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Public Submission by Brent Carey, Chief Operations and Policy Officer on the proposed structural changes to the InternetNZ Group to be published on the InternetNZ website

Introduction

I have been the Chief Operations and Policy Officer and 2IC for the Domain Name Commission for nearly two months.

Having relocated from Melbourne, Australia to further my regulatory and governance career, I have a strong interest in positioning the Domain Name Commission as a leading self-regulator of the .nz domain name industry and provider of online dispute resolution services.¹

Good regulatory outcomes in the .nz domain names market are a combination of two factors:

1. How regulation is administered and
2. the regulatory regime itself.

It was too soon in my tenure for me to comment on the first round of consultation. I feel it now appropriate to provide a response given:

- the revised proposal
- the expectation that the Senior Manager role will Head the Domain Name Commission and
- the desire for the COPO role to lead the transition to an Office focused solely on regulation and dispute management functions.

From the outset may I say that I am looking forward to fostering productive relationships with the incoming Group CEO, staff of InternetNZ, with the DNCL Board, Internet NZ Council and the wider local .nz internet community.

I am also pleased with the revised timeline in relation to the disestablishment of the CEO roles, in particular, the DNCL CEO role. The revised timeline allows more time for the departing CEO of the DNCL for mentoring and transition of the regulatory and dispute management functions encapsulated in the role of a Commissioner. Having allowed for an industry veteran with wisdom and a rich international and national network more time to transfer knowledge I feel better supported in the process to deliver on the proposed change. This is especially important in light of the loss of institutional knowledge of key senior people within DNCL.

¹ The settlement of domain name disputes in an environment that is identical to the initial environment of the domain constitutes an excellent example of the implementation of ODR techniques. See <http://www.sciencedirect.com/science/article/pii/S2351667415000074> Other successful examples of ODR implementations include paypal for its disputes led by Colin Rule now of mediate.com <http://www.mediate.com/people/personprofile.cfm?auid=54> and British Colombia's online dispute resolution portal <https://www.consumerprotectionbc.ca/odr>

Summary of this submission

The key recommendations of this submission are:

- Ensure an organisational model for the Domain Name Commission that creates a robust .nz domain name regulatory environment capable of demonstrating effectiveness in times of external scrutiny.
- Design for legitimacy and longevity by retaining the title of Domain Name Commissioner.
- Build a .nz policy making function that is not divorced from the voice of the Commissioner.
- Adapt the lessons from the field of corporate governance to ensure accountability.
- Deal swiftly with transitional arrangements and people, processes, systems and culture.

Organisation Model

The 2014 OECD paper, *The Governance of Regulators: Best Practice Principles for Regulatory Policy*², guides governance models for different kinds of regulators. The paper outlines three primary organisational models for regulators:

- Governance board model. Typically the Board is responsible for strategy, governance and risk management. The Board appoints the CEO, monitors performance and ensures compliance with the body's governing documents and policies. However, executive staff make regulatory decisions.
- Commission model. The board makes most substantive regulatory decisions.
- Single member regulator. An individual is appointed as regulator and makes most substantive regulatory decisions and delegates other decisions to staff.

The OECD's *Making Reform Happen: Lessons from OECD Countries*³ observed most independent regulators in OECD countries have a governance board or commission structure. The governance board model and commission models provide a diversity of views and range of experience that can be applied to all decisions. They can also provide for greater levels of independence and integrity.

I am in favour of the Commission or single member regulator model as compared to the governance board model because it enables the regulator to be more actively involved in the issues being considered and therefore over time to develop deeper expertise of the industry. It also enables a competitive state of play, not to control it or dictate particular outcomes. More importantly, with statutory

²For the full set of guidelines see <http://www.oecd.org/gov/regulatory-policy/Best%20practice%20for%20improving%20inspections%20and%20enforcement.docx>

³ A collection of essays analyses the reform experiences of the 30 OECD countries in nine major policy domains in order to identify lessons, pitfalls and strategies that may help foster policy reform in the future <http://www.oecd.org/env/making-reform-happen-9789264086296-en.htm>

regulation of the domain name industry ruled out for good reason, accountability depends on the type of self-regulation that comes from appointing a single member regulator for robust governance arrangements and a strong compliance regime.

