

Received: Tuesday, August 20, 2024

Submitter: Dave Smyth

Submission 1

Submission:

I was disappointed to see that the Cultural Support Services report continues to treat Maori as if they are all superstitious and stuck in a pre-scientific understanding of a magical world.

It is incredibly patronising. It would be like creating a Pakeha tikanga that relied on acknowledgement of the "Ethers" and ensuring that meetings were held along "Ley lines" after checking that our Horoscopes were in alignment.

regards,
Dave Smyth

Submission 2

Received: Saturday 24 August 2024

Submitter: David Ward, The Domain Name Company Limited

Submission:

The Domain Name Company Limited hereby submits the following response in relation to the proposed .nz Dispute Resolution Scheme Rules. We have particular concerns regarding the “closed loop” of these proposals – namely that the registry parties are judge, jury and executioner, while they also attempt to assert no liability via a no recourse provision. It is basic integrity that any individual or organisation takes responsibility for its decisions.

- It is not clear whether this process is mandatory on the parties. It needs to be clear for example whether a party has the right to refuse to participate
 - Mediation appears to not be mandatory under 6.17 and 9.6(a).
 - Expert Determination is not mandatory under 10.25, but 12.9 suggests it will proceed regardless
- It is not clear whether decisions under this process are binding - some tangential policies (1.3, 5.12) are binding
 - Mediation appears to not be binding unless agreed by both parties
 - Expert Determination appears to be binding (11.1 and 13.1) irrespective of whether the other party participates
- Assuming a party has no right to step out of this process and/or the decisions are binding, then by definition the DNC, InternetNZ and related parties eg. NZDRC (“registry parties”) cannot absolve themselves of liability for failing to perform their functions objectively and competently (16.x). The registry parties must take responsibility for their failures – this is basic law. Failure to competently and professionally execute a function is a form of negligence and wholly liable under law.
- It is of concern that the NZDRC does not have to explain the reasons for its decisions (5.12) while simultaneously absolving itself of accountability for them (16.x) – the very definition of a “kangaroo court”
- No party can reasonably agree not to obtain a court order forcing an Expert to testify (12.7) where necessary and/or appropriate
- By definition any resolution mechanism should be: objective; impartial; and at arms length.
 - By definition a mediator cannot be impartial (7.4) toward whatever organisation appointed him/her (the registry parties), this must inevitably create a conflict of interest given the registry parties are involved in the process
 - By definition an expert cannot be impartial (11.5) toward whatever organisation appointed him/her (the registry parties) , this must inevitably

create a conflict of interest given the registry parties are involved in the process

- There is also by definition an implicit bias towards large commercial interests by nearly every expert, who potentially stands to benefit financially, now or in the future from a positive relationship with “big business”, this needs to be taken into consideration
- It appears no party has the right to challenge the appointment of an expert even though that expert may be unsuitable and/or the NZDRC may have been negligent and/or incompetent in his/her appointment (10.21). An argument that the appeal process is for this purpose is specious, because it necessitate the automatic loss of “one step” in the process through no fault of the non-registry parties concerned. The parties must have the right to request an alternate Expert (similar to a jury selection process) and/or agree one with the other party.
- What expertise does the NZDRC have in determining who is an expert? An expert panel would be better selected by industry vote.
- 5.14 reasonable notice should be given of any change

On balance the policies appear to be clumsily written and focused purely on avoiding liability, rather than providing a trustworthy, neutral and objective mechanism for New Zealanders to resolve disputes outside of court.

We have witnessed first hand the mechanics of the registry parties – as an example a complaint escalated to InternetNZ regarding the DNC was referred back to the DNC by InternetNZ, thereby allowing the DNC to mark its own homework, the very definition of conflict of interest - as such we cannot have confidence the proposed policies are fit for purpose in their current form given the registry parties and we do not believe that New Zealanders are being provided by a sufficient level of neutrality by these proposals.

Suggestions for improvement:

1. Clarify what is mandatory and/or binding, and if any are - without the consent of both parties to the dispute - the registry parties must be able to be held accountable for any decisions they make
2. Put in place a proper selection criteria for “Experts” – in particular a clear set of guidelines about what constitutes an expert, how they are selected, how they can be replaced, give the parties to a dispute the ability to interrogate an expert on possible conflicts and the option to agree on one themselves

Regards,

The Domain Name Company Limited

Submission 3:**Received:** Monday 26 August 2024**Submitter:** Petya Totuhova , Tucows.com

Dear Registry support team,

Please find below the answers on your questions regarding: .nz Dispute Resolution Scheme Rules.

Question one: Are there any specific aspects of the tikanga-based framework that you consider should be highlighted or further explained in the context of the .nz Dispute Resolution Scheme?

