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## SUMMARY OF DIRECTORS' DUTIES

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### 1. Background

- 1.1 You are a director of **.au Domain Administration Limited ABN 38 079 009 340**, which is also known as auDA.
- 1.2 auDA is a public company limited by guarantee, and its affairs are regulated by the *Corporations Act 2001* (Cth).
- 1.3 The *Corporations Act 2001* imposes a number of duties and responsibilities on directors and officers of companies. These duties and responsibilities are in addition to those imposed on directors under common law (that is, judge-made laws).
- 1.4 As a director of auDA, you must observe these duties and responsibilities. It is an offence under the *Corporations Act 2001* if a director fails to do so. The Australian Securities and Investments Commission (ASIC) is the corporate watchdog, and is the Government organisation that enforces compliance under the *Corporations Act 2001*.
- 1.5 This document summarises some of your key duties and responsibilities as a director of auDA, and the attached document gives you some further detailed information.

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### 2. auDA objectives and its directors

- 2.1 auDA was incorporated with the key objective of administering the .au ccTLD for the benefit of the Australian community. Within this key objective, one of the main purposes of auDA is to maintain and promote the operational stability and utility of the .au ccTLD and the Internet's unique identifier system.
- 2.2 As a director of auDA, your primary duty is to act in good faith and in the best interests of auDA at all times (rather than to any particular class of auDA's members, even if you have been elected by a particular class of auDA's members).
- 2.3 Under auDA's constitution, its board comprises up to 12 directors, made up of the following:
  - four persons elected by the supply class members
  - four persons elected by the demand class members;
  - up to three independent directors appointed by the elected directors; and
  - the CEO of auDA as a non-voting member of the board.

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### 3. Summary of directors' duties

- 3.1 This section sets out some of the key duties, powers and responsibilities of directors, as set out in Part 2D.1 of Chapter 2D of the *Corporations Act 2001*.

- 3.2 A director of auDA:
- 3.2.1 must exercise his/her powers and discharge his/her duties:
- (a) in good faith in the best interests of auDA, and
  - (b) for a proper purpose, and
  - (c) with care, skill and diligence,
- 3.2.2 in making a business judgement, must:
- (a) not have a material personal interest in the subject matter, and
  - (b) inform him/herself about the subject matter to the extent he/she reasonably believe to be appropriate, and
  - (c) rationally believe that the judgement is in the best interests of auDA;
- 3.2.3 must not improperly use his/her position to:
- (a) gain an advantage for him/herself or someone else, or
  - (b) cause detriment to auDA;
- 3.2.4 must not improperly use information obtained because he/she is or have been a director of auDA, to:
- (a) gain an advantage for him/herself or someone else, or
  - (b) cause detriment to auDA.
- 3.3 A director of auDA (being a public company), who has a material personal interest in a matter being considered at a directors' meeting must not:
- 3.3.1 be present while the matter is being considered at the meeting, or
- 3.3.2 vote on the matter,
- except in the limited circumstances set out in the *Corporations Act 2001*.
- 3.4 A director commits an offence if he/she:
- 3.4.1 is:
- (a) reckless, or
  - (b) intentionally dishonest,
- and fails to exercise his/her powers and discharge his/her obligations:
- (c) in good faith in the best interests of auDA, or
  - (d) for a proper purpose; or

- 3.4.2 uses his/her position dishonestly:
  - (a) with the intention of directly or indirectly gaining an advantage for him/herself, or someone else, or causing detriment to auDA, or
  - (b) recklessly as to whether the use may result in him/herself or someone else directly or indirectly gaining an advantage, or in causing detriment to auDA; or
- 3.4.3 dishonestly uses the information obtained because he/she is, or has been, a director of auDA:
  - (a) with the intention of directly or indirectly gaining an advantage for him/herself, or someone else, or causing detriment to auDA, or
  - (b) recklessly as to whether the use may result in him/herself or someone else directly or indirectly gaining an advantage, or in causing detriment to auDA.

**4. Further details**

Attached to this document, is a document which sets out in more detail, the duties of directors of companies.

