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# Submission to Department of Communication and the Arts' Review of Australia's .au domain management

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**To** Department of Communications and the Arts  
Review of Australia's .au domain management  
  
**audomainreview@communications.gov.au**

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**Date** 18 November 2017

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### Summary of Submission

We submit that the current approach to the management of Australia's .au domain of a bottom up, multi-stakeholder, consensus driven model implemented by way of a not-for-profit company limited by guarantee remains fit for purpose and the most appropriate model of management for .au.

However, we consider that the events over the last 24 months have revealed some structural weaknesses in the governance model of .au Domain Administration Ltd (**auDA**), which if rectified may improve the company's ability to perform its Principal Purpose of being the administrator of and Australian self regulatory policy body for the .au ccTLD and to maintain and promote its operational stability and utility and to enhance the benefits of the internet to the wider community.

In particular, we consider that specific consideration should be given to the following changes in auDA's governance arrangements:

1. introduction of term limits for elected and appointed directors (rather than 'independent' directors) of, say, 3 terms;
2. decreasing the number of elected directors to 6, each of whom are elected for a term of 3 years;
3. staggering the terms of elected and appointed directors to achieve a balance of continuity and renewal on the board;
4. removing the distinction between the supply and demand sides of the industry in auDA's membership structure, which no longer appears to serve any beneficial purpose and which has had the unintended consequence that each supplier member's vote carries significantly more weight than each demand member's vote;
5. a requirement that the chair and deputy chair of auDA be appointed directors;

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6. excluding persons who have been elected directors within the last 3 years from being appointed as appointed directors;
  7. the introduction of a formalised, transparent nominating committee process for candidates to be appointed directors which is representative of all stakeholders including government, the domain name industry (including those who operate businesses as domainers) and end users to ensure that individuals selected as appointed directors have appropriate, high level internet and/or “for-purpose” governance experience and expertise; and
  8. potentially, extending the nominating committee process to also apply as a pre-qualification process for candidates offering themselves for election by members, to ensure that candidates are aware of the core requirement that auDA must administer the .au ccTLD for the benefit of the Australian community, rather than to benefit the members or directors of the company themselves.

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## Submission

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### Background

1. We refer to the November 2017 Discussion Paper for the Review of Australia's .au domain management which calls for submissions from stakeholders on specific questions raised in the paper and other issues relevant to the Review's terms of reference.
2. Maddocks has acted for .au Domain Administration Ltd (auDA) between 2001 and 2017.
3. We assisted to implement the competition model for the domain name industry and to draft the Registry Licence Agreement, each edition of the Registrar Agreement and the Mandatory Conditions for all .au domain name licenses. We are not acting for auDA in relation to the current Registry Transformation Project or in any other matter.
4. We have participated in several of auDA's policy development processes and have acted for auDA in significant litigation in its role as the industry self-regulator for the .au domain, including:
  - 4.1 [\*Loans and Debt Assistance Incorporated & Anor v .au Domain Administration Limited\* \[2012\] NSWSC 558 \(24 May 2012\)](#)<sup>i</sup> in relation to the correct method of interpretation of the .au Names Policy
  - 4.2 [\*Australian Style Pty Ltd v .au Domain Administration Ltd\* \[2010\] VSCA 184 \(23 July 2010\)](#)<sup>ii</sup> in relation to the meaning of the term "Security Breach" in the Registrar Agreement and auDA's powers to regulate the .au Domain Name system;
  - 4.3 [\*Capital Networks Pty Ltd v .au Domain Administration Limited\* \[2004\] FCAFC 324 \(9 December 2004\)](#)<sup>iii</sup> in relation to the status, nature and correct interpretation of the Registrar Agreement and auDA's powers to request Registrar's to provide it with information concerning their business; and
  - 4.4 [\*Domain Names Australia Pty Ltd v .au Domain Administration Ltd\* \[2004\] FCAFC 247 \(10 September 2004\)](#)<sup>iv</sup> in which auDA was the lead applicant with the Australian Competition and Consumer Commission in relation to proceedings under the consumer protections provisions of the then *Trade Practices Act 1974* arising from widespread misleading and deceptive conduct in relation to .au domain names.
5. By way of disclosure, we note that we also regularly act for major telecommunications carriers, telecommunications industry bodies and not for profit consumer and user representative groups. We also regularly act for the Commonwealth, including the Department.
6. We have been nominated for and have received the Australian Communications Industry Award (**ACOMM**) for excellence in the Professional Services category in 2010 and 2012. We are generally recognised as a leading supplier of legal services to the government, telecommunications, media and technology sector in Australia.
7. The views expressed in this submission are based only on publicly available information and are those of Maddocks alone.
8. In making this submission we have not specifically consulted any current or former clients and are not acting on the instructions of any other person or organisation.

