

28 August, 2020

80 Boulcott Street
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By email only:

Dear

Commerce Commission staff comments on ‘Re-imagining the future of .nz’ – Options Report of the .nz Policy Advisory Panel.

Introduction

1. The Commerce Commission (the Commission) appreciates the opportunity to comment on the ‘Re-imagining the future of .nz’ Options Report (the Options Report).
2. We appreciate the changes being made by the .nz Policy Advisory Panel to better support all users of .nz domains.
3. Staff have reviewed the Options Report in light of our remit. The Commission’s role is to ensure New Zealand markets are competitive, consumers are well informed and protected, and sectors with little or no competition are appropriately regulated.
4. We do not intend to submit on the Options Report but we do want to provide comment. The Commissioners themselves have not reviewed the Options Report, so please consider the following comments as staff views only.
5. The following will be discussed in our submission:
 - 5.1 Complaint themes relating to .nz domain names;
 - 5.2 Changes to InternetNZ’s guiding principles;
 - 5.3 Geographical limits of registrants;
 - 5.4 Domain and website content abuse;

5.5 The interim emergency circumstances clause; and

5.6 Domain name registration abuse.

Consumer understanding of .nz domain names

6. Our most significant concern is that the average New Zealand consumer sees a .nz domain name and assumes they are engaging with a New Zealand business.
7. These websites are brought to our attention when consumers are subject to misleading or deceptive conduct. This conduct can include failing to supply purchased goods, supplying goods that are different to what was represented at the time of purchase, or supplying counterfeit goods. Since November 2019 36 complaints reference .nz domain names¹.
8. When consumers buy from an overseas website and are subject to misleading or deceptive conduct, the result is twofold as not only is the Commission unlikely to take enforcement action against these kinds of businesses, but consumers have more difficulty enforcing their own rights.
9. The Disputes Tribunal and Consumer Guarantees Act (CGA) have limitations in pursuing overseas businesses. In many cases a consumer may be due a remedy, but it is impossible to actually extract it from the business.
10. When businesses engage in conduct that is misleading or deceptive, and trade using a .co.nz website this undermines the .co.nz brand.
11. In light of these issues we support measures to improve the security of, and trust in the .nz domain regime.

Changes to InternetNZ's guiding principles

12. We do not have any specific comments on the new proposed guidelines. However, we broadly support the introduction of updated guiding principles.
13. We believe the new guidelines will facilitate a more efficient, fair and secure domain name system in New Zealand.

Geographical limits of registrants

14. We support the introduction of a local presence requirement to hold a .nz domain under Option C.
15. Many of the complaints we receive about .nz domains relate to overseas entities. Since November 2019 we have received 17 complaints about .nz domains registered to overseas addresses.

¹ This figure only includes complaints where the consumer provided evidence, the registration details do not match the entity, archive.org shows the previous site or overseas registrar or registrants.

16. We agree with the Panel's assertion that many New Zealanders are unaware that overseas based registrants can hold a .nz domain. This is consistent with the common narrative of complaints the Commission receives where a consumer purchases from an overseas business on the understanding that they were purchasing from a New Zealand business due to the .nz domain name.
17. We also agree that it is difficult to hold overseas-based registrants to account for illegal conduct. A good example is Viagogo where it only accepted the jurisdiction of the New Zealand Courts following a Court of Appeal judgement. For consumers affected by false or misleading behaviour it is very difficult to seek a remedy.
18. A local presence requirement would also bring New Zealand policies into line with the Australian .au Domain Administration (auDA). Currently the Australian model requires a person applying for .au license to have an Australian presence².
19. In our view a local presence requirement would significantly reduce:
 - 19.1 the incidence of overseas based businesses failing to supply or supplying materially different goods to consumers.
 - 19.2 the practice of entities purchasing lapsed .nz domains, using a generic storefront and selling counterfeit goods from overseas
 - 19.3 the issue of consumers mistakenly purchasing from overseas businesses thinking they were New Zealand businesses due to the .nz domain.

Domain and website content abuse

20. We support the introduction of a policy that would allow a .nz domain name to be suspended on the advice of trusted notifier parties.
21. We believe this policy would provide far better protection for New Zealanders and improve the overall security of the .nz domain system. We believe the current system is too slow to address issues around domain and website content abuse.
22. Online based harms can have an immediate affect and often require an immediate response. Waiting for direction from the Courts can seriously limit the ability to act swiftly, allowing ongoing harm and often the cost is prohibitive.
23. In our view the introduction of a robust and transparent policy, allowing the suspension of .nz domains used to facilitate illegal activity will act as a significant deterrent for these types of registrants and an effective way of preventing further harm.

² .au Domain Administration Rules: Licensing 1 July 2020: <https://www.auda.org.au/assets/Uploads/au-Domain-Administration-Rules-Licensing-Approved-1-July-2020.pdf>

24. We also believe it would be helpful for Domain Name Commission Limited (DNCL) to follow a similar approach to that of the auDA. AuDA may suspend or cancel a license when it is in the public interest if two criteria are met:
- 24.1 A request is received from an enforcement body or intelligence agency; and
- 24.2 AuDA believes on reasonable grounds that the action is in the public interest.
25. AuDA's policy lists a variety of factors as public interest objectives – including consumer protection and the integrity, stability, or security of the Domain Name System.
26. A similarly comprehensive policy on the part of DNCL would likely provide a transparent system where registrants would know what to expect and be treated fairly.
27. We believe that the current system or continued adherence to the 'no concern for use' policy would contradict the Panel's goal for a secure, trusted and safe .nz domain name space.

The interim emergency circumstances clause

28. We support the continuation of the interim policy. We do not have views on whether the policy should be modified.
29. We believe that this measure is vital in allowing prompt action during emergency circumstances. Particularly where the alternative relies on the judicial process.
30. Using the example of Covid-19, during Level 4 lockdown the Courts were considered an essential service. However, given public health concerns the heads of bench decided that only proceedings affecting the liberty of the individual or their personal safety and wellbeing, or proceedings that are time critical, should be heard at this time³. It is likely that issues relating to Covid-19 and .nz domains would not be considered a high priority during such circumstances.

Domain name registration abuse

31. We support the introduction of data validation for all domain name registrations and verification for high risk domain name registrations.
32. Together with the requirement for a geographical presence, we expect that a data validation requirement would strongly discourage the establishment or purchase of domains for an illegal purpose as registrants would have to be New Zealand based and use their own contact details

³ *Note from Chief Justice Winkelmann 27 April 2020*
<https://www.courtsofnz.govt.nz/publications/announcements/covid-19/court-protocols/alert-level-4/note-from-chief-justice-winkelmann/>

33. This measure would also bring New Zealand policies into line with the Australian model where a person's identify must be validated before they can be issued a license to use a domain.
34. We are of the view that the current 'reactive' model is not sufficient to address domain name registration abuse. It relies on not only the conduct being detected, but the party detecting it to have the wherewithal to pass the information on to the Domain Name Commissioner (DNC).
35. As a regulator the Commission knows first hand that the complaints we receive represent only a fraction of the non-compliance that goes on in New Zealand markets.
36. In June 2020 we referred 9 .nz domain names to the DNC, most of which were registered overseas. These were cancelled by the DNC. With a robust data validation model – we expect these domains may not have been registered in the first place preventing harm to consumers.

Conclusion

37. We thank the .nz Policy Advisory Panel for this submission opportunity and would be pleased to provide any further assistance.