

8 August 2018

BY EMAIL

Mr Scott Long
[REDACTED]

Dear Mr Long

Supply Related Persons under the auDA constitution

Thank you for your letter of 1 August 2018, annexed to this letter. As promised at the Special General Meeting (**SGM**) on 27 July 2018, this letter will be published on the auDA website so that it is available to all auDA members and stakeholders. Capitalised terms in this letter have the same meaning as in the auDA constitution.

1. **SUMMARY**

Rule 9.4 of the auDA constitution provides that certain persons qualify as Supply Class Members, while rule 9.5 provides that those persons who do not qualify as Supply Class Members may apply as Demand Class Members. Where a person is eligible for Demand Class membership because they are ineligible for Supply Class membership, there is no additional requirement that the person is not a Supply Related Person or is not related to a Supply Related Person.

One of the restrictions on Supply Class membership relates to "groups of related entities" – only one legal person in a group of related entities (as defined in the Corporations Act) may apply to be a Supply Class Member. If it is determined that certain Supply Class Members are a group of related entities and only one of them qualifies for Supply Class membership, then the other members in the group should be registered as Demand Class Members. Should this be required, we will engage with those members to discuss an orderly transition of their membership class.

We acknowledge the finding of the Department of Communication and the Arts in its review of the .au domain that the current auDA governance framework is no longer fit for purpose. Your letter highlights some of the issues with the current auDA constitution. While we have committed to constitutional reform, until the constitution is amended by the members in general meeting, the Board must exercise its powers on the terms of the current constitution.

2. **CONSTITUTIONAL ELIGIBILITY REQUIREMENTS**

2.1 **Rule 9.4 Qualification for Supply Class Membership**

Any Legal Person that is a Registry Operator, an auDA accredited Registrar, or a reseller appointed by an auDA accredited Registrar, in the .au name space, or an association whose membership comprises a majority of such Legal Persons, qualifies to be a Supply Class Member.

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If a group of related entities (as defined in the Corporations Act) consists of more than one Legal Person who qualifies for Supply Class membership, then only one such Legal Person within the group may apply to be a Supply Class Member.

2.2 **Rule 9.5 Qualification for Demand Class Membership**

Any Legal Person that does not qualify for Supply Class membership may apply to be a Demand Class Member.

2.3 **Application of these rules to employees of supply Class Members**

An employee of an auDA accredited Registrar is not himself or herself an auDA accredited Registrar. He or she does not hold the relevant accreditation nor does he or she act as a Registrar. It is the Registrar itself who holds the accreditation and carries out the functions of a Registrar, and it may engage employees to carry out these functions. Unless an employee also holds the relevant accreditation and carries out the relevant activities in his or her own individual capacity, it is only the Registrar that qualifies as a Supply Class Member, not the employee. For the same reason, employees of Registry Operators and resellers are not eligible for Supply Class membership unless the relevant individual separately qualifies in his or her individual capacity.

As they do not qualify for Supply Class membership, employees of Registry Operators, auDA accredited Registrars and resellers may apply as Demand Class Members.

3. **SUPPLY RELATED PERSONS**

3.1 **Who is a Supply Related Person?**

As you have noted, rule 1.2 of the auDA constitution defines a Supply Related Person as a person that (relevantly):

- (a) *qualifies for Supply Class membership; or*
- (b) *is an employee or officer or related entity (as those terms are defined in the Corporations Act) of:*
 - (i) *a Registry Operator;*
 - (ii) *an auDA accredited Registrar; or*
 - (iii) *a reseller appointed by an auDA accredited Registrar in the .au name space....*

An employee of a Registry Operator, auDA accredited Registrar, or a reseller appointed by an auDA accredited Registrar in the .au name space is a Supply Related Person.

3.2 **Consequences of being a Supply Related Person**

The only consequence of being a Supply Related Person (as defined) under the auDA constitution is the requirement in rule 18.3 that:

The Director elected by the Demand Class Members must not, at all relevant times, be a Supply Related Person.

This is the only rule in the auDA constitution which uses the expression "Supply Related Person" (aside from the definition itself).