9. Our submission below is based upon a publication on our website [TechKnowChat Blog<sup>v</sup>](#) made on 22 November 2017.

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## Background and recent history

10. Currently, responsibility for policy development and enforcement and the general management of the .au domain resides with [.au Domain Administration Ltd<sup>vi</sup>](#) (auDA).
11. auDA is a company limited by guarantee with a board elected by members of the supply side (4 directors) and demand side (4 directors) of the domain name industry and 3 independent directors appointed by the elected directors. The CEO of auDA attends board meetings as a non-voting member of the board.
12. Anyone can become a member of auDA and, three months after joining, is able to vote in elections for directors and other matters at the company's general meetings.
13. From the [introduction of the competitive market structure for the Australian domain name industry<sup>vii</sup>](#) in 2002 until 2016, auDA managed the regulation of the industry through a period of rapid growth in a solid, dependable and largely 'no-surprises' way, despite the inevitable controversies and issues which arise in any rapidly growing industry.
14. However, since [the replacement of the long time<sup>viii</sup>](#) chair the Hon Tony Staley AO (a former Minister for Communications and experienced public company director and chair) by the board in late 2015, there has been a large turnover of auDA's directors, including the other long serving independent directors:
- 14.1 [Air Vice-Marshal Julie Hammer AM, CSC<sup>ix</sup>](#) who is an electronic warfare and cyber security expert who had acted as the CIO of the Department of Defence, President of Engineers Australia and is currently a member of the [ICANN Security and Stability Advisory Committee<sup>x</sup>](#); and
- 14.2 Graham McDonald, an experienced lawyer who was a former Presidential Member of the Commonwealth AAT, Chair of the Superannuation Complaints Tribunal and inaugural Australian Banking Ombudsman.
15. In that time there has also been an almost complete turnover of staff including the long term CEO and Chief Policy Officer, with two key senior executives also leaving the company within about a year of their commencement.
16. In July 2017 the Chair who had replaced Tony Staley [unexpectedly resigned himself<sup>xi</sup>](#) after it became clear that a [Special General Meeting<sup>xii</sup>](#) convened at the request of members under the *Corporations Act 2001* would pass a resolution to remove him as a director. A new independent Chair was announced in November 2017.
17. At the same time as these events have been occurring auDA is conducting a process to [transform the arrangements under which the registry of .au domain names is managed<sup>xiii</sup>](#) and a [comprehensive review<sup>xiv</sup>](#) of all of the binding published policies which apply to .au domain names.

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## DOCA Review

18. The DoCA Review's terms of reference are to examine and make recommendations on:
- 18.1 the most appropriate framework for the management of the .au top level domain;
- 18.2 how to ensure that Government and community expectations inform auDA's operation and decision-making; and

18.3 mitigation strategies to address future risks to the security and stability of .au.

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## Current Governance Model

19. auDA is not directly under the control of the Australian Government. Rather, it holds a delegation of power to manage .au from the [Internet Corporation for Assigned Names and Numbers<sup>xv</sup> \(ICANN\)](#) under a [Sponsorship Agreement<sup>xvi</sup>](#) after [auDA was endorsed by the then Commonwealth Minister for Communications \(Senator the Hon Richard Alston\)<sup>xvii</sup>](#) as the appropriate entity to hold the delegation for .au.
20. However, [under its Constitution<sup>xviii</sup>](#), auDA has always recognised that the Internet Domain Name System is a public asset and that the .au country code top level domain (**.au ccTLD**) is under the sovereign control of the Commonwealth of Australia.
21. The [Principal Purposes of auDA<sup>xix</sup>](#) are:
  - 21.1 to be the administrator of and Australian self regulatory policy body for the .au ccTLD; and
  - 21.2 to maintain and promote its operational stability and utility and to enhance the benefits of the internet to the wider community.
22. auDA is to do so through:
  - 22.1.1 cost effective administration of .au;
  - 22.1.2 development and administration of relevant rules for .au and its sub-domains;
  - 22.1.3 liaison with national and international bodies on issues relating to the development and administration of domain name systems; and
  - 22.1.4 establishment of appropriate complaints handling and dispute resolution processes.
23. Accordingly, auDA must administer the .au ccTLD for the benefit of the Australian community, rather than to benefit the members or directors of the company themselves.
24. Further, [Under Part 22, Division 3 of the Telecommunications Act 1997<sup>xx</sup>](#), the [Australian Communications and Media Authority<sup>xxi</sup> \(ACMA\)](#) may declare a specified person or association to be a **declared manager of electronic addressing** if the ACMA considers that the person or organisation is not managing the electronic addressing to the ACMA's satisfaction or if the [Australian Competition and Consumer Commission<sup>xxii</sup> \(ACCC\)](#) directs it to.
25. Once a person or organisation has been declared, the ACMA may then give binding directions after consulting with the ACCC.
26. These processes require the independent statutory office holders of the ACMA and the ACCC to be satisfied that a situation has arisen which makes it necessary to step in and assume a degree of control over auDA and then give directions as to how auDA manages electronic addressing. In effect, this gives statutory 'reserve powers' to the ACMA and the ACCC on behalf of the Australian Government and community but, in practice, they have never needed to be used.
27. This model of industry self-regulation, expressly in the public interest rather than the interest of members of the industry or the government of the day, has been largely successful in enabling and perhaps even driving the rapid growth of the internet in Australia and establishing .au domains as a relatively trusted brand amongst Australian consumers. As

