

April 2005

.nz Oversight Committee  
InternetNZ

## **Implementation of a dispute resolution process for .nz domain names**

In December 2004 the Domain Name Dispute Resolution Working Group (WG) published a consultation paper for public comment. The paper referred to three options for a dispute resolution process for .nz domain names. Two of the options discussed how such a process might be implemented with the third option retaining the status quo. More detail can be read in the consultation paper [http://dnc.org.nz/content/DRP\\_consultation\\_paper.pdf](http://dnc.org.nz/content/DRP_consultation_paper.pdf)

Seventeen public submissions were received and the WG met on 24 March to review the comments. This letter summarises the decisions made at that meeting and seeks NZOC approval to continue the process of implementing a dispute resolution process (DRP) for the .nz domain name space.

### **Submissions Received**

A wide range of submissions were received with input from registrars, registrants, Intellectual Property attorneys, the general legal profession and other organisations such as Nominet UK and Emirates Team New Zealand.

Of the 17 submissions, five did not consider a DRP was necessary for .nz domains. The rest supported a process being developed with a clear majority preferring something based on the Nominet model. A document summarising the submissions is enclosed with this letter.

WG members Rick Shera (Chair), David Farrar, District Court Judge David Harvey and Damian Broadley met on Thursday 24 March 2005 (with Chris Streatfield and Debbie Monahan, the Domain Name Commissioner, in attendance) to consider those submissions and the other information gathered over the lengthy period during which this issue has been under consideration.<sup>1</sup>

Based on the content of the majority of submissions, the level of disputes being referred to the DNC's office, the experiences of some of the WG members and the other information gathered over that period, the WG considers that there is an issue regarding registrant disputes in respect of .nz domains and that there are, and will likely always be, a sufficient volume of such disputes to justify the implementation of a DRP, to enable complainants an alternative to Court. The WG considers that the model best suited for the .nz domain name space would be one based on the Nominet UK model, adapted for NZ conditions.

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<sup>1</sup> It should be noted that the membership of the WG over the past two years has not included David Zanetti or Sarah Mehrstens. Peter Dengate-Thrush, the only other WG member, was unable to attend the 24 March meeting.

## **Implementing a Nominet UK model DRP for .nz domain names**

The WG discussed the various aspects of the Nominet system with a view to identifying the approach preferable for the .nz DRP. These are discussed briefly below but more detail can be provided if requested.

### *Extent of rights/disputes*

It was agreed by the WG that any DRP should acknowledge rights to a domain name wider than just registered trade mark rights. The Nominet model defines 'rights' as including, but not being limited to, rights enforceable under English law and it was agreed that a similar definition, adapted to NZ, would also be useful for a .nz policy.

The WG considered that disputes should be limited strictly to registrant domain name disputes and that the DRP should not, at least at this stage, extend to other disputes (e.g., registrant-registrar disputes).

### *Informal mediation*

This is clearly a successful step for Nominet, as information received from them demonstrates. Given the percentage of cases (around 64%) that are resolved at this informal mediation step, the WG agreed that the .nz DRP should also include this.

### *Appeal Process*

With any process relying on one individual to make a decision there is always the possibility of that decision, on its face, appearing to be incorrect for whatever reason. Also, because the procedure is fast-track, done on the papers and without any scope for detailed cross submissions, cross-examination and testing of evidence that normally accompanies a Court process, there may be situations where a decision warrants another look.

Therefore, the WG favoured allowing the unsuccessful party a right of appeal within the system (always acknowledging that an aggrieved party effectively has an appeal right at any stage by taking the matter to Court, at which stage the DRP would be suspended pending the Court decision). The Nominet model allows for an appeal to be heard by three experts. The WG supported the inclusion of an appeal process for any .nz model with the fee for the appeal set at a level that would enable full cost recovery.

### *Expert panel pool*

After discussion, the WG agreed that a pool of around 8-10 experts available for panel duties and to sit on appeals would be appropriate for .nz given the possible volumes. It was commented that there are already a number of New Zealanders involved in the WIPO UDRP system and therefore experienced in handling domain name dispute matters. Targeted advertising and promotion of the opportunity were discussed as options in appointing experts.

Experts would be appointed for a set term, with the right to reapply at the end of their tenure at which time performance and quality of decision making would be taken into account. A Chair of Experts should also be appointed and paid a stipend to oversee the panel.

