

DRAFT: 22 May 2000

AUNIC Hosting Agreement

between

.au Domain Administration

(ACN 079 009 340)

and

[Pty Ltd]

(ACN [])

BAKER & MCKENZIE
Solicitors

Level 26, AMP Centre
50 Bridge Street
SYDNEY NSW 2000
Tel: (02) 9225-0200
Fax: (02) 9223-7711

Level 39, Rialto
525 Collins Street
MELBOURNE VIC 3000
Tel: (03) 9617-4200
Fax: (03) 9614-2103

Ref: #258329 v1\NKD

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AUNIC Hosting Agreement

This Agreement is made on the _____ day of _____, 1999.

Between

.au Domain Administration (ACN 079 009 340) of 255 Elizabeth Street, NSW 2000 ("auDA").

and

[_____ Pty Ltd] (ACN [_____]) of [insert address] ("Contractor").

Recitals

- A. auDA was established to oversee the administration of Internet domains and domain name registration in Australia, and to manage the operation of associated critical technical functions such as the AUNIC system
- B. AUNIC serves as the central registry for Internet domain names in Australia within the country code top level domain .au.
- C. auDA requires the provision of hosting and other services in connection with the AUNIC System.
- D. At auDA's request, the Contractor is willing to provide the hosting and other services on the terms and conditions of this Agreement.

Operative provisions

1. Definitions and interpretation

1.1 In this Agreement, unless the context requires another meaning:

"auDA Policies" means the policies adopted and/or modified by the Board of auDA from time to time;

"AUNIC System" means the system described in Schedule 1 to be hosted by the Contractor;

"Business Day" means a day that is not a Saturday, Sunday or a public holiday or bank holiday in Sydney;

"Commencement Date" means the date of execution of this Agreement;

"Confidential Information" means all:

- (a) know-how, trade secrets, ideas, concepts, technical and operational information owned or used by a party;

- (b) information concerning the affairs or property (including the Software) of a party or any business, property or transaction in which that party may be or may have been concerned or interested;
- (c) Registry Data;
- (d) information about the terms of this Agreement;

and any information which, by its nature or by the circumstances of its disclosure, is or could reasonably be expected to be regarded as confidential to:

- (a) either party; or
- (b) any third party with whose consent or approval either party uses that information;

"DNS" means the Internet domain name system;

"Force Majeure Event" means an event or occurrence:

- (a) which is beyond a party's reasonable control (including), without limitation, acts of gods or the public enemy, flood, earthquake, storm, fire, explosion, epidemic, war, embargoes, riot, explosion, confiscation or the requisitioning of facilities by the Government; and
- (b) which that party could not reasonably have foreseen or taken reasonable measures to prevent.

"Implementation Services" means the services provided by auDA with respect to the migration of data and testing of the Software at the Site set out in Schedule 5;

"Intellectual Property Rights" means all rights, whether registrable, registered or unregistered in any trade marks, trade names, patents, copyrights or designs and other similar legally enforceable rights anywhere in the world, or any applications for, or rights to obtain or acquire, any such rights;

"Production System" means the AUNIC System that contains live data and accepts update and query requests from users;

"Rebate Fees" means the rebate fees set out in Item 2 of Schedule 10;

"Registrar" means a person or entity that acts as an interface between domain name holders and the Contractor;

"Registry Data" means all data maintained in electronic form in the registry database including, without limitation, Zone File Data and all data submitted by Registrars;

"Registry SLD's" means com.au, gov.au, edu.au, info.au, org.au and such other SLD's as are notified to the Contractor by auDA from time to time;

"Representative" means the representative of a party named in Item 1 of Schedule 7 and his/her replacement from time to time notified in writing by the relevant party to the other party;

"Resources" means all relevant hardware, software and communications equipment resources necessary to operate the AUNIC System including, without limitation, the resources set out in Schedule 2 but excluding the Software;

"Services" means all the services provided by the Contractor to auDA pursuant to this Agreement including, without limitation, the Support Services and the services set out in clause 4.1;

"Service Fees" means the fees set out in Item 1 of Schedule 10;

"Service Levels" means the service levels set out in Schedule 9;

"Site" means [insert address of site at which the server that will host the software will be located];

"SLD" means a second level domain of the DNS;

"Software" means the software program more specifically described in Schedule 4 and includes any Upgrades;

"Specifications" means the specifications set out in Schedule 3 as amended by the parties from time to time;

"Support Services" means the support services set out in Schedule 8;

"Term" means the period of 12 months;

"Test System" means the AUNIC System that is used for testing new or updated software by auDA staff;

"Timetable" means the timetable set out in Schedule 6;

"TLD" means a top-level domain of the DNS;

"Upgrades" means all fixes, alterations, improvements, updates, upgrades or new versions of the Software;

"Website" means [insert definition]

"Zone File Data" means all data contained in DNS zone files for the ccTLD .au as provided to TLD nameservers on the Internet.

1.2 In this Agreement, unless the context requires another meaning:

- (a) a reference:
 - (i) to the singular includes the plural and vice versa;
 - (ii) to a gender includes all genders;

- (iii) to a document (including this Agreement) is a reference to that document (including any Schedules and Annexures) as amended, consolidated, supplemented, novated or replaced;
 - (iv) to a party means a party to this Agreement;
 - (v) to an item, Recital, clause, Schedule or Annexure is to an item, Recital, clause, Schedule or Annexure of or to this Agreement;
 - (vi) to a person (including a party) includes:
 - (A) an individual, company, other body corporate, association, partnership, firm, joint venture, trust or Government Agency; and
 - (B) the person's successors, permitted assigns, substitutes, executors and administrators;
 - (vii) to a law:
 - (A) includes a reference to any legislation, treaty, judgment, rule of common law or equity or rule of any applicable stock exchange; and
 - (B) is a reference to that law as amended, consolidated, supplemented or replaced; and
 - (C) includes a reference to any regulation, rule, statutory instrument, by-law or other subordinate legislation made under that law;
 - (viii) to proceedings includes litigation, arbitration and investigation;
 - (ix) to a judgement includes an order, injunction, decree, determination or award of any court or tribunal;
 - (x) to time is to Sydney time;
 - (xi) the word "including" or "includes" means "including, but not limited to," or "includes, without limitation".
- (b) Where a word or phrase is defined, its other grammatical forms have a corresponding meaning.
 - (c) Headings are for convenience only and do not affect interpretation.
 - (d) If a period occurs from, after or before a day or the day of an act or event, it excludes that day.