4. **2007 CONSTITUTIONAL AMENDMENTS**

4.1 **Background**

You have referred to the Board Minutes from 12 February 2007 stating that the Board would seek advice on how to resolve the issue of "directors and employees of supply class entities becoming demand class members, and potentially demand class directors, of auDA." However, we note that item 9 of the Board Minutes from 16 April 2007 states that:

"it was decided that the change proposed ... to address issue 1 [potential supply side capture of demand class] may not be effective, and further consideration should be given to options for increasing demand class membership and making it more representative."

While the current Board is not in a position to infer the intentions of the previous Board, the Board Minutes from the 16 April 2007 meeting suggest that we cannot assume that the previous Board intended the 2007 amendments to prevent employees of supply related entities to become Demand Class Members.

4.2 **13 August 2007 amendments to the constitution**

The Minutes of the Extraordinary General Meeting of auDA held on 13 August 2007 show that two resolutions were passed to amend the auDA constitution, as follows:

(a) Resolution 1

That auDA's constitution be amended as follows:

In clause 1.2 of the constitution, insert a new definition of "Supply Related Person", in alphabetical order, as follows:

"Supply Related Person" means a person that:

- a. qualifies for Supply Class membership; or
- b. is an employee or officer or related entity (as those terms are defined in the Corporations Law) of:
 - i. a Registry Operator;
 - ii. an auDA accredited Registrar; or
 - iii. a reseller appointed by an auDA accredited Registrar in the .au name space, provided that a person who holds less than 5% of the total number of votes attached to the shares in a listed Registry Operator, auDA accredited Registrar or reseller appointed by an auDA accredited Registrar in the .au name space, will not be taken to be a Supply Related Person by reason only of such holding

In clause 18.3 of the constitution, at the end of the second paragraph, insert the following new paragraph:

"The Director elected by the Demand Class Members must not, at all relevant times, be a Supply Related Person."

(b) Resolution 2

That clause 9.4 of auDA's constitution be amended as follows:

1. In the first paragraph, delete the words "may apply", and replace them with "qualifies."

2. At the end of the first paragraph, insert the following new paragraph: "If a group of related entities (as defined in the Corporations Law) consists of more than one Legal Person who qualifies for Supply Class membership, then only one such Legal Person within the group may apply to be a Supply Class Member."

4.3 **Consequences of these amendments**

Resolution 1 prevents a director elected by the Demand Class Members from being a Supply Related Person. (This is discussed above in section 3.4 of this letter.)

Resolution 2 has two effects:

- (a) substituting "may apply" with "qualifies" clarifies that a person who is eligible to be a Supply Class Member cannot elect to apply as a Demand Class Member; and
- (b) the paragraph dealing with related entities provides additional restrictions on eligibility for Supply Class membership.

Rule 9.5 was not amended, and therefore any Legal Person that does not qualify as a Supply Class Member may (still) apply to be a Demand Class Member.

The Board must act in the best interests of auDA in accordance with its constitution. Complying with the constitution requires the Board to give effect to the words of the constitution itself, which is the document which has been approved by the members.

5. **CASE STUDIES**

5.1 **Appendix A: Tim Connell – Director of auDA**

- (a) *Why was Mr Connell required to revoke a reseller agreement to maintain his Demand Class Membership and yet, 955 employees of Supply Related Entities are not asked to change their status as Supply Related Persons?*

Being party to a reseller agreement meant that Mr Connell was a Supply Related Person and therefore ineligible to be a director elected by the Demand Class Members under rule 18.3 of the auDA constitution. Upon being alerted to this issue, Mr Connell promptly resolved the issue. (Mr Connell has subsequently resigned as a director.)

Employees of persons who qualify for Supply Class Membership are "Supply Related Persons". However, for the reasons outlined in sections 2 and 3 of this letter, being a Supply Related Person does not impact membership because membership is determined in accordance with rules 9.4 and 9.5, neither of which refer to the term "Supply Related Person".

- (b) *How is Mr Connell (a as Member) with a reseller Agreement any different from an employee of a Supply Related Entity, as per Definition of a Supply Related Person in the Company Constitution? It is not, both form a Supply Related Person until, such status is terminated [sic].*

If he was personally party to a reseller agreement, Mr Connell would have qualified as a Supply Class Member (unless there was another reason why he may not have been eligible) and not a Demand Class Member. In any event, as noted, he has terminated the reseller agreement.

