<u>Submission by David Farrar on the restructuring proposal for the InternetNZ Group</u>

This submission is by me in a personal capacity, but reflects my long experience with InternetNZ including:

- InternetNZ Councillor, Secretary and Vice-President
- Chairman of InternetNZ's Public Policy Committee for around a decade
- Director of NZRS
- Director and Chair of DNCL
- Member of InternetNZ Executive Board
- Fellow of InternetNZ

As I am the current Chair of DNCL, a major focus is on the impact on .nz policy and regulation. The DNCL Board will also be making a formal submission.

<u>Introduction</u>

The proposal put forward by the InternetNZ Council for consultation bears no resemblance to what I, as a subsidiary chair, thought would be consulted on.

For six months I have asked for a document which provides the following:

- A clear statement of the problem definition for the InternetNZ Group
- A list of possible solutions for the perceived issues (not just structural solutions, but policy operational etc)
- A clear analysis of the pros and cons of the possible solutions
- A summary of what is the preferred option, and why

None of this has been provided to DNCL or myself. **Instead we have been given a proposal for structural change that does not provide any analysis of the pros and cons of the change proposed, or alternatives. Hence it is extremely difficult to provide meaningful feedback on it.**

I believe **Council should have released an issues and options paper for consultation at least with subsidiaries, and then after having feedback on the issues and options, proceeded to a proposal**. By bypassing this crucial stage, the consultation runs the risk of being inherently flawed. It is highly unusual to propose merging an organisation and making its chief executive redundant without even consulting that organisation formally on options.

I am providing feedback on the proposal, as best as I can. But again I believe the best path forward for Council is to release an issues and options paper for consultation and suspend this proposal until meaningful consultation has occurred. If the current proposal cannot be suspended, then at a minimum it would be desirable to release as soon as possible any background papers which explored the alternatives considered. Staff and other stakeholders are more likely to support a proposal if they understand the rationale for it and the alternatives considered by Council in the decision making-process.

Analysis

In analysing the proposal, my **focus is on how it impacts the local Internet community, as opposed to InternetNZ as an organisation**. Sometimes the impact will be the same, but not always. For example a decision to triple the fee for a .nz domain name would be hugely beneficial to InternetNZ but very detrimental to registrars and registrants.

InternetNZ has the management of .nz under RFC1591 where we are the trustee of .nz for "the nation" and "the global Internet community. So the measure should not simply be does this make things easier for InternetNZ to make decisions, but will these decisions be more or less likely to benefit the local Internet community.

Impact of Proposal

This **is not a minor organisational change**. It is a **radical change to the structure of InternetNZ**. It is hard to imagine how any change could be more radical. In summary the following are proposed:

- Merging three entities into one
- Making redundant all three CEO positions
- Removing all professional directors from the organisation
- Removing all the structural safeguards around .nz that were put in place in 2000 to 2002

Design Principles

The proposal seems totally incompatible with the very design principles that the proposal quotes. Specifically:

- *Protect our ability to recruit and retain talent, including at the governance and management levels* – the proposal is to sack all appointed directors and make it impossible to recruit governors as the only governors will be elected Councillors
- *Retain the ability to engage professional directors to provide independent, specialist perspectives to the governance of the group* - again the proposal is to remove all independent professional directors and leave the governance entirely with elected Councillors

The proposal violates the very design principles it states were used to decide on a preferred option.

I would also argue that most of the other design principles are also undermined, specifically:

- Ensure the independence of .nz policy and the management of registrars - .nz policy will now be directly decided by Council and registrars managed directly by InternetNZ. This could create considerable tension when InternetNZ is disagreeing with a registrar (such as Spark) on public policy issues
- Maintain the good reputations and relationships of InternetNZ – by removing all the structural protections around .nz decision making, there is considerable risk that InternetNZ will face reputational damage over future .nz decisions as the local Internet community will be more likely to think a profit motive is driving decisions

- Continue to deliver the current functions to the high quality they are now – this proposal will see the DNCL Board abolished, the chief executive made redundant and the new second level manager in a new role which differs from that which he was recruited for. **There is a significant risk of DNCL losing most of its institutional knowledge.**

Current Performance

All three entities currently perform extremely well, in my opinion in terms of outcomes. Specifically:

- InternetNZ has had a major and sustained impact on the public policy of the NZ Parliament and Government in relations to the Internet and a score of policy wins on issues as diverse as the intellectual property chapter of the TPP to telecommunications reform. It is hard to think of any similar group with such a list of policy victories
- DNCL has managed .nz policy for 15 years with a minimum of controversy. Significant change has occurred in that time, yet implemented with minimal resistance despite very differing viewpoints amongst stakeholders. This is in stark contrast to some other ccTLDs such as .uk and .au which have had a tsunami of negative press over some of their proposed changes.
- NZRS has operated the registry to exacting and high technical standards, consistently exceeds the SLA, and has around a 95% satisfaction rating from registrars – an extraordinary achievement. It has also rolled out acclaimed initiatives such as the NZ broadband map.