2. Term

This Agreement commences on the Commencement Date and continues for the Term unless terminated in accordance with clause 26.

3. Contract Documents

- 3.1 This contract consists of this Agreement and auDA's Request for Tender dated [#] March 2000 and Contractor's Response to the RTF dated [#] March 2000.
- 3.2 If there is any conflict or inconsistency between or among any of the documents listed in clause 3.1, the following order of priority shall apply:
- (a) this Agreement;
 - (b) auDA Request for Tender dated [#] March 2000;
 - (c) the Contractor's Response to the RTF dated [#] March 2000.

4. Obligations of Contractor

- 4.1 The Contractor will:
- (a) provide the Resources to operate the Production System and the Test System;
 - (b) ensure that the Resources meet the Specifications;
 - (c) operate the Production System and Test System in accordance with this Agreement for the Registry SLD's;
 - (d) provide the Support Services;
 - (e) comply with the Service Levels;
 - (f) report to and discuss all issues, recommendations and decisions related to the AUNIC System with the auDA Representative; and
 - (g) in performance of its obligations under this Agreement, comply with all applicable laws.
- 4.2 The Contractor will, in providing the Services, comply with the Timetable.
- 4.3 If the provision of any of the Services is delayed as a result of any failure by auDA to comply with the Timetable, the Timetable will be altered to the extent of the relevant delay and the Contractor will not be liable for such delay. This will be the sole and exclusive remedy available to the Contractor for any failure by auDA to comply with the Timetable.

- 4.4 The Contractor will comply, in its operation of the Production System, with all relevant auDA Policies.
- 4.5 Without limiting clause 4.4, the Contractor acknowledges that auDA wishes to introduce competition into the provision of registry services and agrees to negotiate in good faith with auDA to amend this Agreement to enable the implementation of a distributed or multiple registry function.

5. Software Licence

- 5.1 auDA hereby grants contractor a non-exclusive and non-transferable licence to host the Software at the Site during the Term for the sole purpose of operating the Production System and the Test System, providing the Support Services and performing such other services as may be requested by auDA from time to time.
- 5.2 Except for the licence granted pursuant to clause 5.1 Contractor will have no proprietary rights or title to or interest in the Software and acknowledges that auDA at all times remains the exclusive owner of the Software.

6. Limitations on Licence

- 6.1 **E**xcept as and to the extent that the Contractor is legally authorised to do so under the *Copyright Act* 1968, the Contractor may only make such copies of the Software as may be necessary for:
- (a) back-up, archival and security purposes; and
 - (b) the exercise of the rights granted to the Contractor under this Agreement and subject to this Agreement.

The Contractor must reproduce all confidentiality and proprietary notices on each of these copies, and must maintain an accurate record of the number and location of each of these copies, and at the reasonable request of auDA will provide a copy of those records to auDA. The terms of this Agreement, with the necessary modifications, apply to each of the copies made pursuant to this clause.

- 6.2 The Contractor must not:
- (a) modify the Software or merge all or any part of the Software with other software programs.
 - (b) distribute, market, rent, lease, sub-licence or otherwise transfer any of its rights granted to it under this Agreement to any third parties or allow such third parties to use or access the Software directly or indirectly, whether on a time sharing, remote job entry, facility management or service bureau arrangement basis, without the prior written consent of auDA;

- (c) install the Software on a network or other multi-user computer system unless otherwise specified in Schedule 3; or
 - (a) disclose the results of Software performance benchmarks to any third party without the prior written consent of auDA.
- 6.3 Except as and to the extent that the Contractor is legally authorised to do so under the *Copyright Act 1968*, the Contractor must not, directly or indirectly, reverse disassemble, decompile or reverse engineer, or allow a third party to reverse disassemble, decompile or reverse engineer the whole or any part of the Software or any locking or security device used or supplied with the Software or otherwise attempt or allow any other party to obtain the algorithms by which the Software performs its functions.
- 6.4 The Contractor acknowledges that the information necessary for achieving interoperability or security testing or correcting of the Software is available on request from auDA in accordance with the requirements of the *Copyright Act 1968* (Cth).

7. Delivery and Implementation

- 7.1 auDA will deliver the Software to the Contractor and will carry out the Implementation Services.
- 7.2 The Contractor will give auDA all reasonable assistance, including the provision of personnel, facilities, Internet and communication access, as auDA reasonably considers necessary to ensure satisfactory implementation of the Software. The Contractor will ensure that auDA is granted all reasonable access, including necessary security clearances, for the purpose of complying with clause 7.1.

8. Access

- 8.1 During the Term the Contractor will provide auDA with such access to the AUNIC System (including the test system) as auDA reasonably considers necessary to allow software installation, updates, development and testing, and problem diagnosis and resolution.
- 8.2 auDA will comply with all security procedures and safety measures notified to it in writing by the Contractor from time to time.
- 8.3 Access will be via the SSH protocol and all Upgrades will first be installed and tested on the Test System before being installed on the Production System.

