

AGREEMENT FOR THE APPOINTMENT OF A MEDIATOR TO THE DOMAIN NAME COMMISSION'S DOMAIN NAME DISPUTE RESOLUTION SERVICE

The Domain Name Commission hereby appoints:

xxx xxxxx (the "Mediator") for the purpose of its Dispute Resolution Service ("DRS") Policy and Procedure.

The Mediator's appointment (the "Appointment") is on the following basis:

1. The Mediator agrees to accept appointment as a Mediator, as set out in the Role Outline attached as Schedule 1.
2. The Mediator agrees to mediate all Disputes referred to him/her in accordance with The DNC's DRS Policy and Procedure, attached as Schedule 2, as amended from time to time.
3. The DNC will offer the Mediator domain name Disputes for mediation on a rotational basis from a list of Mediators, with the next available Mediator being selected to mediate the next Dispute, subject to any conflict of interest.
4. The DNC agrees to pay the Mediator's fees as set out in Schedule 3 and in accordance with the DRS Policy and Procedure at Schedule 2.
5. The Appointment is for a fixed period of eighteen months from the Effective Date, subject to the right of each party to terminate on one month's prior written notice. In default of any written agreement on extension or renewal of the Appointment, the Appointment shall lapse eighteen months from the Effective Date.
6. The other terms and conditions of the Appointment shall be as per Schedule 4. The DNC reserves the right to change these on one month's notice.
7. The Mediator hereby declares that s/he is not an employee of The DNC and the Appointment will automatically lapse in the event that the Mediator becomes an employee of the DNC.
8. This Appointment shall be governed by the law of New Zealand and the parties to the Agreement submit to the exclusive jurisdiction of the New Zealand courts.

Signed on behalf of the DNC

Effective Date

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Signed by the Mediator

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SCHEDULE ONE – ROLE OUTLINE

The Role of the Mediator

The role of the Mediator is to assist the complainant and respondent to resolve disputes that have been submitted under the Domain Name Dispute Resolution Service.

Specifically this requires the Mediator to:

- explain the DRS mediation process and the ground rules to both parties
- promote communication and co-operation between the parties
- encourage the parties to explore the options
- facilitate negotiation and promote problem solving
- identify and record the agreed outcome(s) (in accordance with the DRS Mediation Guidelines)
- manage the mediation process within the ten working day timeframe

This will require the Mediator:

- to be diligent in their preparation for, and conduct of, mediations under the DRS
- to exercise due skill and care in the performance of their responsibilities
- to maintain confidentiality of the mediation processes and outcomes reached
- to be prompt in identifying conflicts of interest when initially assigned a mediation by the DNC
- to operate within the ethical guidelines required of a professional mediator.

Requirements for DRS Mediators

Relevant Knowledge

- a working knowledge of the .nz policies, and the DRS Policy and Procedure
- a general understanding of domain name issues

Relevant Experience

- current membership of AMINZ (as a Mediation Panel member) or LEADR (Advanced Panel membership) and to maintain this status while holding appointment as a DRS Mediator (highly desirable)

or

- membership of an equivalent international body or organisation

or

- significant experience as a mediator working in a formal, structured environment

Personal Qualities and Skills

- integrity
- impartiality
- good judgement and common sense
- diligence
- be a person of good standing
- able to absorb and make sense of competing and often complex factual and legal material
- able to devote adequate time to meet the ten working day timeframe for a DRS expert decision
- passionate about, and committed to, mediation as a dispute resolution process

SCHEDULE TWO – DRS POLICY AND PROCEDURE

http://dnc.org.nz/content/dispute_resolution_service.pdf

SCHEDULE THREE - REMUNERATION

3.1 Mediation Fee

- (a) The Mediator will receive a fee of \$1,400 for each mediation that is assigned to the Mediator by the DNC, and which the Mediator accepts for facilitation.
- (b) The fee payable to the Mediator is inclusive of any costs incurred during the mediation process, and irrespective of the simplicity or complexity of the dispute involved. It covers all work performed during a mediation including preparation for, work during, and any follow-up following the DRS dispute process.
- (c) The fee will be paid by the DNC on completion of the mediation process and on submission of an invoice. This will require receipt by the DNC of:
 - the mediation notes,
 - a copy of the mediation agreement (if any),
 - the invoice and
 - any other relevant paperwork
- (d) The fee paid is exclusive of GST.
- (e) All fees or other sums payable to the Mediator under this Agreement are due on the 20th day of the month following the invoice date.

