

# **.nz Dispute Resolution Scheme Rules**

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Version 5

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# **.nz DISPUTE RESOLUTION SCHEME RULES**

## **PART 1: PRELIMINARY PROVISIONS**

### **1.0 PURPOSE AND SCOPE**

- 1.1 These are the Scheme Rules of the .nz Dispute Resolution Scheme established under the .nz Rules.
- 1.2 These Scheme Rules are in force from the date of DNC's Notice of Decision under the .nz Rules as set out on the cover page of this document or the DNC website until replaced.
- 1.3 The version of the Scheme Rules in force at the time the Dispute is accepted governs the Dispute and is binding on the Parties, the Dispute Resolution Practitioners, DNC, and NZDRC until the Conclusion of the Dispute Resolution Services.
- 1.4 The purpose of the Scheme is to provide dispute resolution processes that are:
- (a) culturally responsive, independent, fair, prompt, efficient, and effective;
  - (b) provide a proportionate response to the complexity of the issues involved; and
  - (c) are a cost-effective and timely alternative to court or other proceedings.
- 1.5 The scope of the Scheme covers Disputes that meet the following eligibility criteria:
- (a) two or more parties are in dispute over who the holder of a .nz Domain Name should be and whether:
    - (i) the Claimant has Rights in respect of a name or mark which is identical or similar to the Domain Name; and
    - (ii) the Domain Name, in the hands of the Respondent, is an Unfair Registration; and/or

- (b) two or more parties are in dispute over a Sub-domain that is attached to a Domain Name registered directly at the second level of .nz as to whether:
  - (i) the Domain Name is a Generic Term or a Descriptive Term such that the Claimant cannot demonstrate Rights in the Domain Name;
  - (ii) the Sub-domain added at the second level of .nz has the appearance of a Domain Name registered at the third level of .nz;
  - (iii) the Claimant has Rights in respect of a name or mark which is identical or similar to the Sub-domain or apparent third-level Domain Name; and/or
  - (iv) the Sub-domain, in the hands of the Respondent, is an Unfair Registration.
  
- 1.6 A Dispute may be referred to the Scheme for resolution via a Claim in a Claim Form. A Claim may not be made in relation to any other dispute or in any other manner.
  
- 1.7 The Claimant may elect to have the Dispute referred to:
  - (a) Mediation (under Part 3); or
  - (b) Expert Determination (under Part 4).
  
- 1.8 A Party may Appeal the Determination of the Expert (under Part 5).
  
- 1.9 To resolve a Dispute by Mediation, the Parties must enter into a Settlement Agreement.
  
- 1.10 To succeed with a Claim in Expert Determination, the Claimant must establish that all the grounds of the Claim are present on the balance of probabilities (more likely than not).
  
- 1.11 To succeed with an Appeal, the Appellant must establish that all the grounds of the Appeal are present on the balance of probabilities (more likely than not).
  
- 1.12 Any Party to a Dispute may request cultural or accessibility support services including use of the Tikanga framework to support that Party throughout the Dispute process once a Dispute is accepted by NZDRC. NZDRC will appoint a Contractor to provide the agreed services and the Contractor's fee will be paid by DNC via NZDRC.

## 2.0 DEFINITIONS AND INTERPRETATION

2.1 Except to the extent the context otherwise requires, in these Scheme Rules:

**Appeal** means a formal challenge to a Determination, made under these Scheme Rules.

**Appeal Notice** means a notice of an Appeal given by a Party in the form published on the NZDRC website at the time the Appeal Notice is submitted, and when completed includes all attachments.

**Appeal Panel** means a panel of three Experts appointed by NZDRC to determine an Appeal.

**Appeal Panel's Fee** means the fee payable by the Appellant as set out on the NZDRC Website at the time an Appeal Notice is received by NZDRC (unless otherwise agreed under these Scheme Rules).

**Appeal Period** in relation to an Expert Determination means the period of 10 Working Days after all Parties have received or are deemed to have received the Determination.

**Appeal Response Form** means the form by that name on the NZDRC Website at the time the Response is submitted, and when completed, it includes all attachments

**Appellant** means the Party that makes an Appeal by submitting an Appeal Notice.

**Claim** means a claim regarding a Dispute submitted to NZDRC via a Claim Form and includes the substance of the Claim and all related Submissions.

**Claimant** means the individual or entity that refers a Dispute to NZDRC for resolution under the Scheme or, if one or more Representatives have been appointed or there are multiple Claimants, the Lead Claimant.

**Claim Form** means either a Mediation Claim Form or an Expert Determination Claim Form.

**Compliance Lock** means where DNC locks a Domain Name that is the subject of a Claim until the Conclusion of the Dispute Resolution Services, as directed by NZDRC.

**Conclusion of the Dispute Resolution Services** means the date of whichever of the following events occur first:

- (a) The Dispute, Claim or Appeal is settled, withdrawn or deemed to be withdrawn;
- (b) The period for lodging an Appeal relating to a Determination expires;
- (c) The Mediator, Expert or Appeal Panel has ended the Mediation, Expert Determination or Appeal process on their own initiative; or
- (d) The Dispute Resolution Services are terminated on any other basis under these Scheme Rules or at law.

**Contractor** means:

- (a) for the purposes of Rules 1.12 and 3.6, any individual or entity appointed by NZDRC to provide cultural or accessibility services; and
- (b) regarding Dispute Resolution Services, any individual or entity appointed by NZDRC to provide Dispute Resolution Services.

**Costs** means the Parties' own costs and expenses of the Mediation, Expert Determination or any Appeal (for example, including the cost of their Representatives, legal fees, their own experts' fees, travel and accommodation costs).

**Descriptive Term** means a word or phrase that is wholly descriptive and illustrates only the purpose, quality or feature of the relevant business, product, good or service, profession, place, or thing and immediately gives an idea of what the goods and services are (for example, 'Holiday Inn' for hotels; 'All Bran' for cereal; 'matrimony' for matrimonial services; and geographic locations), and which is not distinctive and has not acquired a distinctive secondary meaning, and **descriptive** has a corresponding meaning.

**Determination** means the decision reached by an Expert, and includes decisions of an Appeal Panel, and includes the substance of the decision, and **determine** has a corresponding meaning.

**Disclose** means publish, communicate or otherwise supply, and **Disclosure** has a corresponding meaning.

**Dispute** means a dispute that satisfies the relevant eligibility criteria in Rule 1.5, and includes the substance of the Dispute and all related Submissions.

**Dispute Resolution Practitioner** means an individual employed by or contracted by NZDRC to provide Dispute Resolution Services.

**Dispute Resolution Services** means Mediation, Expert Determination or determination of Appeals in accordance with these Scheme Rules.

**Domain Name** or **.nz Domain Name** means a domain name registered in the .nz Register and includes a Sub-domain.

**Domain Name Commission** or **DNC** means Domain Name Commission Limited, a company wholly owned by InternetNZ, and appointed by InternetNZ to manage .nz on its behalf.

**Domain Name Hijacking** means acting in bad faith to deprive a registered Domain Name Holder of a Domain Name.

**Domain Name Holder** or **Registrant** means the individual or entity entered in the .nz Register as the holder of the Domain Name.

**Electronic communication** means email or any other electronic means of communication that provides a record of its transmission, receipt or delivery, and includes the use of any designated electronic filing system or case management system operated by NZDRC.

**Expert** means:

- (a) an individual appointed by NZDRC to resolve a Domain Name Dispute by Expert Determination; and
- (b) in relation to an Appeal means each individual appointed by NZDRC to the Appeal Panel,

in each case selected by NZDRC from the list of experts published on the NZDRC Website at the time of the appointment.

**Expert Determination** means the determination of a Dispute by an Expert under these Scheme Rules and includes the substance of the Determination.

**Expert Determination Claim Form** means the form by that name on the NZDRC Website when the Claim is submitted requesting Expert Determination, and when completed, it includes all attachments.

