

Operating Agreement

Internet New Zealand Incorporated

InternetNZ

and

Domain Name Commission Limited

DNCL

Date 25 March 2021

Hudson™
Gavin©
Martin®

Technology, Media and Intellectual Property Lawyers

This **Agreement** is made on 25th March 2021

between (1) **Internet New Zealand Incorporated** (Inc. No. 692906), a duly incorporated society having its registered office at Level 11, 80 Boulcott Street, Wellington (**InternetNZ**);

and (2) **Domain Name Commission Limited** (NZCN 2072182) a duly incorporated company having its registered office at c/- IZARD Weston, Level 13, 89 The Terrace, Wellington (**DNCL**).

Background

- A. InternetNZ is a non-profit charitable society established for the purpose of protecting, promoting and fostering the development of the Internet in New Zealand. It is responsible for the management of the .nz Domain Name Space in New Zealand.
- B. The .nz domain space is governed by .nz policies which are developed and approved by InternetNZ. Pursuant to those policies certain functions and powers are vested in DNCL and the Domain Name Commissioner relating to:
- (i) enforcement of the .nz policies and contractual framework in relation to the .nz Domain Name Space, and
 - (ii) provision of a .nz Dispute Resolution Service;
- C. The parties wish to record the terms and conditions upon which those functions and powers will be performed.

It is agreed

1. Definitions and Interpretation

1.1 In this Agreement, unless the context otherwise requires or is specified otherwise:

Agreement means this Services Agreement, including any Schedule;

Business Day means a day other than a Saturday, Sunday, or public holiday in Wellington;

Chair of DNCL means that person from time to time that holds the position of chair of the Board of Directors of DNCL;

Commencement Date means the date that the last party executes this Agreement;

Confidential Information means any information relating to the business or affairs of that party and includes, without limitation, object code, source code, modifications to hardware or software, product knowledge, quality standards, research and development, unpublished specifications, technical information, manipulated data, business plans, business processes, methodologies, techniques, general know-how, costs, user lists, financial data, market research and trade secrets;

Data means the data and records contained in the Register that is the domain registrant data, being the contact details of the registrant, the domain zone data,

being the data that is published by the Query Service provided by InternetNZ, and the domain status data, being the rest of the data and records in the Register including the registration date, expiry date and registrar details;

Domain Name Commissioner means the senior employee of Domain Name Commission Limited who is assigned that role pursuant to his or her Employment Agreement and in the case of absence of duty from whatever cause, includes an Acting Domain Name Commissioner appointed by the Board of Directors of Domain Name Commission Limited.

Domain Name System means the domain name system in New Zealand;

Exclusive Licence means the licence granted by InternetNZ to DNCL in clause 4.2(a);

Functions means those functions that DNCL will perform in carrying out the Oversight Services as required by InternetNZ, details of which are set out in Schedule 1;

GST means goods and services tax payable in accordance with the Goods and Services Tax Act 1985, and as amended from time to time;

Intellectual Property Rights means any patent, trade mark, service mark, copyright, moral right, right in a design, know-how, database rights and any other intellectual property rights, whether registered, in the course of being registered or unregistered and any analogous rights worldwide;

InternetNZ Council means those persons elected by InternetNZ members or appointed to govern InternetNZ;

InternetNZ Pre-existing IP means:

- (a) any Intellectual Property Rights which are either:
 - (i) owned by, licensed to or in the possession of InternetNZ on or prior to the commencement of this Agreement;
 - (ii) developed outside of this Agreement by DNCL for InternetNZ in relation to previous agreements or contractual arrangements; or
 - (iii) developed by, licensed to or in the possession of InternetNZ after the commencement of this Agreement, but not in relation to the Agreement; and
- (b) any modifications, enhancements to the items in paragraph (a) of this definition that cannot be used independently of those items;

Licence Agreement means the 'Licence Agreement' dated 11 December 2015 between InternetNZ and DNCL;

Licences means the Exclusive Licence and the Non-Exclusive Licence;

.nz Domain Name Space means the Internet domain names ending in the suffix code ".nz";

.nz Nameservers means the authoritative .nz nameservers operated by, or on behalf of, InternetNZ;

