and 2000 endorsement by the Commonwealth.

### Box 1: Board and Governance Reviews

auDA has sought to improve its governance through two Board effectiveness reviews (in early 2016 and in mid-2017) conducted by respected governance advisers cameron. ralph. khoury. However due to significant and unplanned changes in Board composition during the course of these reviews, both reviews had to be paused in mid-process.

The cameron. ralph. khoury advice has been that fundamental governance framework reform (to both membership structure and voting rights and to Board composition) is necessary to consistently produce a stable and effective Board that is committed to acting in the interests of the whole community and in line with the purposes of auDA.

There should be a clear recognition that the corporate governance model and the imperative for strong stakeholder involvement in policy development should, and can, be separated.

A number of digital-industry membership organisations exist, including Internet Australia (ISOC-AU), the Australian Communications Consumer Action Network (ACCAN), Electronic Frontiers Australia (EFA), the Australian Information Industry Association (AIIA) and the Australian Computer Society (ACS). It could be argued that these organisations are more reflective of a multi-stakeholder digital ecosystem, which lessens the relevance for auDA's current membership model. auDA is committed to engaging with these bodies on policy development as it relates to the .au names space, as it exemplified by the current composition of auDA's 2017 Policy Review Panel. Ensuring that internet policy development is multi-stakeholder based can occur regardless of auDA's membership model for corporate governance. This is discussed further in Section 5.

## 4. Existing Responses to Identified Issues

auDA is developing a strategic approach to deal with each of the four issues identified above. The first two issues are being progressed as a part of strategic and operational planning and are not the prime focus of this submission, which concentrates on the issue of the appropriate governance framework.

As outlined in the discussion paper, auDA's Board was established to reflect the structure of its membership, with Supply and Demand Class members and the addition of independent directors who are not associated with auDA. The Board has been addressing material governance issues within the current governance framework over the past two years.

In October 2016, the auDA Board approved the majority of recommendations made in the Governance Report prepared by cameron. ralph. khoury. This report was published on [auDA's website](#).<sup>4</sup>

Progress has been made towards implementing these recommendations, including:

- holding a Board Strategic Retreat in February 2017
- developing a Board and Management Delegations Manual
- conducting Board Professional Development (AICD workshop)
- developing a Member Code of Conduct
- ongoing implementation of ASX Good Governance Principles

In May 2017, the auDA Board commissioned cameron. ralph. khoury to assist with five governance projects stemming from recommendations of the 2016 Governance Review, namely:

- conducting a Board Evaluation;
- developing a Board Skills Matrix;
- developing a Board Charter and Code of Conduct;
- reviewing the suite of Board Policies; and
- implementing an Accountability and Transparency Framework

This work is ongoing.

As mentioned in Box 1, Section 3, the cameron. ralph. khoury advice has been that fundamental governance framework reform is required. This will require amendment to the Constitution of auDA, which will need support from each membership class.

### **The Review presents an opportunity to consider this critical issue.**

While there is scope to refine the governance arrangements within the current framework, there is nothing fundamentally wrong with having auDA perform the functions that it currently performs. Having said this, this submission notes that:

- ICANN allows many corporate ownership and governance models, including the membership model adopted by auDA
- Supply and Demand Classes of membership are unnecessary for auDA to pursue its purposes (the purposes are set out in Annexure A)

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<sup>4</sup> auDA Board Review Report for Governance Committee, cameron. ralph. khoury, October 2016 (available at: <https://www.auda.org.au/assets/Uploads/Cameron-Ralph-Report-for-auDA2.pdf>)



- Other ccTLDs have revised and updated their governance and operational models in response to changing requirements and some ccTLD managers, including SIDN (.nl), ISS (.se) and DKHostmaster (.dk), are not membership based companies<sup>5</sup>

To progress consideration of governance options in this submission, auDA has:

- Employed a framework to consider relevant dimensions of the governance model
- Adopted a set of principles/criteria against which to assess future governance options
- Considered different models and examples to identify four broad options; and
- assessed these options.

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<sup>5</sup> ISS (.se) has a specific representative board for example which includes representatives of: ISOC-SE, the Swedish chapter of the internet Society (which also appoints the Chairman of the Board), Svenska bankföreningen the Swedish Bankers' Association, Svensk handel Swedish Trade Federation, Sveriges Internetoperatörers forum Swedish Internet Operators Forum (SOF), Svenskt näringsliv the Confederation of Swedish Enterprise and Sveriges Konsumenter the Swedish Consumers' Association.