We agree that an employee of a Registry Operator, auDA accredited Registrar or a reseller appointed by an auDA accredited Registrar in the .au name space is a Supply Related Person until their employment is terminated.

In response to your comments on quorum requirements, rule 24.1 of the auDA constitution applies to quorum requirements for a Board meeting. The Special General Meeting on 27 July 2018 was a meeting of the members of auDA.

5.2 **Appendix B: James Deck and Joe Manariti – Supply Class Directors of auDA**

The auDA constitution does not require the directors elected by Supply Class Members to be themselves Supply Class Members. Rule 18.3 expressly provides that a director is not required to be a member. The only relevant restriction on director eligibility is that directors elected by Demand Class Members must not be a Supply Related Person. This does not apply to Mr Deck or Mr Manariti as directors elected by Supply Class Members.

Thank you for raising that certain auDA Supply Class Members may not be eligible for Supply Class membership by reason of AWIA being a member and/or their membership in AWIA. If:

- (a) AWIA is an association whose membership comprises a majority of Registry Operator(s), auDA accredited Registrars or resellers appointed by auDA accredited Registrars, in the .au name space; and
- (b) members of auDA are either:
 - (i) members of AWIA; or
 - (ii) a body corporate one of whose directors is also a director of AWIA; and
- (c) those members are a "group" of related entities within the meaning of rule 9.4 of the auDA constitution,

only one of those members qualifies as a Supply Class Member under rule 9.4.

We will contact AWIA and other potentially affected members in order to discuss their qualification as Supply Class Members. If required, the Board will exercise its power under rule 9.11 to change the class of membership of Supply Class Members who no longer qualify for Supply Class membership. The Board will do so in consultation with the relevant members to ensure an orderly transition.

I would also like to take this opportunity to thank you for attending the SGM and your ongoing interest in these matters.

Yours sincerely

Chris Leptos AM
Independent Chair

LETTER FROM MR SCOTT LONG

Mr Chris Leptos - Chairman of auDA
.au Domain Administrator Ltd (auDA)
ACN: 079 009 340
Level 17, 1 Collins Street
Melbourne VIC 3000

Date: 01/08/18

By email to: Chris Leptos
Cameron Boardman
Richard Bullock

Dear auDA,

The point of this letter is to re-establish understanding of 9.4 & 9.5 of the Company Constitution and how it relates to the Definition of a Supply Related Person.

At the SGM, I questioned Mr Leptos about the legitimacy of applicants from Supply Related Entities with which the auDA Board claim are valid according to the Company Constitution. Mr Leptos could not provide a valid reason to oppose my reasoning of why employees of Supply Related Entities do not qualify for admission as Demand Class Members of auDA. Instead, Mr Leptos responded saying, 'it was not the way he read it' and he will refer my understanding to Ashurst lawyers to make an assessment which will be published on the auDA website along with this letter.

The Corporations Act 2001 supersedes the Company Constitution, in so doing, the Company Constitution must conform to the Corporations Act concomitantly.

The understanding is;

Any Legal Person employed by a Supply Related Entity does not qualify for Demand Class Membership According to the Definition of a Supply Related Person (b) i, ii, iii. (as those terms are defined in the Corporations Act)

The Company Constitution states;¹ (Bolding is mine for emphasis)

"Supply Related Person" means a person that:

a. qualifies for Supply Class membership; or

b. is an employee or officer or related entity (as those terms are defined in the Corporations Act) of:

- I. a Registry Operator;
- II. an auDA accredited Registrar; or
- III. a reseller appointed by an auDA accredited Registrar in the .au name space.

To clarify my point;

Any Legal Person as an employee of a Supply Related Entity (Registry, Registrar, and Reseller) maintains the status of a Supply Related Person, until employment is terminated.

