

## COMMERCE COMMISSION

### DECISION NO. 281

Determination pursuant to the Commerce Act 1986 in the matter of an application for authorisation of a restrictive trade practice. This is an application by:

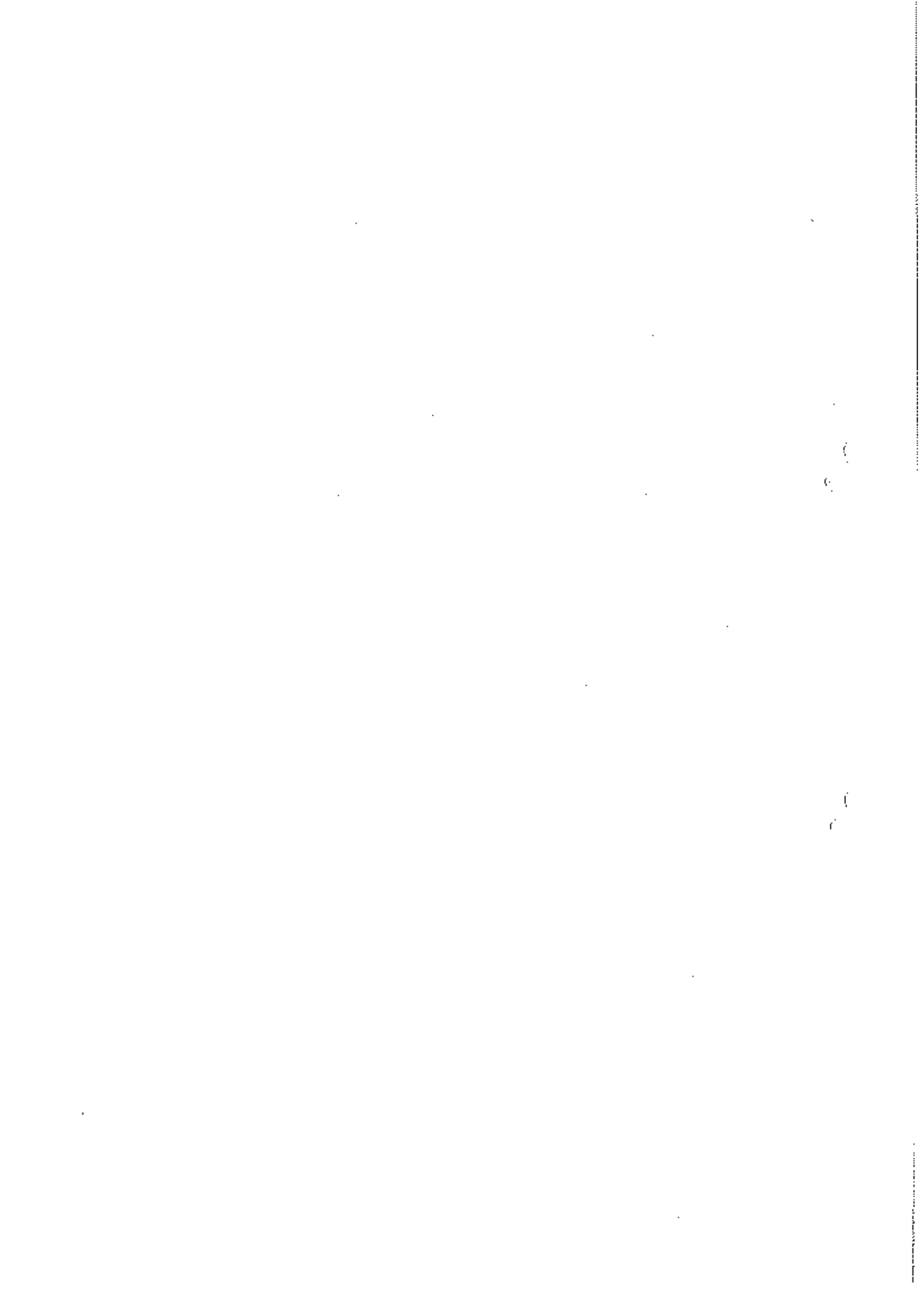
#### **New Zealand Rugby Football Union Incorporated**

for authorisation of the entering into and giving effect to the Player Transfer System of the New Zealand Rugby Football Union Incorporated.

**The Commission:**           A E Bollard (Chairman)  
                                  J G Auton  
                                  E C Harrison  
                                  T G Stapleton

**Determination:**       Pursuant to ss 58 and 61 of the Commerce Act 1986, the Commission determines to grant an authorisation for the New Zealand Rugby Football Union Incorporated to enter into, and to give effect to, the Regulations Relating to Transfer System in the amended form presented to the Commission at the conference on 20 November 1996.

**Date of Determination:**   17 December 1996



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## THE APPLICATION

1 The New Zealand Rugby Football Union Incorporated (NZRFU) has applied, under s 58 of the Commerce Act 1986 (the Act), for authorisation to enter into and give effect to its proposed Player Transfer System. The NZRFU intends entering into the Player Transfer System by passing regulations relating to the Transfer System ("the Regulations") and by amending the NZRFU's rules.

2 The Commission considers that the salient provisions of the Regulations are:

- Regulations 4.1 and 4.2 which provide that the transfer of a Player may only occur during the period 1 November to the immediately following 30 November (inclusive) of any calendar year, or in 1996, between the date that the Regulations come into force and 31 December 1996 ("the transfer period");
- Regulations 7.1 and 7.2 which provide that:

"7.1. The maximum Development Compensation Payment for each Transfer Band ... shall be as set by the Union at its discretion from time to time after consultation with the Affiliated Unions and such other persons as the Union may consider appropriate .... The maximum Development Compensation Payment applicable to each Transfer Band ... as at the date upon which these Regulations are made by the Union is as recorded in the second column of Schedule 1".

"7.2. ...in the event that the Transferor Affiliated Union and the Transferee Affiliated Union are unable to agree upon a Development Compensation Payment for a player, the maximum Development Compensation Payment as set by the Union for that Player's Transfer Band ... shall apply. For the avoidance of doubt:

(a) where a Transferee Affiliated Union is willing to pay the maximum Development Compensation Payment in respect of a Player, and that Player consents to the transfer, the Transferor Affiliated Union will be bound to allow that Player to be transferred to the Transferee Affiliated Union;

(b) a Transferee Affiliated Union shall not, however, be bound to receive a transfer of any Player unless it has agreed to pay the maximum Development Compensation Payment in respect of the Player (or such lesser Development Compensation Payment as the Transferor Affiliated Union is prepared to accept); and

(c) where a Transferee Affiliated Union is not willing to pay the maximum Development Compensation Payment in respect of a Player, and the Transferor Affiliated Union and Transferee Affiliated Union cannot agree on a lesser Development Compensation Payment for the Player then no transfer shall take place (subject to Regulation 10)."

("the Development Compensation Payment"); and

- Regulations 9.1 and 9.2 which provide that:

"9.1. ... the maximum number of transferring Players an Affiliated Union may accept in any 12 month period ... shall be five".

"9.2. ... no Affiliated Union may accept the transfer to that Affiliated Union of more than the specified maximum numbers of players within particular classifications within Transfer Bands, within particular Transfer Bands, or within particular groups of Transfer Bands as set out in Schedule 1".

( "the quota system" ).

- 3 The NZRFU's rules currently provide that the adoption or amendment of its rules may occur following a two-thirds majority vote of delegates at the NZRFU's General Meeting. Amendment of the NZRFU's regulations however, appears to require a simple majority. It is therefore possible for the NZRFU to amend the Regulations after any authorisation of them. The Commission also notes that, under the Regulations, the NZRFU can, by a simple majority of its Board, alter the levels of the maximum Development Compensation Payments without referring the matter to a General Meeting.
- 4 Authorisation, if granted, would be of the Regulations in the form submitted to the Commission. At the Commission's conference, Mr Wallace of the NZRFU noted that the Regulations might subsequently be amended to take account of any concerns from players. Any amendment to the substance of the Regulations and, in particular, to the maximum amount of the Development Compensation Payment, or to the amount of the quota, might not fall within the ambit of any authorisation. The NZRFU should consider whether authorisation should be sought for any such amendment.

## THE PARTIES

### NZRFU

- 5 The NZRFU is an incorporated society which is the administrative body governing the participants involved in the game of rugby union throughout New Zealand. The NZRFU is also responsible for the discipline of players who compete within NZRFU rugby competitions. For the year ended 31 December 1995, the NZRFU had total assets of \$16.4 million and revenue of \$13.8 million. For the year ended 31 December 1996 the NZRFU has a budgeted revenue of \$34.5 million.
- 6 The NZRFU is managed by a board of nine directors, elected at the NZRFU's Annual General Meeting by delegates from the 27 provincial unions, representatives of the Maori Rugby Board and of the New Zealand Rugby Referees' Association. Voting rights at General Meetings of the NZRFU are determined by reference to the number of teams that a provincial union has,



and vary from two to five votes. The Maori Rugby Board and the New Zealand Rugby Referees' Association each have two votes.

### **Provincial Unions**

- 7 Regional boundaries for each provincial union have traditionally been set by the Boundary Commission of the NZRFU. The NZRFU therefore considers any proposed separations or amalgamations of provincial unions.
- 8 There are currently 27 provincial unions throughout New Zealand. These provincial unions, although affiliated to the NZRFU, are independent incorporated societies. Each provincial union has teams playing in both the Senior A National Provincial Championship ("NPC") and NPC Development grades. In addition, each provincial union has affiliated clubs which are predominantly school teams and amateur sporting clubs.

### **Players**

- 9 The NZRFU has stated that there are approximately 130,000 rugby union players throughout New Zealand at the present time, of whom approximately 1,100<sup>1</sup> are subject to the provisions of the Regulations.
- 10 As a result of the development of the Rugby Super 12 and the beginning of professional rugby union in New Zealand, the NZRFU has required all Rugby Super 12 players and All Blacks to sign contracts with the NZRFU. Some development players also have contracts with the NZRFU. All these players receive remuneration directly from the NZRFU.
- 11 In addition, it appears that many provincial unions also have individual contracts with NPC players, which vary significantly between provincial unions. Some contracts provide for player remuneration based on the number of games played, with others based on a fixed per-match fee. Further, some provincial unions reward players with a small 'pay-out' at the end of each season (or each game), the level of which is dependent on funds derived from gate-takings or other sources. In addition to these payments, the provincial unions also pay (on behalf of both themselves and their players) a type of subscription fee to the NZRFU.

### **The Rugby Union Players' Association (RUPA)**

- 12 RUPA is an incorporated society which has been established to represent the interests of New Zealand rugby union players. In August 1996, the Senior A NPC squad of each provincial union except Auckland (since most Auckland players were involved in the All Black tour of South Africa), elected two

<sup>1</sup> In its application, the NZRFU estimated that there would be 1,320 players contained within the bands; in Appendix 9 to the NZRFU submission, the number of affected players was stated as 1,143; at the conference, Mr Wallace referred to 1,350 players affected. The NZRFU has indicated that the 1,143 figure is the most accurate.

players to be each squad's representatives in RUPA. At the conference, Mr Fisher for RUPA stated that, although it does not yet have any financially active members, RUPA represents over 85 percent of the players in the first division of the NPC competition.

## OTHER PARTIES

### The International Rugby Football Board (IRB)

- 13 The IRB is a body established to oversee and adjudicate rugby union issues internationally. It is made up of delegates from the governing bodies of each of the rugby union-playing nations, who vote on rule changes, arrange for tours and administer the Rugby World Cup.

### Sponsors

- 14 New Zealand rugby union has a number of prominent sponsors. These sponsors include Air New Zealand Limited (Air NZ), Lion Nathan Limited (Lion Nathan), and Television New Zealand Limited (TVNZ).

### Broadcasters

- 15 With the development of the Rugby Super 12 competition in 1995, the rugby unions of New Zealand, South Africa and Australia signed an exclusive agreement with the News Corporation Limited (News Corp) which provides News Corp with the rights to televise all rugby union matches (including NPC, Rugby Super 12 and test matches) played in each of the respective countries, for the next ten years. In return, News Corp agreed to pay a total of US\$555 million to the three unions over the next ten years. News Corp has subsequently on-sold some of these rights to local television networks such as Sky Network Television Limited (Sky) which has further on-sold some of these rights to TVNZ.

### New Zealand Rugby Football League (NZRFL)

- 16 The NZRFL is an organisation with a similar structure to the NZRFU, but is responsible for the administration of rugby league in New Zealand. It runs inter-provincial competitions such as the Lion Red Cup. The NZRFL competes with the NZRFU for support from spectators, sponsors and for revenue from broadcasters.

## COMMISSION PROCEDURES

### Procedures

- 17 The application for authorisation of the Regulations was registered by the Commission on 23 September 1996. Notice of the application, in accordance with s 60(2)(c) of the Act, was given to 37 parties who were considered likely

to have an interest in the application. Pursuant to s 60(2)(d) of the Act, the Commission gave public notice of the application on 25 September 1996 in the New Zealand Herald, the Waikato Times, The Evening Post, The Dominion, The Press, the Otago Daily Times and the Southland Times.

- 18 Amendments to the application were received by the Commission on 7 November 1996 and on 20 November 1996. The Commission considered that the amendments did not materially alter the application and accepted both amendments. Copies of both amendments were duly circulated to all interested parties, seeking their comments. No interested party responded to either amendment.
- 19 On 22 October 1996, the Commission issued a Draft Determination, pursuant to s 62(1) of the Act. The Draft Determination provided the Commission's preliminary view that, based on the information available to it at that time, the Commission would determine to decline to grant an authorisation for the Regulations. The Draft Determination also identified a number of areas where further information or comment was sought.
- 20 Pursuant to s 62(2) of the Act, copies of the Draft Determination were sent to the applicant and all interested parties. Submissions on the Draft Determination were sought, and the Commission received eleven such submissions. The submission from the Maori Congress Sports, Recreational and Cultural Committee was received at the conference. This submission was circulated to all interested parties, seeking their comments. No interested party responded to this submission. Attached is a list of those persons who provided submissions upon the Draft Determination (Appendix-1) and a list of interested parties to the application (Appendix 2).
- 21 In the Draft Determination, the Commission indicated that, pursuant to s 62(6) of the Act, it had determined to hold a conference to assist in its consideration of the application. The conference was held in Wellington on 18, 19 and 20 November 1996. Appendix 3 lists those parties who participated at the conference.
- 22 In the course of the examination of the application, Commission staff have spoken to, and sought comments from, a wide range of parties with an interest in the Regulations. A list of persons who have provided comment to the Commission is attached at Appendix 4.
- 23 If the Commission is satisfied that the Regulations would not result in a lessening of competition in terms of any of ss 27, 29 or s 27 via s 30 of the Act, the Commission may decline to authorise the Regulations on the grounds that authorisation is neither required by the Act nor within the jurisdiction of the Commission.
- 24 If the Commission is not satisfied that the Regulations would not result in a lessening of competition in terms of s 27, or s 27 via s 30, of the Act, the

Commission may grant an authorisation for the Regulations if it is satisfied that the Regulations will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result, or would be likely to result or is deemed to result from the Regulations (ss 61(6)(a) & (b)).

- 25 If the Commission is not satisfied that the Regulations would not result in a lessening of competition in terms of s 29 of the Act, the Commission may grant an authorisation for the Regulations if it is satisfied that the Regulations will in all the circumstances result, or be likely to result, in such a benefit to the public that they should be permitted (ss 61(7)(a),(b),(c) & (d)).
- 26 If the Commission is not satisfied that the benefits to the public outweigh the detriments resulting from the Regulations, the Commission shall decline to grant an authorisation (s 61(1)(b)).

#### **Interest of Associate Commissioner**

- 27 Commissioner Auton is a director of The Ford Motor Company of New Zealand Ltd (Ford) but does not participate in any executive decisions on the allocation of advertising funds.
- 28 In the Draft Determination, the Commission sought comment on this matter. RUPA was the only party to respond. RUPA requested, and was provided with, information detailing the extent of Ford's sponsorship of the NZRFU. RUPA has, however, made no further submission to the Commission on this matter.
- 29 The Commission does not believe that this relationship is an interest such as described in s 14 of the Act that would disqualify Mr Auton from taking part in the consideration or determination of the application.

### **THE REGULATIONS**

#### **Introduction**

- 30 In its initial press release of 23 September 1996, the NZRFU listed the founding principles of the Regulations as:
- **Investment in Grassroots Development**  
The player transfer system rewards individual Unions for developing young local players and provides an incentive for Unions to invest in grassroots rugby.
  - **A Players' Market**  
The transfer market is player-driven. Players retain control of where they will play their rugby. No player can be compelled to transfer and no player can be prevented from transferring by his Union.

- Competitive Rugby  
The transfer system will encourage even teams and competitive rugby in New Zealand. It protects the Unions' player strength by restricting the number of players that can move to a Union."

These founding principles were reiterated by the NZRFU in its Policy Statement (which by virtue of Regulation 10.7 forms part of the Regulations) and in information provided at the conference.

- 31 Under the Regulations, rugby union players are split into a number of 'bands' which indicate the level of experience of the player, and the competition in which the player has most recently been playing. The Regulations affect only players transferring between provincial unions who fall within one of the bands and who will play in the receiving provincial union's Senior A NPC team in that or any future year, but the Regulations have consequences for other levels of the sport. The bands are:

- All Blacks
  - ◊ Star
  - ◊ Established
  - ◊ Current
- All Blacks Former  
Rugby Super 12
- Senior A NPC
  - ◊ 1st Division
  - ◊ 2nd Division
  - ◊ 3rd Division
- NPC Development
  - ◊ 1st Division
  - ◊ 2nd Division
  - ◊ 3rd Division
- NZ Colt
- NZ U19 Rep
- NZ Schools
- Academy Members

#### **The Provisions of the Regulations**

- 32 The Commission has identified certain provisions of the Regulations which it considers as its primary focus in this application. These components are:

- the quota system;
- the transfer period; and
- the Development Compensation Payment.

Each of these components is to be established under the 'banding system'.

*Quota System*

- 33 The Regulations allow each provincial union to acquire the services of a maximum of five players in any year. Each provincial union is also restricted in the number of players from each band or grouping of bands of players that it may acquire in any year. As an example, a provincial union may acquire the services of only one All Black (other than former All Blacks) each year.

*Transfer Period*

- 34 As part of the Regulations, the transfer of players will be limited to one month in each year. This period is specified in the Regulations to run from 1 November to 30 November inclusive, in any year other than 1996; when it shall run from the date the Regulations come into force until 31 December 1996.

*Development Compensation Payment*

- 35 Under the Regulations, the NZRFU has specified the maximum amount of the Development Compensation Payment payable with respect to each band of player. These amounts were set following consultation with the provincial unions and other interested parties, based on the consensus maximum value that the provincial unions placed on the skills and experience of players at the various levels.
- 36 While the Regulations enable provincial unions to negotiate the Development Compensation Payment payable in respect of the transfer of a specific player, occasions might arise when provincial unions are unable to agree on the amount of the Development Compensation Payment, when mediation by the NZRFU (pursuant to Regulation 6.6) has been unsuccessful and the Player Transfer Review Committee does not have jurisdiction to consider the Development Compensation Payment (because the player wishes to transfer for reasons other than those provided in Regulation 10). In such circumstances, the effect of Regulations 7.2(a) to (c) is that there will be a transfer if and only if the player agrees to the transfer and the acquiring provincial union agrees to pay the maximum applicable Development Compensation Payment to the selling provincial union. Absent those agreements, the selling provincial union may refuse to agree to the transfer and may retain the player.
- 37 In its 6 November 1996 submission to the Commission, the NZRFU contended that:

"The development compensation payment does not necessary (sic) reflect the cost of developing a particular player but the Union will incur a cost in developing a number of players only a few of which would reach a certain standard. The Union will have to recover the costs of all of those players. The only way to do that is through the few that develop."

Also, the NZRFU stated at the conference that:

“... [T]he purpose of these compensation payments was, firstly to encourage development in existing players; to provide an incentive to develop players successfully; and to encourage the acquisition of lower level players from other unions. ... [T]he values set on the player categories are not assessments of the financial value of those players. They are the values that provincial unions believe is an appropriate maximum value by way of compensation for a union’s investment in that player’s development.”

- 38 However, the Commission considers that the effect of Regulations 7.2(a) to (c) (as explained above), and the inclusion of the specified levels of payment for certain bands of player, suggest that the payment is not based so much on the development costs of the player, but on the expected value of that player’s services. The Commission believes that a provincial union paying the Development Compensation Payment acquires the rights to utilise the services of a player at a specific level of rugby union competency. This is illustrated by the fact that different maximum values apply to ‘Star’, ‘Established’ and ‘Current’ All Blacks, irrespective of the fact that the same investment in development might have been made in each player.
- 39 Consequently, although the purpose of the payment is to ensure compensation to the losing provincial union, the payment is, in effect, a transfer fee, and will be referred to as such throughout this determination.

## THE SPORT OF RUGBY UNION

### Introduction

- 40 Until 1990, New Zealand rugby union had been run on a purely amateur basis. In 1990, the IRB relaxed the rules protecting amateurism to allow players to receive modest payment for promotional services. In 1995 however, with the development of the Rugby Super 12 competition (and the attempted establishment of the World Rugby Corporation (WRC)), the IRB announced that rugby union would abandon its previous amateur status, and instead freely adopt professionalism<sup>2</sup> on a world-wide basis.

### “Grass Roots” of Rugby Union

- 41 At the conference, the NZRFU emphasised the importance of the size of the base of rugby union players in New Zealand. Mr Crawford explained that “by grass roots, we mean the clubs and our junior clubs right down to five year olds”. Mr Lochore said, “[r]ugby truly is a national game in New Zealand.” This was supported by Mr Burdett of East Coast RFU who stated that as many as 24 percent of the population in the East Coast region are involved in rugby union.

<sup>2</sup> Very few New Zealand rugby union players currently receive more than nominal compensation for their services. For the most part, only All Blacks and Rugby Super 12 players are able to subsist on their rugby remuneration.

- 42 The infrastructure of rugby union in New Zealand is pyramid-shaped with the bottom tier formed by the 130,000 players playing from age five through to rugby union at the senior club level. The NZRFU contends that it is this substantial infrastructure which has given New Zealand rugby union its strength, since each provincial union selects its NPC team from the leading players at club level, each Rugby Super 12 team is in turn selected from the NPC teams, and the All Black team is selected from the Rugby Super 12 teams.

#### **National Provincial Championship**

- 43 The NPC competition is organised into three divisions numbered from one to three. These divisions each have nine competing teams that are derived from the 27 provincial unions throughout New Zealand. Each division of the NPC competition is further divided into two levels; that is, the Senior A NPC competition, which is the basis for the NPC competition within each division, and the NPC Development competition, in which teams of the lower ranked players within each division compete. The NPC competition is contested on a largely amateur basis with participation by some professional players. Due to their commitments to All Black rugby, many of these professional players are unavailable for their NPC teams for part of the season, although All Black tour dates are deliberately chosen to enable All Blacks to play for their NPC provinces in key matches.
- 44 Within the NPC competition, specific rules exist with respect to the lending of players between provincial unions. Effectively the lending system enables provincial unions to agree to players playing for provincial unions other than their home unions. This system is typically used by provincial unions that have a particular weakness in their teams and need to acquire players with particular skills, or by players who are not regularly selected by their home provincial union's team but are likely to be selected by another provincial union. A provincial union may utilise the services of a total of four such players, who are not formally transferred between provincial unions and must return to their home provincial unions on request. The NZRFU has advised that the lending system will remain outside the ambit of the Regulations and will not involve transfer fees.

#### **Rugby Super 12**

- 45 The Rugby Super 12 competition was developed by the NZRFU, the Australian Rugby Football Union and the South African Rugby Football Union in 1995. It consists of 12 teams - five from New Zealand, four from South Africa and three from Australia. The competition starts in early March and concludes in late May. In addition, in July of each year there is a tri-series between the three nations, which involves the national team of each country competing in two tests against the other competing nations.



- 46 All Rugby Super 12 team members in New Zealand are professional players who have individual contracts with the NZRFU. The selection system for the Rugby Super 12 competition involves the establishment of five regional teams throughout New Zealand. Selection of players is carried out in two stages, and, as the NZRFU has advised, will now include greater input from the All Black selectors. In the first stage, the coaches of the respective Rugby Super 12 teams (or their selectors) select players from the provincial unions contained within their regions. The players who are not selected in the first stage then become part of a draft system. In this second stage, the coaches of each team then 'draft' from the remaining players, regardless of players' usual NPC regional affiliation.

