

# auDA Terms of Endorsement Review 2021

.au Domain Name Association (.au DNA) appreciates the opportunity to provide constructive insight and recommendations into the Terms of Endorsement underpinning the management of the Australian Domain Name System.

Core principles

## auDA Terms of Endorsement Review

**Department of Infrastructure,  
Transport, Regional Development  
and Communications**

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**Executive summary:**

The .au Domain Name Association (.au DNA) is a collective of Australian internet business owners and entrepreneurs who have an interest in the Australian internet addressing system and its related policy framework.

The .au DNA supports the Government's policy objectives in relation to developing and implementing core principles for the manager of the internet addressing system and welcomes the opportunity to make a submission to the Department.

However, the .au DNA considers that the core principles underpinning the management of the Internet addressing system has a number of missing provisions that are supportive of a successful marketplace. In particular, the .au DNA has concerns about:

- The limited amount of up to date Qualitative and Quantitative data
- Access to research, frequency of market data, and reliability of that information
- Inefficient policy framework for implementing direct registration of .au
- Transaction integrity in the performance of trading domain names
- Competition, Innovation and new entrant accessibility
- Accountability mechanisms in determining elected director decision making

Ensuring the domain name market remains relevant and desired is vitally important to all stakeholders having an interest in the Domain Name System (DNS) and we appreciate the opportunity to engage with the Department on this matter. To this end, we would be pleased to meet with the Department to discuss our submission or provide additional information on any related matters the Department seeks to explore.

## Question 1

Do the proposed ToE accurately reflect community expectations for the management of the .au ccTLD? If not, what amendments could be made to do so?

### 1. Support fair and transparent multi-stakeholder engagement

*According to RFC1591<sup>1</sup> the proper space for national identification on the Internet corresponds to the ccTLDs, who represent the national interest and have a duty to serve their communities fulfilling a role of stewardship on behalf of the best interest to their stakeholders and its local Ecosystem, represented on policies that guide the operation on this sake.*

In light of RFC1591, auDA is tasked with the responsibility of ensuring the Australian Internet Community controls the destiny of its own country level namespace. In order to achieve that aim, it was necessary for auDA to manage and administer the namespace in the interest of their stakeholders.

One of the main attributes of multi-stakeholder membership is the ability to scrutinise and challenge proposed ideas and the leadership that may recommend those ideas. Leadership must be capable of accepting and managing contestability because it is vital to track the interest of membership attitudes and ideas about the company and funnel it to the deciders for inclusion, it must be allowed its rational expression.

***We want a form of decision making that we can own and identify with. So, we can see our interests furthered, and be part of the achievements that auDA seeks to undertake.***

### 2. Engagement with the Australian Government

Government intervention came about because a quorum of auDA Directors sought to orchestrate reform outcomes that were not in the spirit of community expectations.

As a consequence, this portal of power infected every level of stakeholder engagement. It was so pervasive that it removed the majority of members and limited the rights of those members.

The Dept of communications (at the time) appeared complicit in the removal of members. Members of the Australian Internet Community were removed by a torrent of non-Australian (foreign) employees of auDA accredited registrars. It was a betrayal of trust; our Australian membership was founded upon the principle of sovereign multi-stakeholder governance and self-regulatory control. The .au DNA believes the leadership of auDA (at the time) mangled the membership classes to justify an end.

Government intervention did not do enough to protect the integrity of the multi-stakeholder model.

**We want a voice at a government level. We want trustworthy interventive action and investigation from government, especially at critical times of governance breakdown.**

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<sup>1</sup> <https://datatracker.ietf.org/doc/html/rfc1591>

### 3. Promote principles of competition, fair trading and consumer protection

**Core function:** *Administer a licensing regime for .au domain names based in multi-stakeholder processes that is transparent, responsive, accountable, accessible and efficient.*

Good regulatory processes are important not only for achieving good competition policy outcomes, but also for building support for policy reforms through demonstrating the case for change.

#### **Direct registration of .au**

Direct registration remains highly contestable. It is well documented that the policy framework for the direct registration of second level domain names (SLD) contains elements of inconsistency with the core principles of competition, fair trading and consumer protection.

Elements of community concern which remain ignored are;

- Eligibility for legacy policy holders.
- The Exact Match Application Fee.
- The cut off date
- Fees and opportunity costs

#### **Who is eligible to register .au?<sup>2</sup>**

There are two different licencing rules associated with eligibility, it depends on when your current licence period began. An eligible licence is assessed under the auDA Published Policies prior to the commencement date.