The separation of a Legal Person from the Supply Related Entity is not possible. Meaning, the employee is at all relevant times, a Supply Related Person as defined by the Company Constitution, by the definition of 'Related Entity' contained in the Corporations Act 2001 and by 'affairs of the company' s53(a) Corporations Act 2001. (see Appendix A & B)

¹ Company Constitution (Definitions) <https://www.auda.org.au/about-auda/our-org/constitution/#1.2>

There can be Only One;

The Company Constitution contains a 'definition' of a Supply Related Person *as an employee* (as defined in the Corporations Act) with which qualifies the applicant for admission as a Supply Class Member.

9.4 of the Company Constitution states;

If a group of related entities (as defined in the Corporations Act) consists of more than one Legal Person who qualifies for Supply Class membership, then only ONE such Legal Person within the group may apply to be a Supply Class Member.

- All Legal Persons are One within a Supply Related Entity (the group) and;
- Only One may apply for Supply Class Membership.
- No Separation of a Legal Person as a Supply Related Person (i.e. employee) is possible, until status is terminated.

Maintaining that;

A Supply Related Person (as an employee) cannot be approved for Demand Class Membership due to, definition (b) i, ii, iii. of the Company Constitution; subsequently, 9.4 only allows One Supply Related Person to apply for Supply Class Membership, disqualifying all other Supply Related Persons employed by a Supply Related Entity from applying for Demand Class Membership.

Because;

Any Legal Person as an employee of a Supply Related Entity (Registry, Registrar, and Reseller) maintains the status of a Supply Related Person, until employment is terminated.

Who Qualifies as a Demand Class Member?

9.5 Qualification for Demand Class Membership

Any Legal Person that does not qualify for Supply Class membership may apply to be a Demand Class Member.

9.5 of the Company Constitution, requires applicants from Non-Supply Related Entities to apply for Demand Class Membership, as per the commencement of clause 9.5;

“Any Legal Person that **does not qualify** for Supply Class” = **Non-Supply Related Entities / Person.**

Demand Class Applicants include but not limited to:

Any Legal Person from a diverse range of Industries:

- The Financial industry
- Metals and Mining Industry
- Energy and Utilities Industry
- Industrial and Material Industry
- Healthcare/Pharmaceutical Industry
- Education and training industry

Demand Class Applicants must not be ‘related entities’ as per the Definition of a Supply Related Person within the Company Constitution and Corporations Act 2001;

Corporations Act 2001 – ‘Related Entities’

In relation to a body corporate [Supply Related Entity], means any of the following:

- a) a promoter of the body;
- b) a relative of such a promoter;
- c) a relative of a spouse of such a promoter;
- d) a director or member of the body or of a related body corporate;
- e) a relative of such a director or member;
- f) a relative of a spouse of such a director or member;
- g) a body corporate that is related to the first-mentioned body;
- h) a beneficiary under a trust of which the first-mentioned body is or has at any time been trustee
- i) a relative of such a beneficiary;
- j) a relative of a spouse of such a beneficiary;
- k) a body corporate one of whose directors is also a director of the first-mentioned body;
- l) a trustee of a trust under which a person is a beneficiary, where the person is a related entity of the first-mentioned body because of any other application or applications of this definition.

Any Legal Person as a Related Entity such as; relative, spouse, director, and or members of an association, in relation to a Supply Related Person or in relation to a Supply Related Entity are ‘related entities’ and do not Qualify for Demand Class Membership. (as per Corporations Act 2001 & Company Constitution)

Any applicant who fails to satisfy 9.4 doesn’t automatically necessitate eligibility under 9.5 just because that applicant does not qualify under 9.4 of the Company Constitution.

Previous boards demonstrated who qualifies and does not qualify for Demand Class Membership; Demand Class Membership was intended for Legal Persons who are Non-Supply Related Person(s). 9.5 opposes Supply Related Persons from becoming Demand Class Members. Indeed, it is my belief the previous Board since 2007 understood this basic principle and, Directors maintained a proper purpose in opposing the Supply Class stacking of employees into the Demand Class Membership. (See Case Study Appendix A & B)

auDA Directors at Board Meeting 12/02/2007 discussed and noted the potential for mischief within the Membership register.

auDA Board Minutes - 12 February 2007

9. Constitutional Review

The board noted that it is currently possible for directors and **employees of supply class entities to become demand class members**, and potentially demand class directors, of auDA. (*bolding mine*)

Action: CD to ask Maddocks to prepare a report on possible constitutional amendments to address the above issue.²

² <https://www.auda.org.au/about-auda/our-org/board-meetings/2007/070212/>

9.4 & 9.5 in accordance with an understanding of the definition of a Supply Related Person has been twisted by the current Board for the purpose of diluting the self-regulatory element of auDA (its Membership) with the intention of passing their own reform outcomes to recommendations proffered by the Australian Government.