It is puzzling that with such a record of achievement, such a radical restructuring would be proposed. The proposal is what you would expect for an organisation in crisis, not one that is performing very well. That is not to disagree that there are areas of improvement around group culture, cost control and decision making. But the internal challenges are smaller than the external achievements.

International Comparisons

While few, if any, other ccTLDs have our structure, that is because they were set up purely to be the ccTLD manager such as CIRA or AUDA or Nominet. InternetNZ is unusual because we have wider goals around public policy and the Internet. **I know of no other ccTLD that undertakes the breadth and depth of activity that InternetNZ does on Internet issues.**

The structure we have has allowed this to happen. Before the current structure was set up, InternetNZ spent almost all of its time on .nz issues. The structure has allowed InternetNZ to develop a formidable capacity in other areas, which none of our peers match. There is a not inconsiderable risk that InternetNZ will lose focus as it has to also start managing a registry, run domain name policy and regulation, and undertake commercial business ventures as well as manage a massive restructuring that will take a long time to bed in.

Another key point is that **InternetNZ just played a lead role within ICANN in advocating that ICANN should not simply run the IANA registry as a department of ICANN, but that IANA should be a separate legal entity**. We pointed to the success of the .nz model as a reason for this, and we persuaded the global Internet community to support this change. It was a huge victory, and now we appear **open to charges of inconsistency by going in the opposite direction to what we advocated globally**.

Governance

The proposal notes 20 governors is a large number for an organisation with just $10 million turnover. It is. But I would submit that an analysis based purely on turnover is flawed. **We have three governance bodies because we have three very different functions**. One governance body is a specialist market regulator and policy maker. Another oversees a technology company that runs critical infrastructure and does business development. The third is primarily focused on public policy, community events and funding plus oversight of the subsidiaries.

We have had three governance bodies even when turnover was just $4 million a year. That was because it was desirable to have specialist governors in specialist areas. The proposal does not make a case for why 12 general governors of one entity is preferable to the status quo.

Having served on every governance body within the InternetNZ Group, I can say with first hand experience that the subsidiary boards add significant quality to InternetNZ by both challenging and supporting their respective CEs. **Getting rid of all professional directors and having an elected Council of 12 as the only Governors massively increases the power of the staff, and especially the proposed Group CEO.**

If there is a desire to just have fewer governors, one could do this by reducing the independent directors on each board to three, and the size of Council to nine, which would see 15 governors, instead of 20.

The current governance sees 12 elected governors of Council, and eight independent Governors appointed for the skills to the subsidiary board. The proposal does away entirely with appointed Governors and leaves the entire Governance to what the elections may throw up. Council has no ability to co-opt additional members under this proposal.

InternetNZ has attracted many high calibre directors over the years. They have performed very well in my opinion. **The proposal assumes InternetNZ will perform better with no appointed directors at all. I think that is highly unlikely to be the case**.

Senior Staff

The proposal notes there are three chief executives and ten senior managers out of a staff of 35 and is top heavy. I can't comment on the structures of InternetNZ and NZRS but DNCL has already adopted a lean structure with only one CE and one senior manager.

.nz structural safeguards

The proposal dismantles the safeguards around .nz that were put in place after massive dissatisfaction with management of .nz in the period 1998 to 2000. In fact the proposal not only abolished the safeguards put in place, but arguably has even fewer safeguards than in the Domainz era, when at least the registry was a subsidiary company.

By having one Council deciding everything, and one CE as the primary decision maker you run the risk of capture by one or two strong individuals (as has been seen in some overseas ccTLDs).

The current structure is designed to benefit the local Internet community, and to protect them, by having the registry and policy decision making separate.