- **auDA Rules:** Current licence period commenced after 12 April 2021
- **Legacy published policies:** Current licence period commenced before 12 April 2021

Based on legacy licencing rules schedule (a) (1) a legacy registrant may not be eligible to partake in direct registration of .au until they have renewed their domain name.

#### **SCHEDULE A**

##### ELIGIBILITY AND ALLOCATION RULES FOR ALL OPEN 2LDS

#### **First come, first served**

1. Domain name licences are allocated on a 'first come, first served' basis. **It is not possible to pre-register or otherwise reserve a domain name.**

Schedule A (1) requires legal certainty for applicants engaged in the application process for conflicted names. auDA should not expect registrants to renew their contracts early and possibly forfeit their registration timeframes in order to migrate to the new licencing rules to escape Schedule A (1).

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<sup>2</sup> <https://www.auda.org.au/au-domain-names/domain-name-help/which-rules-apply-my-au-domain-name>

### **The Exact Match Conflicted name model is inefficient.**

The process of perpetually *reserving* valuable domain name(s) from the market via the proposed conflicted name process restricts efficiency and competitive advantage. It is not in the best interest of the internet community to implement a namespace of low value domain names and reduce any competitive advantage that can be enjoyed during the emergence of a new namespace.

The current conflicted namespace model does not allow competition for high value second level domain names to enter the new namespace, instead, conflicted applicants are required to wait until after the conflicted name process ends and this may many take years to resolve.

### **If direct registration of .au is to proceed**

- A current business case must be prepared and published. The public is unaware of the opportunity costs associated with this new namespace. It might not be an appropriate time to implement it during a time of low business confidence within the economy.
- Cut-off date (if required at all) should be bought forward to the date that auDA announced Direct .au would be implemented, instead of a cut-off date that was plucked out of thin air, dating to over 3 years ago as at 4 February 2018. Thousands of domain names valued at tens of thousands of dollars have been purchased 'after' the 4 February 2018 cut-off date and it is unfair that these Registrants were not informed they would have no chance of acquiring their Direct .au matching domain name at their point of purchase. There has been no way to tell how many years, if at all, Direct .au would be launched during over these last 3 to 4 years.
- The notorious 'cut-off date' could also be scrapped altogether and seen as irrelevant to implementation. Category 1 & 2 are meaningless to the efficiency of implementing direct registration of .au – the longest registration date is the first to market (first come, first served) and should be automatically awarded the corresponding exact match .au
- Applicants are not provided with an instrument for settlement arrangements between conflicted parties.
- Applicants are not provided with authentication processes or transaction trust pertaining to how parties might agree and be vetted by their agreements.
- Transparency about fees (if any) must be published and disclosed.

A process for vetting or authenticating agreements made between conflicted name applicants are not available (or known) leaving applicants to moderate their own form of transaction platform.

Markets may not facilitate efficient outcomes where consumers are prevented from gathering sufficient information to determine the price, quality and other characteristics of products or services that best meet their preferences.

The public is not aware of any research to determine a cost basis for an application fee. Further, the proposed application fee charged by registrars for registering domain names is based solely on their own cost structures and business plan. Registrants are in the dark about the opportunity cost for registrars to facilitate direct registration, dispute resolution and settlement

arrangements between applicants. Approx. 60-70,000 conflicted names with approx. 250,000+ participants interacting to secure the right to acquire their corresponding .au namesake is a lot of interactions and agreements without a regulatory mechanism to facilitate that negotiation. auDA created a policy without a process to mitigate its efficiency, leaving registrants and registrars to sort it out at their own expense.

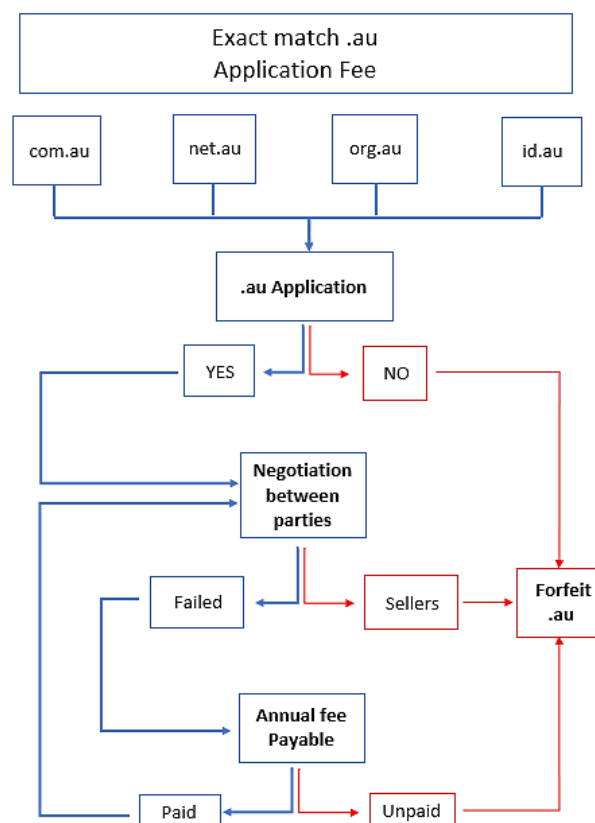
***The more evidence there is that policies are applied inconsistently, the greater the loss of confidence in the registration system.***

**Exact Match Application Fee.**

Category 1.