## 5. Governance Framework Options

Framework to consider relevant dimensions of the governance model

The options examined in Section 5 each have some common elements that are outlined below.

auDA notes that the options examined in Section 5 have not been considered by the members of auDA and that consultation with auDA members will be a critical component of any proposed reform.

However, auDA submits that:

### Corporate structure

- A company limited by guarantee is the most appropriate corporate structure for auDA in all cases. It provides a clear, robust structure that is well known and accepted and has widely recognised strengths. It is appropriate for a not-for-profit organisation performing a public function.
- Director nominations and appointments should be impartial and ensure an appropriate balance and mix of skills and experience.

### Governance practices/conventions

- The process for nominations and appointments should be aligned with appropriate, recognised exemplars such as the ASX corporate governance principles (to the extent appropriate for a company limited by guarantee with auDA's purposes).
- While consideration could be given to establishing an agreement with the Government on alignment with some specific principles embodied in the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), auDA is not a "Commonwealth company" to which the PGPA Act applies and, while its existing membership-based ownership model remains in place, auDA should not be made subject to the PGPA Act.

### Stakeholder engagement

- In all options, stakeholder engagement should be based on a strong transparency and accountability framework to the broader internet community.
- Internet policy development must be multi-stakeholder based. auDA should have formal processes for stakeholder engagement. This should go beyond its members, as has been the past practice. The options specified below identify different membership models and director nominations and appointments processes, as they are the changes most likely to result in a significant improvement in auDA's ability to fulfil its purposes.

### Principles/options assessment criteria

auDA developed the following criteria to assess and evaluate the options described in this submission:

- Does the option ensure auDA acts consistently with the purposes of auDA?
- Is the option consistent with ICANN frameworks/obligations?
- Is the model consistent with Australia's Internet governance and cooperation goals?
- Will the option facilitate the appointment of a Board that is fit for purpose in terms of the mix and depth of skills and experience of directors?
- Will the option ensure a majority of directors are independent?
- Does the option promote stable governance?
- Director continuity until normal rotation occurs
- Ability to manage conflicts of interest
- Ability to replace directors in the event of a legitimate retirement consistent with the principles

- Will the ability to respond to market/technology changes including cybersecurity be strong?
- Can engagement with stakeholders be effective?
- Are there implementation challenges?

## Options for Constitutional Reform

### 5.1 Single member Model

#### Company structure

New or amended constitution with:

- A single member – the relevant Commonwealth Minister
- All directors to be independent
- No direct membership from industry
- The same degree of operational independence from the Government as currently exists

Include explicit reference in the guiding principles set out in the Minister's terms of endorsement (or the Constitution, as relevant) requiring:

- The company to adopt the ASX governance principles (to the extent relevant)
- An annual independent Board evaluation be conducted with a summary report to be provided to the Minister

#### Nomination and selection process

- The Minister would appoint all directors on the recommendation of a nominations committee<sup>6</sup> for fixed terms
- The nominations committee would consider the necessary skills and experience balance required for the Board and would publicly advertise for applications

#### Stakeholder engagement

- New mechanisms, such as regular publication of performance outcomes against targets and stakeholder advisory panel(s), would be used to maintain/strengthen engagement

#### Comments/Assessment

- The relevant Minister being the single member of auDA may be inconsistent with the Government's policy goal to "oppose efforts to bring the management of the Internet under government control"
- If the relevant Minister is auDA's single member, auDA will be considered a "wholly-owned Commonwealth company" for the purposes of the PGPA Act and subject to relevant requirements under that Act
- A clear focus on achieving the Objects and acting in the best interests of the internet community would be facilitated
- The potential for conflict of interest issues for sector-appointed directors would be removed
- The potential for misalignment between the pursuit of member interests and good governance principles would not occur
- There should be a high degree of confidence that the Board will have the right balance of skills and experience. In particular, the focus on the necessary skill and experience composition of the Board in the appointment process should assist auDA to respond appropriately to market/technology changes including cyber-security
- Board stability should be strong\*
- Implementation challenges are likely to exist

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<sup>6</sup> The nominations committee in this instance would have to separate of auDA and subject to its own independent governance framework

