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13 November 2007

Re: Third Consultation on RMC Policy Review

Dear Debbie,

Thank you for your letter of 21 August 2007 providing the New Zealand Bankers' Association with the opportunity to respond to the third consultation on RMC Policy Review.

In its responses of 14 September 2006 and the 14 February 2007 on the first and second consultations on RMC Policy Review the Association supported the introduction of a policy that prohibits names that contravene another act, are identical or almost identical or contain offensive words. The Association understands that this would be similar to the Policy that is operated by the Companies Office.

The Association would expect that such a policy would assist in combating any phishing and Internet related fraud that has a .nz dimension, as it should prohibit the use of names that are almost identical to existing corporate names such as "Wespac" and "Natonal bank".

The Association acknowledges that in certain circumstances this might involve the Domain Name Commissioner ("DNC") making a judgment regarding names, which they may not be comfortable in doing for the reasons outlined in the third consultation document. In particular, the DNC has pointed out that it has no statutory power in order to refuse the registration of certain names or statutory protection if a name is declined, unlike the Companies office. The Association recommends that the DNC obtain legal advice on whether through its terms and conditions that are binding on all registrars and registrants it can give itself effectively the same powers and protections as provided to the Companies' Office under the Companies Act.

The Association also acknowledges that there is a question of resources in terms of vetting registration names that may contravene any RMC Policy that prohibits certain names. The Association is not in a position to analyse the amount of resources required to enforce such a policy but would recommend that the DNC consult with the Companies' Office in this regard if it has not already done so. It might be that automated software is available that can assist in the vetting of registration names.

While the Association acknowledges that it is preferable to ensure that phishing attacks are prevented from happening in the first place should the DNC's resources prove to be a barrier in respect of the implementation of a policy prohibiting certain names then the Association is of the opinion that additional powers/ functions should be given to the Dispute Resolution Service in order to deal with phishing attacks and/ or other Internet based fraud on an urgent basis.

The statement of purpose of the Dispute Resolution Service Policy provides “an alternative to the Courts in situations where two parties are in dispute over who the registrant of a .nz domain name should be”. The Association is of the opinion that the Dispute Resolution Service Policy should assist complainants in relation to all circumstances where there has been an unfair registration, including where the registration unfairly interferes with the complainant’s commercial rights.

The Association submits that it might be possible to amend the Dispute Resolution Service policy in certain areas, including the broadening of the definition of “rights” to include “commercial rights” and consideration of whether the words “and/ or” should be inserted after clause 4.1.1 instead of “and”. If clause 4.1 is to be amended then accordingly 4.2 should be amended so that the complainant is only “required to prove that one of the elements is present on the balance of probabilities”.

Finally, in order to assist complainants that have been victims of phishing attacks then there would need to be provision in the Dispute Resolution Service Policy for the complainant to have his or her complaint heard on an urgent basis before an Expert (i.e. within a 24 hour period). It might be that the Expert is able to make a decision on an interim basis pending a full consideration of the issues at a future date. The Association notes that clause 11 provides for an exclusion of liability for InternetNZ, its councillors, officers, employees or servants or any experts or mediators, which appears to be appropriate in the circumstances. It might also be worthwhile including an exclusion of liability type clause in the RMC policy.

The Association is happy to assist the DNC in respect of its policy recommendations as above.

Yours faithfully

Alan Yates
Chief Executive