**Expert Determination Reply Form** means the form by that name on the NZDRC Website at the time the Reply is submitted, and when completed, it includes all attachments.

**Expert Determination Response Form** means the form by that name on the NZDRC Website at the time the Response is submitted, and when completed, it includes all attachments.

**Expert's Fee** means the fee set out on the NZDRC Website at the time the Claim is accepted by NZDRC (unless otherwise agreed under these Scheme Rules).

**Fair Use** is defined in Schedule 1.

**Fee or Scheme Fee** means (according to the context) any or all of the following: the Mediator's Fee, Expert's Fee, the Appeal Panel's Fee, and any other or related costs, expenses or fees of the Mediator, Expert, Appeal Panel or Dispute Resolution Services required or agreed to be paid by one or more of the Parties.

**Generic Term** means a word or phrase that is a common name in general public use for a product or good, service, profession, place or thing (for example, toy; shop; cleaner; lawyers; Wellington; sparkling wine), which is not distinctive and has not acquired any distinctive secondary meaning, and **generic** has a corresponding meaning.

**InternetNZ** means Internet New Zealand Incorporated, the organisation that holds the .nz delegation and which operates and manages the .nz Register.

**Lead Claimant**, where there are multiple Claimants and/or one or more Representatives, means the Claimant or Representative identified in the Claim Form as the individual who will receive communications on behalf of all Claimants and their Representatives and act on their behalf for the purposes of the Dispute under the Scheme (or any substitute individual notified subsequently as being the Lead Claimant).

**Lead Respondent**, where there are multiple Respondents and/or one or more Representatives, means the Respondent or Representative identified in the Response Form as the individual who will receive communications on behalf of all Respondents and



their Representatives and act on their behalf for the purposes of the Dispute under the Scheme (or any substitute individual notified subsequently as being the Lead Respondent).

**Mediation** means mediation under these Scheme Rules.

**Mediation Claim Form** means the form by that name on the NZDRC Website when the Claim is submitted requesting Mediation, and when completed, it includes all attachments.

**Mediation Response Form** means the form by that name on the NZDRC Website at the time the Response is submitted, and when completed, it includes all attachments.

**Mediator** means a mediator appointed by NZDRC to carry out a Mediation, selected by NZDRC from the list of mediators published on the NZDRC Website at the time of the appointment.

**Mediator's Fee** means the fee agreed between DNC and NZDRC from time to time (and which may be published on the NZDRC Website) to be paid to a Mediator for a Mediation.

**.nz Register** has the meaning given in the .nz Rules.

**.nz Registrar** or **Registrar** has the meaning given to the term 'Registrar' in the .nz Rules.

**.nz Rules** means the rules that govern the .nz domain name space as published on the DNC and InternetNZ websites which may be amended from time to time.

**Notice of Withdrawal** means a notice given by a Party or the Parties withdrawing the Claim or Appeal in, or substantially in, the form appearing on the NZDRC Website.

**NZDRC** means New Zealand Dispute Resolution Centre Limited, a company incorporated under the Companies Act 1993 (company number 2301888). Reference to **NZDRC** in these Scheme Rules includes reference to the NZDRC Registrar acting in that capacity unless the context requires otherwise. NZDRC is the company subcontracted by DNC to administer the Scheme on DNC's behalf.

**NZDRC Registrar** means the individual or individuals authorised by NZDRC from time to time to act as the Scheme's registrar in accordance with these Scheme Rules. The NZDRC Registrar may be contacted at [registrar@nzdrc.co.nz](mailto:registrar@nzdrc.co.nz).

**NZDRC Website** means NZDRC's website, found at [www.nzdrc.co.nz](http://www.nzdrc.co.nz).

**Party** means a party to a Dispute under these Scheme Rules (that is, a Claimant, Appellant or Respondent) and includes their Representatives.

**Reply** means the statement of the Claimant answering the Response (if there was a Response) and includes the substance of the Reply and all related Submissions.

**Reply Form** means the form by that name on the NZDRC Website at the time the Reply is submitted, and when completed includes all attachments.

**Representative** means an individual representing or assisting a Party in any capacity (whether legally qualified or not) and includes a fact or expert witness, translator or interpreter, but excludes a Contractor appointed by NZDRC to provide cultural or accessibility support or assistance to a Party or the Parties.

**Respondent** regarding a Claim means the individual or entity in whose name or on whose behalf a Domain Name is registered, being the Party against whom the Claim is made, or regarding an Appeal means the Party that is not the Appellant.

**Response** means:

- (a) the statement of the Respondent answering the Claim; or
- (b) the statement of the 'other Party' to an Appeal answering the Appellant's Appeal Notice,

and includes the substance of the Response and all related Submissions.

**Response Form** means a Mediation Response Form, an Expert Determination Response Form or an Appeal Response Form.

**Rights** include, but are not limited to, rights enforceable under New Zealand law, but for the purposes of the Scheme exclude rights in a name or term that is a Generic Term or wholly a Descriptive Term.

**Rule** means a provision or section of these Scheme Rules.

**Scheme** means the .nz Dispute Resolution Scheme provided by the DNC as set out in Schedule 2 of the .nz Rules.

**Scheme Rules** means these rules of the Scheme, as amended by DNC from time to time.

**Settlement Agreement** means a written agreement signed by the Parties recording the terms of settlement of the Claim and which the Parties have agreed will be legally binding on them, which must include whether each Domain Name in Dispute is to be transferred or deleted or not.

**Sub-domain** means a name added to a .nz Domain Name by the Domain Name Holder registered directly at the second level. (For example, the Domain Name could be 'shop.nz' and the sub-domain could be 'anyname', being in full 'anyname.shop.nz'.) A Sub-domain is categorised as a Domain Name for the purposes of these Scheme Rules.

**Submission** means:

(a) in Mediation:

- (i) the Mediation Claim Form, and any Mediation Response Form; and
- (ii) any other information or statements (written or oral) or documents provided by the Parties, in response to a request, suggestion or question from the Mediator; or

(b) in Expert Determination or an Appeal:

- (i) the Expert Determination Claim Form, Appeal Notice and any Response Form or Reply Form; and
- (ii) any information or statements (written or oral) or documents provided by the Parties in response to a request, direction or question from the Expert or Appeal Panel.

**Tikanga** broadly means Māori beliefs, protocols, principles, values, and practices that derive from traditional knowledge (mātauranga Māori) and a Māori worldview and traditions.

**Unfair Registration** is defined in Schedule 1.

**Working Day** means:

- (a) a day of the week other than a Saturday, a Sunday, Waitangi Day, Good Friday, Easter Monday, Anzac Day, Matariki, the Sovereign's birthday, and Labour Day;
- (b) a day of the week other than a day in the period commencing on 24 December in a year and ending on 5 January in the following year;
- (c) if Waitangi Day, Anzac Day or Matariki falls on a Saturday or a Sunday, the following Monday;
- (d) any provincial holiday in New Zealand (such as Auckland Anniversary Day) that is observed as a public holiday in the province in which an act is to be done (for example and without limitation, the filing and service of any Claim, Response, Reply or Appeal, or service of a form or notice under these Scheme Rules); and
- (e) if a Party notifies the other Parties, the Mediator or Expert and NZDRG that they reside in a country other than New Zealand, any day that is a public holiday in the country or province in which that Party resides; and
- (f) a Working Day ends at 11:59 pm New Zealand Standard Time (UTC + 12) or New Zealand Daylight Time (UTC + 13) as applicable on that day.

2.2 For clarity, for the purposes of the .nz Rules, each Expert and Appeal Panel is a 'tribunal of competent jurisdiction' or 'Tribunal having jurisdiction' regarding a Domain Name that is the subject of a Dispute.

2.3 Unless the context requires otherwise, in these Scheme Rules, words in the singular include the plural, and words in the plural include the singular, and a part of speech includes all other parts of speech.