Tucows supports the Domain Name Commission NZ's incorporation of the tikanga-based framework into the .nz Dispute Resolution Scheme. We especially support that any party to a dispute may elect to participate in a tikanga-based framework of dispute resolution. We are, however, curious why the tikanga-based framework is not the *primary* dispute resolution framework for .nz domain disputes and encourage the DNC to consider a phase-out of non-tikanga-based dispute resolution frameworks.

Question two: What are your views on the dispute resolution services or access to them? For example, provider gender or other preference, engagement preference, tikanga perspectives given that tikanga varies, language preferences?

Tucows is a domain name registrar and so not likely to be a party to any dispute resolution service, only an implementer of the decisions.

Question three: What are your views on whether the Scheme will be accessible and user-focused?

Tucows believes that the DNC's dispute resolution scheme was already quite accessible and user-focused but notes that the transition toward a tikanga-based framework increases both accessibility and user-focus of the Scheme. As noted in our response to question one, we encourage the DNC to consider phasing out non-tikanga-based dispute resolution options in the future.

Question four: What are your views on the timeframes for various steps to be taken, do you consider them reasonable?

Yes, the timeframes are reasonable.

Question five: If you are a disputes resolution practitioner, what are your views on the new definitions of Fair Use and Descriptive Term?

It is concerning that Fair Use is defined after "Unfair Registration", making it seem that "Unfair Registration" is more presumptive than is Fair Use. The principles of Fair Use as defined in Schedule one are reasonable but Tucows recommends that Fair Use be presumptive (that the registration is reasonable unless there is evidence to the contrary) rather than the other way around. Under the Scheme as currently proposed, a registration is considered reasonable until someone files a dispute resolution matter against it, at which time, it seems as though the presumption switches from the registrant having made a reasonable registration to the registrant having to prove "Fair Use"; it seems that the *complainant* should have to prove *Unfair* Registration as they are the complaining party. This is the manner in which the Scheme is proposed but, again, because of the definitions, it seems that Unfair Registration is the presumption, which a registrant may overcome.

The definition of Descriptive Term is wholly appropriate.

Question six: Do you have any general comments in relation to the proposed Scheme Rules that we can consider?

Tucows would like to reiterate its support for the incorporation of tikanga-based dispute resolution options for the top-level domain serving Aotearoa and encourages the DNC to continue in that direction.

Submission 4:

Received: Monday 16 September 2024

Submitter: Hon Robert Fisher KC

SUBMISSION OF ROBERT FISHER ON PROPOSED DISPUTE RESOLUTION SCHEME RULES

14.9.24

CONSULTATION QUESTIONS

Question one:

Are there any specific aspects of the tikanga-based framework that you consider should be highlighted or further explained in the context of the .nz Dispute Resolution Scheme?

None thank you

Question two:

What are your views on the dispute resolution services or access to them? For example, provider gender or other preference, engagement preference, tikanga perspectives given that tikanga varies, language preferences?

Happy with proposals

Question three:

What are your views on whether the Scheme will be accessible and user-focused?

For many years now at the annual Experts' Panel meetings we have pointed out to DNC the inadequacy of public access to the database of Domain Name Dispute Determinations - see below.

Question four:

What are your views on the timeframes for various steps to be taken, do you consider them reasonable?

Happy with timeframes.

Question five:

If you are a disputes resolution practitioner, what are your views on the new definitions of Fair Use and Descriptive Term?

Part of a larger commentary on the proposed Rules – see below.

Question six:

Do you have any general comments in relation to the proposed Scheme Rules that we can consider?

As a Member of Experts Panel for 18 years I applaud the many improvements in the proposed Rules.

However some of the flaws in the 2nd Sched of the Proposal have been copied over into the proposed Rules. This is an opportunity to remove them. The new drafting has also created new problems that did not exist in the 2nd Sched.

My suggestions follow.

THE PROPOSED NEW RULES

1. The substantive grounds for upholding a claim
 - 1.1 Before turning to matters of procedure, the most important requirement is for the Rules to set out (ideally clearly and in one place) the grounds on which a claim can be upheld. Unless there are such grounds there is no point in a Claimant proceeding further. If the grounds are clearly established there is no point in a Respondent opposing the objection. The grounds are the core of the whole scheme.
 - 1.2 For myself I think it would be more clear if the substantive grounds were set out separately from matters of mere procedure (as they are in Parts A and B of Schedule 2 of the Policy) although I accept that this is not critical.
 - 1.3 In the present draft the substantive grounds on which a claim would succeed are not stated explicitly (as they were in paras 3 and 4 of Sch 2). All the draft does is to state what disputes are *eligible to be processed* under the Scheme (Rules 1.5, 2.1 and Schedule 1).
 - 1.4 Rules 1.5 and 1.6 prescribe “the scope of the Scheme” by reference to the disputes that meet the “eligibility criteria”. In other words it defines what kinds of disputes the Expert can decide. But a different question is the *grounds on which an Expert would uphold a claim*. In the absence of any other statement of those grounds it is a reasonable inference that they are the eligibility criteria. However this seems a strangely obscure way of getting there and leaves room for argument.
 - 1.5 In trying to decide whether to lodge a claim, or whether to defend one, it would be much easier, particularly for non-lawyers, if there were a clear list of the elements that need to be ticked off, not simply to get DNC to hear the dispute

but how the claimant could win. Ideally the grounds, including unjust registration, should be brought together in one place in the Rules.

