

## Consultation Paper: Proposed Registration of .nz Domain Names at the Second Level (Round 2)

Dear Sir/Madam

We refer to the above Consultation Paper. We acknowledge that the deadline for submissions was today at midday, however we hope that you will consider the submissions outlined below in the interests of the future of the Domain Name System in New Zealand.

In general, we (James & Wells Intellectual Property) are not opposed to the proposal. However, we do have some concerns which are detailed in this correspondence.

### Appendix B

**Section 3: 3.7:** We believe this requirement should be amended to include more specific qualification criteria, including proof of rights in a domain name, to minimize the potential for unfair registrations and costs to New Zealand businesses in recovering unfairly registered domain names. For example, the Australian system adopts the following eligibility criteria:

In accordance with Australian Domain Name Policy, to be eligible to register .com.au and .net.au domain names, registrants must be one of the following:

- An Australian registered company
- Trading under a registered business name in any Australian State or Territory
- An Australian partnership or sole trader
- A foreign company licensed to trade in Australia
- Be an owner of an Australian Registered Trade Mark
- An applicant for an Australian Registered Trade Mark
- An association incorporated in any Australian State or Territory
- An Australian commercial statutory body

If you don't fall into any of these categories, there are other .au extension options that you may be eligible to register, such as .id.au. To be eligible for a .id.au name, you just need to be an Australian citizen or an Australian resident; but note these cannot be used for commercial activities.

**Section 6: 6.2:** We are concerned that the proposal allows a person who has registered a domain name unfairly before 30 May 2012 to register a second level domain name also unfairly, without qualification of rights in that domain name.

**Section 7: 7.1:** refer comment above in relation to section 6.2.

**Section 7: 7.6; 7.8.4:** The term 'active' should be defined. 'Active' is not a term used anywhere else under the current Policy, to the best of our knowledge. For example, does 'active' include websites that under development? Further, if 'active' means 'use', then this term conflicts with the principle that use of a domain name is not determinative of rights in a domain name under the DRSP.

**Section 7: 7.7.4.6:** It would be of assistance if the term 'issues' could be defined, or at least examples provided.

**Section 7: 7.8.4:** Given the possibility of abuse in the domain name reservation process, there should be a process for 'un-reserving' domain names in case of abuse.

**Section 7: 7.9.2:** The proposal assumes that consent will be provided by all concerned. What happens if consent is not provided? There needs to be a provision in place for such instances, which are likely to occur.

**Section 7: 7.9.3:** “The DNC will offer advice”: what kind of advice will the DNC offer? Is the DNC suitably qualified to provide legal advice, if that is what the proposal intends? This has potentially far-reaching consequences for the DNC in terms of legal liability.

**Section 7: 7.9.8:** A notification process needs to be put in place so that the remaining registrant does not miss out.

**Section 8: 8.2:** This is unsatisfactory. Refer comment above in relation to section 3.7.

**Section 8: 8.3:** This is unsatisfactory. Why should the DNC claim costs back when successful complainants cannot? We propose the following solution to the issue of costs, which has not been addressed in the proposal:

*The DRSP should introduce a requirement for the Respondent in a complaint to pay an amount equivalent to the Expert’s fee as security for the Complainant’s costs at the same time as filing the Response. The security is to be held in a trust account by the DNC pending resolution of the complaint.*

*If the Respondent fails to pay the security, the Complainant has two options:*

- (i) Pay the Expert’s fee to have the Complaint decided; or*
- (ii) Not pay the Expert’s fee, in which the domain name registration will be cancelled (even if the Respondent files a response) and made available again for registration after 60 days. There is no right of appeal by the Respondent. The registration will not automatically be transferred to the Complainant as there has been no decision on whether the Complainant has rights in the domain name and whether the registration is unfair.*

*If the Complainant opts for (i), the Complainant will be unable to recover the Expert’s fee as is currently the case.*

*If the Respondent files a response and pays the security, the complaint will proceed on the currently prescribed path.*

*If mediation is successful, the security is returned to the Respondent.*

*If mediation is unsuccessful and the Complainant opts to proceed to Expert determination, the Complainant must pay the Expert’s fee as is currently the procedure. If the complaint is determined in favour of the Complainant, the security paid by the Respondent is paid out to the Complainant as an award of costs. If the complaint is determined in favour of the Respondent, the security is paid back to the Respondent.*

In our view this represents a much fairer way of dealing with the issue of costs in domain name complaints.

## **Appendix C**

**Section 3: Definitions: Generic Word:** the definition/examples should be extended to include generic third level domains (sub-domains).

Those complete our comments.

Yours sincerely  
**James & Wells Intellectual Property**

**Ben Cain**

Associate

**James & Wells Intellectual Property**



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