3.2 Tax

- (a) The appointee is responsible for the payment of any Income Tax, Accident Compensation levies or premiums and Goods and Services Tax arising as a result of the fees paid by the DNC to the appointee for their work as a Mediator.

SCHEDULE FOUR – TERMS AND CONDITIONS

4.1 Training

- (a) The Mediator will be required, as a precondition of appointment, to attend an induction training session run by Internet NZ. The initial training will require attendance of up to one day at a time and place nominated by the DNC.
- (b) Ongoing training will be provided by the DNC as required (generally annually) and every effort will be provided to run this at times suitable for all attendees. As a minimum, three months notice will be provided for these ongoing training sessions.
- (c) A fee will be paid for attendance at training days, at a rate of \$1,000/day (excl GST). The DNC will also pay airfares, accommodation and other actual and reasonable expenses incurred that are related to the travel.

4.2 Professional Membership

- (a) As a condition of this Appointment, the Mediator is required to maintain membership in good standing of their professional bodies to the same level while holding appointment as a Mediator under this Agreement.
- (b) For the purposes of this Agreement, this membership is considered to be: (delete those not applicable)
 - Member of the AMINZ List of Mediators
 - Advanced Panel Member, LEADR
 - Other
- (c) If the Mediator ceases to hold membership of their professional body at this level, s/he must notify the DNC in writing promptly.

4.3 Good Standing

- (a) The Mediator is required to notify the DNC in writing promptly if a disciplinary matter or complaint is made against them in any of their professional capacities.

4.4 Managing Conflicts of Interest

- (a) The Mediator agrees to abide by the DRS Conflict of Interest Policy (attached).
- (b) The Mediator is required to declare any conflict of interest promptly when assigned a Dispute to mediate by the DNC. In the event of a conflict of interest being notified, the DNC will reassign the Dispute to the next mediator on the list. The next available mediation will then be assigned to the Mediator.
- (c) No fee will be payable to the Mediator for any work undertaken in respect of an assigned Dispute prior to identifying any conflict of interest.

4.5 Confidentiality

- (a) The Mediator shall keep secret and confidential at all times all information provided by parties to a mediation carried out by himself/herself and all information confidential to the DNC supplied to the Mediator in connection with the Dispute Resolution Service
- (b) The obligations under paragraph (a) above require the Mediator to:
 - a. not use, communicate, copy, make available or re-supply any information received under paragraph (a) to any person other than those of their employees or subcontractors to whom disclosure is necessary for the purposes of providing the mediation services under this Agreement;
 - b. put in place and maintain adequate security measures to safeguard the information from access or use by unauthorised persons and keep the information under the Mediator's control; and
 - c. ensure that any employees or subcontractors it discloses the information to are aware of, and comply with, the provisions of this clause.
- (c) The obligations of confidentiality under this clause do not apply to any disclosure of information:
 - a. that the Mediator reasonably believes is necessary as part of the mediation services being provided under this Agreement
 - b. required by law;
 - c. which is publicly available through no fault of the Mediator or any of the Mediator's employees or subcontractors; or
 - d. which the DNC agrees to in writing before the disclosure is made.
- (d) The Mediator must, on termination of this agreement, promptly:

- a. return to the DNC all information received as part of a mediation (whether in documents, reports, exhibits, data or other papers, and whether on paper or in any electronic information storage and retrieval system or in any other storage medium) in the Mediator's possession or control; and
 - b. destroy or delete, or arrange the destruction or deletion of, all copies (whether on paper or in any electronic information storage and retrieval system or in any other storage medium) of any analysis, notes, memoranda, data or other documents prepared by or for the Mediator which contain or reflect any information received as part of a mediation.
- (e) If requested by the DNC, the Mediator will provide a certificate stating that the information returned or destroyed comprises all the information relating to the provision of mediation services in the Mediator's possession or control.
- (f) The Mediator shall not make any public or other announcement or communication in relation to the Dispute Resolution Service except with the prior approval of the DNC as to the form and content of such communication.

4.6 Due Skill and Care

- (a) Both parties agree to exercise due skill and care in the performance of their responsibilities under this Agreement.

4.7 Assignment

- (a) Neither the DNC nor the Mediator is able to assign their rights or otherwise dispose of their interest in this Agreement.