1.6 Sooner or later a resourceful party is going to argue that Rules 1.5 and 1.6 are matters of jurisdiction only, in the sense that the Expert is entitled to embark on the dispute. The argument will be that as the grounds for the Determination are not explicitly stated, the Expert is free to take into account discretionary considerations that go outside mere eligibility criteria.

2. Sub-domains

2.1 I realise that Rule 1.5(b) is largely taken from the Second Schedule but it is an opportunity to clarify.

2.2 Apart from the criteria specific to sub-domains, I can see no need to distinguish between the criteria for .nz Domain Names in Rule 1.5(a) and for sub-domains in 1.5(b). For example why have a different test (generic and descriptive terms) in Rule 1.5(b)(i) instead of applying the Rights test in 1.5(a)(i)? Surely the same test should apply to both?

3. Unjust registration

3.1 In my experience the expression “unfair registration” causes confusion because people naturally associate it with the occasion when the domain name was registered. In both the Second Schedule version, and the proposed Rules, the label “unjust registration” has been used for what is essentially unfair use *after* the act of registration or acquisition. I would give these distinct concepts the label “unfair registration” or “unfair use” depending on whether the act complained of came, or is likely to come, before or after registration.

3.2 Having a separate category for “unfair use” would also be an opportunity to avoid the unfortunate double-negative in proposed Clauses 1.1(b) and 1.2 of Sch 1. As drafted, the reader is put through three convoluted steps that are very hard to follow:

3.2.1 The Domain Name has been, or is likely to be, used in a manner that is *not* Fair Use (R 1.1(b))

3.2.2 Fair use of the Domain Name means it has *not* been, and is not likely to be, used in a way that that is unfair etc (R 1.2).

3.2.3 Unfair use is use in a manner that *does* take unfair advantage of or was unfairly detrimental to the Claimant’s Rights etc ... (R 1.2)

3.3 It would be far more simple, and easy to understand, to say:

3.3.1 The Domain Name has been, or is likely to be, used in a manner which is *Unfair Use*

3.3.2 *Unfair use* is use in a manner that takes unfair advantage of, or is unfairly detrimental to, the Claimant's Rights etc

4. Reporting determinations

4.1 I could not understand the privacy sought in Rules 10.25, 11.2, 12.6, and 14.11, given the need for the reporting of determinations recognised in Rules 12.11(b), 13.5 and 14.13.

4.2 At least when they are legally represented, the parties rely on precedent determinations to lend authority to their arguments. The Experts also rely heavily on reported determinations to save time (why grapple with issues of principle afresh when they have already been worked out by others) and to avoid bringing the system into disrepute (capricious inconsistency in decision-making).

4.3 The one thing I would add is that we have often discussed with DNC the inadequacies in the existing database for past Determinations. The database is out of date and difficult to research. But that is another matter which need not affect the drafting of new rules.

Robert Fisher KC

Submission 5.

Received: Monday 20 September 2024

Submitter: Prudence Malinki

Question two:

What are your views on the dispute resolution services or access to them? For example, provider gender or other preference, engagement preference, tikanga perspectives given that tikanga varies, language preferences?

So dispute resolution services (or drs moving forward) are integral to providing registration services as they are a much needed mechanism that can assist with the other side of the coin in relation to domain registration process flow and can be effective in brand protection and enforcement. The service should be as accessible as possible to as broad a community as you serve, so languages and translations are also integral to the provision of a good DRS offering.

Question three:

What are your views on whether the Scheme will be accessible and user-focused?

In theory we support this, but it need to be implemented in an meaningful and sustainable way and it does appear that you are doing that- we support these changes.

Question four:

What are your views on the timeframes for various steps to be taken, do you consider them reasonable?

Yes the 10 working days to file a response and the 5 days for the reply to the response do seem reasonable.

Question five:

If you are a disputes resolution practitioner, what are your views on the new definitions of Fair Use and Descriptive Term?

N/A

Question six:

Do you have any general comments in relation to the proposed Scheme Rules that we can consider?

This is just a general comment- but the actions, attitudes and amendments by the DNC and affiliated organisations relating to inclusivity, including cultural and language are applauded and supported in entirety by Markmonitor. We hope that your attitudes and actions set a much-needed precedent that can be replicated, incorporated and eventually standardised across the globe- great work!