**1.7.10 After making an application, the Person:**

- (1) will not be able to update or change their Registrant information for the eligible licence in the Registry Data; and
- (2) cannot transfer the eligible licence to another Person during the Application Period;



***Buyer and Seller will forfeit a claim to the .au***

- *At any time during unresolved applications for .au direct registration, you won't be allowed to sell or transfer your 3<sup>rd</sup> level domain name (. com.au, .net.au) to any 3<sup>rd</sup> party unless, you forfeit your application for .au*

- *In the event of a company restructure, merger, or liquidation your application for .au is not transferable to another interested party. You cannot update the Whois info.*

**Yearly application fee is payable to reserve the .au**

- *When each party holding an exact match domain name cannot resolve the conflicted domain between themselves, a yearly application fee to retain your right to the .au becomes an ongoing yearly concern – the fee is not precisely known*
- *Applicants are more likely to avoid resolution of those disputes due to costly legal means. Paying the application fee avoids this cost, perpetually restricts competition.*

**Trusted namespace**

***The focus of the current review is to make sure the following objectives are sufficiently communicated through the ToE to enable auDA to continue to:***

- **ensure trust and confidence in .au**

Research was undertaken by Pureprofile on behalf of auDA. The research took place in August 2020 and was completed on 17 August. 1,003 Australian-based respondents aged 18+ completed the survey.<sup>3</sup>

Insights from research:

**Question: How trustworthy are websites with these domain name extensions to you?**

	<i>Strongly trusted</i>	<b>Trusted</b>	<i>Neutral</i>	<b>Distrusted</b>	<i>Strongly distrusted</i>	<i>Don't know</i>
.com	5%	24%	56%	5%	1%	8%
.co	2%	10%	52%	17%	3%	16%
.net	2%	15%	60%	9%	1%	12%
<b>.com.au</b>		<b>19%</b>		<b>46%</b>		28%
.gov.au		42%		40%		12%
.net.au		11%		38%		39%
.org.au		23%		42%		25%
.edu.au		34%		41%		17%

<sup>3</sup> <https://businessdailymedia.com/business-training/5831-smes-urged-not-to-overlook-domain-names>

The 93% of participants associate com.au with Australia, however, only 19% of participants believed websites associated with the com.au were trusted.

Is a trusted namespace only as good as the content and practices contained within that namespace, or is trust based on reliability and stability of the naming systems infrastructure?

**Core principle:**

**Support trust and confidence in .au:** *As a critical piece of Australia’s digital infrastructure, the .au domain must be managed competently and securely in a manner which will produce outcomes in the long-term interest of all users. auDA should foster .au’s reputation through education and public awareness activities.*

The core principle is not well defined in describing the elements of trust required in framing its principle. In fact, this principle asks more questions than it answers, for example, is it auDA’s role to promote, educate, and provide web-development best practices to ensure that the .au namespace is a trustworthy transactional space?

**The ACCC stated:** *Providing confidence in the DNS is the degree of certainty that a user has in his/her ability to retain their chosen domain name.*<sup>4</sup>

**Core principle:**

**Support trust and confidence in .au:**

*As a critical piece of Australia’s digital infrastructure, the .au domain must be managed competently and securely in a manner which will produce outcomes in the long-term interest of all users. auDA should foster .au’s reputation through education and public awareness activities.*

**Include in core principle:**

auDA should foster .au’s reputation through education and public awareness activities **to increase security, efficiency, and economic trust in the .au DNS.**

The inclusion of, *to increase security, efficiency, and economic trust in the .au DNS*, this clearly defines elements of the core principles applicable to “ensure trust and confidence in .au”

**We want policy based on facts and not just opinion, we want current feasibility studies, quantitative and qualitative data, we want a collective vision based on what we seek to achieve.**

**4. Encourage innovation, entrepreneurship and the entry of new players**

Over the years, a list of current registrars published on the auDA website has diminished due to consolidation and mergers within the registration space. Very few (if any) new registrars have entered the market. In fact, preliminary research indicates that only one single (1) new registrar was accredited by auDA in the past 7 years.

