



Level 8, 104 The Terrace, Wellington, New Zealand, PO Box 10-991
Telephone: (04) 470 0110, Facsimile: (04) 470 0111, Email: leadrnz@xtra.co.nz
Website: www.leadrnz.co.nz

Submission to the: Domain Name Commissioner

On the: Domain Name Dispute Resolution Service Policy

Submitted By: LEADR NZ

Introduction

This submission is from LEADR NZ Inc. LEADR NZ is an independent, non-profit membership base incorporated society set up to promote and develop mediation. LEADR NZ is committed to the development and growth of mediation (and mediators), and other effective dispute resolution processes. We believe that parties, with the assistance of a skilled mediator, are best able to develop their own effective solutions. LEADR NZ is a financially autonomous chapter of LEADR (based in Australia).

The Board of LEADR NZ has been consulted in preparing this submission.

LEADR NZ has 340 members throughout New Zealand, 140 of whom are accredited either to the Advanced Panel or Panel of LEADR.

Comment on the Policy

Clause B6.2

InternetNZ has been named as a party in the event of informal mediation. This is contrary to the general principles of mediation confidentiality. Mediation is between the parties involved in the dispute unless both agree to the inclusion of a third party. It would be irregular also, to have the body which has selected the mediator to be involved as a party in the dispute.

Where a mediation is being carried out as part of an organisation's service and the mediator is required to report on the outcome of a mediation, it should be only as to whether the matter was settled or not, the terms of the mediated settlement and if necessary, matters outstanding. The positions of parties both during and after the mediation remain confidential to the mediation, including the body under which the mediation is being conducted. This principle should apply to domain names disputes and to the information which InternetNZ should be a party to as far as disputes in the industry are concerned. InternetNZ risks its impartiality if it is a party to disputes.

Clause B2.4.9

It is usual to provide exemption from liability for the mediator. This is absent from clause B2.4.9 which provides an exemption from liability for all but the mediator.

Common clauses are:

Exclusion of Liability and Indemnity

Excluding fraud, the parties jointly and severally release, discharge and indemnify the mediator in respect of all liability of any kind (whether negligent or not) which may be alleged to arise in connection with or result from or relate in any way to the mediation.

Defamation

The parties and the mediator agree that no statements or comments, whether written or oral, made or used by them or their representatives during the mediation shall be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this document may be pleaded in bar to any such action.

Clause 6.7

We would urge that Clause 6.7 should also be included as a term of the mediation agreement, as should the two exemption clauses above when this is drafted.

Clause 6.5

There are many issues around the protocols for telephone mediation and some immediate questions arise out of the draft policy. We would expect that the set of protocols will cover issues such as how do you procure a written agreement when the mediation has been conducted over the telephone, or when one of the parties does not have a facsimile machine, or if the verbal agreement is then reneged upon before it is signed? How will InternetNZ confirm service on the respondent?

A major consideration will be in ensuring that the parties have access to legal advice both during the mediation and before the agreement is committed to writing and signed.

Complaint against a mediator

Under the policy, InternetNZ appoints the mediator. It is unclear from the policy whether a complaint against the mediator or mediation process is made to InternetNZ or the professional ADR body to whom the mediator belongs.

We submit that it should be made directly to the professional body and that InternetNZ remain apart from this process. If InternetNZ handles the complaints, the professional body should not then be involved in the interests of privacy for the mediator.

Pele Walker
LEADR NZ
20 December 2005