As per the Board Minutes 2007, the Directors were concerned about potential stacking of the Demand Class Membership using employees from Supply Related Entities; the Directors aware of potential mischief sought to close this loophole via special resolution at the EGM 2007 which was carried by more than 75% of the Vote in Both Classes.

In light of the previous commitment by auDA Directors to stop Supply Related Entities from stacking the Membership, a board culture emerged, leading to a best practice for the Board in processing Membership applicants. But, recently this current Board, decided against this 'known and accepted' Board practice, resolving to accept applicants as employees of Supply Related Entities of whom the majority are not based in Australia.

As a priority, the Board should reconsider *its* purpose in deciding to resist previous Boards, Directors, and Members who sought to stop Membership stacking. Supply and Demand Classes are distinct from one another and this logical inference separates those involved in the Supply of Domain Name Registration products and services from all other industries.

The Board must commit to ensuring the integrity of the voting system is fit for purpose, audited and corrected according to the correct understanding offered here before voting commences on reform outcomes as recommended by the Australian Government; Otherwise, the Membership remains compromised by the dilution of its self-regulatory element by 955 Supply Related Person(s) as New Members potentially deprived of information in deciding important matters over a minority of established Members who are informed.

I urge you Mr Leptos and the Directors of auDA, consider repealing your decision to allow employees of Supply Related Entities to qualify as Demand Class Members, it goes against the entrenched understanding of the Company Constitution by both previous boards and members.

I expect a reply to my letter as promised at the SGM within 7 days upon receipt of this letter.

Regards,

Scott Long.



Disclaimer - I'm not a lawyer and I have no desire to be a lawyer; The content provided within this letter is made available to the reader without prejudice and should not be construed as legal advice. Information contained in this Letter is derived from my own personal capacity, are my personal views, observations, and research undertaken from Publicly available sources.
Scott Long 2018

Case Study:

Appendix A

Tim Connell - Director of auDA

At the SGM my puzzlement turned to Mr Tim Connell a Demand Class Member Elected Director of auDA who was not present at the meeting for over 40 minutes to form a quorum [as per 24.1 of the Company Constitution] notwithstanding, Mr Connell is also a Demand Class Member and he made an astonishing disclosure about why he was not present, he disclosed to the SGM that he was required to formally revoke a reseller agreement with a Supply Related Entity.

Ian Halson (Member of auDA) asked Mr Leptos (Chair) *'Why is Tim not seated with the board?'* After considering this question further, it became evident that Mr Connell could not attend or vote at the SGM as a Demand Class Member due to, a reseller agreement with a Supply Related Entity under his name (as a sole trader).

Why was Mr Connell required to revoke a reseller agreement to maintain his Demand Class Membership and yet, 955 employees of Supply Related Entities are not asked to change their status as Supply Related Persons?

Mr Leptos (Chair) must have grounds for Mr Connells public disclosure, as opposed to an in-confidence disclosure with the Chair prior to the commencement of the SGM. And, it occurred to me that Mr Leptos is using the very argument against Mr Connell that I raised against Mr Leptos concerning the legitimacy of applicants from Supply Related Entities under 9.4 & 9.5 of the Company Constitution.

How is Mr Connell (a as Member) with a reseller Agreement any different from an employee of a Supply Related Entity, as per Definition of a Supply Related Person in the Company Constitution? It is not, both form a Supply Related Person until, such status is terminated.

Case Study:

Appendix B

James Deck and Joe Manariti – Supply Class Directors of auDA

Triad Problem

1. James Deck is a Director of 1300WebPro (A Supply Class Member)
2. Joe Manariti is a Director of SWiM Communications (A Supply Class Member)
3. AWIA is a Supply Related Entity (A supply Class Member)

As per the Definitions of the Company Constitution and 9.4 and 9.5 concomitantly, both James Deck and Joe Manariti are Supply Related Persons.