9. Security

The Contractor will ensure the physical and electronic security of the Production System, the Test System and the Software. Without limiting the foregoing, the Contractor must:

- (a) impose physical access restrictions on all computing and networking equipment in the Production System and Test System;
- (b) engage in intrusion monitoring of all computing and networking equipment in the Production System and Test System;
- (c) ensure that all operating systems and networking software in the Production System have been configured and had the appropriate patches applied to ensure the highest level of security; and
- (d) regularly test operating systems and networking software in the Production System for potential security breaches.

10. Key Personnel

- 10.1 The Contractor will use its best efforts to ensure that the individuals named in Item 2 of Schedule 7 are available to provide the Services.
- 10.2 If at any time the Contractor needs to replace any individual named in Item 2 of Schedule 7 it will, prior to engaging an individual to serve as the replacement:
 - (a) ensure the individual has the appropriate ability and qualifications;
 - (b) promptly notify auDA of its intention to appoint that individual for that position; and
 - (c) provide auDA with a resume and any other information about that individual reasonably requested by auDA.
- 10.3 If, after being notified of the individual, auDA reasonably and in good faith objects in writing to the proposed individual being appointed as the replacement, then the Contractor will not assign that individual to the position and will propose to auDA another individual of suitable ability and qualifications.
- 10.4 auDA has the right to direct the Contractor not to continue using particular personnel to perform its obligations under this Agreement. Such right will not be unreasonably applied.

11. Support Services & Service Levels

- 11.1 The Contractor will perform the Support Services in a professional manner and in accordance with the Service Levels.
- 11.2 Subject to clause 11.3, if during any month the Contractor fails to comply with any of the Service Levels, auDA will be entitled to the Rebate Fees set out in Schedule 10.

- 11.3 The Contractor will not be liable for a failure to meet its obligations under this Agreement (including the Service Levels) to the extent that the failure arises as a result of:
- (a) a fault or failure of the Software; or
 - (b) a failure by auDA to perform or a delay in performing any of its obligations under this Agreement.
- 11.4 The Contractor must inform auDA as soon as practicable of any defect or problem suspected or identified in the Software and provide all reasonable assistance requested by auDA.

12. Software Support by auDA

- 12.1 auDA will diagnose problems with, and implement Upgrades to, the Software as and when it is reasonably required.
- 12.2 auDA will maintain telephone and electronic mail contact points for the purposes of Software and AUNIC operational issues and will notify the Contractor of these contact points and any changes to them.

[Please consider the extent of auDA's support obligations]

13. Reporting

- 13.1 Within 3 days after the end of each calendar month, the Contractor will report to auDA in writing on the status of the Production System during the preceding calendar month. The status report will include the following information in respect of the preceding month:
- (a) the size of the SQL database in relation to the capacity of the hardware hosting the Production System;
 - (b) the number of accesses on each HTML document through the Production System;
 - (c) the average, minimum and maximum access times, for creation, modification and query transactions conducted through the Production System;
 - (d) all actions taken to ensure security of the Production System and Test System has not been compromised, and that the highest level of security is maintained;
 - (e) the number, and a summary of enquires made through telephone and electronic mail contact; and

- (f) a log of hardware, software and security issues relating to the computer and networking equipment associated with the Production System;
- (g) a log of the time taken by the Contractor to resolve hardware, software and security issues relating to the computer and networking equipment associated with the Production System;
- (h) a log of problems reported or detected with the Software;
- (i) a log of the time taken for the Software problem to be notified to auDA and to be rectified, whether by auDA or the Contractor;
- (j) the amount of time during which the Production System was unavailable; and
- (k) such other information as auDA reasonable requests from time to time.

13.2 The Contractor will keep auDA informed about the true costs of operating Production System and the Test System. Without limiting the foregoing the Contractor shall, on a regular basis and at least quarterly, deliver to auDA reports itemising such costs under at least the following headings:

- (a) physical infrastructure;
- (b) hardware;
- (c) operational staff; and
- (d) ongoing development and maintenance.

13.3 The Contractor will maintain:

- (a) all raw data from which the reports maintained pursuant to this clause are derived; and
- (b) documents and records evidencing the Contractor's compliance with the Service Levels,

for a minimum period of 2 years from the termination or expiration of this Agreement.

13.4 The Contractor will at all times during the Term and for 2 years after the termination or expiration of this Agreement:

- (a) permit, upon reasonable notice and during normal business hours, any duly authorised representative of auDA access to the books and records retained in accordance with clause 13.3;
- (b) supply to such representative, upon request, all information and explanations required by them to verify the performance of this Agreement by the Contractor; and

- (c) permit such representatives to take copies of extracts from the Contractor's records for the purposes of verification.

14. Payment

- 14.1 During the Term auDA must pay to the Contractor the Service Fees.
- 14.2 Within 14 days after the end of each month the Contractor will provide auDA with a monthly statement and invoice showing for the preceding month the total fees due to the Contractor in accordance with this Agreement adjusted as appropriate in accordance with clause 11.2.
- 14.3 auDA will pay each invoice submitted by the Contractor within 30 days of the date of the invoice.
- 14.4 If auDA considers any invoice to be incorrectly rendered, then the auDA will:
- (a) within 14 days after receipt of the invoice, notify the Contractor in writing of the amounts specified in the invoice which it considers incorrectly rendered ("Disputed Amounts"); and
 - (b) pay to the Contractor the amounts specified in the invoice which are not Disputed Amounts.
- 14.5 If the parties are unable to reach agreement in relation to the Disputed Amount within 14 days after the Contractor's receipt of the notice referred to in clause 14.3, the matter shall be resolved in accordance with clause 28.

