

# DotAsia Organisation Limited

## Board Elections: Recent Issues and Disputes as to Governance

1. Membership of DotAsia Organisation Limited (“DA”) is drawn from regional organisations responsible for managing Top Level Domain registries and community or non-governmental organisations in the Internet, information technology and telecommunications sectors.
2. Sponsor Members are entitled to nominate and elect up to 8 Board members and Co-Sponsor Members are entitled to nominate and elect up to 2 Board members, all of whom shall hold office for up to two years and then retire at DA’s annual general meeting (“AGM”) but are eligible for re-election. There is no limit to the number of two-year terms that may be served. The chief executive officer (“CEO”) for the time being also holds office as member of the Board by virtue of his appointment.

### **The 2021 AGM & Forthcoming Board Election**

3. Five members of the Board were elected in 2019 for 2-year terms ending in 2021: Atsushi Endo, Lianna Galstyan, Lim Choon Sai and Tham Yiu Kwok (elected by Sponsor Members) and Tommy Matsumoto (elected by Co-Sponsor Members). Atsushi Endo resigned on 30 June 2020, Lianna Galstyan resigned on 24 November 2020. As is permitted by Article 64 of our Articles of Association (“Articles”) and as was the case with a previous casual vacancy arising in May 2019, the Board decided to leave their seats vacant until the 2021 AGM when Lim Choon Sai, Tham Yiu Kwok and Tommy Matsumoto will retire from office: a total of 5 seats are therefore to be filled next month.

4. On 16 December 2020 the Board adopted a Board Elections Procedure (“BEP”) for 2021 –
  - Nomination Period – 28 December 2020 to 1 February 2021 (36 days)
  - Nominations Report Sent to Board – 3 February 2021
  - Notice of AGM Issued – 5 February 2021
  - Voting Period – 5 February 2021 to 19 February 2021 (14 days)
  - AGM & Announcement of Election Results – 28 February 2021
  - New Board Assumes Office – 28 February 2021
5. The above steps are similar to those of previous elections. In addition, the 2021 BEP requires ballots cast in the Voting Period to be reviewed by DA’s auditors as appointed scrutineers in accordance with HKSRS 4400 issued by the Hong Kong Institute of Certified Public Accountants. This particular step did not feature in the 2020 BEP but was added once it became clear that the 2020 Board election would be particularly contentious.
6. During the 2020 AGM and over the course of the past 12 months a current Board member has claimed that the BEP conflicts with the provisions of Article 40(b) of DA’s Articles of Association. This states -

*“Not less than fourteen (14) days but not more than twenty-eight (28) days before the date appointed for the annual general meeting, there shall have been sent to the Board a notice in writing signed by the proposer and endorsed by the seconder of their intention to propose such candidate for election and also a notice in writing signed by that candidate of his willingness to be elected.”*

7. A former Board member has recently claimed that terms of DA’s auditors’ appointment as scrutineers should be in the nature of an assurance engagement, also that they may not perform those duties neutrally.

8. These claims have been made in the context of High Court Actions launched against DA, its subsidiary Namesphere Limited (“NS”), the CEO and several members of the Board by the former Board member, appear to have been given circulation within the DA membership and the internet community and are rapidly taking on the character of smearing tactics ahead of the 2021 AGM. The Board has accordingly sought counsel’s advice on how best to inform the DA membership. It would be inappropriate for the Board to comment on aspects of these claims that might bear on the High Court Actions and so only extracts of counsel’s advice appear below.
9. As to the claim that BEP conflicts with Article 40(b), it is counsel’s advice that

*The Board’s power to sanction the BEP and related practice falls within the provisions of Article 46 which provides that the Board may make, amend and repeal all such rules as it may deem necessary or convenient for the proper conduct and management of DA, provided that such rules are not inconsistent with the Articles. The BEPs are intended to provide clarifications, interpretations and additional details for the implementation of Board Elections...*

*The Board has consistently set a nomination period well ahead of the AGM in each year since the 2014 Board elections, perhaps earlier. The short question is whether this practice conflicts with Article 40(b). The short answer is that it does not.*

*The operative provision in Article 40(b) “...there shall have been sent to the Board a notice in writing signed by the proposer and endorsed by the seconder... and also a notice in writing signed by that candidate...” does not purport to prescribe a nomination period as such, nor does it prescribe when nominations shall be made. Article 40(b) instead specifies who is to make (and accept) nominations and then the period of time in which the Board shall be informed. But Article 40(b) does not specify who is to inform the Board.*

