

Domain Names Commission Dispute Resolution Service consultation

Dear Brent & Dylan

Thank you for the opportunity to contribute to the DNC's consultation regarding the current dispute resolution process.

My apologies that this has taken so long to get to you and I do remember now that at the time of our workshop I got quite "enthusiastic" about the merits of looking at the dispute resolution process another way. I hope the following is of use to you. It is really just a collection of random ideas that may be of assistance to the Commission. I would be happy to talk further and flesh them out in discussion if there is any merit in doing that (and won't be offended if not).

Purpose of the dispute resolution process

Based on my understanding of the Domain Names Commission dispute resolution process, the notes I took at our workshop on 29 March 2019 and my understanding of the framework, the purpose of the dispute resolution process is to build the confidence of registrants that .nz has a safe and trustworthy registration process. The success of the .nz process is at least in part based on the reputation and integrity of the organisation.

Therefore the better, and (I believe) the more engaging, the dispute resolution process, the more likely the Domain Names Commission is to achieve that credibility and level of utilisation.

Assumptions

I may be completely wrong but the assumptions I have predicated my feedback on are:

- That registrants contract into the current dispute resolution process by way of a default process/membership rules but that the Domain Names Commission has a vested interest in its product and therefore the process.
- Based on the statistics that were provided to us at the workshop the uptake of the dispute resolution system leaves room for improvement. You talked about 22 complaints being received, 16 of those being not responded to by respondents, the other six going to mediation and three of those 6 settling at mediation.
- This raises questions for me about:
 - Whether in fact those 22 complaints are all of the *potential* disputes.
 - 16 non-responses is a high number of non-engagers.
 - You made the comment that experts are concerned that mediate-able cases are coming to them.
 - 12 of the 16 that weren't settled went to the experts, that means that four did not pay. Does that mean that they settled, or didn't settle?

High level suggestions

- Brent, I can't remember if these notes are what you said, or were my thinking at the time, but I agree with you that alternative dispute resolution is not really "alternative" at all today.
- What I wrote down, and I can't remember if it was your wording or mine, is that ADR could now stand for Assisted Dispute Resolution and in fact the Domain Names policy could talk about Assisted "Party to Party" Dispute Resolution.
- The idea that I got excited about for a number of reasons in the workshop was the concept of an independent facilitation role in the dispute resolution process. I believe this could assist with:
 - Increasing the level of engagement of parties (in particular respondents);
 - Increasing the level of intake of all parties to the DR process (i.e. reflecting on my question above about whether all complaints are filed/raised with the DNC).
- The suggestion of an independent facilitation process is not intended as a reflection of the quality of the service that is provided by the DNC however:
 - I think the independence might be valuable because the Domain Names Commission (when it manages the ADR process) also has a role in terms of (i) setting the rules and (ii) enforcing the rules which has a potential effect on the participation of parties; and
 - An independent can have a role in encouraging participation of parties whereby the DNC may not be able to do so and retain its neutrality.
- The facilitation could entail four parties – the complainant, the respondent, the facilitator (all of whom engage in the initial dispute resolution process) and then the Domain Names Commission who potentially provide sign-off.
- I make these comments based on my experience in restorative justice and my knowledge that the idea of facilitated meetings between offenders and victims requires a considerable change in thinking.
- In restorative justice – contacting the parties and the uptake required a specific set of skills that my organisation in the training I provided and utilised was able to increase the uptake of facilitated restorative justice from 37% to 63%. That is, most RJ provider groups in NZ had the offer of restorative justice declined at a rate of 37%. My organisation, because of a particular approach and the engagement skills used, was able to get achieve 63% of Victims saying yes to participation. (I note that this was under the old opt in system and before the legislation changed to make participation in RJ and opt out process. Under the new regime, the standard uptake in generic restorative justice is now even lower.

Brent and Dylan, I haven't really thought this through in significant detail however if it were the case that the Domain Names Commission either appointed an independent facilitator to a dispute at the point in time when the complainant makes contact with the Domain Names Commission (or at least made that option available) then the potential benefit of that *might* be:

- An increase in the complaints that raised with the Domain Names Commission (which sounds bad but given the merits of having a good and well used DR system is actually good);
- An increase in the conversion rate of complaints that end up with an active involvement of a respondent;
- Increased level of settlement of disputes and;
- (Going back to the purpose of the dispute resolution process) decreased dissatisfaction with registrant and registrant issues and increased confidence in the integrity of the .nz registrations therefore meeting the high-level objectives of the dispute resolution process in the first place.

Conclusion

As will be obvious from the rambling nature of the notes above, so far this is really just a half-baked collection of ideas that might be useful as the Commission reviews its dispute resolution process.

I do think it would be valuable for the Commission to give some thought to the idea of involving an independent facilitator/mediator earlier in the process with the outcome that the opportunity for consideration and resolution of disputes becomes more “open door”.

It may be of assistance in supporting this type of process if the Domain Names Commission was then able to, for example, suspend a domain name for failure to participate in the independent facilitation aspect of the process.

Philosophically and epistemologically it has always been significant (problematic) from my perspective that ADR is perceived of as:

- Civilised, less combative but still adversarial competition of rights between parties; and that
- Mediation is viewed as a cheaper, private, more expedient way of resolving disputes; when in fact
- A collaborative approach of independent facilitation is:
 - Non determinative and non-adversarial collaborative problem solving;
 - More attractive to parties – especially if the facilitator has a proactive role in engaging with parties;
 - In other contexts is known to be educational (thereby avoiding future disputes and increasing party satisfaction and utilisation of the Assisted Dispute Resolution process).

My questions in response to the strawperson proposal are:

- Firstly, at the point in the process where the question is asked - “Have the parties made any effort to resolve the dispute?” – “no”. Enquiry referral parties have five working days to discuss the matter and provide a response. This is one of the points in the process where a facilitated process is more likely to produce a result.

- Secondly - the involvement of an independent dispute resolution (ADR) assistant i.e. the facilitator at the point in time where the process asks if the dispute is a candidate for the tailored ADR process would be better run as an inquisitorial and engaged process.
- Finally in the context of there being a legitimate and qualifying dispute, the current failure of respondents responding suggests there is room for the role of facilitator/mediator/independent case manager in this process (as per the statistics there is a reasonably high drop-out rate at this point). [This is probably due to my lack of attention to the paper but I wonder what the conflict resolution in 10 working days is anticipated to look like? (i.e. how it's different from mediation? And, whether again this should be a facilitated process?).

Gentlemen, I hope this at least stimulates some thinking along these lines. Feel free to contact me if you would like to chat (so I can make the hurried summary above make better sense).

Regards



Tim Clarke
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