15. Taxes

- 15.1 The fees payable to the Contractor under this Agreement are exclusive of all government charges, taxes, duties and levies and any such charges, duties, taxes and levies arising in connection with this Agreement will be payable by auDA. In particular, without limiting the generality of the foregoing, auDA must pay to the Contractor any amount ("GST Amount") which is payable by the Contractor on account of GST, as a consequence of any supply made or deemed to be made or other matter or thing under or in connection with this Agreement.
- 15.2 The GST Amount must be calculated by multiplying the amount on which the GST is calculated by the prevailing rate of GST.

16. Variation of the Services

- 16.1 The Contractor may, from time to time, submit written recommendations for amendments to the Services.

- 16.2 Based on the Contractor's recommendations under clause 16.1 or otherwise, auDA may submit a written request for amendments to the Services.
- 16.3 The Contractor will review each request submitted under clause 16.2 and will submit to auDA a written submission including:
- (a) a description of the nature of the proposed change to the Services (the "Change");
 - (b) the procedure and timetable proposed for implementation and testing the Change;
 - (c) the effect of the Change on the Services, including Service Levels, both during and after implementation;
 - (d) role of the auDA in implementing the Change;
 - (e) the cost or estimated cost of implementing the Change;
 - (f) any proposed variation in Fees;
 - (g) the level of any known risks associated with the implementation of Change; and
 - (h) the level of any known risks and, where possible, costs of not implementing the Change.
- 16.4 auDA must notify the Contractor within 30 days after receipt of a submission under clause 16.3 that auDA:
- (a) accepts the submission, in which case the parties will sign and date the submission, which will amend and form part of this Agreement;
 - (b) wishes to renegotiate the submission; or
 - (c) withdraws the request made under clause 16.2.
- 16.5 If auDA does not respond within 30 days after receipt of a submission under clause 16.3, the request will be deemed to have been withdrawn.
- 16.6 If auDA wishes to renegotiate the submission submitted by the Contractor under clause 16.3, then the parties must negotiate in good faith to vary the relevant parts of this Agreement. If the parties are unable to reach agreement on the variation after such negotiation, the matters in dispute will be resolved in accordance with clause 28.
- 16.7 Until such time as a submission is accepted in accordance with clause 16.4, the Contractor will continue to provide the Services in accordance with the then current Agreement.

17. Website

- 17.1 The front-end of the AUNIC system is the web site, consisting of a number of static web pages and cgi scripts. These will be installed maintained by auDA as part of the AUNIC software installation and maintenance.
- 17.2 The contractor will supply and maintain the web server software which will run (or host) the AUNIC front-end.

18. Advertising

- 18.1 The parties will develop a set of mutually acceptable advertising guidelines setting out the policies and procedures for selling and displaying advertising on the Website.
- 18.2 All advertisements placed on the Website by the Contractor must comply with the advertising guidelines developed in accordance with clause 18.1. No advertising shall be placed on the Website unless and until the relevant guidelines have been finalised and accepted by both parties.

19. Warranties

- 19.1 The Contractor warrants to auDA that as at the date of this Agreement:
- (a) all information provided to auDA for the purpose of entering into this Agreement, including, without limitation, all representations made in the Response to Request for Tender, is accurate;
 - (b) it has full corporate power to execute, deliver and perform its obligations under this Agreement;
 - (c) this Agreement constitutes a legal, valid and binding obligation on it enforceable in accordance with its terms by appropriate legal remedy; and
 - (d) there are no actions, claims, proceedings or investigations pending or threatened against it or by it of which it is aware, and which may have a material effect on the subject matter of this Agreement.
- 19.2 The Contractor further warrants that:
- (a) it has all licences, authorisations, consents, approvals and permits required by all applicable laws and regulations in order to perform its obligations under this Agreement, and otherwise complies with all laws and regulations applicable to the performance of those obligations;
 - (b) the Resources will comply with the Specifications; and

- (c) the Services will be performed in a timely and professional manner by personnel who are suitably qualified and experienced to perform the Services and in accordance with all applicable standards.

19.3 auDA warrants to the Contractor that:

- (a) it has full corporate power to execute, deliver and perform its obligations under this Agreement;
- (b) this Agreement constitutes a legal, valid and binding obligation on it enforceable in accordance with its terms by appropriate legal remedy; and
- (c) the Software is original and will not infringe any third party's Intellectual Property Rights.

20. Intellectual Property Rights

- 20.1 Except as otherwise stated in this Agreement, nothing in this Agreement is deemed to constitute a grant or disposal by either party to the other party of any property or any interest in property.
- 20.2 auDA owns and retains ownership of the Software and all Upgrades to the Software, including minor modifications made to the software by the contractor.
- 20.3 auDA has exclusive right and title to the data in the AUNIC System as updated from time to time.
- 20.4 auDA owns and retains ownership of reports, logs, and information provided to auDA as part of the contract.

21. Liability & Indemnity

- 21.1 The Contractor indemnifies auDA and its officers, employees and agents ('those indemnified') against all expenses, losses, damages and costs incurred by those indemnified arising out of or in connection with:
 - (a) any injury to or death of any person caused by any negligent act or omission or wilful misconduct of Contractor or its employees, subcontractors, officers or agents;
 - (b) any loss or damage to real or tangible property caused by any negligent act or omission or wilful misconduct of Contractor or its employees, subcontractors, officers or agents; and
 - (c) any breach by the Contractor or its employees, subcontractors, officers or agents of this Agreement.