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<sup>4</sup> Australian Competition and Consumer Commission - Submission to the second Public Consultation Report of the auDA Name Policy Advisory Panel



## Drop catching services

Drop catching has become an important aspect of industry competition, because it provides registrars with an opportunity to offer additional customer services and differentiate themselves against their competitors.

As demand for .au increases more professionals and business owners are required to become more involved in the .au secondary market, a domain drop catching service becomes more essential for someone who is interested in acquiring an expired or deleted domain name, especially if it is a generic name, intrinsic in value or has an existing high level of internet traffic. It is apparent that information about drop catching services and the secondary market is scarce, and information is really only available to people who are already using those services.

## A monopoly occurred

Any auDA accredited registrar can run a drop catching service. Over the years two registrars built a competitive system exclusive to that aim. However, that changed after the sale of Netfleet.com.au to its drop catching competitor. As a result, this predicament has fuelled speculation about auDA's ability to regulate the registration market effectively, in particular, the expired auction marketplace. It is not the fault of the successful drop catching registrar but the failure of auDA for not fostering new entrants to compete in an essential service market.

## Entry to market

Resellers wanting to become accredited Registrars and offer drop catching services must develop their own proprietary systems and software. Whilst this encourages technical innovation in the industry, it does create a barrier to entry, especially for smaller resellers or competent persons wanting to become a registrar.

- Information about becoming an auDA accredited registrar is limited
- Technical information on the requirements to become a registrar is limited
- The accreditation process is inefficient.
- Technical expertise to develop effective systems is limited

Although auDA has undertaken changes to its suit of policies which include its registry agreement and accreditation policies, it should not be a distraction for new entrants entering the registration market.

From what we've been told by a new potential Registrar looking to enter the market, auDA has been continually "moving the goal posts" and quoting "new **draft** Registrar Agreements" not yet available to the public, as reasons for 'provisional approval' being **denied**. For example, in one email from auDA it was stated to the new potential Registrar that they would need "a **Baseline** Security Audit prior to entering into a registrar agreement", but then in a further email seemingly changed their mind and stated a "**full** ISO27001 audit", at a cost of over \$20,000, would be required for 'provisional approval'. And this all happened **after** auDA had taken payment of a few thousand dollars for a 'Registrar Application Fee'. From what we understand the potential new Registrar is still in the process of working with auDA in this regard at the time of this submission.

**We believe auDA are unreasonably restraining competition and are singling out a potential new competitor Registrar and Drop Catcher for no substantial or reasonable cause.**

## Consolidation and Mergers

The intent of increased merger activity reduces the number of competitors, and in effect, it does indeed raise prices. When competing firms merge, we lose a competitor. This is not necessarily a problem if lots of other competitors exist or if new ones can enter the market quickly. But when a merger reduces competition: high mark-ups, low wages growth, low investment and low innovation, all contribute to greater inequality.

auDA publishes a list of their accredited registrars; during the past 2 years that list has reduced from 44 registrars published in 2019 to 33 registrars today.<sup>5</sup>

The core elements of auDA’s role are:

- **Facilitating competition and consumer choice through the accreditation of multiple .au registrars**

We should be cautious about mergers in the Australian registration market where there are already too few competitors. More than three quarters of Australia’s registration market is concentrated — meaning the three biggest registrars’ control 70% of the market or more.

**Current auDA Accredited Registrar data indicates:**

Another statistical trend impacting the Australian registration market is the number of subsidiaries offering registration service under a parent company.

- 5 Registrars are Parent companies of 21 registrars
- 12 registrars are independent without known subsidiaries linked to the list
- 17 out of 33 registrars provide direct retail .au registration. More than 50% do not provide .au registration services direct to the public.
- 7 out of 12 independent registrars do not provide .au registration direct to the public. Approx. 80% do not provide .au registration direct to the public.