- Implementation will, as a practical matter, require a scheme of arrangement, which will require auDA to satisfy relevant member approval thresholds and statutory and court processes. A particular challenge in this regard is that existing members are likely to see the options as diminishing their level of control over auDA and may not support the proposal
- The Commonwealth Government may not be comfortable with appointing the Board of an entity which is, operationally, independent
- The Commonwealth Government may see a conflict between its appointment of the Board as being in conflict with its policy of opposing efforts to bring the management of the Internet under government control

*\*Mechanisms to measure and report on subsequence performance would need to be developed.*

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## 5.2 Current member model with change to the director selection process

### Company structure

- Retain existing classes of members
- Include explicit reference in the guiding principles set out in the Minister's terms of endorsement requiring:
  - The company to adopt the ASX governance principles (to the extent appropriate)
  - An annual independent Board evaluation be conducted with a summary report to be provided to the Minister

### Nomination and selection process

Amend the Constitution to establish:

- that a majority of directors and the chair must be independent
- new director appointment arrangements
- Government to request the establishment of a nominations committee to establish skill and experience requirements and recommend the appointment of a chair and four directors after publicly advertising for applications. These directors would be appointed by the existing directors
- Entitle the directors appointed by the nomination committee to appoint up to three additional directors
- Establish three positions on the Board for member nominated directors
- Not split between supply and demand interests
- The member nominated directors would be elected by the members

### Stakeholder engagement

Establish new arrangements for engagement with stakeholders

- There would be a need to adopt engagement procedures that are separate from reliance on member appointed director engagement with stakeholders
- New mechanisms such as a regular publication of performance outcomes against targets and stakeholder advisory panel(s) would be used to maintain/strengthen engagement

### Comments/ assessment

- A clear focus on achieving the purposes of auDA and acting in the best interests of the internet community should be facilitated
- The chair and a majority of directors would be independent
- The potential for conflict of interest issues for sector appointed directors would be reduced\*

- The potential for misalignment between the pursuit of member interests and good governance principles would be diminished\*
- Under this model, auDA may be a "Commonwealth company" for the purposes of the PGPA Act and subject to relevant requirements under that Act, depending on the rights of the Commonwealth in respect of auDA
- Should be consistent with Australia's Internet governance and cooperation goals, in terms of the management of the Internet not being under government control
- There should be a high degree of confidence that the Board will have the right balance of skills and experience, at least initially.\* In particular, the focus on the necessary skill and experience composition of the Board in the appointment process should assist auDA to respond appropriately to market/technology changes, including cyber-security
- Governance stability should be strong with an effective renewal process
- Stakeholder engagement should not be weakened if new mechanisms are implemented as proposed
- Amending the Constitution may be challenging in light of the approval thresholds specified in auDA's Constitution, noted above. The requirement for 75% of members in each of the Supply Class Members and Demand Class Members to vote in favour of any proposed amendments may prove difficult to achieve in practice
- Implementation challenges are likely to exist
  - Existing members are reasonably likely to see the option as diminishing their level of control over auDA and may not support the proposal which could make implementation by means of constitutional change challenging (refer comments above).

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### 5.3 Functional constituency member model

#### Company structure

New or amended constitution with:

- Revised Board composition comprising the following representatives of each constituent group:
  - 3 directors appointed by the Commonwealth, subject to independent skills analysis
  - 1 director appointed as an industry representative (eg ISPs or large users)
  - 1 director appointed as a consumer advocacy representative, or internet user group
  - 1 director appointed as a registrar representative
  - 1 independent director (who would act as the Chair)
- The same degree of operational independence from the Government as currently exists
- Revised membership structure which could comprise either:
  - a single membership class; or
  - revised member classes divided along constituency lines described above (eg Commonwealth, industry, consumer, registrar)
- Include explicit reference in the guiding principles set out in the Minister's terms of endorsement (or the Constitution, as relevant) requiring:
  - The company to adopt the ASX governance principles (to the extent appropriate)
  - An annual independent Board evaluation be conducted with a summary report to be provided to the Minister

## Nomination and selection process

- This would require a change to the Constitution. As mentioned under Option 2 above, this could be a challenging process.
- Consideration to be given whether election of directors should occur by:
  - **(all member elections)** nomination of candidates [by each constituency / in accordance with criteria specified for each director position based on the constituency represented] and election of each director by all members; or
  - **(constituency elections)** each constituency-based membership class (eg Commonwealth, industry, consumer, registrar) votes for its own constituency director
  - Entitle the directors appointed by members (by either of the above methods) to appoint one additional director who would serve as the chair