As part of auDA's record keeping, and as part of auDA's processes of ensuring proper corporate governance, please acknowledge that you have read and understood this document together with the attached document

I, being a director of auDA, confirm that I have received a copy of this document (together with the attached document), and that I have read and understood the content.

.....  
Signature

Name (print):

Date:

## More details – duties of directors

Duty	Statute	Common law
<b>Duty of Care, Skill and Diligence</b>		
<p><i>The General Duty</i></p> <p>A director's duty of care, skill and diligence arises from the common law and is also embodied in statute. Section 180(1) provides that as a director you must act with the same degree of care and diligence as a reasonable person with the same position in a company in similar circumstances in carrying out your functions as director.</p> <p>You are likely to breach this duty by:</p> <ul style="list-style-type: none"> <li>not informing yourself about the subject matter of the business judgement that you make;</li> <li>not attending board meetings as often as is necessary to carry out your functions properly; or</li> <li>not actively monitoring the management of the company.</li> </ul> <p>If you can satisfy the Business Judgement Rule (BJR), you will be taken to have met the requirements of this duty. The BJR essentially provides a defence to any breach if you can establish that you:</p> <ul style="list-style-type: none"> <li>made the business judgement in good faith and for a proper purpose; and</li> <li>do not have a material personal interest in the subject matter of the judgement; and</li> <li>informed yourself about the subject matter of the judgement; and</li> <li>rationaly believe the judgement is in the best interest of the company. A belief will be rational unless it is a belief that no reasonable person in your position could hold.</li> </ul>	Section 180(1)	✓
<p><b>Reliance on Advice</b></p> <p>A director has a duty under both common law and statute to only rely on information and advice when it is reasonable to do so.</p> <p>Section 189 of the Act provides that a director's reliance on information or professional or expert advice will be taken to be reasonable if:</p> <ul style="list-style-type: none"> <li>it was received from an employee whom you believed to be reliable and competent in relation the matters concerned, or a professional adviser or expert in relation to matters that you believed to be within that person's professional competence or another director or officer in relation to matter within that person's authority; and</li> <li>the reliance was made in good faith and after making an independent assessment of the information or advice.</li> </ul>	Section 189	✓
<p><b>Preventing Insolvent Trading</b></p> <p>This duty arises purely from statute. Section 588G of the Act provides that a director has a positive duty to ensure that a company is not involved in insolvent trading. Insolvent trading occurs where a company continues to trade and incur debts when the company is insolvent or on the verge of becoming insolvent. A company will be presumed to be insolvent if it fails to keep financial records.</p> <p>You will be in breach of this duty if:</p>	Section 588G	

Duty	Statute	Common law
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- you are a director at the time the company incurs a debt; and
- the company is insolvent when the debt is incurred or becomes insolvent by incurring that debts or debts including that debt; and
- at the time the debt was incurred, there were reasonable grounds for suspecting the company is or would become insolvent.

Directors may have a defence in four situations:

- when a director had reasonable grounds for expecting that the company was solvent and would remain solvent;
- when a director has relied on information from a competent person regarding solvency (and the belief was reasonable and based on a competent system of monitoring);
- absence from management due to illness or for some other good reason at the time the debt was incurred; and
- when a director takes reasonable steps to prevent incurring the debt. This includes action to appoint an administrator.

A breach of this duty could result in a director being charged with an offence under the Act and an order to pay compensation.

### Financial Reporting

Sections  
292-318

Section 292 – 318 of the Act provides that directors of public and large proprietary companies have a statutory duty to prepare a financial report and a directors' report for each financial year.