*Had Article 40(b) specified that the proposer and seconder, also the candidate, are the persons required to send to the Board their written notices within this 14-day*

*window then there would be no room for the Board to specify a timetable requiring proposers, seconders and candidates to send their notices any earlier. However, any election requires time in which to check the validity of nominations received and then to count ballots eventually received. An interpretation of Article 40(b) requiring the Board to receive nomination notices and acceptances from proposers, seconders and candidates within this 14-day window would not realistically permit much more than 7 days for voting. Given the nature of DA's membership organisations, this would hardly be a realistic state of affairs.*

*In my opinion the absences in Article 40(b) of any clear and definitive provision of a nomination period and of just who should send these notices to the Board leaves the Board entitled to sanction (as indeed it has) a more detailed procedure building on the bare simplicity of what is in Article 40(b). Paragraph 2.2 of the BEP closes with the following*

*“The nomination results, along with the nominations, secondings and candidacy acceptances, undersigned and endorsed via emails by the proposers, seconders and candidates respectively, as well as the voting results to be ratified will be submitted to the Board not less than fourteen (14) but not more than twenty-eight (28) days before the day appointed for the AGM.”*

*I am instructed that nominations for the 2020 Board elections were in fact submitted to the Board on 31 January 2020, being within the 14 to 28-day period preceding the 17 February 2020 AGM and as prescribed by Article 40(b), albeit along with preliminary results of voting. As regards BEP2021 paragraph 2.1, this is entirely consistent with the Board being informed in accordance with the requirements of Article 40(b).*

10. As to the claim about the scrutineers' terms of engagement it is counsel's advice that

*The very nature of an assurance engagement is to express matters of opinion, whereas in an engagement pursuant to HKSRS 4400 findings are the “factual results of the agreed-upon procedures performed” and it is up to the engaging party to satisfy itself whether the procedures adopted are in themselves sufficient and satisfactory for the fact-finding purpose. There is no need to extend the scrutineers’*

*task to that of an assurance engagement... If the Board wishes to include an additional procedural element requiring the scrutineer independently to contact each party responsible for returning a ballot in order to confirm as a matter of fact that such party genuinely did so return it then that is a simple matter of amending the agreed-upon procedures to be performed... RSM's finding as fact when carrying out their work as scrutineers that "the ballot of directors' re-election was held according to the memorandum and articles of association" is correct: nominations were sent to the Board on 31 January 2020, being at least 14 days but not more than 28 days prior to the AGM as required by Article 40(b).*

11. The claim about the scrutineers' neutrality is made in the context of a former Board member's allegations of large sums having gone missing from NS and his request for copies of accounting transaction documents concerning allocations of DA expenses charged to NS (in which the former Board member has an investment interest) and which he claims DA's auditors had undertaken on behalf of the CEO (who also has an investment interest in NS) to deliver to him. It is counsel's advice that

*However, there is no mention of RSM in the email correspondence chain provided... in support of this complaint, let alone any mention of the role they are supposed to have performed on the CEO's behalf. In any event, this complaint no longer has substance in light of the fact that the DA board agreed to the appointment (at the joint expense of DA and NS) of an accountant of [the former Board member's] choice to conduct a review to address those inquiries. The Board then resolved to provide access to previous audited financial statements and further resolved that, on account of personal interests in the matter, provision of documents relating to NS issues should be conditional upon signing a confidentiality agreement, also that upon completion of the independent accounting review the former Board member should receive all draft and final reports of inquiries in relation to those expense allocations.*

12. Counsel has also advised that our long-standing practice of inviting Board election results to be ratified by show of hands at the AGM is not only unnecessary but may create conflict with the provision found at Article 40(f)

which provides, *“Each Member of a category is entitled to a number of votes which is equal to the number of vacancies in the Board for such category, the election to the Board shall be made by way of ballot.”*

13. It is counsel’s advice that

*... votes cast by ballot are then made conditional upon... potential rejection by a much smaller number of members taking the trouble to attend the AGM in person; members of one category may choose not to ratify votes cast by ballot of the other category. Seeking ratification also questions the purpose of engaging scrutineers to supervise the election process.*

14. The Board will accordingly be treating the results of ballots cast according to this year’s BEP and certified by scrutineers as final and will report the same to the AGM instead of then seeking to have them ratified by members.