## Stakeholder engagement

Establish new arrangements for engagement with stakeholders

- There would be a need to adopt engagement procedures that are separate from reliance on member appointed director engagement with stakeholders
- New mechanisms such as a regular publication of performance outcomes against targets and stakeholder advisory panel(s) would be used to maintain/strengthen engagement

## Comments/ assessment

- A clear focus on achieving the purposes of auDA and acting in the best interests of the internet community should be facilitated
- The chair and a majority of directors would be independent
- The potential for misalignment between the pursuit of member interests and good governance principles would be diminished\*
- Should be consistent with Australia's Internet governance and cooperation goals, in terms of the management of the Internet not being under government control
- There should be a high degree of confidence that the Board will have the right balance of skills and experience\*, in particular the focus on the necessary skill and experience composition of the Board in the appointment process should assist auDA to respond appropriately to market/technology changes including cyber-security
- Governance stability should be strong\*
- Effective stakeholder engagement should occur if new mechanisms are implemented\*
- Implementation challenges are likely to exist
- Existing members are likely to see the option as diminishing their level of control over auDA and may not support the proposal, which could make implementation by means of constitutional change difficult (refer comments above).

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## 5.4 Minimal change to deliver improvements in governance and operational effectiveness

### Company structure

- Retain existing classes of membership
- Amend the Constitution to establish:
  - that a majority of directors and the chair must be independent;
  - reduce the number of Supply and Demand Class directors to two for each class
- Include explicit reference in the guiding principles set out in the Minister's terms of endorsement requiring:
  - The company to adopt the ASX governance principles (where relevant)

- An annual independent Board evaluation be conducted with a summary report to be provided to the Minister
- Conflicts of interest to be managed appropriately

### Nomination and selection process

- This would require amendment to the constitution. As mentioned under Option 2 above, this would be a challenging process
- Seek independent advice on the skill and experience composition required for the Board
- The Board would appoint a fourth independent director. (Note: A similar change was proposed to members in 2016 and was rejected by the Demand Class)

### Stakeholder engagement

Establish new arrangements for engagement with stakeholders

- Engagement procedures that are separate from reliance on member appointed director engagement with stakeholders should be adopted
- New mechanisms such as regular publication of performance outcomes against targets and stakeholder advisory panel(s) would be used to maintain/strengthen engagement

### Comments/assessment

- This would require a change to the constitution. As mentioned under Option 2 above, this would be a challenging process
- The potential for conflict of interest issues for sector appointed directors could be reduced if ASX governance principles are adhered to\*
- The potential for misalignment between the pursuit of member interests and good governance principles would be diminished if ASX governance principles are adhered to\*
- Should be consistent with Australia's Internet governance and cooperation goals, in terms of the management of the Internet not being under government control
- There should be a higher degree of confidence that the Board will have the right balance of skills and experience, given the increase in independent directors
- The focus on the necessary skill and experience composition of the Board in the appointment process should assist auDA to respond appropriately to market/technology changes including cyber-security
- Further consideration should be given to the status of the government observer at auDA Board meetings. For example, should the observer be able to ask questions, and be asked questions, at Board meetings?
- Stakeholder engagement should not be weakened if new mechanisms are implemented\*

## 5.5 Alternative Membership Model

### Company structure

- A single membership class, or expanded membership classes, with enlarged membership numbers
- Amend the Constitution to establish:
  - 9 directors in total;
  - 1 director appointed by the Commonwealth;
  - 6 directors appointed by a vote of the members.
  - 2 independent directors appointed by the Board
- Include explicit reference in the guiding principles set out in the Minister's terms of endorsement requiring:
  - The company to adopt the ASX governance principles (where relevant)

- An annual independent Board evaluation be conducted with a summary report to be provided to the Minister
- Conflicts of interest to be managed appropriately

### Nomination and selection process

- This would require amendment to the constitution
- Seek independent advice on the skill and experience composition required for the Board
- Board to appoint the 2 independent directors in view of the skills and experience required by the Board
- Membership options:
  - membership base to be expanded by providing opt-out membership to each registrant
  - redefining membership classes including the introduction of a “user” class as defined as individuals who do not buy or sell domain names in the regular course of their business<sup>7</sup>
- Provide incentives to attract experienced independent directors to nominate for election

### Stakeholder engagement

Establish new arrangements for engagement with stakeholders

- auDA to ensure that the membership base was sufficiently robust to meet the organisation’s governance requirements;
- New mechanisms such as regular publication of performance outcomes against targets and stakeholder advisory panel(s) would be used to maintain/strengthen engagement.