Nominet's approach to use a 'first cab off the rank' (subject to any conflict of interest) to allocate cases to the experts was supported by the WG.

### *Fees payable*

Under the Nominet model there is no fee payable to lodge a complaint and have it go through the informal mediation step. If the complainant wants it to go before an expert then a fee is paid at that time with the entire fee going to the expert. This system enables Nominet to maintain the 'first come, first served' model with them having no interest in who the registrant is.

Some submissions had questioned whether the general DNC management fee should be used to cover the initial mediation step as there was concern that it would mean some registrants subsidising others who would never be involved in a dispute. It was agreed by the WG that the current funding model of the DNC office already meant that all registrants were contributing towards the cost of having a service available if it was required and that this was no different. It is also consistent with InternetNZ's "trusteeship" of the .nz space that it (and consequently all registrants ultimately) should bear the expense of any system which improves the overall operation of that space. Such a system potentially benefits all registrants, and potential registrants, any of whom who may be faced with a dispute. It also balances any potential exploitation of the "first come first served" principle, without undermining it in any way.

There was also agreement by the WG that the fee model set up by Nominet enabled them to maintain a 'hands off' approach to who the registrant of a domain name was. This is consistent with the stance taken by InternetNZ since they took over responsibility for the .nz domain name space. Therefore, the WG agreed that fees should only be payable when the complaint was referred to an expert and that the entire fee should be handed to the expert. In that way InternetNZ can be seen to be completely unbiased as to the lodging of disputes and their progress.

### Possible level of fees

Indicative levels of around NZ\$1500-NZ\$2000 for an expert determination were discussed with a possible fee for the three-expert appeal being around NZ\$7,000.

### *Award of costs*

Some of the submissions referred to the ability of the expert to award costs, with others suggesting that a registrant should have to pay a bond at the time a complaint is made in order to cover any possible costs associated with misuse of the domain name.

Though there was acknowledgement of the reasons for requesting costs, the WG raised the point that no other DRP internationally appeared to have a process for awarding costs. If .nz was to depart from that international consistency there would need to be good reasons to justify doing so.

It was agreed that one of the reasons for establishing a DRP was to protect the rights of legitimate registrants. Requiring a fee to be paid 'up front' by the registrant when a complaint is laid would not be fair or equitable and tends to undermine the "first come first served" principle.

Another point raised by the WG was that an award of costs is usually associated with an appearance at a hearing. If it was going to be possible to award costs there might be a danger that parties would demand the right to be heard which in itself starts undermining the very nature of a DRP.

Further, if a panellist is faced with having to make a decision on costs then that would require submissions by the parties, adding to the cost and complexity of the DRP. The WG was also concerned that panellists might be persuaded that parties who were represented and had therefore incurred professional costs were somehow more deserving of costs awards than parties who represented themselves, leading to potential inconsistencies.

In the light of all the issues discussed, it was agreed by the WG that no award for costs should be able to be made in a .nz DRP, and that the registrant should not be required to contribute anything to the costs of the process (except where they elect to take the matter to appeal).

### **Process from here**

At the meeting the DNC advised the WG that provision had been made in the 2005/06 budget for a project to implement a DRP for .nz domain names. The DNC also advised the WG that individual members of NZOC supported the implementation of a DRP based around the Nominet model, though NZOC had not considered the matter as a Committee.

Now that the WG has agreed that InternetNZ should proceed to implement a Nominet style DRP for the .nz domain name space, the WG will notify that recommendation publicly to the public discuss list. The WG now seeks approval from NZOC to proceed with the project utilising the provisions allocated in the DNC budget. Progress reports will be provided to NZOC as the project proceeds.

### **Recommendation**

It is recommended that NZOC:

- Note the outcome of the WG meeting that a DRP based on the Nominet model be developed and implemented for the .nz domain name space
- Approve the WG proceeding with a project plan to implement the DRP using the staff resources of the DNC Office with any expenses covered by the DRP provision in the DNC budget provided that prior public notification of the NZOC's intention to consider giving such approval is issued in the usual way by NZOC (*i.e.* by notification to InternetNZ members of the meeting details and agenda).

Rick Shera  
Chair, Dispute Resolution Working Group