<b>List of auDA Accredited Registrars</b> <i>information provided is indicative and subject to change</i>			
<b>Name of Registrar –</b>		<b>Registrar information</b>	<b>Direct public registration</b>
1	<a href="https://www.cheaperdomains.com.au/">Cheaper Domains Pty Ltd</a>	<a href="https://www.cheaperdomains.com.au/">https://www.cheaperdomains.com.au/</a>	Yes
	<a href="https://www.ddns.com.au/domains/search">Discount Domain Name Services Pty Ltd</a>	<a href="https://www.ddns.com.au/domains/search">https://www.ddns.com.au/domains/search</a>	Yes
	<a href="https://www.ib.com.au/domains/search">Information Brokers Pty Ltd</a>	<a href="https://www.ib.com.au/domains/search">https://www.ib.com.au/domains/search</a>	Yes
2	<a href="http://www.connectwest.net.au/">Connect West Pty Ltd</a>	<a href="http://www.connectwest.net.au/">http://www.connectwest.net.au/</a>	No
	<a href="https://www.westnet.com.au/">Westnet Pty Ltd</a>	<a href="https://www.westnet.com.au/">https://www.westnet.com.au/</a>	No
3	<a href="https://www.cscdbs.com/">Corporation Service Company (Aust) Pty Ltd</a>	<a href="https://www.cscdbs.com/">https://www.cscdbs.com/</a>	No
4	<a href="https://www.domainshield.com.au/">Domain Shield Pty Ltd</a>	<a href="https://www.domainshield.com.au/">https://www.domainshield.com.au/</a>	Yes
	<a href="https://www.drop.com.au">DROP.com.au Pty Ltd</a>	<a href="https://www.drop.com.au">https://www.drop.com.au</a>	Yes
	<a href="https://www.yexa.com.au/">Yexa.com.au Pty Ltd</a>	<a href="https://www.yexa.com.au/">https://www.yexa.com.au/</a>	No
	<a href="https://www.fabulous.com.au/">Fabulous.com.au Pty Ltd</a>	<a href="https://www.fabulous.com.au/">https://www.fabulous.com.au/</a>	No
	<a href="https://www.dntrade.com.au/">DNTrade.com.au</a>	<a href="https://www.dntrade.com.au/">https://www.dntrade.com.au/</a>	No

<sup>5</sup> <https://www.auda.org.au/accredited-registrars>

	<a href="http://www.terrific.com.au/">Terrific.com.au Pty Ltd</a>	<a href="http://www.terrific.com.au/">http://www.terrific.com.au/</a>	No
6	<a href="https://au.godaddy.com/">GoDaddy.com</a>	<a href="https://au.godaddy.com/">https://au.godaddy.com/</a>	Yes
	Wild West Domains LLC	<a href="https://www.wildwestdomains.com/">https://www.wildwestdomains.com/</a>	No
7	<a href="#">Web.com</a>	Newfold Digital Inc acquired <ul style="list-style-type: none"> <li>• Dreamscape Networks incl</li> <li>• Crazy domains</li> <li>• MelbourneIT</li> <li>• Domain Directors Pty Ltd</li> </ul>	Yes
	Melbourne IT Ltd		Yes
	<a href="#">Web Address Registration Pty Ltd</a>		Yes
	<a href="#">Netregistry Pty Ltd</a>		Yes
	<a href="#">Ziphosting Pty Ltd</a>		No
	Instra.com		Yes
8	<a href="https://synergywholesale.com/">Synergy Wholesale Pty Ltd</a>	<a href="https://synergywholesale.com/">https://synergywholesale.com/</a>	No
	<a href="https://ventraip.com.au/">VentralP Australia Pty Ltd</a>	<a href="https://ventraip.com.au/">https://ventraip.com.au/</a>	Yes
9	Domain Central Australia Pty Ltd	<a href="https://www.fluccs.com.au/">https://www.fluccs.com.au/</a>	Yes
10	<a href="https://www.gohosting.com.au/">GoHosting Pty Ltd</a>	<a href="https://www.gohosting.com.au/">https://www.gohosting.com.au/</a>	Yes
11	<a href="https://www.rebel.com/">Rebel LTD</a>	<a href="https://www.rebel.com/">https://www.rebel.com/</a>	Yes
12	UniRegistrar Corporation	<a href="https://uniregistry.com/">https://uniregistry.com/</a>	Yes
13	<a href="https://www.internetx.com/en/domains/">InterNetX GmbH</a>	<a href="https://www.internetx.com/en/domains/">https://www.internetx.com/en/domains/</a>	No
14	MarkMonitor Corporate Services Inc	<a href="https://www.markmonitor.com/">https://www.markmonitor.com/</a>	No
15	<a href="https://www.esa.edu.au/">Education Services Australia Ltd</a>	<a href="https://www.esa.edu.au/">https://www.esa.edu.au/</a>	No
16	<a href="https://www.micron21.com/">Micron21 Data Centre Pty Ltd</a>	<a href="https://www.micron21.com/">https://www.micron21.com/</a>	Yes
17	<a href="https://publicdomainregistry.com/dotau/">Public Domain Registry Pty Ltd</a>	<a href="https://publicdomainregistry.com/dotau/">https://publicdomainregistry.com/dotau/</a>	No
18	<a href="https://www.safenames.net">Safenames Ltd</a>	<a href="https://www.safenames.net">https://www.safenames.net</a>	No
19	<a href="https://opensrs.com/domain-policies/">Tucows (Australia) Pty Ltd</a>	<a href="https://opensrs.com/domain-policies/">https://opensrs.com/domain-policies/</a>	No

## Conclusion:

### Recommendation –

The Terms of Endorsement (ToE) must have practical power to enforce its positive effect.