### Revenue Streams

#### *Sponsorship*

- 47 Air NZ, Lion Nathan, Canterbury International Limited and TVNZ are several of the main contributors to the NZRFU. At this level, the sponsorship usually takes the form of a cash contribution to the NZRFU, although in-kind contributions to the NZRFU and specific levels of rugby union player are also made. An example is the provision by Air NZ of free air travel to provincial union teams travelling for the NPC competition. In addition, Caltex New Zealand Limited, Ford and Philips New Zealand Limited provide sponsorship to the All Blacks Club in particular.
- 48 Sponsorship is a major source of income for provincial unions, and can occur in various forms at this level. For instance, a cash donation to a provincial union may be made by a sponsor, or a sponsor may provide specific commodities to a player, such as accommodation or a vehicle, in order to persuade a player to contract with a particular provincial union. It is understood that even at an amateur level, players have been receiving incentives and payments from the provincial unions and supporters for some time.
- 49 Mr Tew for Canterbury RFU, Mr Foster for RUPA, and some sponsors, consider that with the introduction of the Rugby Super 12 competition,<sup>3</sup> the length of the New Zealand domestic season has been curtailed. Where previously provincial unions could display their sponsors' logos on their playing kit for virtually the whole season (from March to October), that period is now effectively limited to mid-August to mid-October. Some provincial unions' sponsors consider that there is no visibility early in the season and only a few very intensive weeks late in the season, which might lead to a reduction in the amount such sponsors are prepared to pay to provincial unions.

<sup>3</sup> The Rugby Super 12 competition is considered to be an international competition, for which the NZRFU owns nearly all rights to advertising and sponsorship.

*Broadcasting Rights*

- 50 A large proportion of the NZRFU's revenue is derived from the sale of broadcasting rights. The NZRFU controls all the rugby union competitions in New Zealand which are televised with the result that only the NZRFU, and not the provincial unions, may sell the rights to broadcast matches played in these competitions.
- 51 As part of the agreement between Australia, South Africa and New Zealand for the development of the Rugby Super 12 competition, each national rugby union was also granted the ability to sell the rights to each of their respective Rugby Super 12 'brands'. Therefore, under this agreement, the NZRFU is able to derive income from the sale of the five Rugby Super 12 franchises in New Zealand.

*Gate-takings from Spectators*

- 52 Generally, the NZRFU will acquire a percentage of gate-takings from any international or NPC semi final/final games played in a particular province, with provincial unions receiving the remainder after expenses. Different rules exist for the distribution of revenue derived from club games within a provincial union.

*Funding from NZRFU*

- 53 There are several ways in which the NZRFU shares its income from sponsorship, broadcasting rights and gate-takings with the provincial unions. The NZRFU provides direct financial support to provincial unions by underwriting the salaries of development officers (which amounted to \$499,000 in 1995) and chief executives of some of the smaller provinces. This year, it also provided grants to provincial unions, the amounts of which were calculated according to the number of players in each union's NPC team who did not hold NZRFU/Rugby Super 12 contracts. The NZRFU stated at the conference that:

"... in a great majority of cases, those provincial unions on receiving the grant, made payments to their players, they were small but they definitely made player payments."

- 54 Such grants are usually earmarked for specific purposes and the NZRFU sometimes requires a monthly return from the provincial unions showing how the money has been spent. These grants are therefore a form of revenue sharing between the NZRFU and the provincial unions. In turn, some provincial unions provide grants to clubs within their territories.
- 55 The NZRFU offers indirect support to provincial unions through its provision of coaching services, such as coaching schools, position-specific courses or funding of ex-All Blacks' tours of provincial unions. In 1996 the budget for coaching was \$1.3 million.

## THE MARKETS

### Introduction

56 Section 3(1A) of the Act (as amended by the Commerce Amendment Act 1990) provides that:

“the term ‘market’ is a reference to a market in New Zealand for goods and services as well as other goods and services that, as a matter of fact and commercial common-sense, are substitutable for them.”

57 A market is “a field of actual or potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.”<sup>4</sup>

58 The purpose of defining a market is to provide a framework within which the competition implications of a restrictive trade practice can be analysed. The relevant markets are those in which competition can be affected by the contract, arrangement or understanding being considered. Identification of the relevant markets enables the Commission to examine whether a lessening of competition would occur as a result of the arrangement and to determine if the magnitude of any detriment from a lessening of competition is outweighed by the public benefits attributed to the arrangement.

### The Relevant Markets

59 The applicant has identified two markets to which the trade practice for which authorisation is sought relates and an alternative market for each of those markets. The markets identified by the applicant are as follows:

- the market for the acquisition of sports player services in New Zealand, or, in the alternative, the market for the acquisition of rugby union and rugby league player services in New Zealand (“the market for player services”); and
- the market for the provision of sports entertainment services in New Zealand, or, in the alternative, the market for the provision of rugby union and rugby league sports entertainment services in New Zealand (“the market for sports entertainment services”).

60 The Commission considers that versions of the applicant’s two proposed markets are appropriate, but that there is a third relevant market as well. In addition to the transactions which occur between players and provincial unions for player services, there is a field of potential transactions between provincial unions for buying and selling of the rights to use player services.

<sup>4</sup> *Edmonds Food Industries/WF Tucker & Co Ltd*, Decision No. 84, 21 June 1984.

- 61 In *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited & Anor*,<sup>5</sup> the High Court of Australia stated:

“...[A] market can exist if there be the potential for close competition even though none in fact exists.... Indeed, for the purposes of the Act, a market may exist for particular existing goods at a particular level if there exists a demand for (and the potential for competition between traders in) such goods at that level, notwithstanding that there is no supplier of, nor trade in, those goods at a given time.”

- 62 The existence of this third market, characterised by transactions between provincial unions for the rights to use player services, is evidenced by the Regulations and similar player transfer systems used overseas (“the market for the rights to player services”).
- 63 An analysis of these three markets, including discussions of the appropriate product, functional and geographic dimensions of those markets, is set out below.

#### *Market for Player Services*

- 64 There is a market throughout New Zealand in which players compete with each other to supply their skills or services to provincial unions and in which provincial unions compete with each other to acquire them. In some instances, the end result of this competition is the entering into of a contract between the provincial union and the player. As is discussed below in the *Jurisdiction* section of this Determination, the issue of the nature of this contract between provincial union and player as a contract *of service* or a contract *for services* might be relevant for determining whether a market exists for the purposes of the Act.
- 65 With respect to the scope of this market, the applicant postulates in the first instance that there is a market for the acquisition of the services of sports players in New Zealand and, in the alternative, a market for the acquisition of the services of rugby union and rugby league players. For market definition purposes, the issue is whether the skills of other sports players, as a matter of fact and commercial common sense, are substitutable for the skills of rugby union players.
- 66 Although there may be some substitution at the margins in the instance of exceptional athletes, the consensus amongst parties canvassed by Commission staff was that the skills of other sports players are generally not substitutable for those of rugby union players. A rugby union player requires a certain set of skills in order to perform at a ‘banded’ or premier level. Depending upon the player’s position on the team, particular ball handling skills, aerobic fitness, physical strength, training, speed, and understanding of strategies are required. Clearly, the skills of a golfer, lawn bowler or tennis player are not

<sup>5</sup> (1989) ATPR 40-925.

substitutable for those of a 'banded' rugby union player. Accordingly, the Commission dismisses the suggestion of the applicant that the relevant product market is so broad as to include sports players generally.

- 67 The skills of rugby league players most closely approximate those of rugby union players. Notwithstanding the apparent similarities between the two sports, it was the view of most parties interviewed by Commission staff that the skills of only a small percentage of rugby league players could be transferred to rugby union and vice versa. Those parties considered that any switching of players was most likely to occur amongst rugby union backs, rather than amongst forwards who have unique rucking and mauling skills which are not directly applicable to rugby league. The Commission notes, however, that the skills in common between the two sports appear to have converged to a greater extent due to recent changes in the rules of rugby union.
- 68 In its submission, the NZRFU identified several players who have transferred between rugby union and rugby league. The Commission acknowledges that there has been some switching of players from rugby union to rugby league, particularly when there was greater economic incentive to do so (that is, prior to the institution of professionalism in rugby union). There have also been recent, highly publicised incidents of players such as Inga Tuigamala switching back from league to union. The Commission agrees that from a practical perspective, the skills of (mostly back-line) rugby union players are probably substitutable for those of rugby league players.
- 69 At the conference, Mr Tew, for Canterbury RFU and Mr Crawford, for the NZRFU, both presented information that suggests that league players would require retraining, for perhaps as long as one year, before they could play at NPC level. Those players who have switched have mostly played rugby union at some point, and usually play only in back-line positions. Furthermore, of the players cited by the NZRFU as having switched, almost all are playing at the very highest levels of their sport, which was acknowledged by Mr Wallace who said "the players we are talking about from league are high profile players".
- 70 Such evidence indicates that most rugby league players transferring to rugby union require additional training to be provided to them and they cannot immediately play at Rugby Super 12 level, the level at which they could expect subsistence remuneration. Transferring rugby league players could expect some income from playing at NPC level, but the amount would not be comparable with the current levels of remuneration which league players reportedly receive and thus, would not provide rugby league players with a sufficient incentive to switch. The Commission therefore concludes that, as a matter of fact and of commercial common sense, the skills of rugby league players are not generally substitutable for those of rugby union players.
- 71 The NZRFU contended that overseas players and young players are all, from the NZRFU's perspective, part of this market. According to the applicant,

rugby union is played by an estimated 130,000 players throughout New Zealand. However, the applicant states that only about 1,100 of those players are included within the teams comprising the bands and therefore subject to the Regulations. The Commission considers that only a limited additional number of players possess the skills required to play rugby union at the 'banded' levels of the game. The Commission not only considers that the services of other sports players, including for present purposes, rugby league players, do not fall within the relevant 'product' market, but that most rugby union players are also excluded. The skills of the vast majority of the total rugby union playing population are simply not substitutable for those of banded players. Accordingly, for the purposes of analysing the Regulations under the Act, the Commission considers that it is appropriate to limit the scope of the rugby union player services market to only currently or potentially banded rugby union players ("premier" rugby union players).<sup>6</sup>

- 72 The Commission considers that the "sports player services" market is too broad for the purposes of analysing the competitive implications of the proposed trade practice. For the purposes of this Determination, the Commission will assume that the skills of rugby league players and most rugby union players are not substitutable for the skills of "premier" rugby union players. Therefore, the market adopted for competition analysis purposes is the New Zealand market for the provision and acquisition of premier rugby union player services.

#### *Market for the Rights to Player Services*

- 73 As was previously mentioned, the Commission considers that there is another market, not suggested by the applicant, which is relevant for the purposes of analysing the competitive effect of the Regulations; specifically, the market for the buying and selling between provincial unions of the rights to utilise the services of premier rugby union players. This is a national market as, by design, the 27 provincial unions have prescribed territorial boundaries collectively covering the whole of New Zealand.

- 74 It is the rights to player services that are to be bought and sold between provincial unions. These rights "are or are to be provided, granted, or conferred in trade", and therefore are "services" within the meaning of that term as defined in s 2(1) of the Act. The NZRFU has advised the Commission of one instance of a payment having been made and of two instances of payment-free transfers (that is, instances of trade having occurred) between provincial unions for the purchase and sale of the rights to player services, which occurred during the moratorium on player transfers. In its submission, the NZRFU also provided details of all transfers of players between provincial unions which occurred between 1993 and 1995. The Commission believes

<sup>6</sup> In its 4 October 1996 decision reversing (on grounds other than market definition) the judgment of the Federal Court in *News Limited v Australian Rugby Football League Limited & Ors* (1996) 58 FCR 447 (the *ARFL* case), the Full Federal Court of Australia found that clubs were likely to be in competition with each other for the services of "premier" rugby league players.

that the moratorium might have retarded any development of the market for the rights to player services which might otherwise have occurred following the institution of professionalism.

- 75 The issue of the existence of a market for the rights to player services was considered by an Australian court in *Adamson v West Perth Football Club (Inc) & Ors*<sup>7</sup> (the *Adamson* case). In that case, the Federal Court held that because there would be no market for the rights to player services (therein referred to as a "club to club market"), but for the transfer rules and regulations at issue, there existed no market for the rights to player services nor competition within a market for the purposes of s 45 of the Trade Practices Act 1974.
- 76 A subsequent Federal Court of Australia case aptly notes that the judge "does not expand upon the process of reasoning" leading to the conclusions expressed in his judgment.<sup>8</sup>
- 77 Notwithstanding the finding of the Court in the *Adamson* case,<sup>9</sup> the Commission is satisfied from the evidence that there is a field of potential transactions between provincial unions for the rights to player services. In their respective submissions, both the applicant and RUPA supported this conclusion. Accordingly, the Commission will proceed on the basis that a market for the rights to player services exists and will assess the competitive impact of the Regulations on that market.
- 78 The Commission concludes that there is a New Zealand market for the provision and acquisition of the rights to premier rugby union player services.

#### *Market for Sports Entertainment Services*

- 79 The applicant states that there is a market for sports entertainment services, or alternatively, rugby union and rugby league sports entertainment services, in New Zealand.
- 80 In the entertainment services market, multiple transactions occur between multiple parties. For example, rugby union is sold by the NZRFU and/or provincial unions as a form of entertainment to spectators and to the media. Rugby union related merchandise is sold by rugby union organisations to the public. Corporations purchase advertising rights from rugby union organisations (sponsorship and direct advertising) and from the television and radio stations which have purchased rugby union broadcasting rights. Other sports and forms of entertainment also sell their 'services' to many of the same

<sup>7</sup> (1979) ATPR 40-134.

<sup>8</sup> *Adamson & Ors v New South Wales Rugby League Ltd & Ors* (1991) ATPR 41-084, rev'd (1991) ATPR 41-141.

<sup>9</sup> It should be noted that the *Adamson* case was decided 10 years before the previously quoted ruling of the High Court in the *Queensland Wire* case, discussing the existence of markets based on actual or potential transactions.

parties. The issue is whether and to what extent rugby union organisations compete with other sports and forms of entertainment for spectators, corporate sponsorship, the sale of television and radio broadcasting rights, media coverage and publicity, television audiences, and merchandising.<sup>10</sup>

81 Based upon discussions with market participants, the Commission considers that rugby union competes primarily with other forms of sporting entertainment, and to a lesser extent with non-sporting entertainment. A summary of the evidence obtained from market participants on the issue of the substitutability of rugby union with other sports and forms of entertainment, follows:

- According to a 10 March 1994 report produced by The Boston Consulting Group ("the Boston report"), which was commissioned by the NZRFU, about 15% of New Zealand's population may be considered dedicated rugby union supporters for whom no other sport or form of entertainment provides an acceptable substitute. An additional 15% of the population are rugby union rejecters and the remaining 70% of the population is comprised of "theatre goers" for whom rugby union is one of many entertainment choices available (for example, barbecues, golf, reading, movies);
- Provincial unions responding to Commission enquiries stated that rugby union matches are generally scheduled so as to not coincide with rugby league and other significant sporting events, if any.<sup>11</sup> There may be a limited exception to this rule for the very top levels of rugby union (All Black, Rugby Super 12, Ranfurly Shield and NPC playoff matches), for which, in most instances, scheduling conflicts are not a major concern;
- Provincial unions typically set ticket prices with reference to the other forms of entertainment available to the public. One provincial union representative stated that its ticket prices were set at the highest possible level and that a further increase in prices would risk loss of a substantial portion of its spectators to other forms of entertainment;
- In addition to competing for spectators at matches, provincial unions state that they compete for sponsorship and television audiences with other sports and forms of entertainment;

<sup>10</sup> The Commission acknowledges the possibility that these multiple transactions and parties establish the existence of more than one market (for example, a "spectator market", a "sponsorship market", and a "broadcasting rights" market). However, where a number of narrowly defined markets exhibit similar characteristics, the Commission will, for the sake of convenience, treat them as a single class for the purposes of competition analysis.

<sup>11</sup> In some regions, particularly Auckland, provincial unions compete with each other for spectators, sponsorship and merchandising. The NZRFU attempts to eliminate scheduling conflicts between provincial union teams to the extent possible. Also, it was noted that in some regions of the country, rugby union was literally the "only game in town" and that therefore there was no real issue of substitution of other forms of sporting entertainment.



- Although television stations consider that rugby union is the most popular form of sports entertainment, certain league, netball, and one day cricket matches can compete with rugby union and scheduling conflicts with such events will be avoided; and
- Rugby union is an important element of the sponsorship programmes of some corporate sponsors, but funding is typically allocated amongst a range of sports and the arts.

82 The identification of a market for sports entertainment services is consistent with a previous Commission decision, *In the Matter of the Speedway Control Board of New Zealand (Inc)*,<sup>12</sup> where the Commission made the following relevant statement:

“Speedway provides entertainment to a paying public, operating usually on weekends. The Commission considers that speedway competes against other forms of sporting entertainment such as other motor sports, horse racing, rugby etc. The public thus has a wide choice of forms of entertainment on which to spend its money. The demand for the various forms will depend on public tastes, relative prices etc. This market is clearly on a commercial footing and is a relevant market in terms of the Act. The Commission considers ‘a speedway entertainment market’ too narrow an approach and prefers ‘the sporting entertainment market’ within a local or regional area...”

83 The rejection of a narrow rugby union and/or rugby league entertainment market is also consistent with the *ARFL*<sup>13</sup> case where the Court found that, in the event of a significant price rise or quality reduction for rugby league, a significant body of rugby league spectators would be attracted by at least rugby union, soccer, Australian rules football and basketball.

84 The Commission concludes that the relevant market is the market for the provision and acquisition of sports entertainment services in New Zealand rather than a broader entertainment market or a narrower rugby union and/or rugby league entertainment market.

#### **Conclusion On Relevant Markets**

85 For the purposes of analysing the competitive impact of the Regulations under the Act, the three relevant markets are the New Zealand wide markets for:

- the provision and acquisition of premier rugby union player services (“player services”);
- the provision and acquisition of the rights to premier rugby union player services (“the rights to player services”); and,

<sup>12</sup> Decision No. 242, 14 December 1989.

<sup>13</sup> Above n 6.

- the provision and acquisition of sports entertainment services ("sports entertainment services").

## JURISDICTION

### Introduction

- 86 There are two issues of jurisdiction for the Commission to determine before considering the substantive issues. The first relates to the services provided by rugby union players to the NZRFU, and whether these are subject to a contract *of* service (an employment contract) or a contract *for* services. The second issue is whether the Regulations constitute an arrangement which has already been entered into by virtue of the moratorium on player transfers. If this were the case, s 59 of the Act would prevent the Commission from granting an authorisation.

### "Services" in Terms of the Act

#### Introduction

- 87 The Act provides that a market is a market for goods and services,<sup>14</sup> and defines "services"<sup>15</sup> to include:

"... the rights, benefits, privileges, or facilities that are or are to be provided, granted, or conferred under any of the following classes of contract:

A contract for, or in relation to, -

the performance of work (including work of a professional nature)

...

but does not include rights or benefits in the form of the supply of goods or the performance of work under a contract of service."

- 88 The effect of this section is to provide that the services exchanged in employment contracts are not "services" in terms of the Act, and therefore that the buying and selling of services under an employment contract does not occur in a "market" as defined in the Act. Although there exists a market for these services in a commercial sense, there is no such market in terms of the Act. This has the effect of removing contracts of service from the jurisdiction of the Act.
- 89 In its Draft Determination, the Commission reached the preliminary conclusion that the player contracts were employment contracts, that the services provided pursuant to them were not "services" in terms of s 2(1) of the Act and that the market for player services was not a market in terms of

<sup>14</sup> Section 3(1A).

<sup>15</sup> Section 2(1).

s 3(1A) of the Act. The Commission, therefore, gave the market for player services no further consideration.

- 90 In their submissions and at the conference, both the NZRFU and RUPA presented further arguments and information indicating the variety across the provincial unions of the provisions contained in their player contracts. In particular, the Commission notes that most players receive remuneration subject to their selection to play and not as of right.
- 91 The recent judgment of the Australian Full Federal Court in the *ARFL*<sup>16</sup> case considered that certain contracts between rugby league clubs and players were employment contracts. The Full Federal Court found that there was nothing in the ARFL's rules which required the contracts to take the form of employment contracts and that the contracts had been structured in that way to avoid the jurisdiction of the Trade Practices Act 1974. In the Full Federal Court's view, there was a real chance or possibility that there could be competition to engage players otherwise than under a contract of service, which could result in jurisdiction under the Trade Practices Act 1974.
- 92 The Commission will not make a categorical determination of this issue but will proceed on the basis that some of the contracts might be contracts for services or that the market for player services might develop in such a way as to cause many contracts to be construed as contracts for services.

*Conclusion: "Services" in Terms of the Act*

- 93 Without determining this issue, the Commission will proceed with its analysis on the basis that the services provided under the player contracts might be services in terms of the Act, that the market for player services is a market in terms of the Act, and that the Commission therefore has jurisdiction over this market.

**Arrangements Already Entered Into**

*Background*

- 94 Section 59 of the Act provides that the Commission may not authorise the entering into of an arrangement if that arrangement has already been entered into. The applicant cites the moratorium on player transfers as a reason for the lack of current competition for the acquisition of rugby union player services in New Zealand. The issue to determine is whether the Regulations are so similar in their nature to the moratorium, that it is an arrangement which has already been entered into, for which authorisation is being sought.

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<sup>16</sup> Above n 6.

*The Moratorium*

- 95 The moratorium was achieved in two separate parts. Firstly, the chairmen of the provincial unions agreed not to negotiate for the movement of players between provincial unions over the 1995 and 1996 rugby union seasons. Secondly, the contracts between the NZRFU and the All Black/Rugby Super 12 players include a clause requiring these players to play for the same NPC province for which they had played prior to the draft for the Rugby Super 12.
- 96 At the conference, the NZRFU stated that the moratorium was only ever intended as an "immediate solution", to apply for the very short period of time between the 1995 and 1996 seasons, and to apply only to NPC players. Commission staff have been told that the moratorium was set in place in order to allow the NZRFU, the provincial unions and players to adjust to the rapid transformation of rugby union from an amateur to a professional sport. To this end, it was intended to create a total prohibition on player transfers. The moratorium was also agreed to, to assure smaller provincial unions that their best players, who might be drafted to play for a distant Rugby Super 12 side, were obliged to return to their home provincial union for the NPC season. As discussed above, the NZRFU has provided information indicating some instances of transfers in spite of the moratorium, and without any repercussions for the provincial unions or players involved.
- 97 RUPA contended that the moratorium was:

"an integral part of the proposed player transfer system in that it was plainly the first step in the process of NZRFU formulating its transfer regulations. RUPA contends it is artificial to view the moratorium as separate from the transfer regulations."

- 98 The Commission considers that, in contrast to the moratorium, the Regulations establish a perpetual system to control transfers between a much wider group of players. The Regulations provide for player transfers subject to certain conditions, rather than the outright ban on player movement contained in the moratorium. The purpose of the Regulations is different to that of the moratorium, in that the moratorium was intended to allow a pause for rugby union administration in New Zealand to decide what type of regulation would be appropriate. While it might be restrictive, the moratorium is not substantially similar to the Regulations for which authorisation is now being sought.

*Conclusion: Arrangements Already Entered Into*

- 99 The Commission therefore concludes that the moratorium and the Regulations are sufficiently dissimilar in their nature that the Commission would not be authorising an arrangement which has already been entered into.

**Conclusion: Jurisdiction**

- 100 For the purposes of its consideration of the Regulations, the Commission will treat the market for player services as a market in terms of the Act, and will analyse the effect of the Regulations in that market.
- 101 The Commission is satisfied that the Regulations do not form an arrangement which has already been entered into and that the Commission is not prevented by s 59 of the Act from granting authorisation of the Regulations.