2.4 If there is any conflict between Rules, the more specific Rule prevails over the more general Rule unless provided otherwise (for example, regarding the Expert's powers).

## **PART 2: DISPUTE RESOLUTION PROCESSES, RELATIONSHIP WITH OTHER DISPUTE RESOLUTION PROCEDURES AND GENERAL PROVISIONS**

### **3.0 DISPUTE RESOLUTION PROCESSES**

3.1 The Scheme provides two types of dispute resolution processes: Mediation and Expert Determination. An Expert Determination may be subject to an Appeal.

#### **Claimant choice of dispute resolution process**

3.2 When a Claimant submits a Claim, they must elect either Mediation (Part 3) or Expert Determination (Part 4).

#### **Tikanga-based dispute resolution**

3.3 Parties may request NZDRC to facilitate a Tikanga-based process for the resolution of Disputes under the Scheme using Māori beliefs, principles, values, and practices that derive from traditional knowledge (mātauranga Māori) for improved outcomes for Parties. Disputes using a Tikanga-based process are resolved using either Mediation or Expert Determination processes (and any Appeal) provided for in these Scheme Rules in a culturally responsive and respectful way. A Tikanga-based Māori cultural support framework is in place to help guide the application of Tikanga in this respect.

3.4 NZDRC's Tikanga-based approach recognises that Tikanga is not static and can vary in form and application across different rohe (regions). Notwithstanding, there are key Tikanga principles that are universal in nature.

3.5 NZDRC's Tikanga-based approach to dispute resolution services recognises the principles envisaged in Te Tiriti o Waitangi (the Treaty of Waitangi) and affirms the commitment of NZDRC, DNC and InternetNZ to Te Tiriti o Waitangi and its principles, including those of partnership, protection and participation.

3.6 DNC will pay the fee of any Contractor appointed by NZDRC to provide an agreed Tikanga-based approach to the Dispute Resolution Services.

## **4.0 RELATIONSHIP WITH OTHER PROCEEDINGS**

4.1 The operation of the Scheme does not affect any right any individual or entity may have to commence a proceeding in any court or arbitral tribunal or before any decision-making body with jurisdiction, including seeking any interim relief.

4.2 A Party must promptly notify NZDRC:

- (a) of any court, tribunal or other proceedings as soon as it initiates or becomes aware of the proceedings at any time until the Conclusion of the Dispute Resolution Services;
- (b) if the proceedings are discontinued;
- (c) the outcome of those proceedings;
- (d) if the time for lodging appeals has passed and whether any appeal has been lodged or not, and if so, the discontinuance or outcome of the appeal; and
- (e) provide a formal copy of any orders, awards or directions of the court, tribunal or other decision-making body, which may include whether any Domain Name is to be transferred or any Domain Name is to be deleted.

4.3 DNC, NZDRC and any appointed Mediator or Expert will comply with the orders, awards and directions notified to them by a Party. Until the proceedings notified under Rule 4.2 have concluded:

- (a) NZDRC or, if appointed, the Expert or Appeal Panel will suspend the Expert Determination or Appeal process; and
- (b) NZDRC or, if appointed, the Mediator will suspend the Mediation (unless the Parties validly agree otherwise).

### **Consolidation**

4.4 A Party may request NZDRC to, or NZDRC may on its own initiative after consulting with the Parties, consolidate two or more Disputes accepted by NZDRC involving the same or

substantially the same Parties and closely similar domain names into one proceeding. NZDRC's decision on a request for consolidation and any change to the applicable fees is final and binding on the Parties. Parties may be 'substantially the same' where there is a close relationship between them (for example, they are partners, spouses or close relatives, or a director or shareholder of a company and/or the company) or as otherwise decided by NZDRC.

### **Bad faith claims**

- 4.5 If a Claimant has been found to have brought a Claim in bad faith (whether under these Scheme Rules or version 4.2 of the InternetNZ Dispute Resolution Service policy) on three separate prior occasions within a two-year period, NZDRC will not accept any further Claim from that Claimant for a period of two years from the date of the third such finding of bad faith.

## **5.0 GENERAL PROVISIONS**

### **Communications and notices**

#### **Communications must be in writing**

- 5.1 All communications (including any notices, applications, requests, or Submissions that need to be given or served under these Scheme Rules) must be in writing and in English (or in the language of the Mediation or Expert Determination).

#### **All communications to NZDRC**

- 5.2 All communications, including those intended for the Mediator, Expert or Appeal Panel must be addressed to the NZDRC Registrar at [registrar@nzdrc.co.nz](mailto:registrar@nzdrc.co.nz). (If a party does not have access to email, communication by hard copy to NZDRC's physical address on the NZDRC Website will be accepted, provided it is received within any applicable time limit). The NZDRC Registrar will send them to the recipient and copy them to the other Party and/or participants as appropriate.

#### **Electronic communication (email, etc)**

- 5.3 A communication must be given or served by Electronic communication (unless a party does not have access to any means of Electronic communication, in which case communication by hard copy will be accepted, provided it is received within any

applicable time limit). This Rule applies whether or not any contract relevant to the Claim allows Electronic communication.

5.4 A Party can nominate an email address or other reasonable means of Electronic communication as their preferred method of communication. The nomination and any subsequent change must be notified to NZDRC, the Mediator, the Expert, the Appeal Panel, and every other Party.

5.5 If a nominated email address or other means of Electronic communication is notified, any communication must be given or served in that manner, and if delivered or served in that manner, will be considered as having been received by the Party.

5.6 If no email address is nominated or other means of Electronic communication or the nominated address or means of Electronic communication does not appear to be valid (for example, NZDRC receives a system-generated message to the effect that the Electronic communication cannot be delivered to that address) NZDRC may, but is not obliged to send an Electronic communication:

- (a) to the email address of the Domain Name Holder specified in the .nz Register;
- (b) to postmaster@<the Domain Name in dispute>; or
- (c) if the Domain Name resolves to an active web page (other than a generic page which DNC concludes is maintained by an ISP for parking Domain Names), to any e-mail address shown or e-mail links on that web page so far as this is practicable,

and any communication delivered or served in that manner will be considered as having been received by the Party. If a Party does not have access to email or other means of Electronic communication, NZDRC may deliver a communication by hard copy to the Party's physical address advised to NZDRC or appearing in any public register (for example, the Companies Office Register). Any communication delivered or served in that manner will be considered as having been received by the Party.

### **Calculation of time**

5.7 Unless otherwise agreed between the Parties:



- (a) any period of time under these Scheme Rules is to be calculated in accordance with New Zealand Standard Time (UTC + 12) or New Zealand Daylight Savings Time (UTC + 13) as applicable; and
- (b) when calculating any period of time referred to in these Scheme Rules, the day of the act or event is not included in the period of time. The period starts on the first Working Day after the date of the act or event.

5.8 Time periods under these Scheme Rules are calculated in Working Days. If a period is agreed or specified that is not calculated in Working Days, and the last day of such a period is not a Working Day, the period will be extended to the first Working Day that follows.

### **No storage of documents**

- 5.9 All documents must be submitted by Electronic communication in soft copy. Hard copy documents received by NZDRC or a Dispute Resolution Practitioner may be destroyed. Soft copy documents will be stored for the period required by law and afterwards may be deleted.
- 5.10 These Rules are subject to any legal requirement regarding the retention of records and, without limitation, to the provisions of the Privacy Act 2020.

### **Data protection**

- 5.11 A Mediator, Expert, Appeal Panel or NZDRC may issue directions in relation to information security or data protection (for example, by implementing a cybersecurity protocol, requiring the use of a particular electronic information system, or adopting measures to protect personal information). The directions are binding on the Parties and, in the case of a direction issued by NZDRC, on the Mediator, Expert or Appeal Panel, except to the extent they conflict with any applicable law or other mandatory provision.