### **Board Exco**

15. A current Board member and former Board member have recently claimed that DA is run by the CEO with the connivance of an inner circle. This is untrue. It was in fact in response to previous attacks on its integrity and governance that the Board adopted its Corporate Governance Framework (“**CG Framework**”) in April 2020 comprising committees of the Board dealing with community projects, finance and governance. These committees were created by Board decisions of 24 & 25 May 2019 in which the current Board member and former Board member both participated. All Board members were encouraged to join at least one committee. On 19 June 2019 came the Board’s decision (in which the current Board member advancing this complaint participated but from which the former Board member remained absent) to create the Board Exco. It is the Board Exco, not the CEO, which *“shall exercise all powers of the Board in the oversight of the management of the business and affairs”* of DA and although the CEO is

designated as *ex officio* member of its committees the CG Framework does *not* identify the CEO as a Board Officer.

16. It is, frankly, perverse of any current or former Board member to contend that the very measures put in place to guard against the danger of any single Board member usurping the Board's powers and responsibilities are now being misused. I and the other members of the Board Exco (Satish Babu and Lim Choon Sai) resent claims that we are somehow either misled by the CEO, conniving with the CEO or constitute an "inner circle" and any member organization having reason to think that we are misusing the Board's powers and responsibilities is invited to contact any one or all of us directly to discuss their concerns.

17. The same current Board member and former Board member claim that the Board Exco withholds information from remaining members of the Board and that the Board's decision of 29 October 2020 to balance the extent of detail recorded in Board minutes with the commitment to transparency amounts to a severe restriction on Board members' access to books of account. Counsel has advised –

*There is no substance to this complaint since all Board proceedings are recorded and, regardless of how much or how little of those proceedings is reflected in Board minutes all Board members remain entitled to access and listen to the original recordings of those meetings.*

18. Counsel has advised of the Board's "Company Documents Director Request Process" ("BFC-002") which provides guidance as to how a Board member might inspect and obtain copies of DA's documents -

*This is not entirely consistent with that found at common law which provides that a director's right of access to the generality of company papers flows from his office*

*and need not be justified or explained: the right exists in order that he may go about fulfilling his duties. This common law right is subject to the court's power to restrict its exercise in circumstances where the company can show that it would be abused and concerns circumstances where directors of companies incorporated with share capital are tasked with supervising the management of the business, whereas DA is in the nature of a community organization whose directors are geographically and functionally distant from its operations and drawn from member organisations whose own purposes and business might routinely conflict with that of DA and the requirement that a Board member first identify the rationale for any requested inspection is arguably entirely consistent with guarding against the danger of such conflicts... DA would remove the prospect of dispute over a Board member having to justify and explain if BFC-002 were amended*

*1.1 ~~Records~~ Supporting documents related to transactions for which a Director is either an approving authority or a signatory ~~for~~ shall be provided, ~~by default~~ if so requested by the Director, as a matter of routine and otherwise ~~or provided~~ upon request.*

*2.1.2 ~~State the purpose or rationale for such request~~*

19. The Board will adopt counsel's advice and amend BFC-002 so that, unless there are good reasons to suspect abuse, supporting documents be provided to Board members on request and without prior justification being sought. As per counsel's advice, Board members will be reminded of their duties prior to disclosing or sharing confidential information and in appropriate circumstances adopt measures to prevent inadvertent leak of abuse of particularly sensitive or confidential information, particularly matters of litigation.

### **Allocation of DA Costs, Reimbursement of Expenses**

20. At the June 2019 Board meeting and against the background of allegations made by a former Board member (and investor in NS) that very large sums of DA expenses had been wrongly charged to NS or its investments the current Board member requested the CEO (also an investor in NS) to provide *all* Board members with soft copies of DA expense reports and

allocation of DA staff costs in respect of NS activity. The Board resolved that such matters should be considered by the Board finance committee in the first instance and engaged an accounting firm of the former Board member's choice to undertake an accounting review for 7 or so years of NS transactions and to propose adjustments (if any) to the NS cash balance as of 7 June 2019.

21. The *draft* form of accountant's report observed that, since US\$36,285 of expenses incurred by a Board member and a former business development officer on NS matters were not supported by satisfactory receipts showing them as chargeable to NS (there was *no suggestion* that these expenses were not actually incurred), the DA Group cash balance of *negative* US\$607,178.91 as of 7 June 2019 should be adjusted accordingly and to *negative* US\$570,893.55.
22. However, subsequent intervention by the former Board member and his legal advisers against the accounting firm of his choice has since prevented delivery of a final report.