For example under the current structure DNCL determines (after negotiation) a service level agreement for the .nz registry. It does this on behalf of registrars and registrants. Under the new structure, there would either be no SLA or it would be a Claytons SLA where the InternetNZ CEO effectively negotiates on behalf of both the registry and regulatory wings and Council signs off on an SLA about themselves.

What happens under this new structure if the registry breaches .nz policy, as has happened in the past? Who would decide what happens, and would it be made public?

Another example is the .nz fee. The current structure provides that DNCL and NZRS recommend a fee level to Council. Under the proposal, the InternetNZ Council would unilaterally determine the fee. There would be no negotiation or consultation – just a determination.

And another example would be if InternetNZ decided to offer a new service that competed with registrars and breached current .nz policy. InternetNZ itself would be the arbiter of whether or not it is breaching its own policy.

Registrars are currently barred from serving on DNCL. If policy making falls to Council (the proposed advisory group would merely be advisory) then you may have considerable conflicts as registrars could be elected to Council. In fact they may be incentivised to do so. The .au model shows the risks of heading down this path.

Major policy changes such as opening up the second level were widely accepted by the internet community because it was clear that DNCL was not financially motivated by the probability that any opening up would be financially beneficial to NZRS. By having InternetNZ directly operate both the registry and the policy function will mean that members of the Internet community may in similar circumstances in the future face greater scepticism about motives.

This proposal also violates InternetNZ's own top level domain principles which state:

*"We also note that a critical success factor for .nz, and one to continue InternetNZ's support of in the global environment, is the **separation between the operations of a TLD and the setting of the policy framework under which it operates**"*

The proposal replaces a robust structural separation with at best a weak internal Chinese wall with one Council and CEO as the decision maker.

<u>Policy and Regulation</u>

The proposal proposes splitting domain name policy and regulation into two separate functional areas. This is a very bad idea that will make protecting registrants far harder.

DNCL has been an effective regulator because it both has the power to set the rules (make policy) and regulate the market participants under those rules. As you regulate the market you learn things which feed into policy changes.

The best example is of the recent case when a major reseller effectively became non responsive and left many thousands of registrants stranded as they would not respond to requests for service changes.

Despite DNCL having no contractual role with resellers, DNCL was able to work with the affected registrar to find a solution which forced the reseller into action. This was possible due to the intimate knowledge of the policy for .nz. Then after that situation was dealt with DNCL was able to make a change to .nz policy so that better intervention tools would be available in future.

Separating out policy and regulation would be an artificial exercise which will reduce InternetNZ's effectiveness as the ultimate manager of .nz

Domain Policy Advisory Group

The proposal states there will be a domain policy advisory group and provides no details of what this would do apart from presumably advise on .nz policy. It would appear to have no powers or staff or specific role, and presumably Council would make all policy decisions around .nz.

I cannot imagine such a group would attract members of the calibre DNCL has been able to attract. There is a vast difference between a board that has decision making authority and an advisory group.

Proposed interim organisational structure

There are pros and cons about whether to have a group CEO. Even if one did decide that there should be a group CEO, the proposed organisation structure would gut the .nz policy and regulation side as it not only abolishes the role of DNC, but doesn't replace it.

The proposed structure would have the new COPO reporting to the group chief executive and presumably would be responsible for almost all the current powers and responsibilities of the DNC. The person just recruited to that role was recruited to be a deputy, not to be the DNC immediately. It is asking far too much of them to expect them to be able to step into a much enhanced role within weeks of taking up their job.

If the decision is to have a Group CEO, a better option would be for the interim structure to have three direct reports, being:

- A registry manager (a non CEO version of the NZRS CEO)
- A .nz policy and regulatory manager (a non CEO version of the DNC)
- A Deputy CEO (responsible for what is currently the InternetNZ Office)

The proposal states that new roles such as the Group CEO will only be externally advertised if there are no suitable internal applicants. I believe this would not be in the best interests of InternetNZ. There is no more crucial decision for Council than its CEO, and while all three current CEOs are excellent performers who may all be strong contenders for Group CEO – the new role should be advertised to attract the best applicants.

