

Department of Communication and the Arts

Feedback: auDA Constitution

Recommendations	Review feedback (Areas where document does not appear to meet requirements of the review)	Guidance / questions (Dept welcomes views on identified issues)	General Observations / Context	auDA Response
<p>Rec 2: That auDA continue to operate as a not-for-profit entity and does not seek to maximise profit.</p> <p>Rec 7aiv: however, the first board, following the reform of auDA's governance arrangements will be selected according to the skills matrix identified by the Nominations Committee with shortlisted nominees agreed with the Department.</p> <p>Rec 7b: length of terms directors can serve is capped at three years with directors appointed for no more than two consecutive terms.</p> <p>Rec 7c: the Board is structured so that the majority of the Board is independent of auDA's membership.</p> <p>Rec 7d: that within 12 months the Board is reconstituted to ensure all appointments meet this criteria.</p> <p>Rec 10: That auDA reforms its existing membership model by creating a single member class or a functional constituency model and that membership reform is non-discriminatory and supported with transparent membership guidelines.</p>	<ul style="list-style-type: none"> The proposed constitution does not identify that auDA is a not-for-profit entity (Rec 2). The proposed constitution does not give effect to the Department agreeing to the shortlisted nominees of the first board (Rec 7aiv). The proposed constitution does not give effect to the initial board being reconstituted (Rec 7d). 	<ul style="list-style-type: none"> The Critical Infrastructure Centre (CIC) recommends the following eligibility criteria for Board members to help minimise risk of foreign interference: <ul style="list-style-type: none"> the Chair must be an independent director and an Australian resident citizen (and hold a security clearance to a level of NV1 or above) one (or two) members of the Board must be independent and an Australian resident citizen (consider whether veto rights are required) a security-cleared director must be present for a quorum must certify annually that they have not accessed data/information, except as required to discharge their duties as directors. <p>The Department would welcome views from auDA on applicability of these criteria. The Department's preference is for these to be mandatory requirements for Board eligibility.</p> <ul style="list-style-type: none"> The proposed Constitution does not mention that auDA operates under Terms of Endorsement provided by the Commonwealth – are there concerns with these being added? The proposed Constitution does not reflect the core functions as described in the Terms of Endorsement – are there concerns with these being added? Section 2.4 (Eligibility for membership) – can auDA advise why the ability to manage a 	<ul style="list-style-type: none"> The Department anticipates correspondence from auDA providing assurance and clarification regarding a range of issues associated with the constitution, including foreign membership, full implementation of Rec 7, director tenure, Government role as a non-voting observer, access to papers and information and timing for establishing the nomination committee. The Department's feedback on the proposed constitution has considered this correspondence. Best practice supports transparency of Board meetings and publication of minutes. Further advice relating to the proposed constitution may be provided by national security agencies. 	<ul style="list-style-type: none"> The status of the organisation as "not for profit" is determined by the substantive provisions of the constitution which provide, in brief, that auDA must pursue certain objects (clause 1.2), apply its income and assets solely towards promoting those objects, (clause 1.3), and in the event of winding up of auDA, any remaining assets must be transferred to the entity to whom the right to administer the .au ccTLD is to be transferred (clause 23). The former constitution used the heading "non-profit" for clause 5, which has a similar effect to clause 1.3 of the new constitution (i.e. auDA must apply its income solely towards promoting its objects). However, clause 1.4 of the previous constitution provided that "headings do not affect the interpretation of this Constitution." Therefore, the "non-profit" heading was removed because it did not have any substantive effect, and it was considered that the heading "application of income and property" better described clause 1.3 of the new constitution. The Nomination Committee Charter will be amended to provide that the Committee will only approve for appointment or election to the initial board those candidates who have been shortlisted through agreement with the Department. Given the requirement in clause 5.2 that all Directors must have been approved by the Nomination Committee, this will satisfy recommendation 7aiv. Clause 5.2 of the new constitution provides that all Directors "must have been approved by the Nomination Committee". Clause 25.2 of the new constitution provides that this clause will come into effect either six months after the establishment of the Nomination Committee or an earlier date determined by resolution of the Board. On this date, any Director who has not been approved by the Nomination Committee will become ineligible. This satisfies recommendation 7d because the effect of these two clauses will be a reconstitution of the Board, and all Directors will have met the criteria in recommendation 7. auDA has commenced the process to obtain security clearances for key directors (including the Chair and independent directors) and key staff as recommended. In relation to recommendations regarding the quorum and certifications, the board will further consider this. In relation to Clause 2.4, this is referencing Part 2D.6 of the Corporations Act 2001 - Disqualification from Managing Corporations – which we believe is an acceptable standard to become a Governing Member. The provision relating to Related Body Corporate is designed to prevent corporate groups from exercising outsized voting power by registering multiple subsidiaries or related bodies corporate and thereby obtaining multiple votes. Feedback from the CMWG was that there was concern