### **Authority of NZDRC**

- 5.12 All decisions of NZDRC under these Scheme Rules (for example, a decision to appoint a Dispute Resolution Practitioner or a Contractor or revoke their appointment) are administrative in nature. Such decisions are final and binding on the Parties (including their Representatives), the Dispute Resolution Practitioners and the Contractors and are

not subject to appeal to NZDRC. NZDRC is not required to explain the reasons for its decision.

### **Scheme Fees**

- 5.13 The Scheme Fees published on the NZDRC Website may (among other things):
- (a) provide for different fee levels according to the nature and complexity of the Dispute, for example, where there are six or more Domain Names and/or multiple Claimants and/or Respondents;
  - (b) specify the maximum amount of time allotted for Mediation that will be paid for by DNC; and
  - (c) be varied by agreement between NZDRC and DNC at any time. Any changes will be notified via the NZDRC Website.

### **NZDRC Website**

- 5.14 NZDRC reserves the right to make reasonable changes to the NZDRC Website. Modifications will be effective and binding on the date they are made or as specified on the NZDRC Website. With DNC's approval, NZDRC may change the format of the forms and may combine one or more forms.

### **Scheme Rule modifications**

- 5.15 DNC reserves the right to amend the Scheme Rules at any time. DNC may make amendments without any requirement to consult where:
- (a) DNC is acting in pursuance of a statutory or regulatory requirement or a court order;
  - (b) the nature of the amendment is technical and not substantive; or
  - (c) it is necessary in the public interest that the amendment is made urgently.

In all other circumstances, DNC will follow a process of open public consultation in accordance with Rule 5.16 before amending the Scheme Rules.

- 5.16 DNC will publicly notify on its website the process it will follow when consulting on a proposed amendment, which, at a minimum, will include DNC:
- (a) publishing a draft of the proposed amendments on its website;
  - (b) providing not less than 30 calendar days for feedback to be submitted on the proposed amendments;
  - (c) considering any feedback submitted; and
  - (d) publishing the final Scheme Rules determined by DNC and advising the date on which the proposed amendments are effective.

## **PART 3: MEDIATION**

### **6.0 HOW TO START MEDIATION**

#### **Claim submitted by Claimant**

- 6.1 A Dispute can be referred to Mediation by the Claimant submitting a Mediation Claim Form to NZDRC via the NZDRC Website. The Claim may concern more than one Domain Name, provided all Domain Names are registered in the name of the same Respondent (and see Rule 5.13(a) and the NZDRC Website regarding fees for Claims regarding multiple Domain Names).
- 6.2 The Claimant must provide all information required by the Mediation Claim Form and attach all necessary documents.

#### **Costs of the Mediation**

- 6.3 The DNC will pay the Mediator's Fee via NZDRC up to any maximum amount or number of hours allotted for a Mediation by the DNC, as set out in the NZDRC Website.
- 6.4 The Parties must pay their own Costs of the Mediation.
- 6.5 The Mediator cannot require a Party to pay another Party's Costs, but the Parties may agree to this in any Settlement Agreement.

## **Acceptance of the Dispute by NZDRC**

- 6.6 NZDRC will not accept a Dispute if the Mediation Claim Form is missing any of the required information or otherwise does not comply with these Scheme Rules. NZDRC will give the Claimant three Working Days to provide an updated Mediation Claim Form that contains all required information, after which NZDRC will advise the Claimant whether the Dispute is accepted or rejected (including reasons for any rejection).
- 6.7 As soon as reasonably practicable and in any event within five Working Days of a Dispute being accepted and the Claimant being notified, NZDRC will:
- (a) notify and provide a copy of the Mediation Claim Form to the Respondent; and
  - (b) instruct DNC to put a Compliance Lock on the Domain Name until the Conclusion of the Dispute Resolution Services (at which time DNC will remove the Compliance Lock from the Domain Name at NZDRC's direction).
- 6.8 DNC will activate the Compliance Lock as soon as reasonably practicable after receiving the direction from NZDRC.

## **Response submitted by Respondent**

- 6.9 The Respondent may provide a Response to the Claim by submitting a Mediation Response Form within 10 Working Days after receipt of the Mediation Claim Form (unless an extension of time is granted under Rule 6.12). If the Response is late, it will be disregarded.
- 6.10 The Respondent must provide all information required by the Mediation Response Form and attach all necessary documents.
- 6.11 NZDRC will send the Mediation Response Form to the Claimant if the Response complies with the above Rules; otherwise, it will be rejected.

## **Changes to Response Period**

- 6.12 The NZDRC Registrar may allow additional time for the Response if they consider it reasonably required for any reason (for example, due to the size or complexity of the Claim and the Respondent's insufficient time to prepare a Response).

## **Appointment of the Mediator**

- 6.13 NZDRC will appoint a Mediator if a Response is received that meets the requirements of these Scheme Rules. If a Response is not received, Mediation cannot be commenced. The Claimant may choose to instead submit a Dispute for Expert Determination under Part 4.
- 6.14 NZDRC, at its discretion, will appoint a Mediator (and, if needed, any replacement Mediator) by rotation from the list of mediators on the NZDRC Website, subject to their availability and independence. No Party may challenge a Mediator's appointment, except under the Rules below regarding Mediator independence, for example on the grounds of an actual conflict of interest.
- 6.15 NZDRC will use its best endeavours to appoint a Mediator within five Working Days of a valid Response and will notify the Parties of the appointment when it is made.

## **Party Representatives**

- 6.16 A Party may (but is not required to) appoint one or more Representatives to provide advice or support in relation to a Mediation.
- 6.17 Each Representative must agree to preserve the confidentiality of the Mediation and must sign NZDRC's standard form Confidentiality Agreement. A copy of the signed Confidentiality Agreement must be provided to NZDRC (and NZDRC will provide it to the other Party and the Mediator) as a condition of the individual participating in the Mediation.

## **7.0 THE ROLE OF THE MEDIATOR**

- 7.1 The Mediator does not decide or impose a solution but instead helps the Parties find their own solution. The Mediator's role is to assist the Parties in resolving their Dispute.
- 7.2 The Mediator must conduct the Mediation in private and in accordance with these Scheme Rules and any applicable New Zealand law. In all other respects, the Mediator may conduct the Mediation in any manner they think fit, having regard to the purpose of the Scheme (Rule 1.4), the nature of the issues in dispute, the overall circumstances of

the Parties, and the principles of accessibility, independence, fairness, accountability, efficiency, and effectiveness.

- 7.3 The Parties must cooperate in good faith with the Mediator and every other Party to the Dispute in attempting to settle the Dispute.

### **Mediator independence**

- 7.4 The Mediator must be an independent, suitable and impartial individual and must not be an adviser or advocate for anyone involved in the Dispute. While the Parties may have candid discussions with them, the Mediator must remain impartial and neutral and will not give legal advice or decide for any Party how to resolve the Dispute.

- 7.5 Any individual requested to act as a Mediator must provide NZDRC with a written declaration:

- (a) confirming that, to the best of their knowledge, they are ready, willing and able to provide sufficient time, diligence and effort to ensure the conduct of the Mediation in a timely manner and in accordance with these Scheme Rules;
- (b) advising whether, to the best of their knowledge, there are any circumstances (past or present) that are likely to give rise to justifiable doubts as to their impartiality or independence in the eyes of any of the Parties; and
- (c) undertaking to comply with the continuing duty to disclose any circumstances arising which may be likely to give rise to justifiable doubts about their suitability, impartiality or independence in the eyes of any of the Parties (see Rule 10.5).

- 7.6 The Mediator has a continuing duty to immediately disclose to the Parties and NZDRC any circumstances arising which may be likely to give rise to justifiable doubts about their suitability, impartiality or independence in the eyes of any of the Parties. This duty starts at the time of the Mediator's appointment and continues until the Mediation ends.