New IP has the meaning given in clause 8.2 of this Agreement;

Non-Exclusive Licence means the licence granted by InternetNZ to DNCL in clause 4.2(b);

Oversight Services means:

- (a) enforcing and facilitating compliance with policy that has been adopted in relation to the .nz Domain Name Space, as detailed in Schedule 1, and
- (b) such other activity as InternetNZ and DNCL may agree from time to time;

Query Service means the service provided to the general public in accordance with the .nz policies to enable a search for domain name registration data;

Register means the database that is the sole register of .nz domain names and is the authoritative record of top level domains and registrants in New Zealand;

Register Rights means any copyright, database rights, rights in confidential information and any other Intellectual Property Rights that may exist in the Register;

Schedule means a schedule attached to this Agreement; and

Services Fee means the amount to be paid to DNCL by InternetNZ as contemplated in clause 7.1;

SRS means the system used by registrars to create and manage domain name registrations; and

User Contract means the contract entered into between InternetNZ and a user of the Register as part of allowing that user to access information contained in the Register.

1.2 In this Agreement, unless the context requires otherwise:

- (a) words importing one gender include the others;
- (b) words importing the singular or plural number include the plural and singular number respectively;
- (c) headings are inserted for the sake of convenience of reference only and do not affect the interpretation of this Agreement; and
- (d) a **person** includes any individual, corporation, unincorporated association, government department or local authority.

1.3 Where there is a conflict between the body of this Agreement and a Schedule then, to the extent of the conflict, the body of this Agreement will prevail unless there is express provision to the contrary in a Schedule.

2. **Previous arrangements**

- 2.1 The parties acknowledge and agree that this Agreement supersedes and replaces all existing agreements already in place between InternetNZ and DNCL on the subject matter set out in this Agreement, including for the avoidance of doubt the Operating Agreement dated 1 April 2008 between InternetNZ and DNCL and the Licence Agreement, both of which are terminated with effect from the date this Agreement is signed by both parties.
- 2.2 The parties acknowledge and agree that all of the Register Rights created by DNCL and any other Intellectual Property Rights in the Register that vested in DNCL were properly transferred to InternetNZ as required by the terms of the Licence Agreement, and those Intellectual Property Rights form part of InternetNZ's Pre-existing IP. To the extent not properly transferred as at the Commencement Date, DNCL agrees to carry out all acts including the signature of any confirmatory assignment documents as InternetNZ may require to give effect to this clause 2.2.

3. **Term**

- 3.1 This Agreement will commence on the Commencement Date and will continue until terminated in accordance with the terms of this Agreement.

4. **Appointment and Grant of Rights**

- 4.1 InternetNZ appoints DNCL to provide the Oversight Services.
- 4.2 To enable DNCL to carry out the Oversight Services and subject to clause 12.4(c), InternetNZ grants DNCL during the term of this Agreement:
- (a) an exclusive, non-transferable, royalty free, worldwide licence of the Register Rights to use the Data and/or the Register to (**Exclusive Licence**):
- (i) publish the Data in bulk;
 - (ii) publish historical or non-current versions of the Data;
 - (iii) contact registrants in bulk using contact details of those registrants contained in, or that has been contained in, the Register;
 - (iv) access the Register in bulk through the Query Service;
 - (v) make multiple Query Service requests for the purpose of bulk collection of the Data; and
 - (vi) bring, instigate, initiate or defend proceedings for and on behalf of InternetNZ in accordance with clause 8,
- but this Exclusive Licence does not include the right to make the Data or Register available:
- (vii) on an individual record basis through the Query Service;
 - (viii) through the .nz Nameservers, SRS or Other Registrar Systems; or

(ix) in the form of aggregated data that does not contain any individual records,

such rights may, however, fall within the scope of the Non-Exclusive Licence in clause (b);

- (b) a non-exclusive, non-transferable, royalty free, worldwide licence to use the Register to the extent necessary to carry out the Oversight Services, where such use is not licenced under the Exclusive Licence (**Non-Exclusive Licence**); and
- (c) subject to clause 8 (including any decision under clause 9.2), the right, as agent for InternetNZ, to enforce the terms of any User Contract that may be infringed.