Industry Commissioners commonly work to force information issues into the open, to make certain practices known and to work with industry on how best to fix any problems. In the Australian government's landmark study in to industry self-regulation which examined best practice and cost effective self-regulation methods and approaches, the taskforce noted in the final report⁴ that:

"Good practice in self-regulation involves addressing industry specific problems and objectives and the type of regulatory scheme should be the effective minimum solution.

Self-regulation is very broad and covers guidelines, quality management systems, standards, codes, dispute resolution schemes etc. Although there is no one model for good self-regulation, the Taskforce considers that there are elements of good practice that are consistent amongst schemes."

Legitimacy and longevity

The most respected characteristic of a successful self-regulated domain name industry is that people and institutions exercising power in its various forms are generally felt to do so legitimately and over time. They earn some consensus of public confidence; their motives are trusted.

At page 13 of the paper reference is made to the quasi-judicial responsibilities of the current Domain Name Commissioner remaining with the DNCL. However, the paper doesn't make clear *who* will exercise these functions.

The Domain Name Commissioner title is important in the market for exercising these quasi-judicial functions, establishing tone and tenor of business transactions, levels of authority and for building trust. It is especially important in terms of competition law.

The magnitude of carrot (awareness, prevention and education) and stick (sanctions) functions demand a degree of authority and legitimacy. To hold others to account the title of Commissioner is better suited to the head of a Commission.

The key features of the most senior person in the DNCL's role are that they will:

- exercise quasi-judicial powers
- have a head up to the Board strategic intent as well as a head down challenge of running the day-to-day operations of a self-regulator
- authorise/de-authorise registrars and
- Make statements to the market in relation to levels of competition.

⁴ See Taskforce on Industry Self-Regulation – Final Report in particular Chapter 6
<https://treasury.gov.au/publication/taskforce-on-industry-self-regulation-final-report/chapter-6-good-practice-and-cost-effective-self-regulation-methods/>

It will also be incumbent on the position to formalise the liaison with overlapping dispute resolution jurisdictions to maximise efficiency and effectiveness and to develop productive working relationships with a wide number of stakeholders. For example, in the area of registrant privacy complaints, the Domain Name Commission's work will necessitate close working relationships with New Zealand's Privacy Commissioner and in the areas of e-safety ties with law enforcement and the Computer Emergency Response Team.

With the departure of the CEO and current Commissioner of the DNCL, a number of Memorandum of Understandings will need to put in place to formalise working relationships. The person who executes these Memorandums of Understanding should be on equal footing with the corresponding party with whom they are entering into any Agreement.

The Domain Name Commission is also in the process of applying for Australia New Zealand Ombudsman Association membership.⁵ The membership application process has had to be put on hold pending the outcome of the organisation review because ANZOA membership is personal to the Ombudsman or the Commissioner and it isn't the office which holds the membership. When the time comes to resume the application process the approach will need to come from the most senior person left at DNCL personally but only in their capacity as the Domain Name Commissioner.

Independence of DNCL

While there are many methods of self-regulation experience suggests that there is one constant, if the industry does not self-regulate tolerably well, something worse can be imposed on it.

Three key areas of independence for me are:

- the type of regulatory agency
- its regulatory decision-making model and
- when it can be directed in the exercise of its functions.

The idea of separation of contending but roughly equal voices between DNCL and InternetNZ accountable to the local .nz internet community does have merit.

The discussion above on the organisation model supports the organisational reviews suggestion of putting the regulatory and dispute management authority in to a separate legal entity. The benefits of this approach are it will:

- let the organisation focus on its core strengths and will enable a structure that is nimble and flexible to cope with emerging regulatory issues
- promote innovation and competition to ensure a level playing field and
- signal to everyone inside and outside the group that there is no issue of split authority or responsibility between regulatory and service delivery functions.

⁵ The Australian and New Zealand Ombudsman Association is the peak body for Ombudsmen in Australia and New Zealand. ANZOA's members are individual Ombudsmen within industry based, parliamentary and other statutory Ombudsmen offices in Australia and New Zealand. See <http://anzoa.com.au/>

As noted in many of the first round submission comments, it is critical that the compliance and regulatory functions of DNCL have a decision making process that is independent of InternetNZ, otherwise it is InternetNZ making all the decisions.