## OVERVIEW OF COMPETITION ANALYSIS

### Introduction

- 102 The provisions of the Regulations which, if not authorised, might involve a breach of the Act are:
- the quota system (Regulation 9);
  - the transfer period (Regulation 4); and
  - the transfer fee (Regulation 7).
- 103 In its submission, RUPA argued that there were two additional provisions of the Regulations which might involve a breach of the Act, namely:
- Regulation 6 which allows a player to file a Request for Transfer application, and a provincial union to file a Request for Player application, with the NZRFU. On receipt of such a request the NZRFU must inform all affiliated provincial unions of the details (the request system); and
  - Regulation 8 which, as set out in the Regulations accompanying the application, provided that no transfer of a player to which the Regulations applied would be recognised by the NZRFU unless it had been approved by the NZRFU. Subsequently, Regulation 8 was amended to require 'registration' of transfers by the NZRFU (the registration requirement).
- 104 In terms of the request system, RUPA argued that players and provincial unions might be discouraged from negotiating because the public nature of the process could undermine existing relationships between them. However, it is clear from the Regulations that it is open to provincial unions and players to negotiate at any time 'in secret' and merely register the transfer with the NZRFU in November. This was confirmed by Mr Wallace, for the NZRFU, at the conference, and in the NZRFU's Policy Statement on the Regulations.<sup>17</sup> Therefore, the Commission does not consider that any competition issues arise from the request system.
- 105 RUPA was of the view that the registration requirement might empower the NZRFU to refuse a transfer for reasons other than non-compliance with procedural formalities. At the conference Mr Wallace, for the NZRFU, confirmed that, except in the case of non-compliance with the procedural requirements of the Regulations, the NZRFU could not refuse to register a transfer of a player. The Commission does not consider that the registration requirement raises any issues under the Act.

<sup>17</sup> See paragraph 3.1 of the NZRFU's Policy Statement.

- 106 The Commission concludes that neither the request system nor the registration requirement raises any concerns under the Act and, therefore, these provisions will not be considered any further in this Determination.
- 107 The analysis below considers whether, in respect of the market for the rights to player services, the market for player services and the market for sports entertainment services, any or all of the quota system, transfer period and transfer fee might breach s 27, s 27 via s 30 or s 29 of the Act. In the Commission's view, the Regulations predominantly affect the market for the rights to player services, therefore, the Commission will consider the competitive impact of the Regulations on that market first.
- 108 In order to assess the competitive impact of the Regulations it is necessary to identify the counterfactual scenario which is likely to arise in the absence of the Regulations. The discussion below will focus on:
- the counterfactual; and
  - potential entry.

### The Counterfactual

#### *Background*

- 109 In carrying out an assessment of an application under s 58 of the Act, the Commission is required to consider the likely competitive effects of the arrangement in question, and any public benefits or detriments likely to result from the arrangement. This requires the Commission to determine a benchmark or 'counterfactual' against which to measure the likely competitive effects and public benefits. The Commission makes a 'with' and 'without' comparison, rather than a 'before' and 'after' comparison. In other words both the 'with' and 'without' scenarios are forward looking.
- 110 In *Electricity Market Company Limited*<sup>18</sup> the Commission said, in regard to establishing the appropriate counterfactual:
- "The counterfactual is not necessarily the arrangement which might be preferred by the Commission or by others with an interest in the industry. The Commission does not have the mandate, nor the expertise, to be the market designer. The counterfactual is simply the Commission's pragmatic and commercial assessment of what is likely to occur in the absence of the proposed arrangement."
- 111 Determining the counterfactual requires the Commission to ask itself what would be the most likely situation if the Regulations were not implemented. The Commission believes it is appropriate that the counterfactual it adopts be expressed in general terms, and that these terms describe what is pragmatically and commercially likely in the absence of the proposed arrangement.

<sup>18</sup> Decision No. 280, 13 September 1996.

112 In its submission, the NZRFU suggested that whether any possible outcome is indeed the commercially likely alternative depends upon its general acceptance amongst the parties.

113 RUPA likewise argued that the counterfactual must be acceptable to all parties, including the players. RUPA submitted that:

“... any agreement between provincial unions without player consent which operates as a restraint of trade is likely to be challenged in court successfully by individual players”.

114 The Commission accepts that in making its assessment of the likely ‘without’ scenario it must give due consideration to the views of the various interested parties as to what might be acceptable to them, and what might be practical if the Regulations are not implemented. However, ultimately, the Commission must adopt the counterfactual which it considers is the likely situation in the absence of the Regulations, without commenting on the desirability or otherwise of that outcome.

115 The Commission also notes that there are provisions in the Act which address the common law doctrine of restraint of trade. Section 7(1) of the Act provides that nothing in the Act limits or affects any rule of law relating to restraint of trade not inconsistent with any of the provisions of the Act. Section 7(3) provides that no rule of law referred to in s 7(1) affects the interpretation of any of the provisions of the Act.

#### *Discussion*

116 In its application, the NZRFU proposed two alternative counterfactual scenarios (paragraph 6.2 (a)(i)):

- First, a continuation of the moratorium on player transfers; and
- Second, a system in which there is unrestricted transfer of rugby union players between provincial unions, subject to contractual arrangements that the players have with their provincial unions.

117 In the Draft Determination the Commission did not accept either of the counterfactuals put forward by the NZRFU. The Commission’s preliminary conclusion was that, without the Regulations, it was likely that transfers of players would occur within the context of some form of regulation administered by the NZRFU. The Commission, therefore, adopted a counterfactual in which the framework established by the Regulations remained but the elements that might arguably be restrictive of competition were removed; that is to say there would be a transfer registration system and a requirement for provincial unions to negotiate a transfer fee (which might be nil), but without any limitations in terms of a quota system, transfer period restriction or cap on the transfer fee.



118 Submissions made both before and during the conference were either silent towards, or concurred with, the Commission's view that the moratorium on player transfers is not a likely scenario if the Regulations are not implemented. The Commission remains of the view that the moratorium is not a likely counterfactual.

119 In its submission, the NZRFU agreed that the counterfactual adopted by the Commission in the Draft Determination is a possible counterfactual. While the NZRFU stated that it is not in a position to say whether it would be able to proceed with the Commission's counterfactual if the Regulations were not implemented, at the conference Mr Land, for the NZRFU, acknowledged (having listed the possible counterfactuals identified during the course of the conference):

"I am not sure that the NZRFU would really consider any of those alternatives particularly likely, but we would certainly suggest that of all the counterfactuals suggested ... the only one that really meets the test of being an even feasible counterfactual was the Commerce Commission's counterfactual."

120 In the alternative, the NZRFU re-submitted that the counterfactual could be an unrestricted market where players can transfer freely, subject only to contracts between the players and provincial unions. In its submission and at the conference, the NZRFU argued that a feature of this 'free transfer system' scenario would be the existence of long term contracts between players and provincial unions because of the uncertainty as to a player's future development, or to ensure a return on a provincial union's investment in a player's training, among other things. The NZRFU also noted that in this scenario there might, therefore, be a payment between provincial unions if a player were transferring prior to the end of the contract (a contract buy-out). The NZRFU accepted that the analysis, under both the counterfactual adopted by the Commission and the alternative 'free transfer system', would be similar.

121 On the other hand, in its submission, RUPA characterised the Commission's counterfactual as 'unlikely'. In the absence of the Regulations, RUPA envisaged an unrestricted transfer market in which players could transfer freely subject only to contracts of short term duration (due to the quasi-amateur environment of the NPC competition and the potential application of the restraint of trade doctrine).

122 There was also some suggestion from RUPA, in its submission and at the conference, that alternatives to achieving the objectives expounded by the NZRFU could include provisions in the Rugby Super 12 contracts that players not receive any additional money from provincial unions for playing in the NPC competition, or a collective agreement between the NZRFU and players regulating aspects of the sport, including player transfers. At the conference, the NZRFU indicated that it regards these alternatives as being more restrictive than the Regulations. On the information available, the

Commission concludes that these alternatives are not likely to occur if the Regulations are not implemented.

- 123 Likewise, for the reasons discussed below, the Commission remains of the view that the 'free transfer system' referred to both by RUPA and the NZRFU, in which there is unrestricted transfer of players between provincial unions subject only to contractual arrangements that the players have with their provincial unions, is not a likely alternative if the Regulations are not implemented.
- 124 The Commission accepts that it is possible, in the absence of a collective agreement between the provincial unions, that alternative arrangements for payment of a transfer fee (in one form or another) and restrictions on player mobility might arise, over time, as a result of the unilateral or bilateral actions of market participants. For example, transfer fees might be provided for in the terms of contracts between rugby union players and provincial unions, or might result from contract buy-outs by provincial unions.
- 125 However, the Commission considers that there are a number of other factors relevant to its conclusion on the most likely counterfactual, particularly in light of the stated objectives of the Regulations. These relevant factors are that:
- The provincial unions agreed, in light of the advent of professionalism, to implement a moratorium restricting player movement. This indicates they consider that some form of regulation is more likely than the unrestricted transfer system which existed previously;
  - The Boston report notes that sports leagues which have 'left it to the market' to try to achieve an even sporting competition are "experiencing problems". This conclusion was supported by the submission of Dr Jackson (Boston Consulting Group). The NZRFU indicated, at the conference, that it has taken these comments seriously in framing the Regulations. For example, Mr Wallace, for the NZRFU, made the comment that to revert to the previous entirely open system of player transfers would not achieve any of the objectives set out in the Boston report and would go against all of the overseas experience studied;<sup>19</sup>
  - The Commission's research has indicated that overseas there are very few (if any) professional sports leagues which do not regulate player transfers in one form or another. Although there are many variations on the theme, some of these systems specifically involve the payment of transfer fees. Others achieve a similar result by effectively granting

<sup>19</sup> At the conference Mr Land, for the NZRFU, also commented that "[n]o regulation [of] player transfers would permit individual teams to take actions contrary to the best interests of the overall competition".

a club a 'property right' over a player which allows that club to sell the right to another club; others still allow players, on playing out their contracts, to negotiate freely with other clubs but provide that any acquiring club pay the 'losing' club a fee. The submissions of Professor McMillan (Professor of Economics, University of California) and Dr Jackson (Boston Consulting Group) support the above.<sup>20</sup> At the conference, the NZRFU indicated that it had studied the rules of many overseas sports leagues in formulating the Regulations and that controls on player transfers overseas, in some cases, also extend to quasi-amateur competitions; and

- At the conference, Mr Tew, for Canterbury RFU, and Mr Scutts, for Auckland RFU, both indicated that they consider an unregulated transfer system would be not achieve the objective of an even, attractive competition. In particular, both regarded a system whereby provincial unions are compensated for developing players as being important. This is generally consistent with the views of other provincial unions who provided information to the Commission.
- 126 Given the level of commitment that the NZRFU and the provincial unions have demonstrated to a policy of regulating player transfers, the Commission considers that it is unlikely that this policy would be abandoned completely if the Regulations were not implemented. The factors noted above also indicate that the provincial unions regard a formalised system, administered or facilitated by the NZRFU, as being the most practical and efficient means of dealing with player transfers.
- 127 The Commission, therefore, remains of the view that, without the Regulations, it is likely that player transfers will occur within the context of some form of regulation administered by the NZRFU. The Commission considers that this regulation would merely provide the framework within which player transfers would occur and that a likely scenario is a transfer registration system and a requirement for provincial unions to negotiate a transfer fee (which may be nil), but without any limitations in terms of quota system, transfer period restriction,<sup>21</sup> or cap on the transfer fee. The Commission is of the view that such a form of regulation would be unlikely to offend against any rule of law relating to restraint of trade.
- 128 The Commission also notes that it is becoming more common for provincial unions to enter into contracts, of one form or another, with some players. This is a trend that the Commission believes will continue, under both the

<sup>20</sup> It is noted that RUPA was of the view that, due to the unique nature of the NPC competition, overseas experience is not directly relevant to the assessment of the Regulations. However, the NZRFU submitted, and the Commission agrees that, despite the differences, overseas evidence should not be ignored.

<sup>21</sup> The NZRFU also suggested that a transfer period might be part of any counterfactual adopted. However, the Commission notes that there does not appear to be any such restriction at provincial level currently (other than a 21 day residency requirement).

Regulations and the counterfactual scenario adopted. The terms and conditions of these contracts, including length of contract, vary and will continue to be a matter of individual negotiation between the players and provincial unions. It seems likely that (under both the Regulations and the counterfactual) such contracts might include provisions restricting the mobility of players.

- 129 The Commission concludes that, in this case, it is appropriate to take the essence of the Regulations and remove the potential restrictions on competition, and thus establish a pragmatic and commercially likely benchmark against which to assess the competitive impact of the Regulations. This is consistent with the spirit of the Regulations, in that player registration would be preserved, and provincial unions losing players would be compensated by the payment of a transfer fee by acquiring provincial unions.

#### *Conclusion On The Counterfactual*

- 130 The Commission concludes that the counterfactual to the Regulations is a situation in which the framework established by the Regulations remains, but the elements which might arguably be restrictive of competition are removed; that is to say, there is no quota system, no transfer period restriction, and no cap on the transfer fee.

#### **Potential Entry**

- 131 In principle, two forms of competitive entry are possible:

- entry by a new provincial union; or
- entry by a new rugby union organisation competing directly with the NZRFU.

#### *Entry By A New Provincial Union*

- 132 Any new provincial union must apply to the NZRFU for affiliation. Such an application must be made under the sponsorship of two currently affiliated provincial unions, and must be approved at a General Meeting of the NZRFU by a majority of votes. If an application is rejected, the NZRFU will not consider a further application from the same person for a period of at least two years.

- 133 The Commission notes that affiliation to the NZRFU confers to provincial unions exclusive rights to the players falling within their territorial boundaries. In the event of a new provincial union seeking affiliation, any provincial union whose boundaries would be affected has the opportunity to make submissions to the NZRFU. Ultimately, the NZRFU does not require the consent of affected provincial unions to alter boundaries.

- 134 The Commission considers that new provincial unions (in one form or another) are likely to emerge only where the demand for rugby union is high enough to support an additional provincial union in that particular region. Any new provincial union would need to have access to both clubs (players) and facilities.
- 135 In the Draft Determination, the Commission reached the preliminary conclusion that entry by new provincial unions was not likely. Rather, the Commission considered that the territorial boundaries of existing provincial unions might change over time, either through clubs on the fringe of a provincial union's territory switching their affiliation to an adjoining provincial union, or through amalgamation.
- 136 In its submission, the NZRFU agreed with the Commission's preliminary conclusion and cited the proposed amalgamation of Manawatu RFU and Hawkes Bay RFU in support. Other submissions received were generally silent toward the issue.
- 137 The Commission concludes that entry by a new provincial union is not likely. Even if a new provincial union were to be established, that provincial union would, on affiliation to the NZRFU, be subject to the same rules and regulations as an existing provincial union.

*Entry By A New Rugby Union Organisation*

- 138 The NZRFU is currently the only national rugby union organisation in New Zealand. It has an extensive infrastructure including provincial unions, clubs, and access to facilities. In addition, the NZRFU has contracts with a number of the premier rugby union players in New Zealand. These factors, in themselves, may constitute a significant deterrent to any potential entrant.
- 139 In the Draft Determination, the Commission reached the preliminary conclusion that there was not likely to be any entry by a competing rugby union organisation in the near future, on the basis of the NZRFU's existing infrastructure, and its control of a number of premier rugby union players. In addition, the window of opportunity which was available because of the amateur status of the game, and which saw the WRC attempt to set up a new professional competition in 1995, has arguably been closed.
- 140 Industry participants spoken to by Commission staff were of the view that for another national rugby union organisation to become established in New Zealand, the support of a number of the provincial unions currently affiliated to the NZRFU would be required. The rules of the NZRFU (Rule 8) prohibit provincial unions from affiliating with any other "... football organisation ..." without the prior consent of the NZRFU. The present indications from the provincial unions are that there is not the level of dissatisfaction with the NZRFU to suggest that such moves would be likely in the near future.

- 141 In addition, anecdotal information suggests that the ownership, by the NZRFU, of the All Black brand might be a barrier to any new national, or international rugby union organisation obtaining the services of premier rugby union players.
- 142 The NZRFU submitted that entry by a competing rugby union organisation could not be discounted, particularly if the NZRFU is not successful in its efforts to encourage and maintain an attractive and successful competition. However, at the conference Mr Wallace, for the NZRFU, acknowledged that, as matters presently stand, such entry, either by an alternative New Zealand rugby union organisation or by an international competition organiser such as the WRC, is not likely.
- 143 RUPA submitted that, once a number of the NZRFU player contracts expire (at the end of 1998), an environment will exist whereby a rival organisation could contract players.
- 144 The Commission agrees that opportunities might exist in the long term for alternative rugby union organisations to enter the markets. The recent establishment of the Super League competition in Australia competing directly with the Australian Rugby Football League suggests that the 'window of opportunity' in any professional sport is never completely shut. However, it is the Commission's conclusion that entry by a new rugby union organisation is not currently likely, at least while the NZRFU continues to retain the loyalty of the provincial unions, and has contractual arrangements with a number of New Zealand's premier rugby union players.

#### *Conclusion On Potential Entry*

- 145 The Commission concludes that new entry, either by a new provincial union or by a new rugby union organisation, is not likely.

### COMPETITIVE IMPACT ON THE MARKET FOR THE RIGHTS TO PLAYER SERVICES

#### *Section 27*

##### *Introduction*

- 146 Section 27 prohibits contracts, arrangements or understandings which have the purpose, effect, or likely effect of substantially lessening competition in a market.
- 147 Section 61(6) of the Act provides that the Commission shall not authorise an arrangement which the applicant believes might breach s 27 of the Act unless it is satisfied that the public benefit which will in all the circumstances result, or be likely to result, from the arrangement would outweigh the lessening of

competition that would result, or would be likely to result or is deemed to result therefrom. Section 61(6A) provides that:

"For the purposes of subsection (6) of this section, a lessening of competition includes a lessening of competition that is not substantial."<sup>22</sup>

- 148 In terms of an application pursuant to ss 58(1) and 58(2) of the Act, relating to an arrangement which the applicant believes might breach s 27 of the Act, there must be:
- an arrangement;
  - that has the purpose<sup>23</sup> or effect;
  - of lessening competition, which need not be substantial;
  - in a market.
- 149 Within the market for the rights to player services, there is a field of potential transactions between provincial unions for buying and selling the rights to player services. As noted, the NZRFU has advised the Commission of one instance of a payment having been made and of two instances of payment-free transfers between provincial unions for the purchase and sale of the rights to player services which occurred during the moratorium on player transfers. In addition, the NZRFU has provided the Commission with details of all transfers of players between provincial unions which occurred between 1993 and 1995.
- 150 In this section, the Commission first considers whether the Regulations amount to a contract, arrangement or understanding for the purposes of the Act. The purpose and effect of each of the quota system, transfer period and transfer fee are then discussed, followed by an assessment of the overall impact of these provisions on competition in the market for the rights to player services.

#### Contract, arrangement or understanding

- 151 The Player Transfer System will be entered into by the passing of the Regulations and by amending the rules of the NZRFU (paragraph 2 of the application). Rule 9 of the rules of the NZRFU provides that:

"The affiliation of any Union shall operate as an agreement binding such Union and each of its members to abide by the Rules and Regulations of the Union and to accept and enforce all its decisions. Any breach of this agreement or any conduct which is in the opinion of the Board prejudicial to the interests of the Union or of

<sup>22</sup> As inserted by s 4 of the Commerce Amendment Act 1996.

<sup>23</sup> Section 2(5)(a) of the Act provides that, for the purposes of the Act:

"A provision of a contract, arrangement or understanding ... shall be deemed to have had, or to have, a particular purpose if-

- (i) The provision was or is included in the contract, arrangement or understanding ... for that purpose or purposes that included or include that purpose; and
- (ii) That purpose was or is a substantial purpose."

Rugby Union Football shall render such Union or Club or any member of a Union liable to suspension or expulsion or such other penalty as the Board may in its discretion decide."

- 152 This rule has the effect of requiring all affiliated provincial unions to abide by the Regulations. The Regulations, therefore, create mutual obligations and expectations between all such provincial unions, and amount to an arrangement or understanding between them, to which the NZRFU is also a party.
- 153 It could be argued that the Regulations and the rules of the NZRFU have been structured in such a way as to amount to bilateral arrangements between the NZRFU and each provincial union individually. However, in the Commission's view, there necessarily exists some underlying collective arrangement between the provincial unions (for example, Rule 9 of the rules of the NZRFU), to which the NZRFU is also a party, to agree to the Regulations. In the absence of that agreement the Regulations could not operate effectively.
- 154 Therefore, the Commission concludes that the Regulations are an arrangement or understanding between all of the affiliated provincial unions, to which the NZRFU is a party.

#### Quota system

- 155 Regulation 9 of the Regulations provides that the maximum number of transfers of players falling within the specified bands which a provincial union can accept in any 12 month period (1 December-30 November) is five.<sup>24</sup> Within this total, an annual quota is also set for each specified band, classification within a specified band, or grouping of bands of rugby union players. For the majority of bands the annual quota is set at two players. The exception is the All Black band (other than former All Blacks). Provincial unions can only acquire the services of one All Black (star, established or current) per year.
- 156 Transfers beyond the quota can occur with the consent of the Player Transfer Review Committee established under the Regulations. Such transfers can only be authorised by the Review Committee on the grounds that there has been an extraordinary and/or compelling change in a player's personal circumstances. The NZRFU has advised that such circumstances might include genuine employment reasons, a change in family circumstances, or an irretrievable breakdown in the relationship between a player and provincial union.

<sup>24</sup> The Regulations will apply to a transfer only if the player falls within one of the specified bands, and if the player is going to play in the acquiring provincial union's Senior 'A' NPC side in the current or any future rugby union season (Regulation 3.2).



## (a) Purpose

157 The Commission's preliminary conclusion in the Draft Determination was that a substantial purpose of the quota system was to lessen competition between provincial unions for the rights to player services. Submissions received from interested parties, both before and during the conference, generally supported this conclusion.

158 At the conference, Mr Wallace, for the NZRFU, said:

"The purpose of the quota was to enhance the evenness and prevent a dream team being created by an individual union, to preserve stability as supporters of teams generally identify with individual [p]layers and don't wish to see wholesale changes year by year, and, thirdly, to allow flexibility to acquire players to fill gaps that exist in current teams."

159 The NZRFU indicated, in its submission and at the conference, that it is concerned that, in the new professional era, there are greater incentives for player movement and, as a result, greater incentives for provincial unions to purchase 'dream teams' consisting of the best players, to the detriment of developing home grown talent and an even sporting competition. The NZRFU's submission emphasised that it is not the intention of the quota system to prevent provincial unions from 'talent spotting' young talent and drawing it into a province prior to a player becoming 'banded'. Equally, the quota system is not intended to restrict all provincial unions. However, the NZRFU said that the quota system is intended to restrict that limited number of provincial unions which might, at any given time, be endeavouring to acquire a dream team.

160 In its submission, RUPA argued that a more compelling explanation for the quota system is the desire to secure an even spread of All Blacks and Rugby Super 12 players. The Commission considers that this is consistent with the NZRFU's stated purpose.

161 The Commission remains of the view that a substantial purpose of the quota system is to lessen competition between provincial unions in the market for the rights to player services.

## (b) Effect

162 The Commission has adopted a counterfactual under which there is no quota system. Hence the level of transfer activity would be determined by the unrestricted market forces of supply and demand, subject to the terms of contracts between players and provincial unions.

163 If, in the absence of the Regulations, provincial unions were likely to exceed the quota (in total or for each band), then demand would be restricted, giving rise to a lessening of competition.

- 164 Information supplied by the NZRFU indicates that, if the Regulations had been in operation over the period 1993-1995, no transfer of a player would have been prevented by the quota system. The NZRFU estimates that the level of movement over the three years was, on average, half a player per provincial union.<sup>25</sup>
- 165 However, parties who made submissions appeared to accept that the level of transfers of rugby union players between provincial unions in the past is not necessarily indicative of the number of transfers likely in the professional era, for a number of reasons. First, rugby union was, during the period 1993-1995, an amateur sport and the incentives to move for financial reasons were not as great as they are now. Secondly, a moratorium restricting player movement has been in force over the 1996 NPC season (the first season of professional rugby union). Thirdly, players might be more inclined to move in the new professional era to gain exposure and best position themselves to obtain a professional contract to play in the Rugby Super 12. Fourthly, provincial unions hosting the Rugby Super 12 teams might ask players drafted in from other provinces to remain with them for the duration of that season's NPC competition.
- 166 The Commission agrees with the parties that information regarding the level of player transfers in the recent past is of limited value. There are valid reasons to expect that, in a professional environment, the level of transfers might increase in the future. In addition, the reasons players have moved in the past (exposure, education and employment) are unlikely to change.<sup>26</sup>
- 167 It is difficult to predict the level of transfers likely to occur in the future. However, if each of the 27 provincial unions acquired the maximum number of players under the quota system in any one year, then 135 players would move in that year. The Commission agrees with the view expressed by the NZRFU that such large scale movement is not likely on an annual basis.
- 168 The NZRFU has predicted that, in the future, provincial unions will acquire, on average, the rights to two players per year through the transfer system. This would be within the total quota limit set in the Regulations. However, the NZRFU has also acknowledged that the quota system, particularly the annual quota placed on each band of player,<sup>27</sup> is likely to restrict some provincial unions, compared to the counterfactual.