5. Performance of Oversight Services

5.1 DNCL will carry out the Functions in performing the Oversight Services. In doing this DNCL will:

(a) do so:

(i) in the same manner as it is at the date of this Agreement unless DNCL is required elsewhere in this Agreement to operate in a different manner;

(ii) in a professional manner, using all due care and skill;

(iii) in a manner that does not infringe the Intellectual Property Rights of InternetNZ or any third party;

(iv) in compliance with all applicable laws, regulations and codes of practice;

(v) using suitably qualified and experienced personnel; and

(vi) in accordance with good business practices.

(b) use all reasonable endeavours to cooperate with and coordinate its operations with the efforts of InternetNZ.

(c) report in relation to its performance in the manner and at the frequency as reasonably required by InternetNZ from time to time;

(d) comply with the .nz policies as notified to DNCL by InternetNZ, from time to time.

5.2 In the course of providing the Oversight Services DNCL may identify policy changes that could better achieve the intended outcomes of the .nz policies. Where it does so DNCL shall notify those to InternetNZ for its consideration. DNCL shall provide such support as reasonably required by InternetNZ to enable InternetNZ to develop or modify any policy.

5.3 DNCL will only publish or otherwise make available to the public a policy that has been approved by InternetNZ, which InternetNZ may do in its sole discretion.

6. **Independence of DNCL and Domain Name Commissioner**

- 6.1. In undertaking its compliance and dispute resolution roles pursuant to both .nz policies and this agreement, DNCL and the Domain Name Commissioner shall act independently of Internet NZ, without fear or favour and without regard to economic considerations.
- 6.2. In respect of any particular case the Domain Name Commissioner shall act independently and shall not be responsible to InternetNZ for the performance or exercise of such functions or powers.
- 6.3. While nothing in this clause is intended to restrict the ability of the Board of Directors of DNCL to fulfil their duties as directors, the board acknowledge the importance of the independence of the Domain Name Commissioner when determining what matters of compliance to pursue, how to pursue them and how to assist with the resolution of disputed matters. The appointment and grant of rights by Internet NZ under this agreement is made on the basis that the Board of Directors of DNCL shall seek to enable the Domain Name Commissioner to carry out the compliance and dispute resolution roles without undue control by them or influence from them.

7. **Fees**

- 7.1. In performing the Oversight Services, DNCL shall be entitled to be compensated for that activity by InternetNZ whose activity DNCL will be assisting. InternetNZ shall pay DNCL the Services Fee for the Oversight Services in the manner set out in Schedule 2 or such other manner as InternetNZ may prescribe from time to time.
- 7.2. InternetNZ may vary the Services Fee at any time upon 3 months' prior notice to DNCL. Where DNCL does not agree with that change it will advise InternetNZ of this within 1 month of receipt of InternetNZ's notice and may terminate this Agreement with effect from the date the change in the Services Fee is to take effect. If DNCL does not so advise InternetNZ of its disagreement to the proposed variation, the variation of the Services Fee shall be deemed to be accepted by DNCL.

8. **Intellectual Property Rights**

- 8.1. All Register Rights are owned by InternetNZ. To the extent that InternetNZ does not own any existing Register Rights, DNCL assigns without reservation or extra charge its entire right, title and interest in such Register Rights to InternetNZ.
- 8.2. All Intellectual Property Rights, including any Register Rights, arising from or in connection with carrying out the Oversight Services by DNCL under this Agreement (**New IP**), will on creation vest absolutely in InternetNZ and DNCL will execute all documents and do all acts and things reasonably necessary for the purpose of giving effect to this clause.
- 8.3. To the extent the New IP does not vest in InternetNZ on creation, DNCL:
 - (a) assigns without reservation or extra charge the Intellectual Property Rights and all other rights in the New IP to InternetNZ; and

- (b) will join and co-operate with InternetNZ and execute all instruments necessary and perform such acts as necessary to permit InternetNZ to fully protect the New IP.