- 21.2 Subject to clause 21.4, auDA indemnifies the Contractor and its officers, employees and agents ('those indemnified') against any final award or settlement of damages against those indemnified arising as a direct result of:
- (a) any injury to or death of any person caused by any negligent act or omission or wilful misconduct of auDA or its employees, subcontractors, officers or agents;
 - (b) any loss or damage to real or tangible property caused by any negligent act or omission or wilful misconduct of auDA or auDA's Personnel;
 - (c) any claim that the Software infringes the Intellectual Property Rights of a third party; or
 - (d) the Contractor's compliance with an auDA Policy, except that the Contractor shall not be indemnified under this clause to the extent that the damages arise from the particular manner in which the Contractor has chosen to comply with the relevant auDA Policy.
- 21.3 The indemnity provided by auDA under clause 21.2(c) ('auDA IP Indemnity') is subject to the following provisions:
- (a) if a third party makes a claim against the Contractor that is covered by the auDA IP Indemnity ('**IP Claim**') then:
 - (i) the Contractor must promptly notify auDA of the IP Claim and provide full details thereof;
 - (ii) the Contractor must promptly provide all assistance reasonably requested by auDA in relation to the IP Claim;
 - (b) auDA will have sole control and conduct of the IP Claim and any related settlement negotiations;
 - (c) the auDA IP Indemnity is the Contractor's sole and exclusive remedy for an IP Claim.
- 21.4 auDA will not be liable under clause 21.2(c) in circumstances where an IP Claim arises directly or indirectly by reason of:
- (a) the unauthorised use, misuse or modification by the Contractor or its officers, employees, subcontractors or agents of the Software;
 - (b) the failure of the Contractor or its officers, employees, subcontractors or agents to comply with this Agreement or applicable laws, or to follow directions given by auDA, including user manuals and other documents provided under this Agreement;
 - (c) the failure of the Contractor or its officers, employees, subcontractors or agents to use any correction or enhancement made available by auDA to the Contractor;

(d) information or materials provided by any third party (other than a subcontractor of auDA) to the Contractor.

21.5 If the Software is, or in the opinion of auDA is likely to be, held to be infringing, auDA shall at its expense and option either:

- (a) procure the right for the Contractor to continue using it;
- (b) replace it with a non-infringing equivalent;
- (c) modify it to make it non-infringing.;

If none of the above options are available the parties shall discuss what variations are required to the Services as a result and this Agreement shall be amended accordingly.

22. Limitations of Liability

22.1 In no event will either party be liable in contract, tort or otherwise for any indirect or consequential expenses, losses, damages or costs (including, without limitation, liability for loss of profits or revenue, business interruption, loss of data, or failure to realise anticipated savings or benefits or business opportunities) under or in any way connected with this Agreement whether or not the other party has been advised about the possibility of such loss except that such limitation shall not apply to:

- (a) any claim for damages of less than [\$10 million];
- (b) damages caused by a breach of the confidentiality provisions in this Agreement; or
- (c) amounts recoverable under the indemnities in clause 21.

22.2 Each party's liability in contract, equity, negligence, intended conduct, tort or otherwise will be reduced by the extent, if any, to which the other party contributed to the loss.

22.3 Each party will use its best efforts to mitigate any loss, cost, expense or damage which it suffers or incurs on connection with this Agreement.

23. Subcontractors

23.1 The Contractor may not engage subcontractors to perform any part of its obligations under this Agreement without the prior written consent of auDA.

23.2 If auDA consents to a subcontract pursuant to clause 23.1, the Contractor will not be relieved of any of its obligations or liabilities under this Agreement and the Contractor will be liable for the acts, defaults and omissions of any subcontractor or any employee or agent of the subcontractor as if they were the acts, defaults and omissions of the Contractor or the employees or agents of the Contractor.

- 23.3 The Contractor will be responsible for ensuring the suitability of all its subcontractors and for ensuring that the work performed by the subcontractor meets the requirements of this Agreement.
- 23.4 The Contractor will ensure that each subcontractor is aware of all the terms of this Agreement relevant to the subcontractor's part in the performance of this Agreement.

24. Insurance

- 24.1 The Contractor must at its own expense maintain the insurance coverage set out in Schedule 11, such insurance to remain in effect until completion of all work to be performed under this Agreement.
- 24.2 The Contractor must, upon written request from auDA, give auDA any information it may reasonably require concerning the scope of the insurance maintained pursuant to clause 24.1 together with any relevant certificates of currency.

25. Confidentiality

- 25.1 Each party will:
- (a) keep the Confidential Information of the other confidential in the same manner as its holds its Confidential Information of like kind but in no event shall the recipient exercise less than reasonable care in maintaining the confidence of such information and shall not disclose it or make it available directly or indirectly to any third party (subject to disclosure permitted under clause 25.2);
 - (b) use the Confidential Information of the other party only for the purpose of performing its obligations under this Agreement.
- 25.2 Each party may only disclose the Confidential Information of the other party to its officers, employees and permitted subcontractors who:
- (a) have a need to know the Confidential Information for the purposes of this Agreement (and only to the extent that each has a need to know); and
 - (b) have undertaken to maintain the confidentiality of the Confidential Information in accordance with this clause 25.
- 25.3 Each party must:
- (a) immediately notify the other of any information which comes to its attention regarding any actual or potential breach of confidentiality, disclosure or unauthorised use of the other party's Confidential Information; and

- (b) take all steps to prevent or stop a suspected or actual breach of this clause 25.
- 25.4 Upon demand and upon termination or completion of this Agreement, each party must:
 - (a) deliver to the other party all of the other party's Confidential Information in its possession which is capable of being delivered; and
 - (b) delete, erase, or otherwise destroy any of the other party's Confidential Information contained in computer memory, magnetic, optical, laser, electronic, or other media in its possession or control which is not capable of delivery to the other party.
- 25.5 The obligations of confidentiality under this clause 25 do not extend to information that (whether before or after the date of this Agreement):
 - (a) was rightfully known to or in the possession or control of the recipient prior to its receipt from the other party and which is not subject to an obligation of confidentiality on the recipient;
 - (b) is received by the recipient in good faith from a third party without an obligation to keep such information confidential;
 - (c) is public knowledge (otherwise than as a result of a breach of confidentiality by the recipient or any of its disclosees);
 - (d) is independently developed by the recipient without the use of the other party's Confidential Information;
 - (e) is required to be disclosed by a governmental agency or law so long as the recipient promptly provides the other party with written notice of the required disclosure.