1. It is appropriate that the Government retain powers of intervention to overcome problems of technical failure or massive governance issues affecting the technical functionality of the namespace.
2. Stakeholders expect auDA to fulfill its purpose of ensuring its core principles are central to its policy and decision making. As indicated, policy issues regarding direct registration remain unresolved, even after auDA received *hundreds* of opposing views which outweighed auDA's decision to proceed with the conflicted namespace model<sup>6</sup>. There should be appropriate recourse to appeal auDA's decisions.
3. Mergers and subsidiaries of parent company registrars are increasing in number. As indicated, 5 registrars currently control 21 subsidiaries. Only half of all accredited registrars are actually providing .au registration services. And only 20% of independent registrar are providing .au registration services.
4. auDA needs to foster innovation through grant-based allocation or include innovation strategies into their policy development.

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<sup>6</sup> Vote.com.au

## Amendment to ToE -

The focus of the current review is to make sure the following objectives are sufficiently communicated through the ToE to enable auDA to continue to:

- ensure trust and confidence in .au
- promote principles of competition, fair trading and consumer protection
- **encourage innovation, entrepreneurship and the entry of new players**
- advocate for the multistakeholder approach to internet governance
- support effective governance arrangements and a membership structure that is representative of the Australia community, and
- be a trusted adviser to government on internet matters

### ***Include in core principle:***

Support trust and confidence in .au:

auDA should foster .au's reputation through education and public awareness activities **to increase security, efficiency, and economic trust in the .au DNS.**

## Question 2

Does the proposed 'core principles' section accurately reflect auDA's primary responsibilities? If not, what amendments could be made to do so?

### **Maintain effective governance processes that are transparent, accountable, support effective decision-making, and promote the interests of the Australian community**

The core principles matter, but it's the real-world enforcement, desired behaviour and outcomes of those principles that truly matter.

If independent directors were not paying attention but relying on other directors to decide on a particular matter then that director would be seeking to argue that his function only required him to attend the meetings and be concerned about things in his field. However, the fact a director is appointed for specialised skill does not relieve that director of his duty to pay attention to the company's affairs which might be reasonably expected to attract inquiry.

### ***Members want to see director decisions. We want to know how that director is performing in his/her appointment.***

It is well noted in the minutes of meetings that a government observer was not present during critical decision-making events by the auDA board. Members should have the power to elect and remove Directors, and amend the Company Constitution. Proposing to remove or limit the rights of

Australians having an interest in the .au namespace by those who might covet it should not be given any privilege to prosper unopposed.

### **Transparency with member and in Board meetings –**

Commercial-in-confidence on minutes of meetings is used as a blanket over director decision making. Board meeting documents and reports are not described in context of their meaning. Interested parties reading board minutes have no idea what these documents or reports entail. Members or interested parties cannot be informed about the decision-making processes of independent directors because minutes of meetings are redacted or without any real substance as to the nature of its content.

Minutes are used to prove or disprove those directors have fulfilled their fiduciary duties. Members must identify and determine whether director obligations under **section 248G** of the **Corporations Act 2001** support, oppose or abstain from a particular resolution, which requires accurate minutes.

Directors are given power to govern the affairs of auDA. It is necessary to identify the *purposes* for which the power is to be exercised (so far as possible), and having identified that purpose one then has to see whether the directors have exercised it for that purpose, and also whether it was exercised so as to *'promote the objects and activities of the company in good faith and fair play'*.

It is to the disadvantage of members that CORPORATIONS ACT 2001 - SECT 198A (2) can be exploited by directors. They might agree to a decision in order to achieve an outcome without contestability. Management can run the company in their own interests and ignore the interests of members and redirect business opportunities from the company to themselves without fair and proper engagement with members, it effectively oppresses the members purpose for which the organisation was originally formed.

### **Support trust and confidence in .au and, Promote principles of competition, fair trading and consumer protection**

The supply side may view auDA as provisioning its own Cartel as the Administrator and Wholesale Registry for the .au DNS thus, allowing auDA to provision policy in protection of itself or, prohibit and restrict future registries/ registrars from entering the domain name registration market as a result.