noted in the Discussion Paper, [Australia has a policy of and commitment to the multi-stakeholder approach to internet governance](#)<sup>xxiii</sup> which is implemented in this model.

28. Occasionally in the hurly burley of industry politics, such as in the lead up to [a contested election for board positions at auDA](#),<sup>xxiv</sup> some appear to lose sight of the fact that auDA exists to manage the .au Domain Name System for the benefit of the entire Australian community, rather than to benefit the industry it regulates or the sectional interests of directors or the members who elect a majority of them.

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## Possible areas for reform

29. The Victorian Court of Appeal stated in *Australian Style Pty Ltd v .au Domain Administration Ltd* [at paragraphs 6 and 7]:

*6 The parties are participants in the system which governs the allocation and use of internet domain names. It is a system which is now an essential part of daily life, including daily commerce. Those who transact their business and other affairs over the internet depend upon it being secured against those who would exploit it, and the information it contains, in order to obtain an unlawful financial or other advantage. Protecting the system against unauthorised entry is therefore of paramount concern. Both parties to the present litigation had an obligation to maintain that security. One of them, the appellant, failed in this duty.*

*7 The courts and the lawyers also must play their part in the maintenance of the .au domain name system as an important public resource. But it is worth making the point that in this endeavour less may sometimes mean more: the end will not necessarily be best promoted by the taking of an unduly legalistic approach. The principal responsibility for management of the internet must be reserved to those with the relevant expertise; those, in other words, who are familiar not only with what the internet now is (in all its intricacies) but also with what it might become. The law can sometimes, no doubt, assist from the wings. It also has the potential to meddle, both from the periphery and from centre stage. It will meddle, unless the lawyers and the courts approach with diffidence whatever limited role they have.*

30. We venture to suggest that the Court of Appeal's comments in relation the role of courts and lawyers might also be properly applied to the legislative and executive branches of government. While there is no doubt both the legislature and executive have are role in the maintenance of the .au domain name system as an important public resource, in this endeavor also, less may be more.
31. Thus, we consider and submit that the current approach to the management of Australia's .au domain of a bottom up, multi-stakeholder, consensus driven model implemented by way of a not-for-profit company limited by guarantee remains fit for purpose and the most appropriate model of management for .au.
32. We suggest the following mechanisms for improving the governance of the company itself might assist to improve the governance of the company and to avoid future periods of instability such as those experienced in the last 24 months:
- 32.1 introduction of term limits for elected and appointed directors (rather than "independent" directors) of, say, 3 terms;
  - 32.2 decreasing the number of elected directors to 6, each of whom are elected for a term of 3 years;
  - 32.3 staggering the terms of elected and appointed directors to achieve a balance of continuity and renewal on the board;



- 32.4 removing the distinction between the supply and demand sides of the industry in auDA's membership structure, which no longer appears to serve any beneficial purpose and which has had the unintended consequence that each supplier member's vote carries significantly more weight than each demand member's vote;
  - 32.5 a requirement that the chair and deputy chair of auDA be appointed directors;
  - 32.6 excluding persons who have been elected directors within the last 3 years from being appointed as appointed directors; and
  - 32.7 the introduction of a formalised nominating committee process representative of all stakeholders including government, the domain name industry (including those who operate businesses as domainers) and end users to ensure that individuals selected as appointed directors have appropriate, high level internet and/or "for-purpose" governance experience and expertise; and
  - 32.8 potentially, extending the nominating committee process to also apply as a pre-qualification process for candidates offering themselves for election by members, to ensure that candidates are aware of the core requirement that auDA must administer the .au ccTLD for the benefit of the Australian community, rather than to benefit the members or directors of the company themselves.
33. We would be very happy to discuss any aspect of this submission with members of the review team.
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## Contact

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All URLs accurate on the date of submission.