<sup>25</sup> Information provided by the NZRFU indicates that in the 1995 season a total of 15 players transferred to 10 provincial unions, in 1994, 16 players transferred to 8 provincial unions, and in 1993, 13 players transferred to 6 provincial unions.

<sup>26</sup> Some of these transfers might fall outside the quota system if they involve an 'extraordinary and/or compelling change in personal circumstances' within Regulation 10.

<sup>27</sup> Mr Lochore, Mr Copeland and Mr Land (for the NZRFU) all said at the conference that, in their view, the quota restrictions on the 'bands' of players would be more likely to be restrictive than the total annual quota of five players.

- 169 As discussed previously, the NZRFU set the quota at levels designed to constrain the ability of provincial unions to compete for rights to player services. At the conference, Mr Land, for the NZRFU, stated:

"What the quota is intended to do is prevent the creation of a dream team so that it may have an effect on two, three, maybe four teams which are endeavouring to do that by perhaps acquiring two or three All Blacks or by acquiring five or six players. So, it will have some effect on those teams but will not have an effect on the great majority of NPC teams."

- 170 RUPA submitted that the acquisition of a dream team is not likely given the limited financial resources of the provincial unions. However, the Commission notes that there have been some indications in the media that local businesses (for example, in Wellington) might be willing to inject money into provincial unions for this purpose. Also, Mr Tew, for Canterbury RFU, commented that, in the absence of any restraint, there is the potential for a 'rogue' provincial union to act in its own interests and attempt to purchase a dream team of the best players, perhaps with the assistance of a generous benefactor. Mr Copland and Mr Land, for the NZRFU, were of the view that it would be perfectly rational for a provincial union to behave in this way on the grounds that it is better to be the top team than the bottom team in a potentially uneven competition, although an even competition is preferred.
- 171 Additionally, information received from the provincial unions suggests that while some provincial unions will continue to focus, as they do now, on developing players within the province, others might actively seek players from other provinces.
- 172 The Commission's view is that the quota system, by fixing a quantity limit (in total and for each band of player), is likely to constrain the number of premier rugby union players which a provincial union is able to acquire from other provincial unions in any year. The quota levels set do not necessarily reflect, or vary in response to, changes in demand and supply. The Commission agrees with the view expressed by the NZRFU that the quota system is likely only to constrain a limited number of provincial unions in any one year. There will be some provincial unions for whom the quota system will not be restrictive.<sup>28</sup> That is, the quota system is not likely to restrict all provincial unions all of the time, rather it is likely to restrict some provincial unions some of the time. Also, it appears to the Commission that the annual quotas set for the specified bands of player are likely to be more restrictive than the total annual quota of five players. However, the Commission notes that there might be some cases where the total annual quota of five players would be restrictive, for example, where a provincial union seeks to acquire a dream team 'from scratch' (although it is not clear how common this would be).

<sup>28</sup> This is consistent with information received from a number of provincial unions. Some provincial unions consider that the quota levels would be restrictive while others considered that the quota levels would not be restrictive.

- 173 The Commission believes that the level of constraint likely to be imposed by the quota system is sufficient to support a finding that the quota system will lessen competition in the market for the rights to player services.
- 174 The NZRFU has noted that it is possible for any NPC team to include up to three overseas players, provided that those players fall outside of the IRB's 180 day rule,<sup>29</sup> and up to four "borrowed players", being players under the jurisdiction of another provincial union. These rules are an exception to the NZRFU's 21 day residency requirement.<sup>30</sup> The NZRFU has advised that these rules will remain outside the ambit of the Regulations.
- 175 Where demand for the rights to player services is not met due to the existence of the quota system, provincial unions may look to outside sources to meet that demand. Nothing in the Regulations prohibits this.
- 176 However, the Commission is of the view that, due to the new quasi-professional status of the game, the supply of overseas players falling outside the 180 day rule is likely to be limited and may reduce in the future.
- 177 Information received, both from the NZRFU and a number of provincial unions, suggests that the NPC lending rules are used predominantly by second and third division provincial unions which borrow rugby union players from larger neighbouring provincial unions competing in different divisions of the NPC competition.<sup>31</sup> There are some examples of first division teams lending players to other first division teams (and similarly within the second division). However, these situations are not common and tend to be loans by teams more highly ranked in a particular division to teams further down the order.
- 178 Lending arrangements are informal agreements between provincial unions and are usually subject to conditions, such as a requirement that players return to their home provincial unions on request.<sup>32</sup> There is no formal transfer of the player and hence no acquisition of the rights to player services.
- 179 The Commission accepts that the NPC lending rules might provide some provincial unions with an alternative to acquiring the rights to player services and might lessen the impact of the quota system on those provincial unions.

<sup>29</sup> Regulation 9 of the IRB's Regulations provides that any rugby union player transferring between countries is subject to a 180 day stand down period if that player is under a contract to receive material benefit for his participation in the game. It should be noted that the international unions involved can agree to reduce this stand down period.

<sup>30</sup> Rule 74 of the NZRFU's rules provides that a provincial union cannot include a player in its NPC team who has not been resident within its defined boundaries for a period of at least three weeks. Provincial unions can agree to waive this requirement.

<sup>31</sup> Approximately 84% of all players loaned in the 1996 rugby union season were loaned by first division teams to teams in other divisions.

<sup>32</sup> Anecdotal information suggests that there have been situations where a provincial union has loaned players to another provincial union in the same NPC Division, but recalled those players when due to play that other provincial union.

However, there are likely to be a number of provincial unions for which 'borrowing' players is not going to be considered a viable option.

- 180 Therefore, the Commission concludes that the quota system has, or is likely to have, the effect of lessening competition between provincial unions in the market for the rights to player services. The Commission considers that the overseas player and NPC player lending rules are not likely to temper that lessening of competition to any significant degree.

(c) Conclusion

- 181 The Commission concludes that the quota system has the purpose, and has or is likely to have the effect, of lessening competition in the market for the rights to player services.

Transfer period

- 182 Under Regulation 4.1 of the Regulations, transfers between provincial unions of players falling within the specified bands can occur only in the period from 1 November to 30 November (inclusive) each year.<sup>33</sup> However, negotiations and agreements relating to transfer can take place at any time during the year. In addition, transfers can occur outside the transfer period in circumstances where the Player Transfer Review Committee considers that there has been an extraordinary and/or compelling change in a player's personal circumstances.

(a) Purpose

- 183 The NZRFU submitted:

"The purpose of not having movement during the season is to avoid disruption to teams during the season. It is also important for supporters to have confidence in the fairness of a competition which they are following. For that reason there should not be undue physical movement of players during the season other than for compelling circumstances which can be approved by the Rugby Union (or if necessary the Appeal Board). The Union's perception is that there would be negative public reaction if immediately prior to the semi-final or final of the NPC one of the teams involved was to acquire one or two key players which might significantly influence the teams likely chance of success in the semi-final or final."

- 184 The time period restriction was also argued by the NZRFU to be necessary for administrative simplicity. In its submission, the NZRFU indicated that the reason November was chosen to be the transfer period was that it is at the end of the NPC competition, but prior to the Rugby Super 12 draft. Therefore, the initial selection of Rugby Super 12 sides can occur with the selectors having full knowledge of which players are eligible to play in each region. The NZRFU stated "[i]t was considered unacceptable from both the [p]rovincial

<sup>33</sup> However, in respect of the 1996 calendar year transfers can occur only during the period from the date the Regulations come into force until 31 December 1996 (Regulation 4.2).

[u]nions, the NZRFU and the [r]ugby public to have players moving constantly throughout the year".<sup>34</sup>

185 The Commission notes that provincial unions can negotiate and agree to acquire/sell the rights to player services at any time during the year. However, a provincial union cannot actually acquire the rights to player services except during November. The fact that it is the NZRFU's expressed intention that the objects of 'team stability', 'administrative simplicity' and 'perceived fairness' be achieved by reducing player movement to one month following the end of each rugby union season, would appear to support a conclusion that a substantial purpose of the transfer period is to lessen<sup>35</sup> competition between provincial unions in the market for the rights to player services.

186 Therefore, the Commission concludes that a substantial purpose of the transfer period is to lessen competition between provincial unions in the market for the rights to player services.

(b) Effect

187 The counterfactual identified by the Commission has no restriction on the time when rugby union players can transfer between provincial unions.

188 At the conference, the NZRFU argued that there is no real competitive effect arising from the limited transfer period because provincial unions and players can negotiate and agree to transfers at any time during the year (subject to registration with the NZRFU in November). In addition, players can move mid-season where there are extraordinary and/or compelling changes in personal circumstances.

189 Submissions at the conference by Mr Tew, for Canterbury RFU, and information received from some other provincial unions suggests that a provincial union is likely to seek to transfer rugby union players into its province for particular strategic and/or tactical reasons (for example, to fill a 'gap' in a team). Mr Wallace, for the NZRFU, commented that, in the past, most 'strategic' movement of players occurred prior to the start of a rugby union season. Some other parties indicated that, at times, limited strategic mid-season movement has occurred.

190 Parties who made submissions appeared to accept that a restriction on mid-season movement of players was necessary to promote team stability and prevent 'stacking' of teams. Opponents of the Regulations, however,

<sup>34</sup> The NZRFU indicated at the conference that it is common practice in most sports that there be a restriction on movement of players during the course of a season.

<sup>35</sup> In *CC v Port Nelson Limited* (1995) 6 TCLR 406, McGechan J addressed the statutory definition of "lessening" and said that the word "hinder" (as included in that definition) "covers senses which include "do harm to" and "prevent"; but also to "keep back; impede, deter, obstruct", and "delay or frustrate action, by an obstacle or impediment." His Honour said that "One can "hinder" by merely delaying or obstructing for the immediate time."

considered that mid-season disruption could be avoided by alternative means. For example, Mr Foster, for RUPA, suggested restricting movement during the course of the NPC competition only and allowing movement, in particular, during the period between the end of the Rugby Super 12 competition and the beginning of the NPC competition. It was submitted by RUPA that the restriction of the transfer period to the month of November limits, for example, the ability of NPC coaches to take into account and make selection decisions based on form, injuries, availability, and performance of players in the Rugby Super 12. Mr Foster also suggested that the problem of 'stacking' of teams could be dealt with by reinstating the existing NZRFU residency requirement.<sup>36</sup>

- 191 The NZRFU, on the other hand, contended that the November transfer period enables players to position themselves with the provincial union from which they are most likely to receive a Rugby Super 12 contract (without the need to depend on selection in a draft). Also, coaches of NPC sides will know, prior to the Rugby Super 12 series, which players are going to be available to play in provincial teams and can plan their teams accordingly.
- 192 As discussed previously, the Commission believes that most provincial unions do, and are likely to continue to, contract with their key players. These contracts might contain restrictions on player mobility and might tie a player to a provincial union for more than 12 months. At the conference Mr Wallace, for the NZRFU, noted that, under the Regulations, many provincial unions are likely to contract with their key players for more than one year.<sup>37</sup> The difference between the Regulations and the counterfactual would be that, under the counterfactual, a provincial union could, subject to the terms of a player's contract, acquire the rights to a player who wants to move, and the player could transfer, at any time of the year.
- 193 The effect of restricting the ability of provincial unions to acquire the rights to player services to one month a year has, or is likely to have, the effect of lessening competition between provincial unions for such rights. The limited transfer period might affect the price of the rights to player services and the willingness of a provincial union to actually acquire the rights to a player's services (the need for the player having diminished by the November period). Provincial unions might also be less willing to approach other provincial unions and enter agreements to acquire the rights to player services except near or during the transfer period. As a result, mutually beneficial trades might be delayed and the level of competition that might otherwise exist is likely to be lessened.

<sup>36</sup> Above n 30. It is noted that Regulation 3.5 of the Regulations provides that the provisions of the Regulations prevail over the NZRFU residency requirement. Therefore, a player transferring under the Regulations need not comply with the residency requirement set out in the rules of the NZRFU.

<sup>37</sup> Mr Scutts, for Auckland RFU, indicated at the conference that Auckland RFU might be an exception. It is the expressed intention of Auckland RFU to contract players on a season by season basis.

## (c) Conclusion

- 194 The Commission concludes that the transfer period has the purpose, and has or is likely to have the effect, of lessening competition in the market for the rights to player services.

Transfer fee

- 195 Regulations 7.1 and 7.2 of the Regulations provide that whenever a rugby union player falling within one of the specified bands transfers between provincial unions, that transfer is conditional on payment of a transfer fee from the player's new provincial union to the prior provincial union. There are two aspects to this arrangement. The first aspect is that the level of the transfer fee is a matter for negotiation between the two provincial unions; it might be zero, but it cannot exceed the maximum transfer fee set for each band. The second aspect is that in the event that a player wants to move but no agreement on the level of the transfer fee can be reached then, if the acquiring provincial union offers the maximum transfer fee, the selling provincial union must accept that offer and allow the player to move. However, if the acquiring provincial union is not willing to pay the maximum transfer fee for that band of player and no agreement can be reached on a lower or nil fee, and the Player Transfer Review Committee does not have jurisdiction to consider the matter under Regulation 10, then no transfer occurs (Regulations 7.2(a) to (c)).

## (a) Purpose

- 196 The stated purpose of requiring a transfer fee is:

"...to encourage development in existing players; to provide an incentive to develop players successfully; and to encourage the acquisition of lower level players from other unions."

- 197 In addition, the NZRFU indicated in its application (paragraph 6.2(v)(G)), that receiving transfer fees might promote competition for the rights to player services by smaller, less wealthy, provincial unions.
- 198 The purpose of establishing maximum transfer fees is said to be to reduce the ability of provincial unions to unreasonably restrict player movement, for example, by demanding a high transfer fee for a player. That is, the aim is to ensure that provincial unions receive some compensation for player development but do not exercise unlimited ownership rights over players' values.
- 199 RUPA, on the other hand, contended that it is a 'primary' purpose of the imposition of a transfer fee to lessen competition in the market for the rights to player services. At the conference, RUPA argued that the main motive behind the Regulations is to prevent the limited financial resources of provincial



unions being paid to a small group of elite rugby players and thereby being channelled out of provincial unions.

- 200 It appears to be generally accepted that the financial resources of the provincial unions are limited. However, the Commission has received no information which would indicate that the maximum transfer fees have a substantial purpose of lessening the level of competition between provincial unions for the rights to player services. The purpose of the provisions appears to be to establish a system which balances the need for rewarding provincial unions for developing, and encouraging provincial unions to develop, players while at the same time protecting player mobility.
- 201 The Commission concludes that it is not a substantial purpose of the maximum transfer fees to lessen competition between provincial unions in the market for the rights to player services.
- (b) Effect
- 202 The competition impacts which are relevant to the Commission's assessment of the transfer fee are those which result from the difference between the transfer fee provisions and the counterfactual.
- 203 The Commission has adopted a counterfactual in which there is some form of regulation requiring the negotiation of a transfer fee (which may be nil), but in which there is no cap or other restriction on the transfer fee to be paid. Therefore, the aspect of the transfer fee which warrants examination is the setting of the *maximum* transfer fees and the requirements of Regulations 7.2(a) to (c) described above.
- 204 The maximum transfer fees establish price ceilings. A player in any of the specified bands cannot be transferred for a transfer fee which exceeds the maximum set for that band of player.
- 205 As discussed previously, the maximum transfer fees were set by the NZRFU and the provincial unions in a consultative process. The NZRFU submitted at the conference that the caps have been set at reasonable levels, based on what the provincial unions regarded as being the appropriate maximum value by way of compensation for a union's investment in a player's development. However, it was accepted by the NZRFU that, as with most expenditure of a research and development nature, the maximum transfer fees do not just recover the cost of developing the player in question, but amount to recovery of the cost of developing all players, including those who are not as successful. The NZRFU's submissions emphasise that the maximum transfer fees are intended to assist, not restrict, player mobility and that it is open to provincial unions to agree to a lower or nil transfer fee.<sup>38</sup>

<sup>38</sup> The NZRFU has provided the Commission with one example of a proposed transfer which, if the Regulations are authorised, is likely to occur for less than the maximum transfer fee.

- 206 The Commission notes that in the course of the consultative process a range of maximum figures for each band of player was proposed by the various provincial unions. Some provincial unions suggested higher, and some lower, maximum transfer fees than those finally agreed. The view of RUPA, and the player advisors spoken to by the Commission, is that the maximum transfer fees are high. The NZRFU has advised that it intends to reassess the maximum transfer fees on an annual basis.
- 207 As discussed above, Regulations 7.2(a) to (c) compel a selling provincial union to agree to the transfer of a player who wants to move if the maximum transfer fee is offered by the acquiring provincial union. However, the Regulations do not place a cap on the level of remuneration that players can be offered for their services.
- 208 While it is difficult to assess the likely level of transfers and transfer fees in the future, if a provincial union is prepared to pay more than the amount of the maximum transfer fee to acquire the rights to a particular player, the balance of the value of the rights to that player not reflected in the transfer fee could become subject to negotiation between the provincial union and the player regarding remuneration.<sup>39</sup> In such cases, the market for the rights to player services and the market for player services interact and the maximum transfer fees provide a mechanism to determine the distribution of the value of the rights to a player's services between the selling provincial union and the player.
- 209 While the amount that can be received by the selling provincial union is deliberately capped, the Regulations do not cap the potential level of player remuneration. Therefore, the overall payment which can be made by the acquiring provincial union for the acquisition of a player is not limited. In the words of Mr Copeland, for the NZRFU:

"The costs of acquiring the player is the sum of the payment between the unions and the remuneration which has to be paid to the player to get him to move. This combined cost, or the second element of the cost, can continue to be bid up, irrespective of the introduction of the proposed Player Transfer System.

Similarly, a selling union could, if it wished, bid up the remuneration it's prepared to pay to that player in order to try and retain that player. So far as the NZRFU is concerned we don't see the cap as being a contributor towards allocative inefficiency.

On the other hand, we do see the cap preventing a vendor union holding on unreasonably to a player out of spite for that particular player, or in some way safeguarding against facing that player in upcoming matches playing for another

<sup>39</sup> A selling provincial union which values the rights to a player's services higher than the maximum transfer fee it could receive from an acquiring provincial union could bid up the remuneration it is prepared to pay the player in order to try to induce the player to stay.

union, and its for that reason we see the cap as being, with respect to detriments, not adding to detriments and being anti-competitive in that sense.”

- 210 At the conference Mr Foster, for RUPA, argued that the requirement to pay a transfer fee imposes a cost additional to the cost of remunerating the player. In RUPA’s view, the transfer fee provisions will reduce competition for the rights to player services because of the limited financial resources of provincial unions and, also, because a selling provincial union could require the maximum transfer fee to be paid or refuse to allow a player to transfer.
- 211 It is apparent to the Commission that establishing maximum transfer fees does not limit the potential for competition between provincial unions for the rights to player services, compared to the counterfactual. Under the Regulations, provincial unions will be able to compete for the rights to player services, and negotiate on the level of the transfer fee in any particular case as they would under the counterfactual (which, as noted, also requires a transfer fee to be negotiated), except that the provincial unions could not agree to a transfer fee higher than the specified maximum. If a provincial union was willing to pay more than the maximum transfer fee to acquire a player, the excess could become part of the remuneration package offered to the player. An acquiring provincial union is likely to be prepared to pay only a certain amount to acquire a player. The allocation of that money between the transfer fee payable to the selling provincial union and player remuneration is a distribution issue only.
- 212 Under the Regulations it is possible, as RUPA suggests, for a selling provincial union to refuse to agree to a transfer of a player unless the maximum transfer fee is paid by the acquiring provincial union. However, the Commission notes that similar action would be open to a selling provincial union under the counterfactual where there is no limit on the potential level of the transfer fee.<sup>40</sup> The NZRFU has suggested that the maximum transfer fees reduce the potential for provincial unions to attempt to reap abnormally high transfer fees and restrict player movement, because once the maximum transfer fee is offered then the player must be allowed to move.
- 213 The Commission also notes that, although some provincial unions suggested that higher maximum transfer fees than those agreed in the consultative process might be appropriate, there does not appear to have been any suggestion that the maximum transfer fee will in all, or even many, cases be the price paid by an acquiring provincial union for the rights to player services. The provincial unions that made submissions, both before and during the conference, indicated that in many cases transfers might occur for less than the maximum transfer fee or for a nil transfer fee.

<sup>40</sup> This is supported by the submission of Mr Scatts, for Auckland RFU, who suggested at the conference that provincial unions might take such action in the absence of established maximum transfer fees.

214 In the circumstances, the Commission concludes that the maximum transfer fees do not have, and are not likely to have, the effect of lessening competition between provincial unions in the market for the rights to player services.

(c) Conclusion

215 The Commission concludes that the maximum transfer fees have neither the purpose, nor have nor are likely to have the effect, of lessening competition in the market for the rights to player services.

*Overall Assessment Of Impact Of The Provisions On Competition In The Market For Rights To Player Services: Section 27*

216 The Commission concludes:

- The quota system has the purpose, and has or is likely to have the effect, of lessening competition in the market for the rights to player services;
- The transfer period has the purpose, and has or is likely to have the effect, of lessening competition in the market for the rights to player services; and
- The maximum transfer fees have neither the purpose, nor have nor are likely to have the effect, of lessening competition in the market for the rights to player services.

217 The potential competitive impacts of the salient aspects of the Regulations on the market for the rights to player services have been considered individually above. However, these provisions are being implemented together. In the circumstances, the Commission concludes that the Regulations would have, or would be likely to have, the combined or likely combined effect of lessening competition in the market for the rights to player services.

**Section 30**

*Introduction*

218 Section 30 prohibits any provision of a contract, arrangement or understanding between competitors that has the purpose or effect, or likely effect, of fixing prices. Such an agreement is deemed to substantially lessen competition in terms of s 27 of the Act. The deeming provision extends to provisions that have the purpose or have or are likely to have the effect of providing for the fixing, controlling or maintaining of the price for goods or services or any discount, allowance, rebate or credit in relation to goods or services.

219 The only provision in the Regulations which affects price is the system for establishing the maximum level of the transfer fee. The issues to determine are:

- Whether the provisions constitute a contract, arrangement or understanding between actual or potential competitors; and
- If so, whether they have the purpose or effect of fixing, controlling or maintaining the price for the rights to player services.

*Contract, Arrangement, or Understanding Between Competitors*

220 Regulations 7.1 and 7.2 of the Regulations provide that whenever a player transfers from one provincial union to another, there shall be a transfer fee paid from the player's previous provincial union to the new provincial union, and that the amount of the transfer fee shall not exceed the maximum transfer fee specified.

221 Provincial unions compete, or are likely to compete, in respect of the rights to player services. As previously discussed, the Regulations amount to an arrangement or understanding between all these provincial unions, to which the NZRFU is also a party. Therefore, the Regulations amount to an arrangement or understanding between competitors.

222 There are two aspects of this arrangement or understanding. The first aspect is the provision that a transfer fee will be negotiated between provincial unions, but subject to the maximum caps for each band. The second aspect is that in the event that a player wants to move but no agreement on the level of the transfer fee can be reached then, if the acquiring provincial union offers the maximum transfer fee, the selling provincial union must accept that offer and allow the player to transfer. However, if the acquiring provincial union does not wish to pay the maximum transfer fee for that band of player, and no agreement can be reached on a lower fee, and the Player Transfer Review Committee does not have jurisdiction to consider the matter under Regulation 10, then no transfer occurs (Regulations 7.2 (a) to (c)).