8.4 To the extent individuals are entitled to assert any moral rights (as conferred under the Copyright Act 1994 or equivalent laws of another jurisdiction) in or to the New IP, DNCL must ensure that each of its officers, employees, contractors (including subcontractors) and agents involved in the production or creation of the New IP gives all necessary consents and waivers in writing authorising InternetNZ to do any act or omission that would otherwise infringe that person's moral rights.

8.5 Upon New IP being created and rights in it being owned by InternetNZ, that New IP shall form part of the InternetNZ Pre-Existing IP and will be licensed under this Agreement in the manner contemplated by this Agreement.

9. **Enforcement of Register Rights**

9.1 Each party will promptly notify the other in writing as soon as it becomes aware of any infringement or suspected infringement by a third party of any of the rights of InternetNZ (whether Register Rights, rights conferred by any applicable law or regulation, or rights under a User Contract) (**Infringement**).

9.2 Following either party notifying the other of any Infringement, the parties will work together in good faith to determine the most appropriate party to lead on any proceedings or other actions in respect of such Infringement. If it is decided that InternetNZ is best placed to lead any such actions, DNCL will provide InternetNZ with such assistance as InternetNZ may reasonably request in preparing for and undertaking those actions.

9.3 If following consultation under clause 9.2 the parties decide DNCL is the party best placed to lead any action for Infringement, then DNCL has the right, at its own cost, to bring proceedings in its own name or on behalf of InternetNZ (as the case may be), or settle any claim on behalf of InternetNZ, for such Infringement.

9.4 If DNCL takes action in accordance with clause 9.3, DNCL will:

- (a) promptly provide InternetNZ with notice of any such proceedings;
- (b) regularly inform InternetNZ of progress;
- (c) follow any instruction or direction of InternetNZ in relation to the exercise of a right conferred under clause 8.3; and
- (d) promptly provide such information as InternetNZ may request, including copies of all documents filed in the proceedings.

Where requested by InternetNZ, DNCL will immediately notify the relevant court that its grant of the right to bring and enforce the proceedings has been revoked and it will do all things necessary to ensure that InternetNZ is joined or substituted as a party in the relevant proceedings to the extent permitted by law, and, if

required by InternetNZ, where it is the plaintiff it will discontinue those proceedings or where it is the defendant, it will cease to defend those proceedings.

- 9.5 If, under applicable law, DNCL is unable to bring proceedings solely in its own name, it may seek consent from InternetNZ to bring such proceedings jointly with InternetNZ, such consent not to be unreasonably withheld.
- 9.6 If InternetNZ is joined to proceedings pursuant to clause 9.5 or otherwise, DNCL shall indemnify and hold harmless InternetNZ and its respective Council Members, directors, employees and agents, from and against any and all claims, demands, losses, causes of action, damages and expenses (including without limitation, legal fees) arising from or in connection with such proceedings.
- 9.7 Any damages, profits, awards and settlement amounts recovered by DNCL for any such Infringement will be applied first to reimburse DNCL for all actual costs and expenses incurred by it in bringing proceedings with any balance of funds then remaining, being paid to InternetNZ.

10. **Use of Register**

- 10.1 DNCL acknowledges that the Register consists of valuable information to InternetNZ. DNCL will treat the Register with the same care as if it was the owner of the Register and shall only use or permit the Register to be used for the purposes of carrying out the Oversight Services.
- 10.2 DNCL will comply with the requirements of the Privacy Act 2020, the Unsolicited Electronic Messaging Act 2007 and any other applicable law or regulations relevant to its use of the Register.

11. **Confidentiality**

- 11.1 DNCL will treat as confidential all Confidential Information and will only use the Confidential Information for the purpose of carrying out its obligations under this Agreement. DNCL will not disclose the Confidential Information to any person without InternetNZ's prior written consent (except to its employees, for whom DNCL will be responsible, and then only to those employees who need to know such information).
- 11.2 Clause 11.1 does not extend to information that:
- (a) can be established by written records to be already known to DNCL at the time of disclosure;
 - (b) is in or enters the public domain through no fault of DNCL; or
 - (c) DNCL is obliged by law to disclose, provided that it has first advised InternetNZ of this obligation and has allowed InternetNZ reasonable time to avoid the disclosure having to be made, and has given InternetNZ such assistance as InternetNZ reasonably requests.
- 11.3 DNCL will deliver to InternetNZ on request all Confidential Information and any other document supplied by or obtained from InternetNZ.