<sup>i</sup> Austlii, *Loans and Debt Assistance Incorporated & Anor v .au Domain Administration Limited* [2012] NSWSC 558 (24 May 2012) <<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2012/558.html>>.

<sup>ii</sup> Austlii, *Australian Style Pty Ltd v .au Domain Administration Ltd* [2010] VSCA 184 (23 July 2010) <<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2010/184.html>>.

<sup>iii</sup> Austlii, *Capital Networks Pty Ltd v .au Domain Administration Limited* [2004] FCAFC 324 (9 December 2004) <<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2004/324.html>>.

<sup>iv</sup> Austlii, *Domain Names Australia Pty Ltd v .au Domain Administration Ltd* [2004] FCAFC 247 (10 September 2004) <<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2004/247.html>>.

<sup>v</sup> Maddocks, 'An opportunity to express your views on the governance of the internet in Australia' article by Robert Gregory, Partner, 22 November 2017 <<https://www.maddocks.com.au/blog/opportunity-express-views-governance-internet-australia/>>.

<sup>vi</sup> .auDA website, homepage <<https://www.ada.org.au/>>.

<sup>vii</sup> .auDA website, 'Industry Information' <<https://www.ada.org.au/industry-information/>>.

<sup>viii</sup> .auDA website, 'auDA Board appoints new Chair', 9 December 2015 <<https://www.ada.org.au/news/ada-board-appoints-new-chair/>>.

<sup>ix</sup> National Library of Australia, Trove entry on Julie Margaret Hammer <<https://trove.nla.gov.au/people/769076?c=people>>.

<sup>x</sup> ICANN website, 'Security and Stability Advisory Committee (SSAC)' <<https://www.icann.org/groups/ssac>>.

<sup>xi</sup> .auDA website, 'Statement from auDA Chair Stuart Benjamin', 28 July 2017 <<https://www.ada.org.au/news/statement-from-ada-chair-stuart-benjamin/>>.

<sup>xii</sup> .auDA website, 'Notice of Special General Meeting – 2017', 7 July 2017 <<https://www.ada.org.au/news/notice-of-special-general-meeting-2017/>>.

<sup>xiii</sup> .auDA website, 'Registry Transformation Project (2017)' <<https://www.ada.org.au/industry-information/registry/registry-transformation-project-2017/>>.

<sup>xiv</sup> .auDA website, '2017 Policy Review Panel' <<https://www.ada.org.au/policies/panels-and-committees/2017-policy-review-panel>>.

<sup>xv</sup> ICANN website, 'Welcome to ICANN!' <<https://www.icann.org/resources/pages/welcome-2012-02-25-en>>.

<sup>xvi</sup> ICANN website, '.au ccTLD Sponsorship Agreement' signed 25 October 2001 <<https://www.icann.org/resources/unthemed-pages/au-2012-02-25-en>>.

<sup>xvii</sup> IANA website, 'Letter from Senator Richard Alston to Stuart Lynn' 16 August 2001 <<https://www.iana.org/reports/2001/au-redelegation/alston-to-lynn-16aug01.html>>.

<sup>xviii</sup> .auDA website, 'Constitution' <<https://www.ada.org.au/about-ada/our-org/constitution/#Preamble>>.



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<sup>xix</sup> .auDA website, 'Constitution' Part 3.1 'Principal Purposes' <<https://www.auda.org.au/about-uda/our-org/constitution/#Preamble>>.

<sup>xx</sup> Austlii, *Telecommunications Act 1997* – Section 474 Declared manager of electronic addressing <[http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol\\_act/ta1997214/s474.html](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ta1997214/s474.html)>.

<sup>xxi</sup> ACMA website, homepage <<https://www.acma.gov.au/>>.

<sup>xxii</sup> ACCC website, homepage <<https://www.accc.gov.au/>>.

<sup>xxiii</sup> Malcolm Turnbull, 'Australia is committed to a multi-stakeholder system of Internet governance' 15 March 2014 <<https://www.malcolmturnbull.com.au/media/australian-committed-to-a-multi-stakeholder-system-of-internet-governance>>.

<sup>xxiv</sup> .auDA website, 'Notice of 2017 auDA Annual General Meeting' 5 November 2017 <<https://auda.org.au/news/notice-of-2017-uda-annual-general-meeting>>.