*Purpose or Effect of Fixing, Controlling or Maintaining Price*

223 The Commission has considered the broad notion of the prohibition in s 30 and has found that:<sup>41</sup>

... [T]he terms 'fix', 'control' and 'maintain' are synonymous with an interference with the setting of a price, as opposed to allowing such price to be set in response to changes in the supply and demand for goods and services. Thus, in a technical sense any agreement by competitors in a market which has an influence on, or interferes with the setting of a price, amounts to 'price fixing'. However, following Lockhart J for that interference to have any significance in a competition sense, the price that is

<sup>41</sup> *Insurance Council of New Zealand (Inc)* Decision No. 236; (1989) 2 NZB.J.C. 104,477.

fixed must not be "instantaneous or merely ephemeral, momentary or transitory or be the result of arrangements which merely incidentally affect it" "

224 Decision 236 does not specifically consider the issue of agreements between competitors to set a *maximum* price for any product. However, on the only occasion when a maximum price agreement was considered in New Zealand, in the Commission's decision in *Re New Zealand Kiwifruit Exporters Association*,<sup>42</sup> there was no discussion of the application of s 30 to maximum prices, since there was never any doubt that s 30 applied.<sup>43</sup>

225 In its submission, the NZRFU said :

"...in the *Trutone* case (*Trutone Ltd v Festival Records* [1988] 2 NZLR 352) although section 30 was not pleaded the court did not consider that the setting of a maximum price substantially lessened competition. In this case there was no assumption that section 30 applied."

226 In the *Trutone* case a record distributor sought to fix *maximum* retail prices for its records as a condition of supplying them to retailers. The Court of Appeal did not consider whether s 30 applied to the case as the issue had not been pleaded. There are two points to be noted:

- First, the provisions of s 30 are designed to catch provisions in arrangements between competitors that fix, control or maintain the prices charged by others in the resupply of their goods. The provision applies only to collective price fixing. In the *Trutone* case, the maximum retail price requirement involved the unilateral action of one record distributor, not collective action by a group of distributors. Consequently, there was no basis for pleading that s 30 applied to the case; and
- Second, while the resale price maintenance provisions of s 37 of the Act apply only to unilateral practices whereby a supplier prescribes a *minimum* price which resellers must charge on resale, s 30 of the Act does not distinguish between minimum and maximum price fixing.

227 The Commission concludes, therefore, that the *Trutone* case is not relevant to the discussion of s 30 in this case.

<sup>42</sup> Decision No. 221, (1989) 2 NZBLC 104,485. This decision was subsequently revoked due to a material change of circumstances in the kiwifruit industry. However, its reasoning is still valid as an indication of the Commission's approach to maximum price fixes.

<sup>43</sup> In the United States, Section 1 of the Sherman Act 1890 (the equivalent of the Commerce Act's section 27) provides that "every contract ... in restraint of trade ... is declared to be illegal." The US Supreme Court has clearly stated that both vertical and horizontal maximum price fixing arrangements will breach this provision. See for example *Arizona v Maricopa County Medical Society* (1982) 457 US 332; *Albrecht v Herald Co* (1968) 390 US 145; *Kiefer-Stewart Co v Joseph E Seagram & Sons* (1951) 340 US 211.

- 228 The NZRFU has stated that the purpose of requiring a transfer fee to be paid is to encourage development in existing players, to provide an incentive to develop players successfully, and to encourage the acquisition of lower level players from other provincial unions. In addition, the NZRFU has indicated that establishing maximum transfer fees "deliberately limits" the share of the player's value which could be received by selling provincial unions, and might reduce the ability of provincial unions to unreasonably restrict player movement, for example, by demanding unreasonably high transfer fees.
- 229 The Commission is of the view that a substantial purpose of Regulations 7.1 and 7.2 is to set the maximum transfer fee which may be paid. Although this amount will be only the maximum which may be charged, and provincial unions will be free to negotiate a lower or nil transfer fee, the imposition of a maximum interferes with the free market influence on the transfer fee, and therefore amounts to the controlling of the price for the rights to player services.
- 230 Furthermore, where the acquiring provincial union has offered the specified maximum transfer fee, then the transfer fee is set at the maximum applicable. In these circumstances, this provision has the effect of setting the actual price for the rights to player services at the level provided in the Regulations.

#### *Of a Good or Service*

- 231 The services for which the price is being set are the rights to player services.

#### *Conclusion: Section 30*

- 232 The Commission concludes that the maximum transfer fees are an arrangement or understanding between the provincial unions, to which the NZRFU is a party, which have the purpose, and have or are likely to have the effect, of fixing, controlling or maintaining the price for the rights to player services.

#### **Section 29**

##### *Introduction*

- 233 Section 29 prohibits exclusionary provisions. These are provisions of an arrangement or understanding which have the purpose of preventing, restricting or limiting the supply of goods or services to, or the acquisition of goods or services from, a particular person or class of persons, by any or all of the parties to the arrangement or understanding. The section also requires that at least two of the parties to the arrangement or understanding are in competition with each other, and with the particular person or class of persons affected, in relation to the supply or acquisition of the goods or services.

- 234 The provisions of the Regulations that might be exclusionary are the quota system, the transfer period and the transfer fee.
- 235 To bring these provisions within the ambit of s 29 requires that:
- There is, or is likely to be, competition between provincial unions (or would be, absent the provisions) in relation to the supply or acquisition of the rights to player services;
  - The provisions have the purpose of preventing, restricting or limiting the acquisition or supply of the rights to player services between provincial unions; and
  - Any provincial union restricted from acquiring or supplying the rights to player services, as a result of the operation of the Regulations, is or is likely to be, in competition with the provincial unions party to the arrangement or understanding (or would be, absent the provisions) in relation to the acquisition or supply of rights to player services.

*Contract, Arrangement Or Understanding Between Competitors*

- 236 As previously discussed, the Regulations are an arrangement or understanding between the affiliated provincial unions, to which the NZRFU is a party.
- 237 For s 29 to apply, the arrangement or understanding must be between persons any two or more of whom are in competition with each other in relation to the supply or acquisition of all or any of the services to which the exclusionary provisions relate. That is, the area of competition must coincide with the area of contractual regulation.
- 238 The Commission in *Re Pacific Tyres Limited*<sup>44</sup> took the view that it is not necessary that the parties actually be in competition with each other. It is sufficient if they "are or are likely to be" or "but for the relevant provision would or would be likely to be" in competition.

Services to which the provisions relate

- 239 The applicable services to which each of the quota system, transfer period and transfer fee provisions relate in this context are the rights to player services.

Competition in relation to the supply or acquisition of services

- 240 The Commission concludes that, under the transfer system established by the Regulations, the provincial unions are likely to compete with each other (or, absent the provisions, would be likely to do so) in relation to both the acquisition and supply of the rights to player services.

<sup>44</sup> Decision No. 247, 3 May 1990.



### Conclusion

- 241 Therefore, the Commission concludes that there is an arrangement or understanding involving persons, of whom two or more are in competition with each other, in respect of the supply or acquisition of services to which the alleged exclusionary provisions relate, namely the rights to player services.

### *Purpose of Preventing, Restricting or Limiting the Acquisition of Services*

#### Quota system

- 242 As discussed previously, a substantial purpose of the quota system is to ensure that no provincial union is able to acquire a "dream team" consisting of many of the best players and, therefore, to limit or restrict the ability of provincial unions to compete for and acquire the rights to player services from other provincial unions.
- 243 The Commission's preliminary conclusion in the Draft Determination was that the quota system has an exclusionary purpose. Submissions received by the Commission were either silent towards, or concurred with, this conclusion. The Commission, therefore, remains of the view that the quota system has an exclusionary purpose in terms of s 29 of the Act.

#### Transfer period

- 244 In its submission, the NZRFU concurred with the Commission's preliminary conclusion that the transfer period does not have an exclusionary purpose. However, RUPA submitted that the purpose of the transfer period is exclusionary in nature. In its submission RUPA stated:
- "The Commission's view appears to overlook the fact that the perceived need to compete for player services is dependent on a number of considerations which change from day to day. For example, after the Super 12 competition in May, an NPC coach will be bound to reconsider the make up of his NPC team through changes in form and injuries. The desirable options of drafting in from other provinces a number of players to cover newly vacated positions or potential openings in the team will no longer be possible. Many players will therefore not be utilised and will remain non-playing squad members in teams which do not need their services in that season."
- 245 The Commission accepts that provincial unions might have a need to acquire additional players at various times during the rugby union season. However the fact that a provincial union may negotiate with another provincial union for the rights to player services (subject to the player wanting to move) at any time during the year, does not support the existence of a substantial purpose to restrict or limit the acquisition of those services.

- 246 Therefore, the Commission concludes that the transfer period does not have an exclusionary purpose in terms of s 29 of the Act.

Transfer fee

- 247 The stated purpose of the transfer fee is to compensate provincial unions for developing players, to provide an incentive for provincial unions to invest in developing their players and to encourage the acquisition of lower level players from other provincial unions. The NZRFU has also indicated that the receipt of transfer fees might assist smaller, less wealthy, provincial unions, to compete for the rights to player services.
- 248 The purpose of establishing maximum transfer fees is stated to be to ensure that provincial unions receive some compensation for developing players but are not able to unduly restrict player movement, for example, by demanding an unreasonably high transfer fee for a player.
- 249 In its submission, RUPA contended that a substantial purpose of the transfer fee is to prevent, restrict or limit the acquisition of rights to player services by other provincial unions. However, the Commission has not received any information that would support this view. The aim appears to be to establish a system balancing the need to reward provincial unions for developing players, while protecting player mobility. The maximum transfer fees might in some circumstances assist an acquiring provincial union, in that if an acquiring provincial union is willing to pay the applicable maximum transfer fee, then the selling provincial union must, if the player wants to move, agree to the transfer.
- 250 The Commission concludes that the maximum transfer fees do not have an exclusionary purpose in terms of s 29 of the Act.

*From any Particular Person or Class of Persons, by all or any of the Parties to the Arrangement*

- 251 The quota system has a substantial purpose of restricting or limiting the acquisition of services from a class of persons, namely provincial unions affiliated to the NZRFU. Such restriction involves the acquisition of services by any of the parties to the arrangement.

*The Excluded Person or Class of Persons is in Competition with One or More of the Parties to the Contract, Arrangement or Understanding in Relation to all or any of the Services to which the Provision Relates*

- 252 Any provincial union which may be prevented, restricted or limited from acquiring or supplying the rights to player services, by reason of the Regulations, is likely to be (or, absent the Regulations, would be likely to be) in competition with the other provincial unions party to the arrangement, in relation to the supply and acquisition of the rights to player services. The

rights to player services are services to which the exclusionary provisions relate.

*Conclusion: Section 29*

253 The Commission concludes:

- The quota system is an arrangement or understanding which has the purpose of preventing, restricting or limiting the supply of the rights to player services to, or the acquisition of the rights to player services from, a class of persons, namely the provincial unions affiliated to the NZRFU, to which s 29 applies;
- The transfer period is not an arrangement or understanding which has the purpose of preventing, restricting or limiting the supply of the rights to player services to, or the acquisition of the rights to player services from, a class of persons, namely the provincial unions affiliated to the NZRFU, to which s 29 applies; and
- The maximum transfer fees are not an arrangement or understanding which has the purpose of preventing, restricting or limiting the supply of the rights to player services to, or the acquisition of the rights to player services from, a class of persons, namely the provincial unions affiliated to the NZRFU, to which s 29 applies.

## COMPETITIVE IMPACT ON THE MARKET FOR PLAYER SERVICES

### Introduction

254 As discussed previously, the Commission has concluded that, for the purposes of its consideration of the Regulations, it will treat the market for player services as a market in terms of the Act, and will analyse the effect of the Regulations on that market. In the Draft Determination, the Commission's preliminary conclusion was that it did not have jurisdiction over the market for player services and, therefore, interested parties were not specifically requested to comment on the competitive impact of the Regulations on that market.

255 However, the Commission is of the view that the competition analysis of the impact of the Regulations on the market for player services would be similar to the analysis of the market for the rights to player services. The two markets appear to be different sides of the same coin. For example, in order to field a player falling within any of the bands specified in the Regulations a provincial union must acquire the rights to use that player's services from the prior provincial union, and must also come to some arrangement with the player for the supply of the player's services or skills. At the conference, both the

NZRFU and RUPA<sup>45</sup> agreed that the competition analysis of the impact of the Regulations on the market for player services would be similar to the analysis of the market for the rights to player services.

- 256 In this section, the Commission considers whether the Regulations might lessen competition in terms of s 27 of the Act.
- 257 The Commission has determined that, for the purposes of its consideration of the Regulations, player services and the rights to player services are services which exist separately and are, therefore, both subject to the Act. However, in this case, the application of ss 30 and 29 of the Act to player services is not considered because:
- The Regulations do not interfere with the setting of the price of player services and, therefore, s 30 is not applicable; and
  - Section 29 requires a finding that the boycotted party be in competition with at least one party to the arrangement. In this case, the boycotted parties are the players, who are not parties to the Regulations, and are not in competition with any of the parties to the Regulations. Therefore, s 29 is not applicable.

## Section 27

### *Introduction*

- 258 Within the market for player services, players compete with each other to supply their skills or services to provincial unions, and provincial unions compete with each other to acquire those skills or services.
- 259 As discussed previously, in some instances, the result of competition in this market is the entering into of a contract between a player and a provincial union. The terms and conditions of these contracts vary and will, under both the Regulations and the counterfactual, continue to be a matter of individual negotiation between players and provincial unions.
- 260 In this section, the Commission considers the purpose and effect of each of the quota system, transfer period and transfer fee on competition on the market for player services, followed by an assessment of the overall impact of these provisions on competition in that market. As noted above, the previous analysis of the impact of these provisions in the market for the rights to player services is also relevant to the competition analysis of the impact of the Regulations on the market for player services. The Commission does not believe that it is necessary to repeat that analysis in full in this section.

<sup>45</sup> At the conference Mr Fisher, for RUPA, conceded that the competitive detriment was unlikely to change even if the Commission considered the market for player services (see page 198 of the transcript of the conference).

Contract, arrangement or understanding

- 261 As discussed previously, the Regulations are an arrangement or understanding between the provincial unions, to which the NZRFU is also a party.

Quota system

(a) Purpose

- 262 As previously discussed, the stated purpose of the quota system is to ensure that no one provincial union is able to build a "dream team" consisting of all the best players, thereby leading to a more uneven rugby union competition. This is achieved by placing a quota limit on the number of players (in total and for each specified band of player) that can transfer to a provincial union in any one year.
- 263 The Commission concludes, therefore, that a substantial purpose of the quota system is to lessen competition in the market for player services, by restricting the ability of provincial unions to acquire such services from players.

(b) Effect

- 264 The Commission has adopted a counterfactual under which there is no quota system. Hence the level of transfer activity would be determined by the unrestricted market forces of supply and demand, subject to the terms of any contract between a player and provincial union.
- 265 As previously noted, the Commission considers that, in the professional era, there are increased incentives for players to move between provincial unions, and for provincial unions to acquire players. Therefore, the level of transfers in the past is not necessarily indicative of the likely future level of movement.
- 266 While it is difficult to predict the level of player movement likely in the future, the Commission is of the view that the quota system, by fixing a quantity limit (in total and for each band of player), is likely to lessen competition between provincial unions for player services. For example, a provincial union can only acquire the services of one current All Black in any one year. However, the Commission agrees with the view expressed by the NZRFU that the quota system is only likely to affect a limited number of provincial unions in any one year. In any particular year there will be some provincial unions which are not restricted by the quota system.
- 267 The Commission notes that the provincial unions, as purchasers of player services, are directly constrained by the quota system. Players technically could promote their services to all 27 provincial unions without restriction. However, the quota system is also likely to constrain player movements, for

example, where the provincial union to which a player is seeking to move has already acquired its quota of players for the year.

- 268 The Commission concludes that the level of constraint likely to be imposed by the quota system is sufficient to establish that it has, or is likely to have, the effect of lessening competition in the market for player services. For the reasons noted previously, the Commission does not consider that the overseas player or NPC player landing rules will temper this lessening of competition to any significant extent.

(c) Conclusion

- 269 The Commission concludes that the quota system has the purpose, and has or is likely to have the effect, of lessening competition in the market for player services.

Transfer period

(a) Purpose

- 270 As discussed previously, the stated purpose of the time period restriction is to promote team stability and prevent 'stacking' of teams. The NZRFU also argued that a limited transfer period is required for administrative simplicity.

- 271 Provincial unions cannot actually acquire player services, and players cannot actually sell their services or skills to other provincial unions, except during the November transfer period. However, players and provincial unions can negotiate and agree to acquire/sell player services to provincial unions at any time of the year.

- 272 On an objective basis, the Commission is of the view that a substantial purpose of the transfer period is to ensure that rugby union players within the specified bands are 'tied' to a particular provincial union for at least 12 months, and, therefore, to hinder the ability of provincial unions to acquire, and players to sell, player services except for one month between each rugby union season.

- 273 The Commission concludes that a substantial purpose of the transfer period is to lessen competition in the market for player services.

(b) Effect

- 274 It is only the registration of the transfer and the physical transfer (in terms of contractual arrangements) of a player that must occur during the transfer period. Approaches to players, and agreements to move, can occur at any time of the year. The counterfactual identified by the Commission has no restriction on the time when rugby union players can transfer between provincial unions.

275 Under the counterfactual, player services could be acquired/sold at any time (subject to the terms of contracts between players and provincial unions). The limited transfer period might affect the price which a provincial union is willing to pay for player services and might affect the willingness of a provincial union and/or player to compete in the market for player services, except near or during the November transfer period. As a result, mutually beneficial trades might be delayed and competition in the market for player services is likely to be lessened.

276 For the reasons outlined above, and previously in the Commission's analysis of the effect of the transfer period on the market for the rights to player services, the Commission concludes that the transfer period has, or is likely to have, the effect of lessening the ability of players to compete for transfers, and of provincial unions to acquire player services, and thus of lessening ... competition in the market for player services.

(c) Conclusion

277 The Commission concludes that the transfer period has the purpose, and has or is likely to have the effect, of lessening competition in the market for player services.

Transfer fee

(a) Purpose

278 The stated purpose of the transfer fee is to compensate a provincial union for developing players, to provide an incentive for provincial unions to invest in developing their players and to encourage the acquisition of lower level players from provincial unions. The Commission accepts this as being a substantial purpose of the transfer fee.

279 The NZRFU has indicated that the purpose of establishing maximum transfer fees is to ensure that provincial unions receive some compensation for developing players but are not able to unduly restrict player movement, for example, by demanding an unreasonably high transfer fee for a player.

280 The Commission has not seen any information which would suggest that it is a substantial purpose of the maximum transfer fees to lessen competition in the market for player services. The aim appears to be to establish a system under which the provincial unions are recompensed for developing players, while at the same time protecting player mobility.

281 The Commission concludes, therefore, that the maximum transfer fees do not have a substantial purpose of lessening competition in the market for player services.

## (b) Effect

- 282 Given that the counterfactual suggests that there would remain a requirement to negotiate a transfer fee, the aspect of Regulations 7.1 and 7.2 which warrants examination is the setting of the maximum transfer fee, and the requirements of Regulations 7.2 (a) to (c) described previously.
- 283 It is difficult to assess the likely level of transfers and transfer fees in the future. The maximum transfer fees cap the amount of compensation that a selling provincial union can receive on the transfer of the player. However, the Regulations do not cap the amount which can be received by the player by way of remuneration. Therefore, if a provincial union is prepared to pay more than the amount of the maximum transfer fee to acquire the rights to a particular player, the balance of the value to that provincial union of the rights to that player not reflected in the transfer fee could become the subject of negotiation with the player regarding remuneration. In this case, the market for the rights to player services and the market for player services interact and the maximum transfer fees provide a mechanism to determine the distribution of the value of the rights to a player's services as between the player and the selling provincial union. The overall payment which can be made by the acquiring provincial union is not limited.
- 284 There was some suggestion from RUPA, in its submission and at the conference, that requiring a transfer fee to be paid would lessen competition in the market for player services by imposing an additional cost on a provincial union. It was also suggested by RUPA that a selling provincial union could hold out for the maximum transfer fee or refuse to allow a player to transfer.
- 285 The Commission notes that the remuneration which a provincial union will be willing to offer a player might depend, in part, on the level of the transfer fee it pays.<sup>46</sup> However, as noted previously, the difference between the Regulations and the counterfactual is limited to the setting of maximum transfer fees (the counterfactual also requiring the negotiation of a transfer fee which may be nil) and it is apparent to the Commission that the establishment of maximum transfer fees does not limit the potential for competition between provincial unions for a player's services. A provincial union is likely to be prepared to pay only a certain amount for a player. The allocation of this money between the transfer fee and the player remuneration is a distribution issue only.
- 286 Under the Regulations, it is possible, as RUPA suggests, for selling provincial unions to refuse to agree to the transfer of a player unless the maximum transfer fee is paid by an acquiring provincial union. However, the Commission notes that there is also the potential for this to occur under the counterfactual where there is no limit on the level of the transfer fee. The

<sup>46</sup> It was accepted by the NZRFU, in its application (paragraph 6.2(a)(iv)), that the fixing of a transfer fee could in some circumstances be a significant proportion of the total cost to a provincial union in acquiring a player from another provincial union.



NZRFU has gone so far as to suggest that the maximum transfer fees might reduce the potential for provincial unions to attempt to reap abnormally high transfer fees and restrict player movement, because once the maximum is offered then the player must be allowed to move.

287 For the reasons outlined above, and previously in the Commission's analysis of the impact of the transfer fee provisions on the market for the rights to player services, the Commission concludes that, compared to the counterfactual, the maximum transfer fees do not have, and are not likely to have, the effect of lessening competition in the market for player services.

(c) Conclusion

288 The Commission concludes that the maximum transfer fees have neither the purpose, nor have nor are likely to have the effect, of lessening competition in the market for player services.

*Overall Assessment of Impact of the Provisions on Competition in the Market for Player Services: Section 27*

289 The Commission concludes:

- The quota system has the purpose, and has or is likely to have the effect, of lessening competition in the market for player services;
- The transfer period has the purpose, and has or is likely to have the effect, of lessening competition in the market for player services; and
- The maximum transfer fees have neither the purpose, nor have nor are likely to have the effect, of lessening competition in the market for player services.

290 The potential competitive impacts of the salient aspects of the Regulations on the market for player services have been considered individually above. However, these provisions are being implemented together. In the circumstances, the Commission concludes that the Regulations would have, or would be likely to have, the combined or likely combined effect of lessening competition in the market for player services.

**COMPETITIVE IMPACT ON THE MARKET FOR SPORTS ENTERTAINMENT SERVICES**

**Analysis**

291 It is necessary to consider whether the Regulations have the purpose or effect of lessening competition in the market for sports entertainment services under s 27. There are no s 30 or s 29 issues that arise in respect of sports entertainment services.

- 292 In the Draft Determination, the Commission reached the preliminary conclusion that the Regulations have neither the purpose nor effect of lessening competition in the market for sports entertainment services.
- 293 The majority of submissions received by the Commission were silent toward this issue. However, the NZRFU, in its submission and at the conference, indicated its support for the Commission's preliminary conclusions.
- 294 In adopting the Regulations, the NZRFU submitted that its purpose is threefold: to maintain and enhance evenness of competition; to recognise and encourage player training and development; and to enhance player skills while protecting as far as possible the opportunity for players to move and unions to acquire players. Insofar as this purpose is to allow provincial unions to compete with each other based on their teams' abilities rather than their cashflow, and as far as this results in a higher number of provincial unions continuing to field competitive rugby union teams at national and international level, the purpose is pro- and not anti-competitive.
- 295 Rugby union makes up only one part of the market for sports entertainment services and therefore, any purpose or effect in relation to rugby union will have only a limited purpose or effect in relation to the broader market. It is the Commission's conclusion that the Regulations do not have the purpose of lessening competition in the market for sports entertainment services.
- 296 Most provincial unions spoken to by Commission staff believe that the Regulations will have the effect of promoting an even national rugby union competition. If this were to occur, rugby union as an input to the sports entertainment market might gain a competitive advantage over other sports. Even were this not to occur, the worst result for rugby union is that it becomes less attractive as a spectator sport. But this in itself does not constitute a lessening of competition.

#### Conclusion

- 297 The Commission concludes that the Regulations neither have the purpose, nor have nor are likely to have the effect, of lessening competition in the market for sports entertainment services.