The Group CEO role can not be seen as a minor change from any of the current roles. You are seeking a CEO who can:

- Manage business development and be responsible for revenue generation
- Oversee policy making and regulation
- Oversee an advocacy and outreach programme
- Run a world class registry which is critical infrastructure

Impact on .nz

The proposal seeks to remove the entire DNCL Board and the Domain Name Commissioner. The COPO only starts his role in July and he replaces two senior managers who have been made redundant (as the future work plan did not necessitate having two senior managers and the recruitment process found an external applicant was the strongest candidate for the new role). **Hence the proposal would if agreed remove every person of seniority with experience in .nz policy and regulation.**

This will impact .nz directly. Specifically:

- The .nz joint strategy (approved by Council under the group strategic plan) will not have the resources to be progressed, specifically the transformation to establish best practice for a ccTLD and assess .nz against that
- The expert independent review of how DNCL regulates .nz would be unable to continue
- The capacity of the office to implement the new WHOIS policy on schedule will be in doubt

Again I stress with DNCL having made redundant the existing two senior managers, **this proposal would see no existing senior DNCL staff remaining, plus the loss of the entire DNCL Board. As DNCL Board Chair I must warn in the strongest possible terms that this is a very bad idea.**

This proposal would also require a massive change in agreements and policies. All policies would have to be rewritten to remove references to DNCL and NZRS. The registrar agreements would need to be changed. The framework agreement would become meaningless and need to be updated to reflect a new internal structure. The separate authorisation and connection agreements would need to be combined. That is a considerable body of work, and there would be no experienced senior .nz staff to undertake it.

Different faces can be valuable

The proposal states that a single face for the organisation would provide clarity and consistency. But it overlooks that it is useful to have different functions have different faces.

The .nz policy maker and regulator needs to be independent and impartial and be seen to be above politics.

InternetNZ sometimes needs to participate vigorously in the political process, running campaigns against the copper tax, fighting the US proposals for the TPP etc. It was hugely beneficial that this was a separate face to the face of .nz management. If you have the same face, then you run the risk of politicians associating how well InternetNZ manages .nz with the stance InternetNZ takes on controversial issues.

It is a very good thing that InternetNZ has run campaigns on issues such as the copper tax, TPP and telecommunications reform. I have been a strong supporter of such campaigns. There is a risk that InternetNZ in future will decide to hold back on fronting a campaign because of the risk that it is seen as inappropriate for the .nz domain name policy setter and regulator to be so active politically.

A greater risk is that a future Government or Parliament could decide that it is uncomfortable with InternetNZ directly running .nz policy and regulation while also taking part in controversial political issues. You can be a neutral respected regulator or you can run aggressive political campaigns, but you generally can't do both.

There have been a number of cases in recent years where Parliament has separated out regulatory bodies from advocacy bodies in areas as diverse as health, real estate and education.

If this proposal goes ahead, I strongly believe it will increase the chance of a future Government or Parliament deciding that InternetNZ should not retain the .nz delegation without oversight. No other country has a domain name regulator and policy setter as politically active as InternetNZ is.

Our structural safeguards represent best practice regulation in the public interest. They have protected us from critics who have been unhappy that .nz fees fund InternetNZ. Removing the structural safeguards removes the best line of defence against said critics. It would allow a future Parliament to say that regulation and service should be separate and in order to achieve that a Government appointed body will (for example) approve policy and what level of fee the registry can charge. This **would have the effect of eliminating all income for InternetNZ except that necessary to run the registry**.

More and more of our peers face legislation or regulation from their Governments as to how they managed their ccTLD. We are unusual in that we have been exempt from that. Our structure is again part of why we have not faced this.

<u>Recommendations</u>

My primary recommendation is that this proposal is rejected. It violates its own design principles, removes structural safeguards for the local Internet community, undermines the InternetNZ Group Strategic Plan and would significantly weaken the management of .nz.

If InternetNZ does decide to proceed, then I recommend the following as ways to mitigate the proposal:

1. Immediately release an issues and options paper (which presumably Council received from the Working Group) so stakeholders can understand what this is the preferred option, and give more meaningful feedback on it
2. Seek a rule change allowing Council to co-opt members so that governors with desired skills can be appointed
3. Upgrade the domain policy advisory group to a board similar to DNCL (but not responsible for staffing, finance) that can preserve some of the structural safeguards around .nz
4. Appoint a suitable senior staffer with .nz experience to work with the new COPO for a period of around a year so they can then manage a team of .nz policy and regulatory staff
5. Externally advertise the Group CEO position. It is vital that this be fully contestable

I'm happy to discuss the concerns about the proposal at any stage. Also that as someone who has served InternetNZ for 20 years I will work in good faith to implement any final decisions made by InternetNZ.

David Farrar
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