Accordingly, both James Deck and Joe Manariti are Directors of Australian Web Industry Association (AWIA) a, Not for Profit Company with paying Members.

As per 9.4 of the Company Constitution – only One Supply related Person may Qualify for Supply Class Membership. This means, AWIA does not qualify as a Supply or Demand Class Member of auDA, both Directors of AWIA are also Directors of their own Companies and Directors of auDA concurrently.

Members of AWIA that are Members of auDA also do not qualify for both Supply or Demand Class Membership unless; James Deck and Joe Manariti both resign as Directors of either auDA or AWIA; *If* James and Joe resign from these Directorships then, AWIA as a Supply Related Person can qualify for Supply Class Membership.

In this regard, the Members of AWIA also do not qualify under 9.4 for Supply Class Membership, and Members of AWIA do not qualify under 9.5 for Demand Class Membership unless, AWIA formally revoke their reseller agreement with the Supply Related Entity.

Whilst James Deck and Joe Manariti remain as auDA Directors they would be required to resign as Directors of their own companies or resign as auDA Directors because they are both Directors of the Related entity AWIA regardless of AWIA remaining as a Supply Member of auDA. Accordingly, auDA will be required to advise relatives, spouse, and employees that *they* also do not qualify for Supply or Demand Class Membership because only One Legal Person Qualifies for Supply Class Membership.

Supporting References:

The Company Constitution states;³ (*Bolding is mine for emphasis*)

"Supply Related Person" means a person that:

- a. qualifies for Supply Class membership; or
- b. is an employee** or officer or related entity (**as those terms are defined in the Corporations Act**) of:
 - IV. a Registry Operator;
 - V. an auDA accredited Registrar; or
 - VI. a reseller appointed by an auDA accredited Registrar in the .au name space.

Definition of Legal Person within the Company Constitution: ⁴

"Legal Person" means the legal definition of a person, including without limitation a natural person (individual) or an Organisation - see also clause 1.3(c);

1.3 Construction

- c. words (including defined expressions) importing persons shall include corporations and bodies politic;

9.4 of the Company Constitution;

If a group of related entities (as defined in the Corporations Act) consists of more than one Legal Person who qualifies for Supply Class membership, then only one such Legal Person within the group may apply to be a Supply Class Member.

9.5 Qualification for Demand Class Membership

Any Legal Person that does not qualify for Supply Class membership may apply to be a Demand Class Member.

³ Company Constitution (Definitions) <https://www.auda.org.au/about-auda/our-org/constitution/#1.2>

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As per the Corporations Act:⁵

“related entity “

In relation to a body corporate, means any of the following:

m) a promoter of the body;

- Employees of the Company
- Officers of the Company
- Directors of the Company
- Contractors, Subcontractors

n) a relative of such a promoter;

o) a relative of a spouse of such a promoter;

p) a director or member of the body or of a related body corporate;

q) a relative of such a director or member;

r) a relative of a spouse of such a director or member;

s) a body corporate that is related to the first-mentioned body;

t) a beneficiary under a trust of which the first-mentioned body is or has at any time been trustee

u) a relative of such a beneficiary;

v) a relative of a spouse of such a beneficiary;

w) a body corporate one of whose directors is also a director of the first-mentioned body;

x) a trustee of a trust under which a person is a beneficiary, where the person is a related entity of the first-mentioned body because of any other application or applications of this definition.

Under the “Affairs of the company” AS defined in **s53(a) Corporations Act 2001**, which provides an extensive definition.⁶

Any dealings by a body:

This category covers:

- Promotion
- Formation
- Membership
- Control, business
- Trading
- Transactions
- Dealings, property
- Liabilities
- Profits
- Receipts
- Losses
- Outgoings
- Expenditure

of the body corporate. [means, a Supply Related Person of a Registry, Registrar, Reseller as a body]

⁵ Related Entity http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s9.html

⁶ Affairs of the Company - http://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s53.html