#### CONCLUSION ON COMPETITIVE IMPACT OF THE REGULATIONS

- 298 The Commission concludes:
- The quota system has the purpose, and has or is likely to have the effect, of lessening competition in the market for the rights to player services and the market for player services;

- The transfer period has the purpose, and has or is likely to have the effect, of lessening competition in the market for the rights to player services and the market for player services;
- The maximum transfer fees have neither the purpose, nor have nor are likely to have the effect, of lessening competition in the market for the rights to player services and the market for player services;
- The quota system, transfer period and maximum transfer fees have the combined or likely combined effect, of lessening competition in the market for the rights to player services and the market for player services;
- The maximum transfer fees are a price fixing arrangement in terms of s 30 and are, therefore, deemed to substantially lessen competition in the market for the rights to player services; and
- The quota system is an exclusionary provision in terms of s 29.

## DETRIMENTS

## Introduction

299 As set out in the section above on Commission procedure, the Commission is required to weigh the benefits to the public arising from the Regulations against the detriments caused by the lessening of competition consequent upon the Regulations. The Commission's approach to the assessment of public benefits and detriments is explained in its publication *Guidelines to the Analysis of Public Benefits and Detriments in the Context of the Commerce Act*, which was issued in 1994.

300 The various issues raised have been enumerated and discussed in a number of decisions by the Commission and the courts in recent years. In assessing both detriments and benefits, however, the focus has increasingly been on economic efficiency. The Court of Appeal stated in *Trutone Ltd v Festival Records Retail Marketing Ltd*<sup>47</sup> that the Act:

"is based on the premise that society's resources are best allocated in a competitive market where rivalry between firms ensures maximum efficiency in the use of resources."

301 Richardson J, sitting as one of five judges of the Court of Appeal, in *Telecom Corporation of New Zealand Ltd v Commerce Commission (AMPS A)*,<sup>48</sup> also remarked on:

"... the desirability of quantifying benefits and detriments where and to the extent that it is feasible to do so .... In this case certain major efficiency gains were quantified for Telecom at some \$75 million. While both the commission and the Court did not accept elements in that quantification, both bodies considered that there would be significant efficiency gains if Telecom had management rights over both AMPS A and AMPS B. In those circumstances there is in my view a responsibility on a regulatory body to attempt so far as possible to quantify detriments and benefits rather than rely on a purely intuitive judgement to justify a conclusion that detriments in fact exceed quantified benefits."

302 In his judgment in the same case, Casey J noted and concurred with the comments of Richardson J on this topic.

303 The Commission's approach to the quantification of detriments and public benefits was supported by the High Court in the recent decision of *Ravensdown Corporation Limited v The Commerce Commission and Others*.<sup>49</sup> After referring to the above passage from the *Telecom case*, the judge stated:

<sup>47</sup> [1987] 2 NZLR 352.

<sup>48</sup> [1994] 5 NZBLC 103,431.

<sup>49</sup> Unreported, High Court Wellington, AP 168/96, 9 December 1996, Panckhurst J and Professor R O Lattimore.

"We accept that the Commission did adopt an analytical framework from which it proceeded to an analysis of allocative, productive and innovative efficiency. We regard the use of such framework in the present case as a strength of the Determination. It was an approach which helped guard against the dangers of missing elements which required consideration on the one hand, and the double counting of elements on the other. Moreover, the framework as an economic model represented a mainstream approach suitable for the task in hand."

304 Later in its decision the court said:

"We have considered the quantitative assessment of detriments undertaken by the Commission. What is notable about that assessment is its transparency ... Where evidence was available to arrive at a quantitative assessment, that was done, but equally in the absence of sufficient evidence no endeavour to quantify in dollar terms was attempted. It is also significant that the analysis included both a separate examination of the benefit and detriment elements, followed by a more holistic exercise. In other words, the Commission considered the individual issues but then stood back and looked at benefits and detriments in the round. We are not persuaded the methods employed were inadequate or wrong."

305 The Commission thus believes that it should attempt to quantify detriments and benefits wherever feasible, always recognising that given the difficulties inherent in such quantification, it may only be possible to establish the range within which the actual value of a particular detriment or benefit is likely to fall. This is not to say that only those gains and losses which can be measured in dollar terms are to be included in the assessment; those of an intangible nature may also be relevant. The Commission considers that a public benefit is any gain, and a detriment is any loss, to the public of New Zealand, with an emphasis on gains and losses being measured in terms of economic efficiency. However, changes in the distribution of income, where one group gains while another simultaneously loses, are generally not included either as a benefit or as a detriment. As noted in its decision in *Goodman Fielder Ltd/Wattie Industries Ltd*,<sup>50</sup> the Commission must assess detriment only in the market in which competition is lessened, but canvas for possible benefits to New Zealand both in that market and in all other markets in New Zealand.

306 The preceding discussion has focused on two markets in which the Regulations will reduce competition: the market for player services, and the market for the rights to player services.<sup>51</sup> The first involves transactions between provincial unions and players, and the second, transactions between provincial unions. The two markets are inter-related, however, since the remuneration which a provincial union is willing to offer a player depends in part upon how much that provincial union has to pay to acquire the rights to the player's services in the first place.

307 The extent to which competition in each market is reduced, and the amount of detriments flowing therefrom, are to be gauged against the counterfactual scenario. The latter has been specified earlier as one where the three restrictions evident in the Regulations, relating to the maximum transfer fees,

<sup>50</sup> (1987) 1 NZBLC (Com) 104,108.

the quota system, and the transfer period, do not apply. The attempt to measure the detriment must rest on an assessment of how the two markets - for player services, and for the rights to player services - are likely to develop in the future in the context of a professional game both with and without the Regulations. In order to make this assessment, it is useful to consider briefly how the labour and transfer markets for professional sports players operate overseas.

## **Labour Markets for Professional Sports Players**

### *The Overseas Perspective*

#### Labour Markets<sup>51</sup>

308. Players are the crucial input into any professional team sport. Economic theory suggests that their remuneration will be determined by the forces of demand and supply in the market for their services. Top players overseas are paid so highly because of the combination of the high demand for their services and the limited supply of star talent. The intersection of demand and supply in the market thus determines that remuneration will be high.

309. As an input, player services are demanded not so much in their own right, but rather because they contribute to an output - a proxy measure for which might be 'games'<sup>52</sup> - which is in high demand, both in terms of ticket sales and through television ratings, and as a medium for sponsorship and merchandising. Premier players are highly remunerated because they add substantially to the revenues earned by the club. Although the sum is difficult to calculate in practice, in principle the most that a profit-orientated club would be prepared to pay annually to a player is the amount that that player would add to the team's annual revenue. Anything more would lower the team's profits; anything less would add to those profits.

310. From a player's perspective, and in theoretical terms, the minimum remuneration which a player would accept to join a particular club - the 'reservation wage' - is what that player could earn in the next-best employment opportunity, taking into account non-pecuniary advantages and disadvantages associated with both. A remuneration of less than the reservation 'wage' would see the player preferring that alternative employment. The alternative employment available to a player depends upon the freedom of players and teams to negotiate. There are a range of possibilities, of which the following represent two extreme cases:

- the players' labour market is highly controlled: players might be forced to negotiate only with their clubs, which would tend to generate low

<sup>51</sup> James Quirk and Rodney D. Fort, *Pay Dirt: The Business of Professional Team Sports*, Princeton, Princeton University Press, 1992.

<sup>52</sup> 'Games' might mean the entertainment quality of the contest, and include the enjoyment of watching 'star' players.

reservation 'wages' because the alternative employment available would be outside of the sport, and here the remuneration that players can command is often relatively low. Such market controls would thus effectively grant clubs the monopsony bargaining power to keep down player remuneration to near that level; or

- the players' labour market is completely unrestricted: players would be able to consider offers from other clubs (subject to contractual arrangements with their current clubs), in which case the alternative employment would be in the sport, and the reservation 'wage' would be high. Here players would (ignoring non-pecuniary factors) end up signing with the club for which they were the most valuable, with a remuneration between the maximum offered by that club and the maximum offered by the next highest. Hence players would capture most of their economic rent associated with their participation in the sport.

311 The maximum remuneration which the club will pay and the reservation 'wage' that the player will accept for playing form the upper and lower bounds respectively on the remuneration that the player can expect to earn. Where the remuneration actually falls is likely to depend upon the relative bargaining strengths of player and team, and that in turn will, to an important degree, reflect the presence or absence of labour market controls. Hence it has often been argued overseas by those who have studied professional team sports that while labour market controls may ostensibly be maintained to restrict player mobility with the objective of preserving evenly contested games (see below), the controls have the effect of reducing player remuneration.

#### Transfer Markets

- 312 The transfer market is linked with the labour market. In English professional soccer where there is an active (though regulated) transfer market, player transfers probably stem (at least in part) from a divergence between the remuneration paid to a player by their current club, and the maximum which another club would pay. This gap provides the scope for a 'buying' club to acquire the rights to use that player's services by offering the 'selling' club a transfer fee. In principle, it is only worthwhile for a profit-seeking club to pay as a transfer fee up to the maximum of that differential, allowing for the years of expected service over the player's remaining likely playing career, together with such risk factors as possible non-appearances because of injury, loss of form, and absences on international service (all discounted to present value).
- 313 There appears to be a variety of motives behind transfers in English professional soccer.<sup>53</sup> For a buying club, the primary motive is likely to be team strengthening aimed at improving sporting success and, through that,

<sup>53</sup> See: F. Carmichael and D. Thomas, "Bargaining in the Transfer Market: Theory and Evidence", *Applied Economics*, vol. 25, 1993, pp. 1467-76.

financial success. Players may be transferred in as part of longer term team building, or to meet short term expediencies, such as the need to replace an injured player or to strengthen the team with the aim of gaining promotion or of avoiding relegation. The characteristics of available players (for example, age, experience, skills, playing record, etc) are also likely to be important. For a selling club, a transfer may be negotiated with varying degrees of willingness because a player is no longer required, or because the player wishes to transfer, or because the club is in financial difficulties. Transfer fees sought are said to depend upon the player's characteristics, the selling club's bargaining position, and that club's desire to seek compensation for the loss of the player's contribution and for his development.

### *The New Zealand Perspective*

#### Labour Market

- 314<sup>42</sup> Until recently, rugby union was an amateur game. Nonetheless, anecdotal evidence suggests that players from club level upwards did receive some recompense for playing, often on a per match basis. At the higher levels, players have recently received payment for promotional work, and for international representative duties. Some were paid to play in Europe in the southern hemisphere off-season.
315. The situation has changed dramatically with the advent of professionalism, and is likely to change further in the future in possibly unpredictable ways. The income from television rights for All Black, Rugby Super 12 and, to a lesser extent, NPC, matches has allowed the NZRFU from 1996 to pay salaries closer to those received by top sportspeople overseas for those players with whom it has contracted to play in the Rugby Super 12 competition. These are the new professional players. The remaining provincial players who play in the NPC competition have continued to receive limited payments (often on a per match basis, sometimes with a win bonus) from their provincial unions, but as their income derives largely from employment outside of rugby, they are regarded as amateur players. It is generally accepted that provincial unions, especially in the second and third divisions, have insufficient income to be able to pay those players much more than token amounts.

#### Transfer Market

- 316 In New Zealand rugby union in the era before professionalism, it appears that there were a number of factors promoting the movement of players between provincial unions, and few restrictions, apart from the need to meet the NZRFU's undemanding 21 day residential requirement. Player motives for moving included employment opportunities, to gain tertiary education qualifications, or the wish to play for a better team in order to catch the eye of the selectors of representative teams. For example, Mr Burdett of the East Coast RFU stated at the conference that his province had lost many players for employment reasons, and that in consequence eight of the playing fifteen in



the neighbouring Poverty Bay team last season came from the East Coast. Hawkes Bay RFU is another provincial union which traditionally has lost players because of the region's relative lack of tertiary education institutions, whereas Otago RFU has gained for the opposite reason.

- 317 For acquiring provincial unions, incoming players were often welcomed because they filled a perceived gap in the team, or strengthened the team and brought the prospect of gaining promotion or of avoiding relegation. Also, in some cases, players were offered inducements to move, in the form of help in finding jobs and accommodation. 'Losing' provincial unions, usually the less financially strong provincial unions in the second and third divisions, were often unable to staunch the outflow of their better players, and received no compensation for the expenses incurred in training and developing them.
- 318 With the introduction of professionalism, the same motives for player transfers are likely to continue, but now there is much greater scope for the more able players to treat rugby as a career. Those amateur players at the NPC level, including the emerging players often used as reserves for the established players, who have aspirations to make rugby their career, are facing increased incentives to move between provincial unions in order to gain greater playing exposure. Nonetheless, the prerogative will remain with the individual provincial unions as to whether or not they choose to acquire the rights to the services of particular players, and this will not necessarily be overridden by the wish of a player to play for a different provincial union.
- 319 Under professionalism in rugby union, player transfer fees are likely to be paid for one of a variety of reasons:
- the presence of a divergence between the value of a player to his current provincial union, and his value to other provincial unions;
  - the possible need to 'buy out' a transferring player's contract with his current provincial union; and
  - the provision in the Regulations which would require a transfer fee to be paid (although the fee could be as low as zero).<sup>54</sup>
- 320 The sizes of the transfer fees paid to players would probably depend upon a number of factors. These would include the characteristics of the player (for example, age, experience, skills, playing record etc), the gap in the team to be filled, the wealth of the provincial union, and the objectives of the provincial union.

<sup>54</sup> In the absence of this requirement, players who have played to the end of their contracts with their present provincial unions would be in the position to capture the equivalent of the transfer fee in the form of a higher remuneration. The buying provincial unions would still pay for the rights to those players' services, but in this case the 'losing' provincial unions might receive no compensation.

- Income of provincial unions: provincial unions will be acquiring the rights to player services only for the eight NPC games of 'round robin' play each year, of which only the four home games generate revenues for each provincial union. Moreover, apart from Ranfurly Shield challenges, the revenues from home games are typically quite small. Also, because the NPC competition is no longer preceded by a period in which a number of 'friendly' matches are played, Mr Foster of RUPA suggested at the conference that the resulting smaller number of home games has probably made it more difficult to attract team sponsors. Hence, the prospect of a dramatic increase in the rewards for provincial team success in the NPC competition in the professional era seems unlikely.
  - New income sources: at the conference rumours were voiced that companies in various regions were planning to offer funds to their local provincial unions for the 'purchase' of players to strengthen the team, with reference being made to press comment that \$600,000 might be made available from business sources to the Wellington RFU. The NZRFU believes that such corporate sponsorship is quite likely. However, RUPA expressed scepticism in the absence of any firm evidence of such arrangements being agreed to.
  - Quality of the team: the transfers of good players will be likely to command relatively large transfer fees when they are added to teams of good players in financially strong provincial unions, compared to the situation where the same players are added to teams of less able players in financially weak provincial unions.
  - Objectives of the team: the overseas literature points to the team's goal as being important. If it is to maximise wins rather than to maximise profits, a provincial union may pay transfer fees exceeding the differential value of the player to the provincial union, thereby sacrificing profits in order to improve team strength. In submissions, several provincial unions have specified objectives which might be characterised as a desire to maximise the number of wins subject to a financial break-even constraint. RUPA has pointed out that since provincial unions are incorporated societies, profit-making is not a part of their objectives.
- 321 The NZRFU has stated repeatedly that the purpose of the Regulations is to prevent the financially stronger provincial unions, through the transfer system, from being able to acquire more of the best players, thereby 'unbalancing' games to the detriment of the NPC competition as a whole. In the light of the huge sums paid for some transferring players by English soccer clubs, the NZRFU also appears to be concerned that individual provincial unions may behave irrationally by paying 'too much' to acquire players, causing them to experience financial difficulties. A further concern is that players wishing to transfer may be denied the opportunity by provincial unions holding out for

unreasonably high transfer fees. However, the extent to which the Regulations might serve to obviate these perceived 'problems' is discussed in the section on public benefits.

### **Detriments**

- 322 As discussed earlier, the purpose and effect of the Regulations is to reduce the ability of provincial unions to acquire the rights to player services compared to the counterfactual. The Regulations also have the purpose and effect of restricting competition between provincial unions and between players in the market for player services. However, from an economic perspective the two markets appear merely to represent different sides of the same coin. For example, when games in the NPC competition yield low revenues, players are likely to receive low rates of remuneration in the market for player services, and at the same time to attract low transfer fees in the market for the rights to player services. In other words, the former market puts a value on the player's annual remuneration, whereas the latter puts a value on the player's career contribution. The two are clearly linked. Hence in assessing detriment, the Commission takes the view that it need focus only on the market for the rights to player services.
- 323 The competition analysis above concluded that because of the quota, the annual number of player transfers may be reduced below that which would otherwise occur in the counterfactual.
- 324 By fixing a quantity limit in the market, the quota may directly constrain the total number of players per year which a provincial union is able to acquire, and within that total, the numbers of players in the different bands which can be acquired. In addition, it was also concluded that the time period aspect of the Regulations could act as a further restraint, in that the annual number of transfers - whatever that should be - is restricted to taking place within only one month of the year.
- 325 The resulting detriments in the market for the rights to player services from the restrictions imposed by the Regulations are considered under the following headings:
- price and quantity (allocative efficiency);
  - productive efficiency;
  - maintaining asset quality; and
  - innovative efficiency.
- 326 Each is now discussed in turn.

#### *Price and Quantity*

- 327 Under an unrestricted transfer system, as envisaged in the counterfactual, the rights to player services would tend to be traded between provincial unions in

circumstances where the acquiring provincial union values their services more highly than the selling provincial union. Mutually beneficial trades would be possible because acquiring provincial unions would be able to pay more for players than they are worth to the selling provincial unions. In this way, players would be allocated to their most valued employment. Subject to market failure reservations discussed in the public benefit section below, allocative efficiency would be enhanced.<sup>55</sup> The impact of the market restrictions contained in the Regulations, by reducing the numbers of transfers, could thus harm allocative efficiency; in other words, mutually beneficial trades may be prevented, or at least delayed. This would be measured in principle by the extent to which players are not allocated at the margin to the provincial unions which value their services most highly.

328 The size of this detriment would depend upon a number of factors:

- the level of the average transfer fee in the uncontrolled market;
- the extent to which the Regulations restrict the number of player transfers compared to what would otherwise occur; and
- the price elasticities of the relevant demand and supply curves for the rights to player services.

Since all of these elements are very difficult to predict, the size of the detriment flowing from the loss of allocative efficiency is uncertain.

329 In the Draft Determination, the Commission made a preliminary attempt to estimate the possible size of this detriment using the following assumptions: the quota is the binding restraint; each provincial union would be restrained to the extent of being unable to effect either one or two transfers per year; there would be 27 provincial unions; the average transfer fee in the unrestrained market would be \$20,000; and the price elasticity of both demand and supply would be one. It then became possible to estimate the size of the welfare loss as described above. Because of doubts about the assumptions made, alternative estimates were computed on the basis that the average transfer fee would be \$10,000, and that half the provincial unions would be acquiring provincial unions, and the other half would be selling provincial unions. It was also suggested that as transfers in 1996 had been impeded because of the moratorium, there was likely to be a larger than usual number of transfers in 1997. As a result, the Regulations might be more restrictive in the short-term,

<sup>55</sup> In an independent submission, Professor McMillan argued that the market failure to be discussed below would, in the unrestricted transfer market, result in too many transfers taking place compared to what was the allocatively efficient number. Hence, in his view, some level of restriction would actually improve allocative efficiency, which would then constitute a public benefit, without there being any off-setting losses of allocative efficiency. While this may be a possibility, the Commission prefers to take a more conservative approach, in the belief that the outcome under either approach is likely to be the same.

and therefore lead to a correspondingly greater detriment, than in the longer term.

330 Mr Copeland, the applicant's economic expert, accepted at the conference that the Commission's model was a useful guide, and that the quota would be the binding restraint. He argued, however, that because the Commission had been hampered by a lack of information, the allocative inefficiency estimates were based on inappropriate assumptions. He suggested the following alternative assumptions:

- A total of 26 provincial unions, given that a merger of Manawatu RFU and Hawkes Bay RFU had been authorised for the 1997 season;
- An average transfer fee of \$12,073; calculated as the average of the maximum transfer fees for each of the bands weighted by the number of players in those bands in 1996 (the Commission notes that this compares with an average of about \$16,400 when the number of players who actually transferred in the period 1993-95 are used as the weighting factor); and
- In the first year, because of the moratorium, one-third of all provincial unions would be frustrated by the Regulations to the extent of being unable to acquire the rights to two players above the quota; in the second and subsequent years, one-quarter of all provincial unions would be frustrated to the extent of being unable to acquire the rights to one player above the quota.

331 On this basis, Mr Copeland estimated total allocative efficiency losses of no more than \$62,000 in the first year, and \$13,000 per year thereafter. He regarded the assumptions used as being 'conservative' (that is, they generated the largest plausible detriment), on the grounds that the quota had been fixed so as to prevent the formation of a 'dream team', not to impede normal transfers between provincial unions. He argued that provincial unions could also acquire the rights to player services in ways which avoided the quota restriction: from outside the banded group, by loan, from overseas or rugby league, or via appeals by players to the Player Transfer Review Committee.

332 Without necessarily agreeing with the precise dollar values calculated, the Commission believes that they are likely to be at the upper ends of the likely ranges for total allocative efficiency losses.

#### *Productive Efficiency*

333 The market at issue is the market for the rights to player services. Apart from provincial unions, the players and their advisors/managers would also obviously be involved in transfer negotiations. These negotiations would result in all parties incurring bargaining costs. However, it seems unlikely that the Regulations would add to the size of these bargaining or transaction costs

relative to the costs which would be incurred in the counterfactual. There appears to be no loss of productive efficiency in prospect from this source.

334 The Regulations would also have to be administered and policed. This would involve resources being used by the NZRFU, by each of the provincial unions, and by the Player Transfer Review Committee. However, Mr Wallace of the NZRFU suggested at the conference that these costs would be very small, and not much different from similar costs incurred under the counterfactual, where a player registration system would still be required. The time period restriction would also add to the administrative simplicity of implementing the Regulations.

335 The Commission believes that the Regulations will, at most, result in only a very small loss of productive efficiency relative to the counterfactual.

#### *Maintaining Player Skill Levels*

336 In economic terms, players may be seen as comprising a mixture of natural athleticism and accumulated rugby union playing skills and training. Some of the skills may be team-specific, in that they are not readily transferable to other teams. Also, transferring players may be of value to their new provincial unions by bringing information about the team tactics or training methods of their former provincial unions. To perform at their optimum level, players need regular play to maintain fitness and to hone their skills, and an 'attitude' conducive to the maintenance of 'team spirit'.

337 The applicant describes the Regulations as being 'player driven', in that players are able to initiate transfer negotiations, and players cannot be forced to transfer against their will. However, for reasons to be discussed below, the Regulations paradoxically are also designed to limit the numbers of player transfers. Hence it is not difficult to imagine situations arising where players who wish to, but cannot, transfer, either because of the quota system or because their provincial unions value them more highly than potential acquirers, may become disgruntled. As a result, such players might either perform less well, or become a focus of discontent, so that they might not be selected, or might be selected only for reserve grade teams, leading to an erosion of their skills. Similarly, emerging players might be relegated to reserve team duties because of the coach's preference to field established players, and yet might not be able to transfer because their provincial union wishes to retain them for 'back-up' purposes, meaning that their skills are not developed as rapidly as might otherwise be possible.

338 Any loss of skills (or, in economic terms, of 'asset value') linked to the under-employment of players, caused by the Regulations relative to the counterfactual, would be a detriment associated with the Regulations. While not discounting the possibilities just outlined, Mr Wallace stated that the Regulations strove to establish a balance between the interests of players, and the interests of the provincial unions which had contributed to the

development of those players. He also argued that the Regulations could actually serve to enhance player skills through the promotion of a more even NPC competition (see below). Mr Crawford, the NZRFU's Manager of Rugby Development, claimed that more funding for development would become available as the attractiveness of more even games increased revenues.

- 339 The Commission accepts that there are arguments on both sides. For example, the need of teams for reserves has to be balanced against players' wishes to transfer. Some players may well be disadvantaged under the Regulations, as Mr Foster of RUPA claimed at the conference, but it seems likely that the NZRFU is seeking to maximise skill development in total rather than the development of particular individuals. The Commission notes that the Player Transfer Review Committee is likely to deal with irretrievable breakdowns between provincial unions and players. Overall, the Commission takes the view that this detriment is likely to be small.