Duty	Statute	Common law
<b>Duty of Loyalty and Good Faith</b>		
<b>Duty to act in good faith and in the best interests of the company and for a proper purpose</b>	Section 181(1)	✓
This statutory duty derives from the common law duty to act in good faith in the interests of the company and the duty to use powers for proper purposes.		
Section 181(1) of the Act provides that as a director you must act:		
<ul style="list-style-type: none"> <li>• in the best interests of the company as a whole (ie. in the interests of the collective body of members); and</li> <li>• for a proper purpose.</li> </ul>		
Traditionally, exercising power to defeat a takeover, entrenching control of the company or benefiting one group of members over another were improper purposes. However, if a director is acting in good faith and in the company's best interests, then it is likely that there will be no breach of the duty.		
<i>Directors of wholly-owned subsidiaries</i> A director of a company that is a <i>wholly-owned subsidiary of another company</i> will be taken to act in good faith in the best interests of the subsidiary if:	Section 187	
<ul style="list-style-type: none"> <li>• the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company;</li> <li>• the director acts in good faith in the best interests of the holding company; and</li> <li>• the subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's act.</li> </ul>		
<b>Duty not to misuse information or position</b>	Sections 182-184	✓
The duty of a director not to misuse information or position is a statutory duty that derives from the common law duty imposed on directors to use their powers for a proper purpose.		
The duty not to misuse information continues even if you cease being a director. The duty is not limited to information which is classified as confidential.		
You will be in breach of this duty where you engage in conduct with the purpose of:		
<ul style="list-style-type: none"> <li>• obtaining a benefit for anyone; or</li> <li>• causing a detriment to the company</li> </ul>		
regardless of whether the benefit or detriment actually occurs.		
Sections 182 – 184 of the Act provides that you must not improperly use your position as director or any information you obtain because of your position as director to gain advantage for yourself or someone else or to cause detriment to the company.		

Duty	Statute	Common law
<b>Duty to Avoid Actual and Potential Conflicts of Interest</b>	Sections 191-192, 194-195	✓
<p><i>The General Duty</i>  Directors should not allow a conflict of interest to compromise their position in the company, or compromise their ability to give independent consideration. In circumstances where there is a conflict, or a real possibility of conflict between a director's personal interests and those of the company, directors, as fiduciaries, are under a duty not to promote their personal interest in making or pursuing a gain.</p>		
<p><i>Disclosure of Material Personal Interest</i>  If a conflict arises, you will generally be free to pursue your personal interests if you have the company's fully informed consent.</p>	Section 191(1)	
<p>Obtaining the company's fully informed consent requires you to:</p>		
<ul style="list-style-type: none"> <li>• disclose the nature and full extent of your interest to the company (this may be done at a directors' meeting or to the other directors individually in writing);</li> <li>• give standing notice in respect of an ongoing interest which conflicts with an interest of the company.</li> </ul>		
<p><i>Exceptions to Disclosure</i>  There are a limited number of exceptions to the general requirement that you disclose any conflict of interest. These include interests:</p>	Section 191(2)	
<ul style="list-style-type: none"> <li>• in a company held in common with the other members of the company; and</li> <li>• that relate to the director's remuneration as a director of the company.</li> </ul>		
<p><i>Directors of Public Companies</i>  Directors of public companies cannot be present at a directors meeting when the matter in which they are interested is discussed or vote on the matter unless the non-interested directors resolve otherwise and indemnify the interested directors and their interest.</p>	Section 195	
<b>Duty to retain discretion to exercise powers</b>		✓
<p>This duty derives solely from the common law. There is no equivalent duty in the Act.</p>		
<p>Directors must exercise their powers for the benefit of the company. As a director, you cannot limit your decision making authority to accommodate the interests of another. Therefore, as a director you cannot agree to exercise your discretion to act in a particular manner, for example, by contracting with a third party to vote in a particular way at board meetings.</p>		

Duty	Statute	Common law
<b>Penalties for Breaching a Duty</b>		
A contravention of any of these duties constitutes a breach of the civil penalty provisions of the Act. You can be liable for substantial fines, compensation or disqualification from management.	Part 9.4B	
Pecuniary penalty orders: The relevant maximum amount an individual may be ordered to pay is \$200,000. A body corporate may be ordered to pay up to \$1 million.	Section 1317G	
Compensation orders: Directors may also be ordered to pay compensation for damage suffered by a corporation. There is no specified limitation on the amount of compensation payable by the director.	Section 1317H	
Breaches of duties to act in good faith, not to misuse position or information and not to trade when insolvent also attract criminal penalties if you intentionally or recklessly breach your duties.	Section 184	