26. Termination

- 26.1 Either party may immediately terminate this Agreement by written notice to the other party if:
 - (a) the other party materially breaches this Agreement and fails to remedy such breach within 30 days of receipt of notice from the first party specifying the breach and requiring it to be remedied;
 - (b) the other party materially breaches this Agreement and the breach is incapable of remedy;
 - (c) any step is taken to appoint a receiver, receiver and manager, an official manager, a controller, a liquidator, a provisional liquidator, an administrator or other like person of the whole or any part of the other party's assets, undertaking or business;

- (d) any step is taken by a mortgagee or chargee to enforce a security held in respect of the whole or any part of the other party's assets undertaking or business;
- (e) any step is taken to enter into any scheme of arrangement between the other party and its creditors;
- (f) the other party becomes insolvent or is otherwise unable to pay its debts as and when they become due or otherwise if something with the same or similar effect to paragraphs (c),(d), (e) or (f) happens under the laws of any jurisdiction.

26.2 auDA may terminate this Agreement by giving 90 days written notice to the Contractor provided that before giving that notice auDA:

- (a) convenes a meeting, on reasonable notice, to consult with the authorised representative of the Contractor; and
- (b) provides the Contractor with reasons for its decision.

27. Consequences of Expiry or Termination

27.1 Upon termination or expiration:

- (a) the Contractor must ensure the AUNIC System remains fully functional and available to the Internet addressing system;
- (b) the Contractor shall comply with auDA's reasonable directions to effect the orderly transition and migration to auDA or a third party designated by auDA of all or any of the applicable portion of the Services (the "Termination Transition") ensuring that the services provided by the AUNIC System shall not be interrupted or degraded;
- (c) the Contractor shall develop and submit to auDA a transition plan setting out the respective tasks to be accomplished by each party in connection with the Termination Transition ("Transition Plan"); and
- (d) the Contractor shall continue to provide the Services to be terminated or to expire in connection with the Termination Transition for a period mutually agreed upon by auDA and the Contractor, during which period the terms of this Agreement shall remain in effect.

27.2 auDA will cooperate in good faith with the Contractor in connection with the Contractor's obligations under clause 27.1 and will perform its obligations under the Transition Plan.

27.3 The Contractor will perform its obligations under the Transition Plan provided that, if the termination or expiration assistance provided by the Contractor under this clause requires resources beyond those otherwise then being provided by the Contractor under this Agreement, auDA shall pay Contractor for such additional

resources at the Contractor's then-current standard contracting rates for the provision of such services.

- 27.4 Upon completion of the Termination Transition the Contractor must immediately deliver to auDA:
- (a) all copies of the Software;
 - (b) all material containing some or all of auDA's Confidential Information; and
 - (c) any books, papers, drawings, writings and other things, such as (but not limited to) equipment, tools or other devices owned by auDA which might have come into its possession or under its control.
- 27.5 During the Termination Transition, auDA shall pay the Contractor the Service Fees and any additional fees payable in accordance with clause 27.3.
- 27.6 Clauses 13.3, 13.4, 19, 20, 21, 22, 25, 27 and 28 will survive the expiry or termination of this Agreement for any reason.
- 27.7 The expiry or termination of this Agreement will not affect or limit any accrued rights of the parties.

28. Dispute Resolution

- 28.1 The parties agree that should any dispute, controversy or claim ("Dispute") arising under, out of or relating to this Agreement, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, the procedure set out in this clause 28 will apply.
- 28.2 A party claiming that a Dispute has arisen must notify the other party giving details of the Dispute ("Notification").
- 28.3 Within 7 days (or any longer period agreed between the parties) after a Notification is given, a representative of the Contractor and auDA ('Project Executives') must personally or through a nominee attempt to resolve the Dispute.
- 28.4 If the Project Executives cannot resolve the Dispute within 14 days after the Notification is given (or any longer period agreed between the parties), the Project Executives must immediately refer the Dispute to the Chief Executive Officers of each party.
- 28.5 If the Chief Executive Officers cannot resolve the Dispute within 21 days after the Notification is given (or any longer period agreed between the parties), the Dispute will be referred to and finally resolved by arbitration in accordance with the current Rules for the Conduct of Commercial Arbitrations issued by the Institute of Arbitrators Australia and:

- (a) any arbitrator(s) shall be an independent person chosen by the parties, or if the parties fail to agree upon such independent person, such arbitrator shall be appointed by the Secretary general of the Australian Commercial Disputes centre;
 - (b) the place of arbitration shall be **[Sydney]** Australia;
 - (c) the law applicable to the arbitration procedure shall be determined by referring to the law of the place of arbitration;
 - (d) the arbitrator shall determine the matters in dispute in accordance with the law governing this Agreement.
- 28.6 The parties must continue to perform their respective obligations under this Agreement pending the resolution of a Dispute.
- 28.7 A party must not start court proceedings (except proceedings seeking interlocutory relief) unless it has complied with this clause 28.

29. Force Majeure

- 29.1 Neither party will be liable for any failure or delay in the performance of its obligations under this Agreement if that failure or delay is due to a Force Majeure Event. If that failure or delay in performance exceeds 60 days, either party may immediately terminate this Agreement by written notice to the other party.
- 29.2 **A**ny party who is, by reason of a Force Majeure Event, unable to perform any obligation or condition under this Agreement must notify the other party as soon as possible specifying:
- (a) the cause and extent of such non-performance;
 - (b) the date of commencement of non-performance; and
 - (c) the means proposed to be adopted to remedy or abate the Force Majeure Event.
- 29.3 **A** party who is, by reason of a Force Majeure Event, unable to perform any obligation or condition under this Agreement must:
- (a) use all endeavours to remedy or abate the Force Majeure Event as quickly as possible;
 - (b) resume performance as quickly as possible after cessation of the Force Majeure Event; and
 - (c) notify the other party when the Force Majeure Event has terminated or abated to an extent which permits resumption of performance to occur.
- 29.4 **S**ubject to any other termination provisions a non-performance by either of the parties of any obligation or condition under this Agreement shall be excused during

the time and to the extent that such performance is prevented, wholly or in part, by a Force Majeure Event of which notice has been given under clause 29.2.

