

KENNETH JOHNSTON QC

26 June 2017

Jamie Baddeley,
Chair
Internet NZ

By e-mail: Jamie.baddeley@vpc.co.nz

Dear Jamie

RE: PROPOSED STRUCTURAL REFORM

I make this submission in my personal capacity as a member of Internet NZ. It is short. As a member of DNCL's board, I am a party to that board's submission, and no useful purpose would be served by mere repetition of the same. There is no shying away from the fact that what I say below is critical. However, I would ask you to accept that my criticism is not personally directed, but made in what I genuinely believe to be in the best interests of the INZ group.

I have served on the DNCL board for over six years. Over that time, I have been impressed by the approach adopted by the INZ group as a whole, and its three constituent organisations, in addressing and resolving a number of complex and difficult matters. This approach has been characterised by carefully identifying issues as they arise, developing the widest possible range of solutions, teasing these out to the point of being able to identify potentially workable solutions, scrutinising the pros and cons of these, presenting them in a careful way to interested parties for external scrutiny, reviewing all feedback in an objective and thoughtful way (which often influences internal thinking) and finally developing the best possible outcome in the interests of all concerned.

The Council paper to which this submission responds stands in stark contrast to this. In my opinion, the paper is an unintelligent document which betrays a lack of proper analysis and thought.

The Council is proposing a radical restructuring of the INZ group. Indeed, it is difficult to envisage a more radical restructuring than the collapsing of the three independent entities into one. Such a restructuring demands a thorough and careful analysis of the sort I have described. The Council's paper suggests anything but.

What follows is my assessment of the questions which do not appear adequately to have been asked or addressed:

1. How did we get to where we are now?

It is elementary that before proposing radical structural reform, some examination of the historical process by which the group arrived at its current structure is called for. History might well identify that any perceived issue or issues have been the subject of

earlier examination, and the results of that exercise might inform thinking. Nothing of this sort is to be found in the paper.

2. What is the issue which the proposal seeks to resolve?

Putting aside some anecdotal material, there is no robust analysis of what the issue is. It cannot possibly be sensible to propose radical structural reform without first identifying the underlying reason for this.

3. To what extent is the current structure causative of that issue?

It seems to me that before dismantling a structure which appears on its face to be operating reasonably satisfactorily – if not perfectly – it is at very least necessary to identify that that structure is causative of the issue which has been identified. The Council's paper identifies no evidence that this is the case.

4. What alternative structure or structures might there be which would address the issue in question, and precisely how will it or they do so?

The paper identifies only one alternative. I am given to understand that other alternatives were also discussed, but these do not see the light of day. What is demonstrably missing from the paper is any analysis at all of how the one proposed alternative structure will alleviate the perceived issue.

5. What downsides might there be of the proposed new structure?

Again, the Council's paper is entirely silent on this. The DNCL's submission identified a number. I emphasise two:

- 5.1 First, a degree of formal separation between INZ, NZRS and DNCL has previously been identified as reflecting international best practice. The INZ group has strongly advocated such practice, and, nationally and internationally, received a good deal of recognition for its current structure. The proposal would involve abandoning this. There is no analysis of the disadvantages;

- 5.2 Second, the DNC performs a range of tasks. Amongst these there is a quasi-judicial role which involves decision-making which affects the commercial interests of third parties. It is an elementary principle that judicial and quasi-judicial roles must be independent, and be seen to be independent, in order to command recognition of their legitimacy. The current structure facilitates this. The proposed structure would totally undermine it, in my opinion. I do not accept at all that this can be compensated for within the new structure by the establishment of advisory groups. To my mind, this is perhaps the single best example of the dangers of not thinking through proposals carefully. Frankly, I find it bewildering that this issue has received so little attention, especially as there are lawyers on Council.

6. What process is to be adopted for the purposes of achieving the optimum outcome?

The Council's paper contains some loose suggestions about what might happen next, and the usual corporate-speak about consulting with stakeholders. But noticeable by its absence is any clear process and timeframe which would facilitate a proper process for testing such a radical proposal.

Frankly, the approach which the Council has taken to this matter is, to my mind, an embarrassment. In my opinion, the Council should recognise now that it has not embarked upon this process in an appropriate way and go back to square one. That would involve a process starting with identifying in a considered way what the issue is, and proceeding in an organised and careful way from that point. If the Council needs a model for how to approach this – and it appears to me that it may well do – the approach which NZR took to the development of its business planning, or the approach which DNCL took to the second level domain reform are both good models.

I do not wish to be misunderstood. I acknowledge that there are governance and management issues within the INZ group, and I have observed myself that the culture within the group is not always entirely conducive to achieving what the group says its objectives are. These matters are critically important to the long-term success of the group, and should be addressed, and addressed quickly. But it seems to me that they can and should be addressed in a way which the group has hitherto dealt with such matters.

Yours sincerely,



Kenneth Johnston QC

Cc DNCL Board Members: dncl-board@dnc.org.nz