12. Termination

12.1 Either party may terminate this Agreement:

- (a) by notice in writing if the other party becomes subject to any form of insolvency or other external administration; or
- (b) if there is a material breach of this Agreement by the other party and:
 - (i) the material breach cannot be rectified; or
 - (ii) the material breach can be rectified but the party in breach fails to remedy such breach within 20 Business Days of receiving notice from the other party specifying the breach and requiring it to be remedied.

12.2 Either party may terminate this Agreement if InternetNZ ceases to be the sole authority for the management and administration of the .nz Domain Name Space.

12.3 InternetNZ may terminate the Agreement without cause by giving 20 Business Days notice in writing to DNCL.

12.4 If this Agreement is terminated:

- (a) DNCL's appointment to carry out the Oversight Services will cease; and
- (b) DNCL shall:
 - (i) immediately provide to InternetNZ:
 - (A) all records and information, including Confidential Information, in DNCL's possession or control; and
 - (B) all other property of InternetNZ (including, without limit, documents and associated Intellectual Property) which is in the possession or control of DNCL; and
 - (C) all other assets or property of DNCL that are needed for the performance of DNCL's functions and duties under .nz policies or under this agreement.
 - (ii) if requested by InternetNZ, destroy or erase all copies in any form of the Confidential Information; and
 - (iii) carry out all acts, including the execution of any confirmatory assignment documents, as InternetNZ may require to give effect to this clause; and
- (c) all licences granted under this Agreement shall be revoked with immediate effect, except to the extent needed to close out any claim of Infringement it is involved in under clause 9.

12.5 Termination of this Agreement will not affect the provisions of this Agreement which are intended to continue, or should reasonably continue, after termination (including, without limit, clauses 4.2, 8, 11, and 13). Termination will not affect

any claim by either party against the other party arising out of any breach or failure under this Agreement prior to termination.

13. Disclaimer and Indemnity

- 13.1 Except as expressly provided in this Agreement, all representations or warranties (statutory, express or implied), except any which may not lawfully be excluded, are expressly excluded.
- 13.2 Without prejudice to any other rights and remedies of InternetNZ, DNCL indemnifies InternetNZ against all liabilities, damages, costs or expenses that InternetNZ sustains or incurs arising out of or in connection with any claim from the performance of its Oversight Services infringing the rights (including any Intellectual Property Rights) of any person.

14. Insurance

- 14.1 DNCL will effect and maintain, with a reputable third party insurance company and during the Term, professional indemnity insurance and such other insurance in relation to performance of its Oversight Services, at such coverage limits, as a prudent person carrying out similar activities would maintain.
- 14.2 All insurance effected and maintained by DNCL pursuant to clause 14.1 will:
- (a) name InternetNZ as an insured party; and
 - (b) contain an effective and binding clause to the effect that the insurer waives all rights of subrogation which may otherwise have existed against InternetNZ, its Council Members, employees, and authorised representatives.

15. Force Majeure

- 15.1 Neither of the parties will have any liability whatsoever or be deemed to be in default, for any delay or failure in performance under this Agreement resulting from acts beyond the control of that party, including, but not limited to, acts of God, acts or regulations or orders of governments, war or national emergency, accident, fire, riot, lock-outs, industrial disputes or epidemics.

16. Books and Records

- 16.1 DNCL must keep proper, accurate, and complete books, accounting records and statistical information.
- 16.2 DNCL will permit InternetNZ and any person authorised by InternetNZ to inspect or audit the records and accounts referred to in clause 16.1 during normal business hours and to take copies and extracts from those records and accounts.

17. Notices

- 17.1 Any notice given pursuant to this Agreement must be made in writing or by email sent to the registered office or principal place of business of the other party as set out in this Agreement or to such other address as may be notified by either party to the other from time to time. Any communication sent by email will be deemed

to be received when transmitted to the correct email of the recipient with no indication of incomplete transmission. Any other notice will be deemed to be received when left at the specified address of the recipient or on the fifth day following the date of posting.