## **8.0 MEDIATION PROCESS**

- 8.1 The Mediator will fix a timetable for the Mediation in consultation with the Parties.

- 8.2 The Mediation is a confidential process and will be held without prejudice to any other legal rights or remedies available to the Parties.
- 8.3 Any communication, whether written or spoken, made in connection with a Mediation is privileged, whether in accordance with the Evidence Act 2006, the common law or otherwise.
- 8.4 The Mediator will conduct the Mediation by telephone and/or video conference or any combination of those methods that the Mediator considers appropriate.
- 8.5 The Mediator will help the Parties to:
- (a) identify and explore issues to be resolved;
  - (b) understand each other's viewpoint;
  - (c) share information with each other;
  - (d) develop options to resolve the issues; and
  - (e) reach an agreement that accommodates the interests and needs of the Parties.
- 8.6 The Mediation Claim Form will be the Claimant's opening position statement, and the Mediation Response Form will be the Respondent's opening position statement in the Mediation. The Parties are strongly encouraged to comply with the Mediator's requests or suggestions to provide Submissions and to share information with each other.
- 8.7 The Mediator may talk or meet with the Parties separately and/or jointly at any time before the Mediation ends. A Party may communicate confidential information to the Mediator and the Mediator will not disclose that information to the other Party without the disclosing Party's consent.
- 8.8 All participants in the Mediation must keep all communications (written or oral) and documents disclosed during the Mediation confidential. They must not disclose them to any non-party except as set out under 'Permitted Disclosures' in Part 6 below or unless another exception applies under these Scheme Rules or at law.

- 8.9 The Parties may not, at any time before, during or after the Mediation, call the Mediator or NZDRC to testify in any legal or administrative proceeding concerning the Dispute or the nature and extent of any Settlement Agreement reached as a result of the Mediation.
- 8.10 The Parties may not call for the records, notes or work product of the Mediator or NZDRC for any purpose, including any legal or administrative proceedings that might arise before, during or after the Mediation. However, any Settlement Agreement resulting from the Mediation that is intended by the Parties to have legal effect and to be legally enforceable may be subpoenaed, called for or produced in any proceedings to which it is relevant, subject to any valid agreement by the Parties to the contrary.

## **9.0 END OF MEDIATION**

### **Settlement**

- 9.1 If the Parties agree on all matters in dispute, such agreement must be recorded in a Settlement Agreement stating (among other things) which Party will be the Domain Name Holder or whether the Sub-domain registration will stand (as applicable). The Parties must notify the Mediator, and the Mediator must notify NZDRC, that a Settlement Agreement has been signed and any terms of the Settlement Agreement relevant to Rule 9.2 below. The Mediation ends when NZDRC receives any such Settlement Agreement.
- 9.2 NZDRC will notify DNC, and DNC will notify the .nz Registrar, of the terms of any Settlement Agreement notified to them that require DNC or the .nz Registrar to take action to give effect to the settlement.
- 9.3 Any action required to be taken by DNC or the .nz Registrar to give effect to the Settlement Agreement will be completed by DNC or the .nz Registrar as soon as reasonably practicable (and DNC will remove the Compliance Lock as necessary to enable the action to be taken). DNC will ensure that DNC and the .nz Registrar uses their best endeavours to fulfil their duties and obligations within five Working Days after receiving the notification by DNC. DNC will notify NZDRC when the required actions are completed.
- 9.4 Where the Settlement Agreement requires a change of Domain Name Holder, the new Domain Name Holder is deemed to have accepted the .nz Registrar's standard terms and conditions.



### **Withdrawal by the Claimant**

- 9.5 The Claimant can withdraw the Claim at any time before Mediation is completed by giving NZDRC a Notice of Withdrawal. The Claimant may resubmit a new Claim for the same or a substantially similar Dispute provided the Claim has not been settled by the Parties and is not a resubmission of a Claim that has been resolved by Expert Determination or Appeal (as determined under Rule 10.9).

### **No settlement**

- 9.6 The Mediator may end the Mediation on their own initiative if:
- (a) a Party is no longer willing or able to participate in the Mediation; or
  - (b) The mediator considers it unnecessary or impossible to continue the Mediation because they feel they cannot assist the Parties in resolving the Dispute or the Mediation will exceed the allotted number of hours or the maximum period.
- 9.7 Unless terminated earlier, the Mediation ends if agreement on all matters is not reached within 10 Working Days or within the allotted number of hours available for Mediation (whichever occurs first) after the Mediator is appointed.
- 9.8 If the Mediation is terminated, the Mediator will notify the Parties and NZDRC. Termination does not prevent the Complainant from submitting a Dispute for Expert Determination.

## **PART 4: EXPERT DETERMINATION**

### **10.0 HOW TO START EXPERT DETERMINATION**

#### **Claim submitted by Claimant**

- 10.1 A Dispute can be referred to Expert Determination by the Claimant submitting an Expert Determination Claim Form to NZDRC. The Claim may concern more than one Domain Name, provided all Domain Names are registered in the name of the same Respondent (and see Rule 5.13(a) and the NZDRC Website regarding fees for Claims regarding multiple Domain Names or multiple parties).

- 10.2 The Claimant must provide all information required by the Expert Determination Claim Form and attach all necessary documents.

### **Costs of the Expert Determination**

- 10.3 The Claimant must pay the Expert's Fee before the Expert Determination can commence.
- 10.4 The Parties must pay their own Costs of the Expert Determination.
- 10.5 The Expert cannot order a Party to pay another Party's Costs.
- 10.6 The Claimant must pay NZDRC the Expert's Fee within two Working Days of submitting the Expert Determination Claim Form.

### **Acceptance of the Dispute by NZDRC**

- 10.7 NZDRC will not accept a Dispute if the Expert Determination Claim Form is missing any of the required information, the Expert's Fee has not been paid, or the Dispute otherwise does not comply with these Scheme Rules. NZDRC will give the Claimant three Working Days to provide an updated Expert Determination Claim Form that contains all required information or to pay the Expert's Fee, after which NZDRC will advise the Claimant whether the Dispute is accepted or rejected (including reasons for any rejection). If the Claim is rejected because the Expert's Fee has not been paid, the Claim is deemed to be withdrawn.

### **Resubmitted Claims are invalid**

- 10.8 A Claim is not valid if it is in substance the resubmission of an earlier accepted Claim or Dispute that has been settled by the Parties or where a Determination has been issued in any previous Expert Determination or Appeal. There may be Appeal rights in relation to the Determination, but otherwise, the Dispute will not be reconsidered, and the Claim will be rejected. The Expert's Fees paid will be forfeited.
- 10.9 In determining whether a Claim is in substance the resubmission of an earlier Claim or Dispute, NZDRC or, if appointed, the Expert will consider whether:
- (a) the Claimant, the Respondent and the Domain Name at issue are the same as in the earlier case;

- (b) the substance of the Claim relates to acts that occurred before or after the close of Submissions in the earlier case;
- (c) if the substance of the Claim relates to acts that occurred before the close of Submissions in the earlier case, there are any exceptional grounds for the rehearing or reconsideration, bearing in mind the need to protect the integrity and operation of the Scheme; and
- (d) the substance of the Claim relates to acts that occurred after the close of Submissions in the earlier Determination (acts on which the re-filed Claim is based should not be, in substance, the same as the acts on which the previous Claim was based).

### **Notification to Respondent**

- 10.10 As soon as reasonably practicable and in any event within five Working Days of a Dispute being accepted and notified to the Claimant, NZDRC will:
- (a) notify and provide a copy of the Expert Determination Claim Form to the Respondent; and
  - (b) instruct DNC to put a Compliance Lock on the Domain Name until the Conclusion of the Dispute Resolution Services (at which time DNC will remove the Compliance Lock).
- 10.11 DNC will activate the Compliance Lock as soon as reasonably practicable after receiving the direction from NZDRC.