If left unchecked auDA may undermine future investment in the DNS as a result of;

- its dominant centralisation of power.
- Power to make policy in support of its own objectives
- Not subject to judicial review / without an oversight committee
- Perceived as a cartel with a monopoly
- Membership dissent due to unfair indifference
- Fixed pricing and contractual agreements may not be negotiable, restricting market innovation or, defying economic fluctuations in favour of profit.

auDA is in a position of commercial strength due to monopoly rent seeking. Evidence of auDA's rent seeking power is found in its conflicted names model. Whereby, auDA has given itself the opportunity to extract perpetual annual fees from participants to partake in exclusive dealings with 2 to 5 other parties over *one* domain name.

## Registrar interests

Experience shows that a small number of registrars, and even a monopoly (as is the case at the time of this submission) can often capture the market for premium, popular domains. Whether it's upon the creation of new top-level domains, upon easing of pre-existing regulations, or upon deletion of names from registries.

Large registrars that have significant numbers of accredited registrars can efficiently "game the system"<sup>7</sup>. Registrars have direct access to the registry databases, they can easily query .au databases in order to secure valuable names, apply glue records,<sup>8</sup> or flood the registry with queries to delay the expiry or registration of a domain name because they can determine which domain names available to register, close to expiration and will soon be deleted from the registry.

The registry agreement includes:

### 3. PERMISSIBLE OWN USE REGISTRATION BY REGISTRARS

3.1 Under the Registrar Agreement, registrars are allowed to register domain names on their own behalf which are connected to the provision of registrar services. For example, a registrar may register domain names that are an exact match, abbreviation or acronym of its own company or business name(s) or trademark(s), as well as domain names that refer to its registrar services. Domainier articles.

3.3 auDA may, at its own reasonable discretion, permit a registrar or its related entities to register a domain name on their own behalf in connection with the provision of services such as web hosting, website design, email and ISP services, IT hardware and software.

*3.3 intent, restricts the registrar from multiple registrations because a registrar must first be permitted by auDA before undertaking such registrations by the registrar or related entities.*

(Related entities - CORPORATIONS ACT 2001 - SECT 228)

The core principle of trust and confidence in .au doesn't go far enough in addressing the anti-competitive wholesale activities that can occur behind closed doors at the expense of retail consumers. Registrars must make a profit to survive but in order to achieve that aim registrars are also looking for technical loopholes, policy and regulatory weaknesses to exploit.

## Recommendation –

### Terms of reference

#### Principle 2.

- *In addition to best practice security, auDA will also have regard to maintaining and enhancing the reputation of the .au domain as a safe, trusted online space.*

**Include:** [insert] "social protection" and "transaction integrity"

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<sup>7</sup> <https://domainer.com.au/drop-com-au-names-for-mates/>

<sup>8</sup> <https://domainer.com.au/pddd/>

### Principle 3.

- *auDA's policies will improve the utility of the .au domain for all Australians and continue to promote competition, fair trading and consumer protection to facilitate equitable access to the market.*

**include:** [insert] and increase consumer accessibility<sup>9</sup>

... means, policy efficiency to improve aftermarket activity

### Principle 5.

- *auDA will work to promote the utility of the internet for all Australians for example through undertaking strategic research, education and public awareness raising.*

**Include:** [insert] Education and Cultural awareness raising. (Diversity and inclusion of character specific addressing, educating the value of internet addressing)

[insert] maintain and promote the operational stability and utility of the .au DNS

### Principle 6.

- *auDA will continue to operate within the provisions of its Constitution and as a fully self-funding not-for profit and for-purpose organisation and in accordance with its sponsorship arrangements with the Internet Corporation for Assigned Names and Numbers (ICANN).*

**Include:** [insert] Self-regulatory

### Question 3

How should auDA's relationships and responsibilities in domestic and international multi-stakeholder engagement be accurately communicated in the ToE?

The Australian namespace is interconnected with the global internet community at large. However, the .au ccTLD is not competing against global TLD's and it is not required to branch out into the global spectrum of customers by opening its border via unrestrictive policy – the purpose of .au ccTLD is that it creates a safe space “trust” within its own community.

in light of this aim, it is important to represent Australian interests within the spectrum of global interests. Attending ICANN related events are important in conveying Australian interests, and equally important to share in the success of our namespace with others.

It is remiss to remove this core principle. auDA is under a sponsorship agreement with ICANN and therefore the department should consider re-introducing this core principle.

Likewise, if auDA doesn't adhere to ICANN policy ICANN can revoke its control over the .au ccTLD and therefore, .au ccTLD ceases to exist; auDA is merely a represented authority of ICANN in

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<sup>9</sup> [http://www3.weforum.org/docs/Global\\_Social\\_Mobility\\_Report.pdf](http://www3.weforum.org/docs/Global_Social_Mobility_Report.pdf)

Australia, and it is in the best interest of the Australian internet community for auDA to maintain a relationship with ICANN and its related parties at international forums.