18. **General**

- 18.1 This Agreement represents the entire agreement between the parties regarding the subject matter of this Agreement, and supersedes any previous understanding or agreements between the parties.
- 18.2 This Agreement will not be deemed to create a partnership, joint venture or agency relationship of any kind between the parties.
- 18.3 If any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions of this Agreement will remain in force and effect.
- 18.4 No variation or waiver of any provision of this Agreement will be recognised or binding unless it is in writing and signed by both parties.
- 18.5 DNCL may not assign or transfer this Agreement or any of its rights or obligations under this Agreement, whether in whole or in part, without the prior written consent of InternetNZ.
- 18.6 This Agreement is subject to the laws of New Zealand and the parties submit to the exclusive jurisdiction of the New Zealand courts.

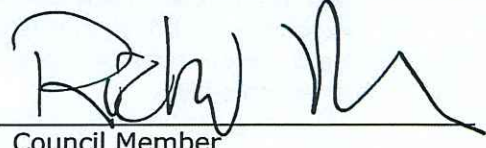
Execution

Executed as an agreement

The **Common Seal** of **Internet New Zealand Incorporated** was affixed in the presence of:



President / Vice-President



Council Member

Jamie Paddleton

Print Name

RICHARD HULSE

Print Name

25/3/21

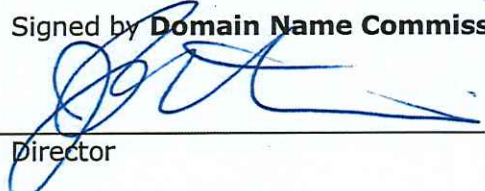
Date signed



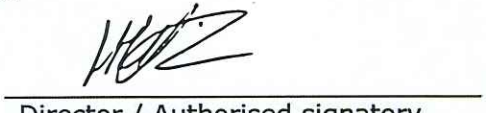
25 March 2021

Date signed

Signed by **Domain Name Commission Limited**:



Director



Director / Authorised signatory

JORDAN CARTER

Print Name

Melanie Lyn Hewitson

Print Name

25/03/2021

Date signed

25/03/21

Date signed

Schedule 1 – Functions

The parties acknowledge and agree that DNCL will perform the following functions:

- Enforce the .nz policies, and assure compliance with them by market participants
- oversee the market and ensure compliance of registrars, resellers and registrants with applicable regulatory standards and rules
- Authorise and deauthorise registrars
- Maintain an understanding of the competitiveness of the marketplace for .nz domain names
- Provide a dispute resolution service for .nz domain names
- Respond to and attempt to resolve queries from the public regarding the .nz domain name space and its operation
- Investigate and resolve complaints regarding .nz authorised registrars.
- Perform any appropriate functions, in conjunction with InternetNZ, arising from some unexpected event or crisis affecting the .nz domain name space.
- Participate as part of the InternetNZ Group in appropriate and applicable international forums and events
- Publish information and reports related to these functions as appropriate
- Provide significant input into changes to .nz policies.

Schedule 2 – Fees

Services Fee

- 1 DNCL will annually present InternetNZ with a draft budget, including the necessary sum of the service fee, for the forthcoming year. The budget is to be sufficient to allow DNCL to perform its functions in a sustainable, efficient and effective manner.
- 2 In calculating the service fee in the draft budget DNCL will take into account the other sources of revenue it has and contingency fund it reasonably requires as discussed below.
- 3 InternetNZ will review the budget and approve the service fee as part of its usual budget approval process. The service fee will then be paid monthly by InternetNZ to DNCL.
- 4 DNCL will have the following other sources which it must take into account when setting the service fee in the draft budget:
 - 4.1 Any fees paid to the Commission pursuant to its functions or to the functions set out in the .nz policies (for example, fees to registrar authorisation processes, or fees relating to dispute resolution services)
 - 4.2 Investment interest
- 5 DNCL can retain a contingency fund to manage cash flow and protect from possible litigation costs. The level of this fund is to be decided by the DNCL Board but it is intended that it should not exceed 60% of the annual operating budget.