4.8 Dispute Provision

- (a) Any dispute between the parties regarding the interpretation of this Agreement or the rights and obligations of either party under the Agreement or anything connected with the Agreement shall be referred to mediation in the first instance. Such mediation may be initiated by either party giving notice in writing to the other party identifying the dispute which is being suggested for mediation. The parties will agree on a suitable person to act as mediator or, failing agreement within five working days will ask the Arbitrators' and Mediators' Institute of New Zealand Inc or LEADR to appoint a mediator. If the matter cannot be resolved between the parties it shall be the subject of confidential arbitration before a sole arbitrator in accordance with the provisions of the Arbitration Act 1996 or any amendment or replacement of that Act.

4.9 Waiver for Breaches

- (a) The fact that one party may ignore or not do anything about a breach of the Agreement by the other party does not mean that it is not entitled to take any action regarding a previous or subsequent breach of the Agreement.

4.10 Termination

- (a) The DNC has the right to terminate the Agreement by giving the Mediator one month's notice in writing if:
- the Mediator commits any serious breach of the Agreement and does not remedy the breach within 14 days of notice in writing from the DNC requiring the breach to be remedied
 - the Mediator commits any serious breach of his/her obligations under the Agreement that is not capable of being remedied
 - the Mediator commits an act of bankruptcy
 - the Mediator does anything which causes or is likely to cause substantial damage to the reputation of the DNC and/or the .nz domain name DRS
 - where, due to the ill health of the Mediator, the work required to be done by the Mediator cannot reasonably be expected to be completed within the timeframes and there is a reasonable expectation that this situation will continue
- (b) The Mediator can terminate this Agreement by giving the DNC one month's notice in writing if:
- The DNC has not paid the Mediator's invoice for more than 20 working days after any payment is due, unless The DNC has given notice before payment is due that there is a dispute over the payment.
 - The DNC has breached any of the terms of this Agreement and fails to remedy the breach within 14 days notice in writing from the Mediator requiring the breach to be remedied.

Please note that for the purpose of payment of invoices, the Mediator is required to have completed and forwarded to the DNC all the requisite paperwork (see Guidelines) before an invoice will be paid.

4.11 Cancellation of Former Agreements

- (a) This Agreement contains the entire provisions of the Agreement between the Mediator and the DNC and replaces any previous arrangements between the parties which may have existed

4.12 Indemnity

- (a) The DNC agrees to indemnify the Mediator against all liabilities, damages, losses, costs and expenses (including legal expenses) which the Mediator may incur as a result of any claim, demand, action or suit that may be made against the Mediator, except as a result of breach of this Agreement or other unlawful conduct by the Mediator or any of the Mediator's employees or subcontractors.
- (b) The Mediator agrees to indemnify the DNC and its employees and agents against all liabilities, damages, losses, costs and expenses (including legal expenses) from any claim, demand, action or suit that may be made against the DNC as a result of breach of this Agreement or other unlawful conduct by the Mediator or any of the Mediator's employees or subcontractors; provided that the Mediator shall not be liable to the DNC for losses resulting from negligence in anything done or omitted to be done in the conduct of any mediation.

CONFLICT OF INTEREST POLICY

A conflict of interest arises where a mediator or expert has an interest which conflicts (or might conflict, or might be perceived to conflict) with the interests of the DNC in providing a fair, impartial and effective domain name dispute resolution service. While the conflict of an interest in itself is unlikely to be improper, it could lead to improper conduct or allegations of such.

What is a conflict?

In determining whether a conflict is present or not, there are two questions to ask:

- Would a reasonably informed objective observer infer from the circumstances that the mediator or expert's professional judgement is likely to be compromised in either mediating or adjudicating the dispute?

or

- Does the interest create an incentive (or a perception of an incentive) for the mediator or expert to act in a way that would be contrary to the objectives of a fair, impartial and effective dispute resolution process?

If the answer to either question is 'yes', a conflict of interest exists.

The conflict may be more perceived than actual. Whether or not the mediator or expert would actually be compromised or act on the incentive is irrelevant. The processes of the DRS must be fair and ethical, and must be very clearly seen to be so.

Even where the conflict of interest is able to be managed for the period that the mediator or expert is involved in the dispute, it is better that it is avoided and the dispute is assigned to another mediator or expert.

Examples

Examples of conflicts of interest that may arise include where the mediator or expert:

- has represented either the complainant or respondent in a professional capacity
- is a partner in a professional practice that is representing either the complainant or respondent
- holds shares in either the complainant or respondent

- has a personal or family relationship with either the respondent or complainant or with a person representing either of these parties in the dispute
- is an employee or employer of either the complainant or respondent.