### **Board Meetings, Decisions & Minutes**

23. A current Board member has in recent months claimed that DA Board meetings have not been convened with sufficient notice, also that Board papers have not been circulated with sufficient notice, citing the 21-day notice and 14-day agenda requirements found at Article 54. Failure to meet these notice and agenda requirements is cited as justification for declining participation in Board meetings and as grounds that Board meetings have not been validly held in recent months - and, in consequence, decisions taken (including the election of the current Board chair) are invalid).
24. This is a matter of fundamental concern and on which the Board has sought counsel's advice –

Articles dealing with proceedings of the board of directors begin with Article 51 which provides “*The Board may meet and regulate its business as it thinks fit.*” This is a general enabling provision to be read without restriction and to suit the Board’s circumstances from time to time. Those 21 and 14 day requirements at Article 54 concern the particular purpose and circumstances of Article 54, being those exceptional instances where a Board member takes it upon himself to convene a particular Board meeting and do not bind the Board in respect of its meetings generally. The misunderstanding of the purpose of Article 54 has even been extrapolated to responses to notices of NS board meetings which was asserted that should also be convened with at least 14 days’ notice, whereas article 65 of NS’s articles states “*The directors may meet together for the dispatch of business, adjourn and otherwise regulate their meetings, as they think fit.*”

25. Also a matter of fundamental concern is the claim that minutes of DA Board meetings fail to reflect correct or complete records of proceedings and that the CEO has distorted matters as recorded - in minutes of the October 2019 Board meeting in particular. Again, the Board has sought counsel’s advice -

*Other than presenting a complete, verbatim account there is no satisfactory formula to be adopted when drafting minutes of any meeting. Minutes are in essence a record of decisions taken, along with any materially relevant facts by way of explanation, and not a record of every nuance or particular view expressed. If persons present at a meeting speak at risk of their full and frank views finding their way into the record (which, in the case of DA is a very public record) then this will inhibit discussion and, in turn, the quality of decision making.*

*The DA Code of Conduct states, “All business undertaken by the Board is confidential.” This requirement has to be understood along with the fact that DA is in the nature of a community organization practising a high degree of transparency and posts minutes of Board meeting to its website and hence in the public domain. If directors are to feel secure in voicing opinions fearlessly then they must be afforded some degree of protection when it comes to the prospect of those opinions being recorded in Board minutes.*

*Current arrangements for the writing of Board minutes commence with the Secretariat preparing an initial draft for circulation among Board Exco members and then, adopting any changes made at that stage, the minutes are circulated to the Board as a whole.*

26. On the role of the Board Exco, it is counsel's advice -

*Reserving to itself the role of approving and presenting minutes to the full Board for final approval risks being perceived as the kind of "inner circle" function of which [the current Board member] has made allegation... Minutes of meetings are more typically drafted for the Chairman by the meeting secretary and according to his style and practice as to how much or how little to record and whether to attribute views to particular members present or resort to use of the third person. Notwithstanding the Board chair's function in working collaboratively with the CEO and, implicit at paras 3.3, 3.4 & 3.5 of the Board Governance Framework, responsibility for presenting draft minutes of meetings of the Board, the Framework ought to state clearly that draft minutes are prepared at the Board chair's instructions for prompt circulation among all Board members and then presented by the Board chair at the next meeting their approval and without first being considered by the Board Exco.*

27. The Board intends to address this procedural observation at its next meeting so that draft minutes are circulated among all Board members simultaneously once they have been reviewed by the Chair and, consequently, sooner than is currently the case.

28. Let me close this note with a personal observation. Any current or aspiring Board member who at any time feels they have been given insufficient information, or inadequate time in which to consider information, so as to go about their duties is entitled *and expected* to say so during our Board meetings. Inability to attend in-person is no excuse – even before current health and travel advisories and restrictions it has always been possible to join our Board meetings online. It is a well-established principle of good

governance that boards govern through principles of collective responsibility: once a decision has been reached all Board members are expected to support it. Choosing to sit on the sidelines while throwing stones and citing forensic and highly technical complaint does none of our member organisations any credit.

For and on behalf of the Board

Maureen Hilyard

Board Chair

11 January 2021