### **Response submitted by Respondent**

- 10.12 The Respondent may provide a Response to the Claim by submitting an Expert Determination Response Form within 10 Working Days after receipt of the Expert Determination Claim Form (unless an extension of time is granted under Rule 10.18). If the Response is late, it will be disregarded.
- 10.13 The Respondent must provide all information required by the Expert Determination Response Form and attach all necessary documents.

- 10.14 NZDRC will send the Response to the Claimant if it complies with the above Rules; otherwise, it will be rejected.

### **Reply**

- 10.15 The Claimant may provide a Reply in answer to the Response sent to it by NZDRC by submitting an Expert Determination Reply Form within five Working Days after receipt of the Expert Determination Response Form (unless an extension of time is granted under Rule 10.18). If the Reply is late, it will be disregarded.
- 10.16 The Reply must be strictly in reply to the Response. It cannot raise any new issues. It may include supporting documents and new evidence only to the extent that they are relevant to the Reply.
- 10.17 NZDRC will send the Reply to the Respondent if it complies with the above Rules; otherwise, NZDRC will reject it.

### **Changes to Response Period or Reply Period**

- 10.18 The NZDRC Registrar or, if an Expert has been appointed, the Expert may allow additional time for the Response or the Reply if the NZDRC Registrar or the Expert considers that additional time is reasonably required for any reason (for example, due to the size or complexity of the Claim and the Respondent has insufficient time to prepare a Response). An extension of time can be made at the request of either Party. However, a request must be made before the expiry of the relevant period. The NZDRC Registrar and Expert must disregard any late request unless there are extenuating circumstances.

### **Appointment of the Expert**

- 10.19 NZDRC will appoint an Expert to determine the Dispute once the Dispute has been accepted and the Claimant has paid the Expert's Fee or on receipt of a Response or Reply, or when the time for a Response or Reply has elapsed, whichever NZDRC considers appropriate. However, NZDRC will not appoint an Expert or take any other steps regarding the Claim until the Expert's Fee is paid in full.
- 10.20 NZDRC will use its best endeavours to appoint an Expert within five Working Days after payment of the Expert's Fee, receipt of a Response or Reply, or when the time for a

Response or Reply has elapsed, whichever NZDRC considers appropriate. NZDRC will notify the Parties of the appointment when it is made.

- 10.21 NZDRC, at its discretion, will appoint an Expert (and, if needed, any replacement Expert) by rotation from the list of experts on the NZDRC Website, subject to their availability and independence. No Party may challenge an Expert's appointment, except under the Rules below regarding Expert independence, for example, on the grounds of an actual conflict of interest.

### **Party Representatives**

- 10.22 A Party may (but is not required to) appoint one or more Representatives to provide advice or support in relation to an Expert Determination. The manner of appointment differs before and after the Expert is appointed to ensure that the appointment does not create a possible conflict of interest once an Expert is appointed.
- 10.23 Before an Expert is appointed, a Party must notify NZDRC and every other Party of the name and contact details of any Representative they have appointed for the Expert Determination.
- 10.24 Once an Expert is appointed:
- (a) a Party who wants to appoint a Representative or change their Representative must notify the Expert, NZDRC and every other Party of the name and contact details of their proposed Representative;
  - (b) the Expert's prior approval must be obtained before that proposed Representative is appointed; and
  - (c) the Expert may withhold approval if they consider (in their discretion) that the individual's appointment could create an apparent or actual conflict of interest.
- 10.25 Each Representative must agree to preserve the confidentiality of the Expert Determination process and must sign NZDRC's standard form Confidentiality Agreement. A copy of the signed Confidentiality Agreement must be provided to NZDRC (and NZDRC will provide it to the other Party and the Expert) as a condition of the individual participating in the Expert Determination.

## **11.0 ROLE OF THE EXPERT**

- 11.1 The Expert makes a Determination that is binding on the Parties, subject to any Appeal under Rule 14.0 of these Scheme Rules, any order of the courts or agreement of the Parties.
- 11.2 The Expert must conduct the Expert Determination in private and in accordance with these Scheme Rules and applicable New Zealand law, including the principles of natural justice. In all other respects, the Expert may conduct the Expert Determination in any manner they think fit, having regard to the purpose of the Scheme (Rule 1.4), the nature of the issues in dispute, the overall circumstances of the Parties, and the principles of accessibility, independence, fairness, accountability, efficiency, effectiveness, and natural justice.
- 11.3 The Expert has the authority and powers set out in these Scheme Rules, including in Rule 12.0 below.
- 11.4 All communication with the Expert must be via NZDRC: the Parties and their Representatives must not communicate directly with the Expert unless directed otherwise by the Expert or NZDRC.

### **Expert independence**

- 11.5 The Expert must be an independent, suitable and impartial individual and will not be an adviser or advocate for anyone involved in the Dispute or an individual who has been a Mediator regarding the Dispute. The Expert must remain impartial and neutral, and they will not give advice to the Parties.
- 11.6 Any individual requested to act as an Expert must provide NZDRC with a written declaration:
- (a) confirming that, to the best of their knowledge, they are ready, willing and able to provide sufficient time, diligence and effort to ensure the conduct of the Expert Determination in a timely manner and in accordance with these Scheme Rules;

- (b) advising whether, to the best of their knowledge, there are any circumstances (past or present) that are likely to give rise to justifiable doubts as to their impartiality or independence in the eyes of any of the Parties; and
- (c) undertaking to comply with the continuing duty to disclose any circumstances arising which may be likely to give rise to justifiable doubts about their suitability, impartiality or independence in the eyes of any of the Parties.

11.7 The Expert has a continuing duty to immediately disclose to the Parties and NZDRG any circumstances arising which may be likely to give rise to justifiable doubts about their suitability, impartiality or independence in the eyes of any of the Parties. This duty starts at the time of the Expert's appointment and continues until the Expert Determination ends.

## **12.0 EXPERT DETERMINATION PROCESS**

### **What the Expert can determine**

12.1 The Expert can determine:

- (a) a Dispute, and the matters set out in the Claim and any Response or Reply;
- (b) the Expert's jurisdiction to determine a matter (for example, if there is a dispute about the eligibility of the Dispute, the Expert can determine that); and
- (c) any matters necessary to carry out the Expert's role under these Scheme Rules, including but not limited to those in this Rule 12.

12.2 In making a Determination, the Expert must have regard to:

- (a) the Claim;
- (b) any Response or Reply that is served in time; and
- (c) any other Submission provided by the Parties to the Expert provided it has not been generated within Mediation (unless otherwise agreed by the Parties).

## **Evidence and admissibility**

- 12.3 Each Party will bear the burden of proving the facts relied upon to support its Claim or any affirmative defence, in each case on the balance of probabilities (more likely than not).
- 12.4 The Expert will determine the admissibility, relevance, weight, and materiality of any Submissions offered by the Parties.
- 12.5 The Expert may receive any Submission that may, in their opinion, assist them in dealing effectively with the Claim before them, whether or not the Submission would be admissible in a court of law, provided it has not been generated within Mediation (unless otherwise agreed by the Parties). The Expert may decline to receive any document or other Submission if the Expert believes it is in the overall interests of justice to exclude that document or other Submission from consideration.

## **Confidentiality**

- 12.6 Expert Determination is a confidential process. The Parties must keep all communications (written or oral) and documents disclosed during the Expert Determination process confidential. They must not disclose them to any non-party except as set out under 'Permitted Disclosures' in Part 6 below or unless another exception applies under these Scheme Rules or at law.
- 12.7 The Parties may not, at any time call the Expert or NZDRC to testify in any legal or administrative proceeding concerning the Dispute or the nature and extent of any Determination. The Parties may not call for the records, notes or work product of the Expert or NZDRC for any purpose.