#### *Innovative Efficiency*

- 340 It appears that the Regulations will not lead to a loss of innovative efficiency, in terms of other means of effecting player transfers, in the relevant market. For example, player swaps, or the use of player agents, are not precluded by the Regulations.
- 341 At the conference, RUPA expressed the concern that the transfer period might diminish the incentive for provincial unions to be innovative in terms of player remuneration and employment conditions, because after 30 November players would be tied to their provincial union for the ensuing 12 months. However, the loss of incentive involved would appear to be slight, suggesting a very small potential loss of innovative efficiency.

#### **Conclusion on Detriments**

- 342 Given that the level of activity in the market for the rights to player services, and hence the degree of restrictiveness of the Regulations, is difficult to predict, the detriments in prospect from the lessening of competition in that market relative to the counterfactual are difficult to gauge. However, under all plausible assumptions they are clearly of limited size.
- 343 The main category of detriment arises from the restriction by the quota on the allocation of players to the teams which value their services most highly, but estimates of the size of the loss of allocative efficiency suggest that the detriment is likely to be small in dollar terms. While the two other potential detriments - the loss of productive efficiency in terms of the costs associated with the administration and policing of the Regulations, and the erosion of the skills of those players whose transfer wishes are frustrated by the Regulations - are not able to be quantified, they appear to be very small.

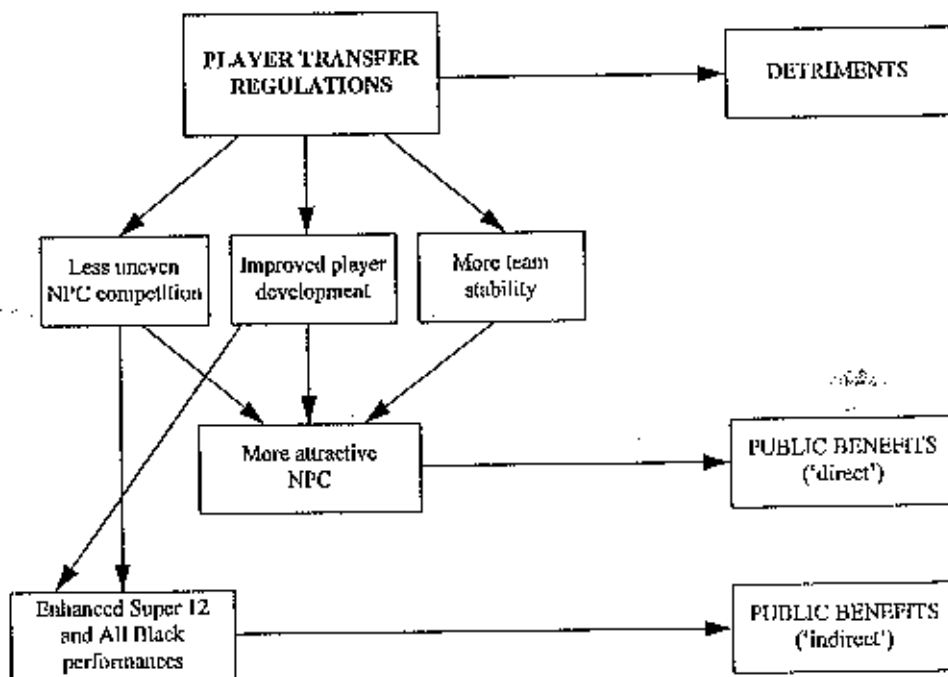
344 The Commission thus concludes that the detriments, in total, are likely to be small.

#### PUBLIC BENEFITS

345 As discussed above in the section on detriments, the emphasis in assessing public benefits is on efficiency gains to New Zealand, with distributional changes being ignored. These benefits have to be measured against the benchmark provided by the counterfactual.

346 A stylised view of the nexus between the Regulations and the public benefits claimed by the applicant is given in Figure 1 below. The claimed crucial link in the chain of cause-and-effect is between the Regulations and the promotion of a less uneven NPC competition. To be able to assess the public benefits being claimed by the NZRFU, it is first necessary to analyse the role of competitive balance in professional sports leagues. Further claimed links arise between the Regulations and the promotion of player development and of team stability. Claimed indirect links subsequently flow from the less uneven NPC competition and improved player development to enhanced performances in Rugby Super 12 and All Black games. All of these claimed links are now discussed in turn.

Figure 1  
Stylised View of Detriments and Claimed Benefits





## Competitive Balance in Professional Sports Leagues

### *Introduction*

- 347 It has long been recognised overseas, especially in the United States, that a key ingredient of the demand for viewing professional team sports is the excitement generated by the uncertainty of the outcome of individual games.<sup>56</sup> Few spectators and viewers are purists who enjoy watching the skills exhibited by outstanding athletes; most wish their team to win a close encounter with a strong opponent. An unbalanced league causes audiences to lose interest, and attendances to fall.
- 348 For an individual club, however, the uncertainty attached to outcomes of games may be only one determinant of attendances at its games; and thus of its income. The club's own playing success is also said to be important. Hence a club may have an incentive to increase its playing success by acquiring the services of better players, which may increase the attendances at its games, even though this may be at the expense of attendances for the league as a whole because of reduced uncertainty of outcome. In economic jargon, by this behaviour the club would impose a detrimental externality on other clubs. Hence a professional sports league, in order to maintain its popularity and financial viability, has an incentive to preserve uncertainty of outcome by ensuring that teams maintain roughly equal playing strengths. Typically, this is done through the operation of rules designed to internalise the externality, that is, rules which induce the club to take into account the impact of its decisions on the league as a whole.
- 349 Policies used overseas to preserve competitive balance among teams fall into two main categories: player labour market controls, and revenue-sharing.

### *Player Labour Market Controls*

- 350 Since a team's performance is determined to some degree by its relative playing strength, activity in the player labour or transfer markets may either promote or reduce product ('game') market uncertainty. Thus, owners of teams traditionally have used the need to preserve uncertainty of outcome to justify restrictions on the rights of players to sell their services to the highest paying team.
- 351 While the organisational details and mechanics between professional team sports, and within leagues have varied over time, most leagues currently employ a system of controls on player mobility. In US professional sports

<sup>56</sup> See, for example above n51; and J. Cairns, N. Jennett, and P. J. Sloane, "The Economics of Professional Team Sports: A Survey of Theory and Evidence", *Journal of Economic Studies*, vol. 13, pp. 3-80.

leagues, these have been eroded by legal challenges by players and player associations. The main types of controls are as follows:

- Reserve rule: a rule which restricts players to playing for the club which holds that player's league registration, irrespective of the player's contract status with their employers. As players may transfer between teams only with their current employer's consent, they can effectively be tied to an employer indefinitely;
- Draft scheme: a mechanism for restricting competition for new talent entering professional sports. In US major league sports, all new players leaving college enter the competition via the draft, with clubs choosing players in reverse order of finish;
- Recruitment zones: players are zoned according to their birthplace in order to create equal 'recruitment areas'. A number of British sports leagues (for example, cricket, basketball, and rugby league) have also introduced controls on the number of overseas players eligible to register for each team, so as to equalise playing strengths and to develop a strong national team; and
- Payments cap: the use of maximum wage controls, or the capping of the total salary of a team. These are used by some leagues (for example, Australian rules) to offset the financial imbalances between clubs, so as to help to maintain balanced player strengths.

#### *Revenue-Sharing*

352 Some leagues have introduced revenue-sharing measures to reduce the inequality in incomes between the clubs, and hence to reduce their unequal abilities to acquire good players. Such measures include:

- Revenue-sharing: gate revenues are divided between the home and the visiting teams, rather than all going to the home team;
- Centralisation of gate revenues: net attendance proceeds from internationals and playoffs accrue to the central league organisation for distribution to clubs; and
- Centralisation of sponsorship revenues: revenues from sponsorship, merchandising, and media rights, being regarded as the 'competition asset', accrue to the central league organisation, from which they are disbursed to clubs with varying degrees of even-handedness.

#### *Discussion*

353 The standard defence for labour market controls is based on the proposition that, in their absence, the financially stronger clubs are able to achieve their

goal of winning more games by using their wealth to buy the services of the best players, regardless of the profit consequences for other clubs, or even for themselves. As a result, they come to dominate the league, with uncertainty of outcome, and hence attendances, for the league as a whole declining.

- 354 It seems generally to be accepted that if the player transfer markets associated with professional team sports are left free and uncontrolled, the end result is likely to be an excessive number of transfers, particularly of the best players, which leads to an unbalanced competition as the richest clubs acquire the strongest teams. Some economists consider, however, that the free market contains a partial self-correcting mechanism which provides a brake on the amount of competitive imbalance, roughly to the level generated with controls. Rottenberg<sup>57</sup> argued that a financially strong club would run into diminishing returns from acquiring additional players, so that eventually an additional player would be worth more to another, financially weaker, club. At this point the poorer club would be able to bid players away from the wealthier club. This view seems not to be inconsistent with the evidence on sports leagues, which is that substantial imbalance remains even with the most draconian of controls. For example, Quirk and Fort,<sup>58</sup> after examining the evidence for the five major league sports in the US<sup>59</sup> for every decade in the period from 1901 to 1990, found that none of the leagues had ever come close to attaining competitive balance, despite strong player labour market controls over long periods. They concluded that:

“There is ample evidence of long-term competitive imbalance in each league, despite the league rules that are supposedly designed to equalise team strengths.”

- 355 Professor McMillan, an independent economist from the University of California, San Diego, who made a submission to the Commission, similarly concluded as follows:

“By and large, however, the various restrictions on player mobility adopted in US sports seem to have succeeded at best only partially in actually fostering competitive balance among teams. No perfect solution to the problem of competitive balance exists.”

- 356 “Another school of thought, while admitting that even strong controls leave much imbalance, argues that the imbalance is less than would apply in the unregulated market. Moreover, they argue that the predictions of the ‘free market school’ assume that clubs are rational profit maximisers, which may not always be realistic. If, instead of maximising profit, clubs had the objective of winning games, the impact of a free market on competitive balance would be different. Clubs would seek to acquire additional quality players regardless of the profit consequences for themselves or for other clubs.

<sup>57</sup> S. Rottenberg, “The Baseball Player’s Labour Market”, *Journal of Political Economy*, vol. 64, 1956, pp. 242-58.

<sup>58</sup> Above n51, chapter 7.

<sup>59</sup> American League (baseball), National League (baseball), National Basketball Association, National Football League, and National Hockey League.

This would be especially likely where they were funded by wealthy external interests who regarded winning, rather than profits, as the return on their investment. There are examples overseas of clubs sacrificing profits, or of spending inordinately large sums on new players, in order to win league championships.

357 A further source of market failure may arise where the final league position determines access to an additional source of revenues, such as the play-offs, or entry to an international competition. Clubs would then have an incentive to behave in a non-profit-maximising way in order to enhance their final league positions in the hope of qualifying for those other revenue sources.

358 Hence this school of thought considers that controls are a valid, if imperfect, instrument to help to alleviate the evident market failure.

359 There seems to be little dispute in the literature, either from the 'free market school' or its opponents, that labour market controls are unlikely in themselves to produce competitive balance. Whether the labour market is controlled or not, regional population and income imbalances are likely to lead on average to stronger and weaker teams. However, some have argued that such controls are a necessary condition for competitive balance, for they may at least serve to slow the rate at which the best players gravitate to the richer teams. Many sports people overseas maintain that imbalance would be worse but for the restrictions.

#### *The New Zealand Evidence*

360 The evidence relating to team sports in New Zealand is very limited. With regard to rugby union, the Boston report<sup>60</sup> shows that average attendances at Ranfurly Shield ("the Shield") challenges declined consistently and sharply each year over the four years 1982-85 during which Canterbury RFU held the Shield. The same declining trend applied for the long period 1985-92 when the Shield was held by Auckland RFU, with the exception of a jump in attendances in 1988-89. These are held to illustrate the problem posed by lack of competitive balance. However, a strongly declining trend in average annual attendances is also evident for the period 1971-78 (except for 1975) when Shield tenure was varied.<sup>61</sup>

361 Other evidence provided by the Boston report<sup>62</sup> suggests a relatively uneven pattern of outcomes in New Zealand rugby union in the recent past:

<sup>60</sup> Page A12.

<sup>61</sup> Over the period 1971-78 the Shield was held variously by seven different unions. The longest tenure was that of Manawatu, which lasted from mid-season in 1976 to near the end of the 1978 season. See R.H. Chester and N.A.C. McMillan, *History of New Zealand Rugby Football: Volume 3: 1958-79* Auckland: Moea Publications, 1992, pp 568-69.

<sup>62</sup> Pages A9-A10.

- over the period 1976-92 four provincial unions - Auckland, Canterbury, Otago, and Wellington - won 83% of the first division titles, and took 76% of the top two placings;
- while the number of provincial unions with New Zealand Colt representation remained relatively static for the years 1968-92, the number of provincial unions with current All Black representation exhibits a marked declining trend, from around 15 at the beginning of the period to about six at the end; and
- success in premier competition games has been relatively unevenly distributed over teams over the period 1983-92 compared to some overseas leagues, with 24% of teams winning more than 60% of their games, and 47% of teams winning less than 40% of their games.

362 Of course, this apparent inequality in outcomes occurred during the period when there were no restrictive controls on domestic transfers of players.

#### *The Role of the Regulations*

363 The NZRFU believes that the unevenness in the NPC competition will worsen in the counterfactual where there are no restrictions on transfers. As noted above, the major motive for including the quota system in the Regulations is to prevent a provincial union backed by wealthy external interests from buying up all of the best players to form a 'dream team', in order to win as many games as possible. It appears that if an uncontrolled NPC competition eventuates, then some of the first division provincial unions may behave in this way on the grounds that it is better to be the top team than the bottom team in an uneven competition, although an even competition is preferred. However, the total quota limit of five transfers per provincial union per year appears unlikely to prevent an already strong, wealthy, team from getting stronger. Thus the total quota is only likely to be effective, as intended, in preventing the extreme scenario of 'dream team' formation 'from scratch', the probability of which may only be low.

364 The NZRFU cites with favour the Rugby Super 12 competition in 1996 as an example where player labour market controls, in the form of the draft system, made the competition more even, so much so that every team in the competition was allegedly capable of beating every other team in the competition. The NZRFU desires the same evenness of competition in the NPC.<sup>63</sup> The possible formation of a new 'dream team' would undermine that evenness. In contrast, RUPA submitted at the conference that while it was in favour of an even competition, it saw little reason to believe that the Rugby

<sup>63</sup> The Rugby Super 12 competition was also made more even by the way in which the catchment regions for the five New Zealand teams were constructed. Thus the Auckland Blues drew only on the Auckland and Counties provincial union areas, whereas the Wellington Hurricanes drew on the Wellington, Horowhenua, Wairarapa Bush, Manawatu, Wanganui, Taranaki, King Country and Hawkes Bay provincial union areas.

Super 12 was any more even than the NPC competition. Mr Foster said that with one week remaining of the round robin competition of the NPC, seven out of the nine teams in the first division could have reached the final. He attributed the main pressure for the introduction of the Regulations to come from Auckland RFU's recent dominance of the first division, which he considered to result from special 'one-off' factors which were unlikely to be repeated once some of its leading forwards retired.

365 Dr Jackson of the Boston Consulting Group for the applicant, and Professor McMillan, both made submissions which remarked upon the widespread use overseas of regulations in sports leagues. They argued that since all use controls of one sort or another, they cannot all be wrong. They also argued that the controls do have some effect in producing a more balanced competition. Dr Jackson gave the example of the Australian Football League, which turned around its declining fortunes from 1987 after introducing stringent labour market controls and revenue-sharing. Professor McMillan stated that the quota system proposed by the NZRFU differed from the controls normally used overseas. He believed that the quota, combined with the extent of revenue-sharing in New Zealand rugby union (which he overstated), meant that "the NZRFU proposals stand a better chance of succeeding in maintaining a reasonable competitive balance than the policies adopted in overseas sports leagues."

366 In its submission in response to the Draft Determination, the NZRFU noted, without rebutting, the Commission's statement that "the proposed degree of control is limited compared to overseas professional team sports labour markets". The NZRFU submitted that limited controls were justified as it was not possible to impose greater control because of the essentially quasi-amateur nature of the NPC competition. However, the public benefits claimed by the applicant rest largely on the premise that the Regulations will prevent the NPC competition from becoming more uneven. The NZRFU appears to be arguing that the Regulations will do just enough to prevent excessive imbalance in that competition. This claim has to be viewed against the particular circumstances of the structure of the provincial unions:

- The provincial unions have very unequal income levels, which will promote inequality, and this will remain after the transfer system is introduced. The Boston report claimed that the income disparity increased from 5:1 in 1970 to over 26:1 in 1993. The Regulations contain no new revenue-sharing mechanisms;
- The possibility of wealthy business interests funding the acquisition of a 'dream team' may not entirely be ruled out. By working within the Regulations, additional quality players (that is, one All Black, and perhaps two more on the fringes of All Black selection, per year) could be added to an already strong provincial team;

- The Regulations would not necessarily prevent provincial unions from behaving 'irrationally' (an apparent fear of the NZRFU) - that is, spending excessive amounts on acquiring players to improve their success at the risk of financial insolvency - because they could use funds beyond the maximum transfer fees to pay players inducements to transfer.

367 The Commission accepts that the scope available to the NZRFU to restrict player transfers between provincial unions is limited by the semi-amateur nature of the NPC competition. The Commission recognises the danger to the preservation of spectator and viewer interest in allowing the NPC competition to become more uneven, which is likely where there is a free transfer market for players. While the Regulations are relatively mild compared with overseas labour market controls, it seems likely that they will have some effect, in terms of avoiding the excesses which might eventuate in a free market where provincial unions could compete for players to stay one step ahead of the others. In other words, the Commission accepts that there is a linkage between the Regulations and evenness of the NPC competition, but believes that the strength of the linkage is low. In recognition of this, the Commission proposes to take a very conservative stance in terms of the assessment of the claimed public benefits.

#### **Player Development and Team Stability**

368 The NZRFU also claimed that the Regulations would promote player development and team stability relative to the counterfactual, and that these, along with a less uneven NPC competition, would generate certain 'direct' public benefits (see Figure 1 on page 74). These two further claimed linkages are now examined in turn.

#### *Player Development*

369 The NZRFU claimed that the Regulations would promote player development, and enhance player skills, to a greater extent than would occur under the counterfactual of an unrestricted transfer market. Two elements are involved:

- The more even competition, which will hone players' mental and physical skills through subjecting them to the more searching test posed by strong opponents. The value of this was emphasised at the conference by Mr Lochore; and
- The maximum transfer fees, which will provide a 'safety valve' whereby players are not prevented from transferring through the inability of acquiring and selling provincial unions to reach agreement on the fee, or by the selling provincial union unreasonably holding on to players, provided that the maximum fee is offered and the player is willing to transfer.

370 With regard to the second point, the NZRFU argued that under the counterfactual, financially strong provincial unions could prevent 'second string' players, whom they wished to keep for 'back up' purposes, from transferring, thereby depriving them of progression to higher level rugby. This would impede their development as players. Mr Land, for the applicant, also argued that the same might apply to rising stars, where a second or third division provincial union might prevent a transfer in order to maximise the size of the transfer fee to be received in the future. However, in the latter case the extent to which the player's development might be retarded is not clear, since the argument presupposes further development up to the time of the eventual transfer. Under either scenario, provincial unions might seek to hold onto players if their contracts permitted them to do so. However, the extent to which provincial unions might behave in this fashion is uncertain, given that they would be likely to avoid team morale being upset by players frustrated at being unable to transfer.

371 The argument posed by the applicant that the very fact of the payment of transfer fees will enhance development spending, especially by second and third division provincial unions who in the past have lost their better players to first division provincial unions without receiving any compensation, is not supported, because transfer fees (which may be nil) will be paid under the counterfactual.

372 While the Commission accepts that there is likely to be some nexus between the Regulations and the promotion of player development, it believes that the nexus is likely to be weak.

#### *Team Stability*

373 As discussed previously, the transfer period contained in the Regulations, whereby transfers would occur in the month of November only (except for those exceptional cases approved by the Player Transfer Review Committee), would help to promote team stability compared to the counterfactual. Teams would be able to develop their own strategies and tactics, without the disruptions caused by mid-season transfers of players, possibly to opponents. This need also seems to find expression in the current provincial union-player contracts, which typically are for one or two years or for the length of an NPC season.

#### **Conclusion on Nexus for 'Direct' Public Benefits**

374 The Commission concludes that there is some nexus between the Regulations and the promotion of a less uneven NPC competition, improved player development, and more team stability, compared to the counterfactual, as set out schematically in Figure 1 (page 74). However, because the controls in the market for the rights to player services are agreed by all (including the applicant) to be mild, the strength of the nexus, in terms of maintaining the attractiveness of the NPC competition, is likely to be weak. In recognition of



this fact, the Commission proposes to treat conservatively any substantiated public benefits which are expected to flow from the maintenance of the attractiveness of the NPC competition (the 'direct' benefits).

### **Improved Rugby Super 12 and All Black Performances**

- 375 The final claimed linkages in the chain of cause-and-effect are that the less uneven NPC competition and improved player development, relative to the counterfactual, will maintain the competitiveness of the New Zealand Rugby Super 12 and the All Black teams relative to their overseas counterparts. This will in turn generate public benefits from overseas (the 'indirect' benefits). These benefits are indirect because they arise from maintaining the performance of New Zealand representative sides, which is likely to be promoted only indirectly by the Regulations.
- 376 The NZRFU argued strongly in its submission that "... right throughout New Zealand rugby ... it is universally accepted and understood that more even competition among contributing teams produces a stronger representative team." It cited the relative strengths of the New Zealand and South African sides, and the relative weakness of the English side, over the years as reflecting the strong provincial competitions in those southern hemisphere countries, and the lack of strong club competition in England. Hence the NZRFU argued that "getting the regional balance right at NPC level has important flow on effects at Rugby Super 12 and All Black level." Mr Copeland stressed at the conference that New Zealand rugby could not afford to rest on its laurels, despite the international success of the All Blacks in the 1996 season, because other countries like South Africa and England had enormous resources on which to call, and had the potential to improve their international performances significantly.

### **Conclusion on Nexus for 'Indirect' Public Benefits**

- 377 The Commission accepts that the impact of the Regulations could flow through to the performance of representative teams, but given the weakness of the primary linkages as assessed earlier, and the indirect nature of the further linkages just discussed, the effects are likely to be very attenuated.

### **Evaluation of Claimed Public Benefits**

#### *Introduction*

- 378 As noted earlier, the Act requires the Commission to consider public benefit claims on the basis that any benefits which are benefits to the public of New Zealand are to be included. The Commission's consideration is not limited to the market in which competition is lessened, nor indeed to only the markets affected by the application.

379 The Commission has accepted that there is a nexus, albeit weak, between the Regulations and the promotion of a less uneven NPC competition, and between the Regulations and the promotion of player development and team stability. The NZRFU claimed that these factors would maintain the NPC competition as a spectacle, compared to the counterfactual, from which certain, 'direct' public benefits would flow. The Commission also accepts a further, very weak and indirect nexus between the promotion of a less uneven NPC competition and improved player development, and the maintenance of the competitiveness of the New Zealand Rugby Super 12 and All Black teams relative to their overseas counterparts. The NZRFU claims that the resulting success in international competitions by New Zealand teams will generate further 'indirect' benefits relative to the counterfactual (see Figure 1 on page 74). These two groups of claimed benefits, the direct and the indirect, are as follows:

Direct benefits

- a more attractive NPC competition for spectators and viewers; and
- enhanced domestic sponsorship, merchandising, and broadcasting interest and funding.

Indirect benefits

- greater audience enjoyment of New Zealand international matches;
- increased net foreign earnings for the NZRFU from television rights and business sponsorships;
- increased foreign sponsorship for affiliated provincial unions and clubs;
- saving on overseas marketing expenses for businesses;
- enhanced exports of New Zealand goods; and
- greater inflows of foreign tourists.

380 The Commission is of the view that the main impact of the Regulations would be on the NPC competition, with more attenuated effects on the Rugby Super 12 and All Black teams. In consequence, the claimed benefits could be arranged hierarchically, with the benefits from domestic sources potentially being more likely and more significant, and those derived from overseas being smaller and less likely.