- 29.5 The period of time during which performance of any obligation or condition is prevented by a Force Majeure Event shall be added to the time provided in this Agreement for performance of that obligation or condition and to the time required for the performance of any act dependent that obligation or condition.

30. Notices

30.1 All notices must be:

- (a) in legible writing and in English;
- (b) addressed to the recipient at the address or facsimile number set out below or to any other address or facsimile number that a party may notify in writing to the other

to the Contractor:

Address: []

Attention:[]

Facsimile []

to auDA:

Address: []

Attention:[]

Facsimile no:[]

- (c) signed by the party or, where the sender is a company, by an authorised officer or under the common seal of the sender; and
- (d) sent to the recipient by hand, prepaid post (airmail if to or from a place outside Australia) or facsimile.

30.2 Without limiting any other means by which a party may be able to prove that a notice has been received by the other party, a notice will be considered to have been received:

- (a) if sent by hand, when left at the address of the recipient;
- (b) if sent by pre-paid post, 3 days (if posted within Australia to an address in Australia) or 10 days (if posted from one country to another) after the date of posting; or
- (c) if sent by facsimile, on receipt by the sender of an acknowledgment or transmission report generated by the sender's machine indicating that the whole facsimile was sent to the recipient's facsimile number;

but if a notice is served by hand, or is received by the recipient's facsimile, on a day that is not a Business Day, or after 5:00 pm (recipient's local time) on a Business Day, the notice will be considered to have been received by the recipient at 9.00 am on the next Business Day.

31. Entire Agreement

This Agreement, the Request for Tender and the Response to the Request for Tender constitutes the entire agreement of the parties about its subject matter and supersedes any previous understandings or agreements on that subject matter. The Contractor acknowledges that in entering into this Agreement, the Contractor:

- (a) has not relied on any statement made or conduct engaged in by auDA or any person on behalf of auDA other than the statements set out in this Agreement;
- (b) was not influenced or induced to enter into this Agreement by any statement or conduct of the type referred to in paragraph (a).

32. Conflict of Interest

- 32.1 The Contractor warrants that as at the date of this Agreement no conflict of interest exists or is likely to arise in the performance of its obligations under this Agreement, by itself, its employees or any sub-contractor.
- 32.2 If, during the Term, a conflict or risk of conflict of interest arises, the Contractor will notify auDA immediately in writing of that conflict or risk of conflict.

33. Further Assurances

Each party will promptly at the request of the other party execute and deliver such further documents and do such further acts as shall be reasonably necessary to give full effect to this Agreement and the transactions and conditions contemplated in this Agreement.

34. Waiver

- 34.1 A waiver by a party of a provision of or of a right under this Agreement is binding on the party granting the waiver only if it is given in writing and is signed by the party or an authorised officer of the party granting the waiver.
- 34.2 A waiver is effective only in the specific instance and for the specific purpose for which it is given.
- 34.3 Failure by a party to exercise or delay in exercising a right does not prevent its exercise or operate as a waiver.

35. Amendments In Writing

This Agreement may only be altered in writing signed by both parties.

36. Invalid or unenforceable provisions

- 36.1 Any provision of this Agreement will be read down to the extent necessary to prevent that provision or this Agreement being invalid, voidable or unenforceable in the circumstances.
- 36.2 If, despite clause 36.1, a provision of this Agreement is still invalid or voidable:
- (a) if the provision would not be invalid or voidable if a word or words were omitted, that word or those words will be deleted; and
 - (b) in any other case, the whole provision will be deleted, and the remainder of this Agreement will continue to have full force and effect.

37. Relationship

- 37.1 The Contractor is an independent contractor without authority to bind auDA by contract or otherwise and neither the Contractor nor its employees or agents are employees or agents of auDA.
- 37.2 The Contractor assumes full responsibility for the actions of its personnel while they are performing services pursuant to this Agreement and shall be solely responsible for their supervision, direction and control, payment of salary (including withholding taxes and superannuation), workers compensation, disability benefits and the like.

38. Publicity

The Contractor will not, directly or indirectly make any media release, public announcement or public disclosure relating to this Agreement or its subject matter without the specific approval of auDA unless it is required to make the announcement or disclosure by law or by a stock exchange.

39. Counterparts

This Agreement may be executed in any number of counterparts and all counterparts taken together constitute one instrument, but this Agreement is of no force or effect until the signed counterparts are exchanged.

40. Governing Law

This Agreement is governed by the laws of New South Wales, Australia. Each party irrevocably and unconditionally:

- (a) submits to the non-exclusive jurisdiction of the courts of new South Wales and courts able to hear appeals therefrom; and
- (b) waives, without limitation, any claim or objection based on absence of jurisdiction or inconvenient forum.

41. Assignment

A party must not assign, create an interest in or deal in any other way with any of its rights under this Agreement without the prior written consent of the other party.