The proposal to have two Independent directors on the board of the DNCL also ensures a level of independence is maintained and importantly seen to be upheld.

When further enhancing the DNCL's regulatory independence and institutional form attention should be paid to the New Zealand Productivity Commission's findings in to regulatory institutions and practices Final Report.⁶

.Nz policy function

Any enforcement mechanism must have a way of defining those who are bound by the rules. In the domain name industry in New Zealand this is through .nz policy.

Policy stability and predictability is necessary to ensure that authorised Registrars have confidence to build the domain name infrastructure that will deliver required reliability and security. It is also important for protecting the rights and relationships of all parties in the .nz market (registrars, registrants, and registry).

A foreseeable problem with removing the .nz policy making function from the Domain Name Commission is it has the potential to weaken the regulatory scheme. Such removal may be perceived as favouring the organisation with responsibility for the financial performance of the registry. Self-regulators need flexibility to set and interpret policies and mechanisms to enforce policies in a consultative manner that is for the good of the industry not any one particular player.

I do understand the working group's rationale for why there should be a .nz policy coordination mechanism through having a Policy sub Committee of the Internet Council which will see a wider representation of voices. The Policy subCommittee will play an important role on the .nz policy space by bringing an outside perspective and a "fresh set of eyes" to policy formation in the .nz space.

When establishing the committee the criteria should be specific as to who is able to be elected precluding remembers of the registrar community, domainers, internet technologists and anyone else who may stand to benefit by having a commercial interest in .nz policy.

Retaining policy coordination within the DNCL

Having established a Policy sub Committee of Council, I can see no reason why the .nz policy coordination function cannot remain within the DNCL especially given most of the policies are about .nz operations.⁷ The results of cherry picking elements of the DNCL's functions and injecting them into InternetNZ could limit the regulatory compact's effectiveness and may not gain the benefits desired.

⁶ <http://www.productivity.govt.nz/sites/default/files/regulatory-institutions-and-practices-final-report.pdf>

⁷ In the area of global professional sports regulation it is not uncommon for regulatory and policy making functions to reside within the Commission. http://www.sportslawyer.com.au/wp-content/uploads/2013/11/SportsLawyer-Paul-Horvath_article.pdf

DNCL can provide the coordination mechanism via the DNCL Board through to the Internet NZ Policy sub Committee in the short to medium term. The next significant consultation is a review of the Dispute Resolution Service policy in 2018 which largely impacts Registrars, registrants and the operations of the DNCL.

The benefits of keeping DNCL as the policy coordinator for the time being are:

- it allows the Group CEO of InternetNZ who is also the Chair of the DNCL Board time to ensure he or she has a full picture of any emerging regulatory policy issues
- there will be time to develop an appropriate consultation mechanism loop to include the voice of the DNCL in policy development if it is still deemed necessary in the longer term to transfer the policy functions away from the DNCL and
- it won't jeopardise the major policy review of the Dispute Resolution services policy.

Adapting corporate governance

For an organisational review of this magnitude, the area of corporate governance seems to offer some guidance for the architects of the two new corporate structures.

The following suggestions are intended to be helpful:

- Independent Directors – how will they be recruited, how will they be elected, will there be enough of them on the DNCL Board and the Council to prevent capture by any one particular interest.
- Policies in corporate governance, as well as the law, how will they try to prevent conflicts of interest or the appearance of them.
- There should be clearly accepted division of responsibilities between the Group CEO and the Head of DNCL which will ensure a balance of power and authority, such that no one individual has unfettered powers of decision.
- Corporate governance principles emphasise transparency and disclosure. Disclosure of decision-making is a crucial element of effective domain name industry self-regulation.

More attention to adapting corporate governance best practice could impact the final design for each of the standalone corporate entities. In the UK the Royal College of Veterinary Surgeons as part of its First Rate Regulator Initiative performed a literature search about best practice in professional regulation, as well as internet based research⁸. Key messages contained in the report are:

- The following principles for good regulation are widely accepted: transparent, accountable, proportionate, consistent and targeted.
- The governing bodies of professional regulators have councils that range in size from 7 to 14 members – the direction of travel is 8 to 12 members.
- All professional regulators set standards of conduct, competence and ethics.