Core principles should include elements of this relationship.

- ***represent Australian internet industry interests in the internet domain name system at national and international fora.***
- ***promote the success of the .au ccTLD locally and internationally for the benefit of all Australians***

#### **Question 4**

Through managing the .au domain space, auDA plays an important role in enabling the internet within Australia. In support of the Australian internet community, what other responsibilities or functions could be considered for inclusion in the ToE?

The promotion of the domain name aftermarket. Registrars should play an active role in aftermarket activities and not just in providing domain registration services. Registrars are missing out on revenue that can be derived from the sale of aftermarket domain names.

Internet addressing enables business owners and internet connected participants the opportunity to enhance their business objectives or social causes through memorable, recognisable and easy to spell domain names.

auDA prides itself on the number of domain names under management via social media and various publications. However, domain names that are appealing and valuable leaves new entrants with limited keyword options because all the *good* domain names are taken. Even *if* direct registration is implemented, all valuable domain names will be locked into the conflicted names process.

The aftermarket is mostly hidden from consumer knowledge, information about how to acquire an aftermarket domain or how to negotiate with other parties is scarce, and it often becomes a deterrent for a potential buyer in acquiring a domain name.

As registration numbers increase, registration quality decreases. It is therefore important for auDA to recognise the value contribution from transactional activity within the aftermarket.

#### **Internet addressing brokerage services**

auDA should enable market efficiency and transaction integrity through advocating the importance of aftermarket platforms. Building trust in their value contribution through broker accreditation or other means of professional certification.

- Aftermarket business operators need a professional identity to enable trust in the performance of their business activity within the consumer market.
- Buying and selling domain names is a policy function of the licencing rules.
- Transaction integrity is vital in building trust in the .au namespace.



- Efficient and effective negotiation (tools and processes) increases economic activity.

### **Transaction integrity**

The process to transfer a domain name is unclear and to most “outsiders” the transaction itself doesn’t have a method of trust. auDA could establish an escrow service, accredit/ endorse an Australian escrow service provider, or enable registrars to undertake this task.

As direct registration draws closer, it becomes more apparent that an escrow service provider is required for transaction integrity. Under the proposed rules for direct registration, applicants are not prohibited from negotiating with other applicants (in fact it is encouraged by policy) to buy out or otherwise get the applicant to relinquish their right. It is therefore difficult to determine the value of that instrument and equally difficult to determine transaction integrity is maintained in the performance of that agreement.

### **Recommendation –**

- *auDA’s policies will improve the utility of the .au domain for all Australians and continue to promote competition, fair trading and consumer protection to facilitate equitable access to the market.*

**Include:** [insert] to facilitate transaction integrity, and equitable access to the market.

### **Question 5**

Do the ToE sufficiently define Government’s oversight of auDA’s activities?

### **ICANN sponsorship with auDA states:**

One mechanism to reflect these commitments is the arrangement embodied in the GAC Principles.

*Where, as here, the relevant government is prepared to carry out the ultimate responsibility for overseeing the ccTLD Manager service to the local internet community and the Manager is prepared to conduct itself with that framework, the interests of the local and global internet communities and served by ICANN joining into that cooperative arrangement.*

### **PRINCIPLES AND GUIDELINES<sup>10</sup>**

#### **Governmental Advisory Committee**

#### **4. ROLE OF GOVERNMENT OR PUBLIC AUTHORITY**

##### **4.1 Principles**

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<sup>10</sup> <https://gac.icann.org/principles-and-guidelines/public/principles-cctlds.pdf>

*4.1.1. Ultimate public policy authority over the relevant ccTLD rests with the relevant government or public authority; how this authority is exercised is determined by applicable law.*

#### **4.2 Guidelines**

*4.2.1. The relevant government or public authority is strongly encouraged to ensure that the ccTLD is being administered in the public interest, within the framework of its national public policy and relevant laws and regulations.*

*4.2.2. The relevant government or public authority should be able to ensure that domain name registration in the ccTLD by Registrars benefits from effective and fair conditions of competition, at appropriate levels and scale of activity.*

#### **Recommendation -**

##### **Engagement with the Australian Government**

The Australian Government has a strong interest in the management of the **.au DNS**.

The Department of Infrastructure, Transport, Regional Development and Communications (the Department) will manage the relationship with auDA on behalf of the Government.

The Department will **oversee the management of auDA and** expects that auDA will continue to work closely with the Department so that the **.au DNS** is managed consistent within the framework of its core principles and relevant laws and regulations. ~~with community expectations.~~

**Include:** .au TLD / oversees the management of auDA and / within the framework of its core principles and relevant laws and regulations.