381 Each of the claimed benefits is now assessed in turn.

*Direct Benefits*A more attractive NPC competition for spectators and viewers

- 382 Preserving the attractiveness of the game for spectators and television viewers, compared to the lesser attractiveness of a more uneven competition in the counterfactual, would count as a benefit to the New Zealand public. Mr Wallace emphasised that rugby relies on the portion of attendees called 'theatre goers', as opposed to avid rugby fans, whose interest in the game depends upon its quality as a spectacle, and who readily switch to other forms of entertainment if that quality deteriorates. The media and the sponsors of the NZRFU and of the provincial unions spoken to by the Commission all support the view that an even competition is important in generating spectator and viewer interest.
- 383 The intangible nature of this benefit makes it difficult to quantify, yet because of its potential significance, it is important that the effort be made. One measure might be the increase in the numbers of spectators and viewers, or the rise in gate takings, but this would be only a partial measure because it would not include the extra benefit enjoyed by existing spectators and viewers, nor would it incorporate off-setting losses in entertainments from which the increased spectators and viewers have shifted patronage.
- 384 In the Draft Determination, a preliminary estimate was made using a model which incorporated such factors, and which was based on the following assumptions: a price elasticity of demand of one in the sports entertainment services market; an average NPC ticket price of \$8; an average attendance of 5,000 per NPC game; a total of 117 NPC games per year; and a switch of attendances from other sports to rugby union of varying possible magnitudes of up to 20%. The preliminary results suggested that the net benefit of a more attractive NPC competition to spectators (not including television viewers) might be in the range between zero and \$187,000 per year.
- 385 In his submission and at the conference, Mr Copeland argued that the assumptions built into the model were unduly conservative. In particular, although the NZRFU felt that attendance at an even contest was likely to be at least double that of an uneven contest, using a conservative figure of only 50% increased the benefit to \$470,000. Mr Copeland also argued that this estimate understated the true gain because the Commission's model unrealistically assumed that the higher utility enjoyed by NPC spectators would partially be offset by a loss of utility of those persons continuing to attend non-rugby sports entertainment.
- 386 In recognition of Mr Copeland's criticism mentioned in the previous sentence, the Commission revised its model accordingly. The Commission accepts in principle that crowds are likely to be larger at even as compared with uneven games. However, the NZRFU was not able to provide any convincing

evidence in submissions or at the conference in support of this claim. The comparison offered between the attendances at the 1995 and 1996 NPC competition first division finals was inconclusive, because it did not take into account the range of factors which determine the attendance at a particular game, only one of which is the expected degree of evenness of the contest. Drawing inferences about the relationship between attendance and evenness by comparing the attendances at, and the subjectively assessed evenness of, two games, without making allowance for all of the other factors which influence attendances, is likely to be unsafe.

- 387 The Commission has reworked its calculations on the assumption that evenness of games would be preserved by the Regulations, but decline under the counterfactual, so that the Regulations would bring a benefit by preserving a part of spectator enjoyment which would otherwise be lost. Using the same numerical assumptions as in the preliminary estimates with regard to average attendances, ticket prices, etc, it is estimated that the net annual benefit to spectators of preserving a more attractive NPC competition could fall in the range between zero (the Regulations have no effect) and about \$1.5 million (the Regulations prevent a 20% decline in attendances). However, given the relatively weak nexus between the Regulations and either the increased attractiveness or the preservation of a less uneven NPC competition, the Commission considers that the claimed public benefit is likely to be towards the lower end of the range.
- 388 Mr Copeland also extended the quantification to the benefit enjoyed by television viewers. The total viewing audience for the 1996 NPC competition for males and females in the 15-54 age group was estimated, on the basis of TV ratings and Statistics New Zealand population estimates, at 4.99 million person-viewings. In its written submission, the NZRFU suggested that viewers on average might value the increased attractiveness of a more even game in the range between 50 cents and \$10 per person-viewing. At the conference, Mr Copeland suggested that a figure in the range of \$3-\$5 per person-viewing was plausible (whether propounded on the basis of either the increased attractiveness or the preservation of a less uneven NPC competition), but even at a figure of only 50 cents the public benefit in this category would still total some \$2.5 million per year.
- 389 While the Chairman and Commissioners Auton and Stapleton accept the general approach adopted by Mr Copeland, they consider that the relatively weak links between the Regulations and either the increased attractiveness or the preservation of a less uneven NPC competition renders the estimates at the lower end of the range more likely. Commissioner Harrison accepts that an increase in or preservation of spectator/viewer enjoyment may be categorised as a public benefit by reason of its flow on effects, but does not accept that it could or should be quantified in dollar terms because she regards it as being of an intangible and subjective nature. In addition, Commissioner Harrison believes that Mr Copeland's approach involves double counting because, in her view, the economic rent for the "utility" that the benefit represents is

already captured through, firstly, gate takings and the return on sale of broadcasting rights and, secondly, sale of television advertising and subscriptions.

Enhanced Domestic Sponsorship, Merchandising, and Broadcasting Interest and Funding

- 390 In its original submission, the NZRFU argued that a more attractive NPC competition which raises spectator and television viewer numbers will attract more sponsorship, merchandising, and broadcasting interest and funding, which may raise the income of the NZRFU, provincial unions, and perhaps the players. Since the costs of administering the game and running competitions are largely fixed, the extra revenues would be mostly additional profit. The Commission prefers to consider the alternative possibility: that without the Regulations, some of this income might be lost to rugby union and would not be gained by other New Zealand sports. Mr Maingay of Air NZ, the main sponsor of the NPC competition, said at the conference that rugby union was the company's preferred area for sports sponsorship. Under questioning, he indicated that if the company's sponsorship of rugby union were hypothetically to reduce, then its overall sponsorship in New Zealand could possibly decline.
- 391 In its submission, the NZRFU concentrated on the earnings from the international television rights associated with NPC and Ranfurly Shield matches which it has sold (along with the Rugby Super 12 and All Black television rights, which are dealt with separately below) to News Corp. The maintenance of an even competition was considered an important factor in retaining this income, which is significant. In terms of public benefit, however, the income derived from overseas by the NZRFU has to be balanced against the outlay by Sky to News Corp to acquire the New Zealand rights. As Mr Copeland explained at the conference, the former is likely to be both larger than the latter to the extent that the NZRFU can capture the value to News Corp of its on-selling the television rights to other countries, and smaller to the extent that News Corp can earn a profit for itself on the deal with Sky. Overall, there could be net foreign earnings, but the Commission has not been provided with any information to show this to be the case, apart from the statement that packaged programmes of 'highlights' of NPC games are broadcast weekly in both Australia and the United Kingdom.
- 392 The source of potential public benefit in this case is the risk of loss in ten years' time when the contract between the NZRFU and News Corp comes up for renewal, should the Regulations not be introduced. However, any loss - measured as the difference in the net foreign exchange flows with and without the Regulations - is likely to be small because of the weak impact that the Regulations have been adjudged to have in avoiding more unevenness of the NPC competition, relative to the counterfactual. In addition, any loss to be incurred ten years and more in the future would have to be discounted to its present value for the purposes of weighing benefits against detriments.

Viewed in this light, the public benefit derived from the Regulations appears, at best, to be rather small.

*Indirect Benefits*

Greater Audience Enjoyment of New Zealand International Matches

393 The preservation of the performance of New Zealand's international teams at the Rugby Super 12 and All Black levels relative to their overseas counterparts was argued by the applicant as being necessary to maintain the current high levels of enjoyment for spectators, television viewers, and supporters in general. For All Black test matches alone in 1996 the television audience for males and females in the 15-54 age group totalled 6.04 million person-viewings. In its submission, the NZRFU used a range of possible values of benefit per person-viewing from 50 cents to \$10. At the conference Mr Copeland said that using only the lowest figure of 50 cents would give a public benefit of \$3 million per year. Such an estimate excludes benefits to persons outside the age group for which data was available, to spectators, and to viewers of Rugby Super 12 games.

394 While the Chairman and Commissioners Auton and Stapleton accept that either an increase or an avoidance of the reduction in the current level of enjoyment said to result from poorer performances of the Rugby Super 12 and All Black teams in the absence of the Regulations would count as a public benefit, nevertheless, given the attenuated effects of the Regulations on the performances of those teams, they believe that it is appropriate to use a conservative monetary estimate of utility per person-viewer. For the reasons expressed in paragraph 389, Commissioner Harrison does not accept that this public benefit could or should be quantified in dollar terms.

Increased Net Foreign Earnings from Television Rights and Business Sponsorships

395 The NZRFU has provided the current annual net foreign earnings (a confidential figure, but running into many millions of dollars) which it earns from the All Black brand. This figure includes the sponsorship deal with Mizuno, and advertising in Japan involving NEC Panasonic batteries and Nippon Suisan. It seems likely that if these sponsorships were lost by the NZRFU, they would not be diverted to other New Zealand sports, which have insufficient international status. The continuation of such sponsorships is argued to depend upon the maintenance of New Zealand's high reputation in international rugby, in terms of All Black performance, which in turn results indirectly from the Regulations.

396 The Commission accepts that the maintenance, or possibly the improvement, in the current net inflow of foreign earnings from sponsorship, royalties and endorsements, compared to the counterfactual - where it is expected that such flows may be static, or even fall, would constitute a benefit to the public of

New Zealand, but in the circumstances believes that the size of these indirect benefits which can be attributed to the Regulations is likely to be small.

- 397 The maintenance of the value of the international television rights for New Zealand rugby is recognised to be critical to the NZRFU, because that income provides the funding for the payments to the professional players. The contract with News Corp is for 10 years, and contains a warranty that the competitions will not change so as to "adversely and materially affect the value of the rights", although no specific remedy is provided for. Mr Wallace argued strongly that it was imperative for the NZRFU to maintain an attractive, marketable product. In these circumstances, he said that doing nothing with respect to player transfers was not an option; the Regulations were seen as the least restrictive way of maintaining, if not enhancing, the attractiveness of New Zealand rugby to the international television audience.
- 398 While the Commission accepts the validity of the NZRFU's long term objective, the assessment of public benefit derived from the sale to News Corp of the television rights for Rugby Super 12 and All-Black games must necessarily proceed on the same basis as that for the NPC television rights. That is to say, there is a public benefit to the extent that the Regulations, by preserving New Zealand's international rugby success relative to the counterfactual, avoid a worsening in the net flows of overseas funds from the point when a new contract for television rights is signed at the expiry of the present 10 year contract. Any such loss would, from today's perspective, have to be heavily discounted in converting the sum to its present value. Moreover, the loss, in dollar terms, may be small because it is measured as the difference between having and not having the Regulations (the 'with' and 'without' scenario) which, in respect of the nexus for indirect benefits, has been judged by the Commission to be weak and the effects as likely to be very attenuated.

#### Increased Foreign Sponsorship for Affiliated Provincial Unions and Clubs

- 399 The NZRFU stated that some provincial unions and clubs affiliated to the NZRFU receive sponsorship and royalty monies directly from overseas. Mr Copeland cited several examples. Suzuki Sportswear of Japan has a long term contract with New Zealand Universities RFU providing for cash payments and free products in return for promoting Suzuki's sales in Japan. New Zealand Universities RFU has just signed a five year sponsorship contract with the Mitsubishi Motor Company of Japan, directed principally at marketing Mitsubishi outside of New Zealand. Various New Zealand clubs are said to have sponsorship deals with Japanese companies involving financial benefits to those clubs in exchange for the rights to market the clubs' jerseys in Japan. Mr Copeland claimed that these benefits arise only because of New Zealand's reputation in world rugby, and are likely to be put in jeopardy should that reputation decline.
- 400 The Commission accepts that this country's rugby union status internationally currently yields such advantages to the provincial unions and clubs. To count

as a public benefit flowing from the Regulations, however, it has to be demonstrated that without the Regulations these advantages would be smaller in the future. Given the weak and indirect linkage with the Regulations, the Commission believes that this claimed benefit is likely to be very small.

#### Saving on Overseas Marketing Expenses for Businesses

401 Mr Copeland claimed that some marketing expenditures by New Zealand companies, which would otherwise be conducted overseas, are diverted to domestic sponsorship (using the All Black brand in particular), thereby saving on overseas funds. For example, the marketing by Lion Nathan of 'Steinlager' through sponsorship of the All Blacks is targeted to a large extent at overseas markets, yet much of the expenditure is incurred in New Zealand. The same applies to Canterbury International and Wools of New Zealand sponsorship of the New Zealand Barbarians brief 1996 tour to England. If such sponsorship were to cease because it was no longer considered to be effective, Mr Copeland claimed that those companies would have to spend more on less efficient means of marketing their respective products, much of it overseas. The marketing efforts of those companies would suffer, and overseas marketing media would gain at the expense of the NZRFU.

402 While the Commission agrees that this factor is capable of being categorised as a public benefit, it would have to be heavily discounted by the weak and indirect linkage between the status of the All Black brand and the Regulations, and is likely to be very small.

#### Enhanced Exports of New Zealand Goods

403 Mr Copeland suggested that New Zealand sporting successes, including those in rugby union, raise New Zealand's profile in overseas markets, thereby aiding New Zealand exporters in those markets. This is said to apply even where rugby union is not the national game, or even a prominent game, in such important overseas markets as Australia, Japan and the United Kingdom. In Japan, for example, rugby is played by teams associated with the universities and large corporations, and thus generates an interest in the game at the level at which business contacts are made. Mr Copeland suggested that such advantages to New Zealand business may decline should New Zealand rugby become less prominent. While this may be so, the Commission is disinclined to place any real weight on this claimed benefit, given its tenuous nature, and the weak and indirect linkage with the Regulations.

#### Greater Inflows of Foreign Tourists

404 The NZRFU claims that the New Zealand tourism industry would benefit from an increase in overseas visitors, both on rugby union and other tours, and from a greater overseas awareness and profile of the country generated by its sporting successes. A range of New Zealand businesses, including airlines, travel agents, hoteliers, and land transport operators, would experience a rise



in profits. Commission inquiries reveal that Air NZ flies in ex-patriate New Zealanders and some Japanese visitors specifically to watch home rugby union tests. Mr Garvie of Willimont World Travel estimated that currently there are about 100 incoming rugby team tours per year, averaging 50 persons per tour, and with an average duration of 14 days. In addition, there are visitors accompanying international rugby tours to New Zealand, including tri-nation games and tests. These were estimated to result in extra spending in New Zealand from overseas sources of about \$18 million per year. Mr Copland then conservatively estimated that this extra spending yields a net benefit to New Zealand; in the form of additional taxes to the government and of additional profits to the New Zealand owners of the businesses concerned, of at least \$2 million.

- 405 Next year the NZRFU is commencing incoming tours of schoolboy rugby players and coaches, using local schools as hosts. These will add slightly to the net benefit just mentioned.
- 406 From the perspective of the public benefit to be attached to the Regulations, however, the crucial issue is the extent to which net earnings from inflows of foreign tourists would be higher than they would be in the counterfactual without the Regulations. To help elucidate this issue, Mr Garvie advised that following New Zealand's success in the inaugural 1987 Rugby World Cup, interest in New Zealand as a destination for overseas rugby tours was at a high level, but that this waned after New Zealand's less impressive performance in the 1991 Rugby World Cup. This interest was restored following New Zealand's creditable performance in the 1995 Rugby World Cup. However, Mr Garvie was not able to substantiate these impressions with actual data on the number of incoming tours over those years.
- 407 The Commission concludes that the public benefit from this source, as measured by the drop in tax receipts to the government and in profits to the New Zealand owners of the businesses concerned in the counterfactual which would be avoided with the Regulations, is likely to be relatively small, given the weak and indirect linkage between tourism flows and the Regulations.

*Conclusion on the Evaluation of Claimed Public Benefits*

- 408 The NZRFU has claimed that a number of public benefits will flow from the Regulations. These have been examined above. A characteristic of the claimed benefits is that they are intrinsically difficult to measure for a number of reasons:
- they would be derived from a market in which commercial transactions have not yet occurred;
  - they would flow from market restrictions contained in the Regulations which, compared with the counterfactual, are very mild; and

- they would flow from the Regulations through a series of linkages, some of which are weak.

### BALANCING

- 409 Sections 61(6) and 61(7) of the Act set out the balancing exercises to be undertaken by the Commission in considering an application for authorisation under these sections. The Commission has considered the public benefits and detriments which are likely to flow from the Regulations and is satisfied that the benefits are likely to be of an order of magnitude sufficient for them comfortably to exceed the detriments.
- 410 Pursuant to s 61(6) of the Act, the Commission may grant an authorisation for the Regulations if it is satisfied that the Regulations will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result, or would be likely to result or is deemed to result from the Regulations.
- 411 On the basis of the Commission's assessments of public benefits and detriments, and for the reasons set out in the previous sections, the Chairman and Commissioners Auton and Stapleton are satisfied that the Regulations will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result, or would be likely to result or is deemed to result from the Regulations. Commissioner Harrison shares this view, notwithstanding the concerns expressed in paragraphs 389 and 394.
- 412 Pursuant to s 61(7) of the Act, the Commission may grant an authorisation for the Regulations, being an arrangement containing an exclusionary provision, if it is satisfied that the Regulations will in all the circumstances result, or be likely to result, in such a benefit to the public that they should be permitted to be entered into and to be given effect to.
- 413 On the basis of the Commission's assessments of public benefits and detriments, and for the reasons set out in the previous sections, the Chairman and Commissioners Auton and Stapleton are satisfied that the Regulations will in all the circumstances result, or be likely to result, in such a benefit to the public that they should be permitted to be entered into and to be given effect to. Commissioner Harrison shares this view, notwithstanding the concerns expressed in paragraphs 389 and 394.

### DEFERMINATION

- 414 Having concluded that the benefit to the public which will in all the circumstances result, or be likely to result, from the Regulations:

- outweighs the lessening in competition that would result, or be likely to result or is deemed to result from the Regulations; and
- is such that the Regulations should be permitted to be entered into and to be given effect to;

the Commission, pursuant to ss 61(6) and 61(7) of the Act, determines to grant an authorisation for the New Zealand Rugby Football Union Incorporated to enter into, and to give effect to, the Regulations Relating to Transfer System in the amended form presented to the Commission at the conference on 20 November 1996.

#### COMMENT ON DETERMINATION.

- 415 The combined anti-competitive effect of the quota system, the transfer period and the transfer fee is such that it appears to the Commission to conflict with one of the founding principles of the Regulations that “[they are] player-driven. Players retain control of where they will play their rugby. No player can be compelled to transfer and no player can be prevented from transferring by his Union”.
- 416 As noted, the Regulations can prevent players from transferring from their current provincial unions. If players are unable to invoke the provisions of Regulation 10, then they are compelled to remain with their current provincial unions. The provincial unions, and not the players, then control where players will play rugby.
- 417 In the circumstances, the Commission has considered whether the combined anti-competitive effect of the quota system, the transfer period and the transfer fee is such that conditions should be attached to the authorisation pursuant to s 61(2) of the Act and in keeping with the observations in the Commission’s decision in *Re New Zealand Kiwifruit Exporters Association*<sup>64</sup> to ensure that the detriments are contained within the bounds assessed and that the public benefits are realised and maximised.
- 418 In deciding not to attach conditions to the authorisation, the Commission notes that, in accordance with the acknowledged “heavy responsibility” which the NZRFU has to the game, the Commission expects the NZRFU to monitor the effects of the Regulations on the players and to take such steps as may be necessary to ensure that, in terms of the founding principles, the Regulations “[are] player-driven. Players retain control of where they will play their rugby. No player can be compelled to transfer and no player can be prevented from transferring by his Union” and that they operate in “a players’ market”.

<sup>64</sup> Above n 42

- 419 Failure to undertake such monitoring and such steps may result in the Commission concluding that the stated founding principle referred to above was not, in fact, such a principle and that the Commission should consider initiating the process prescribed by s 65 of the Act which might result in either the amendment or the revocation of the authorisation.

Dated at Wellington this 17<sup>th</sup> day of December 1996.

The Seal of the Commerce Commission was affixed hereto in the presence of:



A F Bollard  
(Chairman)



LIST OF PERSONS WHO PROVIDED SUBMISSIONS ON DRAFT  
DETERMINATION

Boston Consulting Group  
Canterbury Rugby Football Union (Inc)  
Mike Copeland of Brown Copeland & Co Ltd  
East Coast Rugby Football Union (Inc)  
Horowhenua Rugby Football Union (Inc)  
New Zealand Rugby Football Union Incorporated  
Northland Rugby Football Union (Inc)  
Professor John McMillan  
Maori Congress Sports, Recreational and Cultural Committee  
Rugby Union Players' Association (Inc)  
TradeNZ

LIST OF INTERESTED PARTIES

Auckland Rugby Football Union (Inc)  
Bay of Plenty Rugby Football Union (Inc)  
Buller Rugby Football Union (Inc)  
Canterbury Rugby Football Union (Inc)  
Counties Rugby Football Union (Inc)  
East Coast Rugby Football Union (Inc)  
Hawke's Bay Rugby Football Union (Inc)  
Horowhenua Rugby Football Union (Inc)  
King Country Rugby Football Union (Inc)  
Manawatu Rugby Football Union (Inc)  
Marlborough Rugby Football Union (Inc)  
Mid-Canterbury Rugby Football Union (Inc)  
Nelson Bays Rugby Football Union (Inc)  
North Harbour Rugby Football Union (Inc)  
North Otago Rugby Football Union (Inc)  
Northland Rugby Football Union (Inc)  
Otago Rugby Football Union (Inc)  
Poverty Bay Rugby Football Union (Inc)  
South Canterbury Rugby Football Union (Inc)  
Southland Rugby Football Union (Inc)  
Taranaki Rugby Football Union (Inc)  
Thames Valley Rugby Football Union (Inc)  
Waikato Rugby Football Union (Inc)  
Wairarapa-Bush Rugby Football Union (Inc)  
Wanganui Rugby Football Union (Inc)  
Wellington Rugby Football Union (Inc)  
West Coast Rugby Football Union (Inc)  
Rugby Union Players' Association (Inc)  
All Blacks Players Committee  
Television New Zealand Limited  
TV3 Network Services Limited  
Horizon Pacific Television Limited  
Sky Network Television Limited  
Radio New Zealand Limited  
Newstalk ZB  
Sports Roundup  
Newspaper Publishers Association  
New Zealand Press Association

LIST OF PERSONS WHO MADE SUBMISSIONS AT THE COMMISSION'S  
CONFERENCE 18 - 20 NOVEMBER 1996

Auckland Rugby Football Union (Inc)  
Canterbury Rugby Football Union (Inc)  
East Coast Rugby Football Union (Inc)  
New Zealand Rugby Football Union Incorporated  
Rugby Union Players' Association (Inc)

LIST OF PERSONS FROM WHOM COMMENT OBTAINED

Air New Zealand Limited  
Ansett New Zealand Limited  
Auckland Rugby Football Union (Inc)  
Auckland Warriors Rugby League Limited  
Bay of Plenty Rugby Football Union (Inc)  
BP Oil New Zealand Limited  
Buller Rugby Football Union (Inc)  
Caltex Oil (NZ) Limited  
Canterbury Rugby Football Union (Inc)  
Clear Communications Limited  
Coca-Cola Amatil Limited  
Counties Manukau Rugby Football Union (Inc)  
East Coast Rugby Football Union (Inc)  
Andy Haden (player representative)  
Hawke's Bay Rugby Football Union (Inc)  
Norm Hewitt (player)  
David Howman (player representative)  
David Jones (player representative)  
Dominion Breweries Limited  
Ford New Zealand Limited  
Lion Nathan Limited  
Lotteries Commission  
Marlborough Rugby Football Union (Inc)  
Mitsubishi Motors New Zealand Limited  
Mobil Oil New Zealand Limited  
Nelson Bays Rugby Football Union (Inc)  
Nike (NZ) Limited  
North Harbour Rugby Football Union (Inc)  
NZ Rugby Football League (Inc)  
Otago Rugby Football Union (Inc)  
Pepsi-Cola Bottlers Limited  
Rugby Union Players Association (Inc)  
Saatchi & Saatchi Advertising Limited  
Shell New Zealand Limited  
Sky Network Television Limited  
South Canterbury Rugby Football Union (Inc)  
Southland Rugby Football Union (Inc)  
Taranaki Rugby Football Union (Inc)  
Telecom New Zealand Limited  
Television New Zealand Limited  
Thames Valley Rugby Football Union (Inc)  
Toyota New Zealand Limited



TV3 Network Services Limited  
Waikato Rugby Football Union (Inc)  
Wairarapa Bush Rugby Football Union (Inc)  
Wanganui Rugby Football Union (Inc)  
Wellington Rugby Football Union (Inc)

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