### Comments/assessment

- This model potentially addresses auDA’s current low membership base and allows for a larger pool of director candidates;
- By increasing incentives to directors, experienced directors can be elected and the Board can appoint further independent directors to obtain the skill and experience required;
- The potential for conflict of interest issues for directors would remain due to the vested interest of some membership sectors. Nonetheless this could be reduced if ASX governance principles are adhered to\*
- The potential for misalignment between the pursuit of member interests and good governance principles could be diminished if ASX governance principles are adhered to\*.
- Should be consistent with Australia’s Internet governance and cooperation goals, in terms of the management of the Internet not being under government control
- Potential new membership definitions may be inconsistent with internationally accepted definitions
- Further consideration should be given to the status of the government observer at auDA Board meetings. For example, should the observer be able to ask questions, and be asked questions, at Board meetings?
- Opt-out membership model for all registrants substantially increases administrative and compliance costs

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<sup>7</sup> The definition, eligibility and scope of Supply Class to allow membership of all domain industry service providers and Demand Class to be exclusive to those with substantial domain holdings would need to be assessed



## 6. auDA Board Remarks

### Are there statutory changes that would assist auDA?

The Commonwealth could give consideration to enshrining auDA's role and purpose in relevant legislation such as the Digital Economy Act. Considering the importance of auDA's functions and of the .au domain name space to the national economy, this could improve the professionalism and recognition of auDA and .au, ensuring the organisation performs its functions in a diligent and responsive manner in the national interest.

### Board Recommendation

The Board of auDA has approved the submission of the paper as a basis to further encourage discussion and debate with auDA's stakeholders, members and the Commonwealth. It is essential that appropriate mechanisms be implemented to further such debate and that all relevant parties work together to deliver improved .au domain administration for Australia. The auDA Board commits that any future reform is conducted through comprehensive stakeholder and member engagement, informed by the findings of this Review.

## Annexure A

### Section 3 of the Constitution of .au Domain Administration Limited

#### 3 OBJECTS

##### 3.1 Principal Purposes

The principal purposes of auDA are:

- a. to be the administrator of, and the Australian self regulatory policy body for the .au ccTLD and its associated Second Level Domains;
- b. to maintain and promote the operational stability and utility of the .au ccTLD and more generally, the Internet's unique identifier system, and to enhance the benefits of the Internet to the wider community; (Amended by Special Resolution, 14 August 2006)
- c. to ensure a cost effective administration of the .au ccTLD and its sub-domains;
- d. to develop and establish a policy framework for the development and administration of the .au ccTLD including:
  - i. rules governing the operations of second level domain registries;
  - ii. the creation of second level domains;
  - iii. rules governing the accreditation of registrars and registry operators; (Amended by Special Resolution, 23 September 2002.)
  - iv. rules governing the registration of names within second level domains and access to second level domain registries;
  - v. ensuring that registrars have equal access to second level registry services.
- e. to manage the operation of critical technical functions including:
  - i. the primary and secondary .au name servers;
  - ii. zone files for second level domains; and
  - iii. a searchable data base containing information on registrations within the .au ccTLD.
- f. to liaise with national and international bodies on issues relating to the development and administration of domain name systems.
- g. to establish appropriate complaints handling and dispute resolution processes to provide for conciliation or redress of grievances on matters associated with the administration of the .au ccTLD.

##### 3.2 Activities

Without reducing the effect of clause 4, auDA will seek to achieve its principal purposes as set out in clause 3.1, through:

- a. ensuring the continued operational stability of the domain name system in Australia;
- b. establishing mechanisms to ensure it is responsive and accountable to the supply and demand sides of the Australian Internet Community;

- c. the promotion of competition in the provision of domain name services;
- d. the promotion of fair trading;
- e. the promotion of consumer protection;
- f. adopting open and transparent procedures which are inclusive of all parties having an interest in use of the domain name system in Australia;
- g. ensuring its operations produce timely outputs which are relevant to the needs of the Australian Internet Community.

(Amended by Special Resolution, 14 August 2006)”

(<https://www.ada.org.au/about-ada/our-org/constitution/>)