## **Powers of the Expert**

### **Power to make directions, rulings and requests**

- 12.8 The Expert can make any directions, rulings or requests that they think fit in the conduct of the Expert Determination process. This is a general power and the specific powers under Rule 12.11 do not limit this general power. Directions, rulings or requests can be made at the request of any Party or on the Expert's own initiative.



### **Expert may draw inferences and determine the Claim based on available information**

- 12.9 The Expert's power to determine a Claim is not affected by a Party's failure to comply with these Scheme Rules, respond to any requests or comply with any directions, rulings or requests. The Expert may make a Determination based on the information available to them.
- 12.10 The Expert may draw any reasonable inferences they think fit from any such failure and give any weight they think fit to information that was asked for or directed to be provided but was provided later than requested or directed.

### **Specific powers**

- 12.11 Without limiting the Expert's powers, the Expert may:
- (a) determine that the Claim was brought in bad faith (for example, in an attempt at Domain Name Hijacking); and
  - (b) have regard to published determinations of other disputes (but is not required to do so). Published determinations are not binding precedents but are of persuasive value only. Determinations of an Appeal Panel are more persuasive than determinations of a sole Expert.
- 12.12 In making their Determination, the Expert must not consider any evidence of acts or omissions amounting to Unfair Registration or Fair Use that occurred more than three years before the date of the Claim.

### **The Determination will be made on the papers**

- 12.13 The Expert will determine the Dispute based on the Submissions (but will disregard any late Response or Reply).
- 12.14 An Expert Determination is not an arbitration. The provisions of the Arbitration Act 1996 (or any substituted Act) do not apply to any Expert Determination under these Scheme Rules.

## **Substance of Determination**

- 12.15 The Expert will Determine all matters in the Dispute, including the elements relevant to the Claim from among those listed in Rule 1.5. The Determination must contain the reasons for the Determination, including addressing each of the relevant elements according to the scope of the Dispute.
- 12.16 The extent of reasons that the Expert gives will be proportionate to the time available to the Expert to make the Determination and the nature, complexity and number of Disputes or matters for Determination.
- 12.17 A Claim will be either dismissed or accepted. If accepted, the Expert will order the Domain Name(s) to be transferred to the Claimant and/or that the Domain Name Holder will delete the applicable Sub-domain and not reinstate it at any time.
- 12.18 If the Domain Name Holder does not comply with the order to delete the Sub-domain within three Working Days after the expiry of the period for an Appeal from the Determination, DNC must suspend the related Domain Name until the order is complied with.

## **Form of Determination**

- 12.19 The Determination must be in writing and be signed and dated by the Expert.
- 12.20 A failure to sign and date a Determination does not affect the validity of a Determination. The Expert will use their best endeavours to fix any failure to sign or date a Determination within five Working Days of receiving notice from NZDRC of the defect.
- 12.21 The Expert must submit the Determination in draft form to NZDRC for scrutiny before signing a Determination. Without affecting the Expert's independence and autonomy, NZDRC may:
- (a) make recommendations directed to identifying any clerical or typographical errors or errors of a similar nature in the Determination; and
  - (b) draw to the Expert's attention any points of substance or internal inconsistencies in the Determination.

### **Timing of Determination**

- 12.22 The Expert must make their Determination and issue it to NZDRC within 10 Working Days after the end of the Response Period or, if there is a Response, the end of the Reply Period.
- 12.23 NZDRC will give the Determination to the Parties and DNC as soon as practicable and in any event within five Working Days after the Expert has signed it. The Expert, or NZDRC at the Expert's request, may correct any clerical or typographical errors or any errors of a similar nature in the Determination on their own initiative. Any corrections of this kind must be made within five Working Days of the date on which a copy of the Determination is given to the Parties. No additional Fees can be charged for the correction.

### **End of Expert Determination**

- 12.24 The Expert Determination ends when a Determination is given to the Parties and any time for an Appeal Notice to be filed has expired, or when the Dispute is settled or the Claim is withdrawn.
- 12.25 The death of a Party does not end the Expert Determination, and the deceased individual will be substituted with their legal representative. This Rule does not apply if the Parties have agreed otherwise or if a cause of action is extinguished by law on the death of an individual.

### **Withdrawal by the Claimant**

- 12.26 A Claim can be withdrawn unilaterally by the Claimant by providing a Notice of Withdrawal to NZDRC at any time before a Determination is issued.
- 12.27 If the Claimant withdraws the Claim, the Expert does not make a Determination. No portion of the Expert's Fee is refunded.

## **13.0 EFFECT AND ENFORCEMENT OF DETERMINATION**

### **Determination is binding**

- 13.1 The Determination is binding on the Parties unless and until any Appeal is determined (see Part 5 below) or the Dispute is finally determined by proceedings in a court, arbitral tribunal or other decision-making body (see Rule 4.2).
- 13.2 NZDRRC will notify DNC, and DNC will remove the Compliance Lock to enable either DNC or the .nz Registrar to take action to give effect to the Determination.
- 13.3 DNC will use its best endeavours to ensure that any action required to be taken by DNC or the .nz Registrar to give effect to the Determination is completed as soon as practicable:
- (a) if no Appeal is lodged within the Appeal Period, following the end of the Appeal Period; or
  - (b) if an Appeal is lodged within the Appeal Period, after the Appeal is Determined under these Scheme Rules.
- 13.4 Where the Determination requires a change of Domain Name Holder, the new Domain Name Holder is deemed to have accepted the .nz Registrar's standard terms and conditions (unless the terms of the Determination require something different).

### **Publication**

- 13.5 NZDRRC and/or DNC will publish all Determinations, together with a case summary, which will include the Domain Name and may include the names of the Parties to the Dispute (but excluding any contact details of the Parties). The Parties consent to the Determination and case summary being published.

## **PART 5: APPEALS**

### **14.0 APPEAL PROCESS**

14.1 A Party has the right to Appeal a Determination to an Appeal Panel within 10 Working Days after receipt of the Determination from NZDRC. A Party may do so by submitting an Appeal Notice to NZDRC and paying the Appeal Panel's Fee in full at the time of submitting an Appeal Notice.

14.2 The Appeal Notice must provide detailed reasons or grounds for the Appeal, but it cannot contain any new evidence unless NZDRC or the Appeal Panel considers that it is in the interests of justice to admit that new evidence.

#### **Costs of the Appeal**

14.3 The Appellant must pay the Appeal Panel's Fee before commencement of the Appeal.

14.4 The Parties must pay their own Costs.

14.5 The Appeal Panel cannot order a Party to pay another Party's Costs.

#### **Appeal Process**

14.6 NZDRC will send the Appeal Notice to the other Party within three Working Days of receiving the Appeal Notice and payment of the Appeal Panel's Fee in full.

14.7 The other Party may provide a Response to the Appeal Notice by submitting an Appeal Response Form within five Working Days from the date of receipt or deemed receipt of the Appeal Notice. The Response must explain why the Appeal should be rejected. It cannot include new evidence. The Appellant has the right to submit a Reply provided it is limited to addressing the matters in the Response only.

14.8 After the Response or, if there has been a Response, the Reply is submitted (or the deadline to submit the Response or Reply passes), NZDRC will appoint an Appeal Panel to determine the Appeal. Subject to Rule 14.9 below, the Appeal Panel will comprise three Experts selected by NZDRC.

- 14.9 The Expert that issued the Determination that the Appeal relates to must not be appointed to the Appeal Panel.
- 14.10 The Appeal Panel has the authority to hear Claims anew. This means that the Appeal Panel will consider the Claim from the beginning and will review all evidence and other Submissions as if the Claim is being heard for the first time.
- 14.11 The Appeal will be determined on the papers, and there will be no hearing. The Appeal process will be conducted in private.
- 14.12 The provisions of these Scheme Rules relating to Expert Determination, with necessary modifications (and subject to the Rules in this Part 5), will apply to an Appeal as if references to the 'Expert' are references to the 'Appeal Panel' and on the basis that the Appeal process is an Expert Determination. However, there is no right of appeal under these Scheme Rules regarding the Determination of the Appeal Panel.