Executed as an agreement

Signed for and on behalf of)
.au Domain Administration)
by its duly authorised representative)
in the presence of:)

Signature of witness

Signature of authorised representative

Name of witness (please print)

Name of authorised representative
(please print)

Signed for and on behalf of)
[insert name])
by its duly authorised representative)
in the presence of:)

Signature of witness

Signature of authorised representative

Name of witness (please print)

Name of authorised representative
(please print)

Schedule 1

AUNIC System

The AUNIC system consists of three main components:

- a) an SQL database that holds domain name and NIC Handle objects (the *back-end*);
- b) a series of HTML documents, cgi scripts and perl programs that form the user interface to create and modify database objects (the *front-end*); and
- c) a set of query tools to allow access to the database objects (the *whois service*).

The architecture of the AUNIC System is described in the document entitled *AUNIC Technical Specification*, annexed to this Agreement and marked "A"

Schedule 2

Resources

The Contractor will provide sufficient dedicated computing resources to operate both the Production System and the Test System.

Specifically, the Contractor will provide the following:

1. Hardware:

[insert details]

2. Network Equipment:

[insert details]

3. Operating System:

[insert details]

4. Database

[include if Contractor decides to provide its own SQL database]

5. Connectivity

[insert details of connection to the Internet]

Schedule 3

Specifications

The Production System and Test System need not be located on physically distinct machines, but must be completely separate so that failure of the Test System can have no possible impact on the Production System. The database associated with the Test System need not be fully populated.

The computing resources provided for each system must be capable of operating the front-end and whois service without any modification, apart from those described below.

[If Contractor supplies their own SQL database to operate as the back-end:

The SQL database must be fully compatible with the functionality provided by the SOLID Web Engine Version 2.2 and the only permitted changes to the front-end are to the SQL.pm module.

If the Contractor is not going to supply its own SQL database:

The computing resources must be capable of supporting the SOLID Web Engine Version 2.2.

Other technical requirements:

- at least 6Gb of disk storage for the Production System and 3Gb of disk for the Test System, with the ability to expand this capacity if necessary;
- a 10Mb/s or better connection to a local peering point, with failover redundancy;
- a secure machine room environment with redundant UPS;
- a regularly tested, operational contingency plan to deal with disaster situations, with a maximum permissible downtime of 6 hours; and

Schedule 4

Software

1

Schedule 5

Implementation Services

- (a) Installation of Software at the Site
- (b) The creation or modification of all database tables associated with the AUNIC System [
- (c) Testing of the Software
- (d) Migration of data from the current AUNIC database to the SQL database to be hosted by the Contractor
- (e) Testing of the database

Schedule 6

Timetable

Task	Date of Completion
Site Preparation by Contractor	
Finalisation of Production and Test Systems	
Delivery of Software by auDA to Contractor	
Installation of Software at the Site by auDA	
Completion of database tables associated with the AUNIC system by auDA	
Software testing by auDA	
Migration of data by auDA	
Testing of Database by auDA	
Supply of policies relating to the AUNIC System by the Contractor to auDA	

Schedule 7

Personnel and Representatives

Item 1: Representatives

auDA Representative:

Name:

Position:

Tel No:

Fax No:

Contractor Representative:

Name:

Position:

Tel No:

Fax No:

Item 2: Contractor Key Personnel

Schedule 8

Support Services

1. The Contractor will maintain a telephone support number and electronic mail address for the purposes of specific Production System hardware and software support issues. These contact points will be staffed on a 24 x 7 basis.
2. The Contractor will provide 24 hours x 7 days support for the Production System and Test System to resolve:
 - (a) any hardware issues in relation to equipment associated with the Production System and the Test System, including computer systems, peripherals and networking hardware
 - (b) any software issues in relation to any operating systems or networking software associated with the Production System and Test System
 - (c) minor issues in relation to the Software
3. The Contractor will perform regular maintenance on the Production System and the Test System to reduce the likelihood of any problems with the systems.
4. The Contractor will promptly notify the nominated auDA support contact of any issues in relation to the Software including minor issues which it is able to resolve.
5. The Contractor will maintain on-site spares, on-site engineering staff capable of repairing or replacing faulty equipment, and service contracts with vendors, for all computer and network hardware associated with the AUNIC System. Service contracts must specify a minimum response time of 4 hours.
6. The Contractor will perform a daily backup of all operational data, and at least 2 backups not more than 2 weeks old and one full backup per month kept in secure off-site storage.
7. The Contractor will operate a performance monitoring and reporting system that provides adequate notification of potential performance problems with the AUNIC System.
8. The Contractor will develop, implement and maintain policies and procedures for the maintenance and operation of the AUNIC System.

Schedule 9

Service Levels

Problem Resolution

Priority Levels

auDA will determine the severity level of the particular problem with the AUNIC System in accordance with the following:

Priority 1: Where the problem has a serious impact on the AUNIC System such as loss of the AUNIC System or major functionality or serious degradation of the AUNIC System.

Priority 2: Where the AUNIC System is useable, however, functionality is degraded or restricted. For example, where a defect corrupts data, gives rise to erroneous results or degrades performance. This would include highly visible errors which cause repeated calls for support.

Priority 3: Where the problem has little or no impact on AUNIC System operation

Response Times

Priority Level	Target Resolution Time (Where problem is not caused by Software)	Target Notification Time (Where problem is cause by Software)
Priority 1	Within # hours	Within # hours
Priority 2	Within # hours	Within # hours
Priority 3	Within # hours	Within # hours

Target Resolution Time means the time elapsing between the occurrence of a problem with the AUNIC System and the time it takes the Contractor to reach a solution.

Target Notification Time means the time elapsing between the occurrence of a problem with the AUNIC System and the time it takes the Contractor to notify auDA.

Other Service Levels

The other target service levels are:

- 99.9% Production System availability (8 hours per year allowable downtime);
- 10 second or better response time for database creation/modification using the front-end
- 1 second or better response time for database queries using the whois service, tested from a distance of two or more router hops on the remote side of a peered connection.

Schedule 10

Fees

1. Service Fees

2. Rebate Fees

Schedule 11

Insurance