⁸See full report at <https://www.rcvs.org.uk/document-library/best-regulatory-practice-report/twilliams2013e-rcvs-best-regulatory-practice-report.pdf>

- Registration requirements generally include providing evidence of good character in addition to appropriate qualifications.
- The emphasis of quality assurance is outcome focused with risk based approaches.
- Regulators need to actively work to explain their processes and outcomes to complainants.
- Professional regulators engage with a wide range of stakeholders.

Other General Comments on Proposal

Shared services model for corporate services and retaining talent

Both NZRS and InternetNZ has provided the DNCL with various corporate functions for many years including our payroll and finance. The service delivery model reduces costs and removes the need to replicate corporate services functions in the DNCL.⁹

The DNCL will continue to look for ways it can focus on its core regulatory, policy making, compliance and dispute resolution functions by sharing or collaborating with InternetNZ when it comes to the standardisation and delivery of corporate services for mutual benefit.

This business sensibility helped shaped our most recent agreement between the DNCL and InternetNZ to share internal communication services rather than backfill externally for a vacant Communications Advisor.

The registry also has a rich expertise in relation to data sets and business intelligence and reporting. Having reporting systems reside in various places is very cumbersome and at times may lead to inaccuracy, replication of information and increased maintenance. I am therefore looking forward to improving capabilities in relation to data analytics and how best to use analytics to regulate with the support of the registry.

Updates to policies

Retaining the role of the Commissioner and the DNCL will mean few changes to .nz policy other than needing to remove references to NZRS and replace with registry or similar descriptors and other minor language amendments.

Recruitment of the Group CEO

Having myself been recruited to the COPO role as a result of an external international recruitment search, I welcome the change in approach to advertise the Group CEO role internally and externally through a merit-based selection process.

New reporting lines, position description and employment contract

I consider it appropriate that the COPO's reporting line changes to report directly to the DNCL Board. I also see no reason why the CEO and COPO positions cannot be combined supported by shared administrative services. A single role as

⁹ Combining human resources, financial, information technology, and management services is for the State Services Commission, the Department of Prime Minister and Cabinet, and Treasury, reduces costs and builds back-room capability.

identified in the organisation review can continue to oversee the operations of the office.

As proposed, however, this is a new job within the scope of the COPO role and is more than just a reporting line change. There will need to be material changes to the position description of the COPO role when it comes time to unpicking the functions of the disestablished CEO role and working out what functions are to be performed centrally by InternetNZ. It's an exciting change but one that will necessitate individual employment contract negotiations between the COPO and the Chair of the DNCL Board.

Transition and Change management

Finally, I am pleased that Council has appointed a Program Manager to progress the organisational review. I expect that part of their remit is to identify work streams and transitional arrangements and I am looking forward to working with Richard Currey and the incoming Group CEO on the practicalities of implementing the proposed change.

Whatever the change management approach¹⁰ adopted by the Program Manager, it is important that the cycles of change are well understood and staff are supported through the change. Where strategy falls over is when not enough time is devoted to transition¹¹ or the implementation of the change.

When a company restructures, many other aspects of the organisation must change too. These include management processes, IT systems, the culture, reward and recognition programs and leadership styles. This has to happen quickly if not simultaneously. Failure to do so will mean the sponsors and leaders of the change won't capture the hearts and minds of employees and will result in misalignment that can lead to talent loss and interruption to service delivery.

It would be helpful if Managers together with appropriately identified change champions within each of the organisations had access to the resources of the Wellington chapter of the Change Management Institute including their global virtual mentoring program.¹²

I thank you for considering this submission.

I would be more than happy to discuss any aspect of it with anyone on the working party, the Program Manager or Council.



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¹⁰ This article summarises three frameworks for change management used to deliver organisational change: <http://www.quickbase.com/blog/three-types-of-change-management-models>. Helpfully the New Zealand Auditor-General's Office in Appendix 1 has also produced a change management best practice guide for any agency contemplating a shared services model <http://www.oag.govt.nz/2014/cass/docs/cass.pdf>

¹¹ For transition it is important that the phase has a beginning and an end and that we can expect to have muck in the middle. See <http://www.hullstrategies.com/articles/TranSteps.pdf>

¹² See <https://www.change-management-institute.com/virtual-mentoring-program>