		<p>corporation is a qualifier for becoming a member?</p> <ul style="list-style-type: none"> • Section 2.4 (Eligibility for membership) – any person who is a Related Body Corporate of another Governing Member is not eligible to be Governing Member (same for Associate Members). Can auDA advise the purpose of this section and expected outcome? • Section 2.6 (a) ii (Expelling a Member) – is broad and subjective. Will auDA develop/publish a code of conduct that describes activity that is prejudicial to the interests of the company? • There is no acknowledgement of auDA being accountable and responsive to the needs of the Australian internet community— this was in the existing Constitution. Can auDA advise why this was removed? • Section 9.4 (Director interested in a matter) appears to allow a director to vote and receive benefits from a matter in which the director has a personal interest. Notwithstanding the provisions of s195 of the Corporations Act, it would still not appear to be consistent with best practice? See for example at p. 45 of the AICD Good governance principles for NFPs. • Section 14.5 (a) and (b) (Attendance at general meetings) - provides that members have the right to attend meetings of members, but only directors have the right to speak at meetings. What mechanisms will be provided to allow members to raise views/concerns? • Section 19.3 (Inspection of minute books) - allows members to request to view minutes of meetings of members, but not Board meetings. Can auDA confirm how minutes will be published? Will this be discussed in the accountability and transparency framework? 		<p>about the ability of corporate groups to register multiple members in order to obtain multiple votes, and this provision was introduced to address these concerns.</p> <ul style="list-style-type: none"> • A new Code of Conduct for Associate Members will be considered by the General Standing Advisory Committee. • auDA's accountability to Australia internet users, and the broader internet community will be referenced in the Stakeholder Engagement Plan. Clause 3.2(b) of the previous constitution was removed from the constitution, along with the entire "activities" clause as a general update to comply with modern corporate governance practice. Modern not-for-profit constitutions do not generally include a closed list of "activities", instead they provide for a list of objects or purposes, and permit the organisation to carry out any activities which will achieve these objects or purposes. auDA will address matters such as its accountability to the community in more appropriate and flexible documents, such as the Stakeholder Engagement Plan. Importantly, the former clause 3.2(b) did not place any requirement on auDA to be accountable and responsive to the needs of the Australian internet community, so we do not believe that this amendment in any way negatively changes auDA's relationship to the Australian internet community. • Section 195 of the Corporations Act relevantly provides (in brief) that a director may be present and vote on a matter in which he or she has a material personal interest only if the directors who do not have a material personal interest in the matter pass a resolution identifying the director and his or her interest in the matter, and stating that the interest should not disqualify the director from voting or being present at discussions of the matter. While generally it may be expected that a director with a material personal interest would not vote on a matter in which he or she has a material personal interest, it is standard practice for the non-interested directors to be permitted to pass a resolution permitting the director(s) with a material personal interest to be present and vote on a matter. This is not inconsistent with the AICD Good Governance Principles and Guidance for Not-for-Profit Organisations, which states on page 45 that once a conflict of interest has been disclosed, "the other members of the board should then decide the best course of action". It is also consistent with clause 22.3 of the former constitution. • auDA will provide reasonable opportunity for Associate Members to raise any issue, and ask questions at the Annual General Meeting. This will be included as a specific agenda item in the meeting notice. The reason for this amendment is because auDA intends to undertake a substantial reform of its membership structure, with the objective of ultimately having over 12,500 members after the transition period is complete. When auDA grows to this size, there is a risk that providing an automatic right to all members to speak at a general meeting will render the general meeting unable to properly carry out its business, or prone to disruptive tactics. It is expected that the Chair will permit members to speak at general meetings, however the change to the constitution affords the Chair the discretion to limit questions or comments from members where he or she considers this necessary to conduct the meeting properly, consistent with best practice meeting procedure. • auDA has a separate, and publicly available, Minutes Preparation and Publication Policy. This will continue to apply.
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