### **Publication**

- 14.13 NZDRC and/or DNC will publish all Determinations, together with a case summary, which will include the Domain Name and may include the names of the Parties to the Dispute (but excluding any contact details of the Parties). The Parties consent to the Determination and case summary being published.

### **Withdrawal by the Appellant**

- 14.14 An Appeal can be withdrawn unilaterally by the Appellant at any time before a Determination is issued by providing a Notice of Withdrawal to NZDRC.
- 14.15 If the Appellant withdraws the Appeal, the Appeal Panel does not make a Determination on the substantive matters. No portion of the Appeal Panel's fee is refunded. The Appeal Panel may not make a Determination on Costs against or in favour of any Party.
- 14.16 The Appellant cannot submit a new Appeal against the Expert Determination.

## **PART 6: OTHER PROVISIONS**

### **15.0 PERMITTED DISCLOSURES**

#### **Disclosure under these Rules, to pursue a legal right or comply with any law**

- 15.1 Confidential information can be Disclosed by a Party to the Dispute Resolution Services to a non-party only to the extent:
- (a) necessary to enforce a Settlement Agreement (including, to the extent that it is disputed, whether there is a concluded Settlement Agreement); or
  - (b) necessary to comply with any law or other compulsory process (for example, a court order);
  - (c) as agreed in writing by the Party that owns or produced the confidential information.
- 15.2 A Party must notify NZDRC and the other Party (and NZDRC will notify the Mediator or Expert) of full details of and the reason for an intended Disclosure as soon as practicable before they intend to make the Disclosure.

#### **Other Disclosures**

- 15.3 NZDRC and DNC may collect information relating to Mediations or the use of any support services for the Dispute Resolution Services for business analysis, statistical, research and reporting purposes and may publish that information in anonymised or summary form that could not reasonably be expected to identify any particular Party, Representative, individual, entity or Dispute Resolution Practitioner.
- 15.4 NZDRC and DNC may publish Determinations and case summaries excluding any contact details of Parties.

### **16.0 EXCLUSION OF LIABILITY AND INDEMNITY**

- 16.1 The purpose of this Rule is to give a Contractor, Mediator, Expert, Appeal Panel, InternetNZ, DNC, and NZDRC the widest immunity from liability that the law will allow. Any reference to InternetNZ, DNC or NZDRC in these clauses includes a reference to

the agents, employees and contractors of InternetNZ, DNC and NZDRC (including the NZDRC Registrar, and the .nz Registrar).

- 16.2 A Contractor, Mediator, Expert, Appeal Panel, InternetNZ, DNC and NZDRC are not liable for any act done or not done in relation to Dispute Resolution Services or these Scheme Rules. The Parties release each such individual or entity from all liability of any kind (including negligence, misrepresentation, breach of contract or breach of duty of any kind, including fiduciary or equitable). This release does not apply to the obligations regarding confidentiality, privacy and privilege in these Rules or to the extent that an individual or entity has acted fraudulently or has intentionally breached any obligation or duty.
- 16.3 If a claim is brought against a Contractor, Mediator, an Expert, an Appeal Panel member, InternetNZ, DNC or NZDRC despite Rule 16.2, the Parties (jointly and severally) indemnify each such individual or entity in respect of that claim.
- 16.4 Words of a Contractor, Mediator, Expert, an Appeal Panel member, InternetNZ, DNC or NZDRC made or given during the course of Dispute Resolution Services (whether written statements or oral comments) cannot be used in any action for defamation, libel, slander, or any similar claim.

## **SCHEDULE 1**

### **UNFAIR REGISTRATION GUIDANCE**

#### **1.0 WHAT IS UNFAIR REGISTRATION?**

1.1 **Unfair Registration** in relation to a Domain Name means it either:

- (a) was registered or otherwise acquired in a manner which, at the time when the registration or acquisition took place, took unfair advantage of or was unfairly detrimental to the Claimant's Rights; or
- (b) has been, or is likely to be, used in a manner which is not **Fair Use**,



having regard to all relevant factors, which may include some or all the factors set out in this Schedule.

1.2 **Fair Use** of the Domain Name means that it has not been, and is not likely to be, used by the Domain Name Holder in a manner that took unfair advantage of or was unfairly detrimental to the Claimant's Rights, having regard to all relevant factors, which may include some or all the following:

- (a) the purpose and character of the use;
- (b) the nature of the name and its use;
- (c) the amount and substantiality of the use;
- (d) the effect of the use on the potential market; and
- (e) other factors set out in this Schedule.

1.3 **Fair Use** may include websites operated solely in tribute to or in criticism of an individual or business.

## 2.0 EVIDENCE OF UNFAIR REGISTRATION

2.1 A non-binding non-exhaustive list of factors that may be evidence that the Domain Name is an Unfair Registration is set out below:

- (a) Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily:
  - (i) for the purposes of selling, renting or otherwise transferring the Domain Name to the Claimant or to a competitor of the Claimant, for valuable consideration in excess of the Respondent's documented out-of-pocket costs directly associated with acquiring or using the Domain Name;
  - (ii) as a blocking registration against a name or mark in which the Claimant has Rights; or

- (iii) for the purpose of unfairly disrupting the business of the Claimant;
- (b) Circumstances demonstrating that the Respondent is using the Domain Name in a way that is likely to confuse, mislead or deceive people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Claimant;
- (c) The Claimant can demonstrate that the Respondent is engaged in a pattern of registrations where the Respondent is the Domain Name Holder of domain names (under .nz or otherwise) which correspond to well-known names or trademarks in which the Respondent has no apparent rights and the Domain Name is part of that pattern;
- (d) The Claimant can demonstrate that the Respondent has knowingly given false contact details to a Registrar and/or to the DNC; or
- (e) The Domain Name was registered arising out of a relationship between the Claimant and the Respondent, and the circumstances indicate that the Claimant and the Respondent intended that the Claimant would be entered in the .nz Register as the Domain Name Holder of the Domain Name.

2.2 There is a presumption of Unfair Registration if the Claimant proves that the Respondent was found to have made an Unfair Registration in three or more Dispute Resolution Service cases in the two years before the Claim was filed. This presumption can be rebutted by the Respondent by proving in the Response on the balance of probabilities (more likely than not) that the registration of the Domain Name is not an Unfair Registration.

### **3.0 HOW MAY THE RESPONDENT DEMONSTRATE THAT THE DOMAIN NAME IS NOT AN UNFAIR REGISTRATION?**

3.1 A non-binding non-exhaustive list of factors that may be evidence that the Domain Name is not an Unfair Registration is set out below:

- (a) Before being aware of the Claimant's cause for Claim (not necessarily the Claim itself), the Respondent has:

- (i) used or made demonstrable preparations to use the Domain Name or a Domain Name that is similar to the Domain Name in connection with a genuine offering of goods or services;
  - (ii) been commonly known by the name or legitimately connected with a mark that is identical or similar to the Domain Name; or
  - (iii) made legitimate non-commercial or Fair Use of the Domain Name; or
- (b) The Domain Name is a Generic Term or a Descriptive Term, and the Respondent is making Fair Use of it in a way that is consistent with its generic or descriptive character;
- (c) In relation to clauses 2.1(c) above; that the Domain Name is not part of a wider pattern or series of registrations because the Domain Name is of a significantly different type or character to the other domain names registered by the Respondent; or
- (d) In relation to clause 2.1(e) above, that the Domain Name Holder's holding of the Domain Name is consistent with an express term of a written agreement entered into by the Parties.
- 3.2 The Respondent's failure to use the Domain Name for e-mail or a website is not in itself evidence that the Domain Name is an Unfair Registration.
- 3.3 Trading in a Domain Name for profit and holding a large portfolio of domain names are of themselves lawful activities. Each Claim will be determined on its merits.