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COMMERCE COMMISSION

**PUBLIC
VERSION**

DRAFT DETERMINATION

Note: This is a Draft Determination issued for the purpose of advancing the Commerce Commission's decision on this matter. The conclusions reached in this Draft Determination are preliminary and take into account the information provided to the Commission to date.

PROPOSED AMENDMENT OF AN AUTHORISATION GRANTED TO THE NEW ZEALAND RUGBY UNION IN DECISION 580

Draft Determination pursuant to the Commerce Act 1986 (the "Act") in the matter of the New Zealand Rugby Union's (NZRU's) application to vary the authorisation granted in Decision 580.

The Commission: P R Rebstock (Chair)
D F Caygill
G Pickering

Draft Determination On 6 June 2006, in its Decision 580, the Commission determined, pursuant to s 61(1)(a) of the Act, to grant a conditional authorisation, allowing the NZRU to enter into a Salary Cap Arrangement and player movement regulations. The Commission now proposes, on the basis of the information provided to it to date, that it would be likely to amend that authorisation pursuant to s 65 of the Act to provide salary cap relief for the 2007 year only.

Date: 16 March 2007

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SQUARE BRACKETS.**

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EXECUTIVE SUMMARY¹

Introduction

1. On 2 June 2006, the Commerce Commission (the Commission) granted a conditional authorisation (Decision 580) in terms of ss 58 and 61(1)(a) of the Commerce Act 1986 (the Act), allowing the New Zealand Rugby Union (NZRU) to enter into, and give effect to the Salary Cap Arrangements (as set out in clauses 50 and 53-59 of the Collective Employment Arrangement 2005-2008 (CEA) between the NZRU and the New Zealand Rugby Players' Association (the NZRPA)), and to the player movement regulations.
2. On 12 December 2006, the NZRU applied to the Commission to vary the authorisation on the grounds that there had been a material change of circumstances since the authorisation had been granted. The NZRU submitted that the decision to apply for a variation followed two developments that affect the operation of the salary cap for 2007 only:
 - the approval of a conditioning programme for 22 players who are expected to be selected as members of the All Black squad for the Rugby World Cup in 2007. This conditioning programme overlaps with the first seven rounds of the Rebel Sport Super 14 competition, which commenced on 2 February 2007. As a consequence, the 22 players have been unavailable for selection for that period, and the Super 14 franchises affected have found it necessary to obtain replacements. Under the salary cap rules authorised, those replacements will gain notional values that will add to the qualifying salary cap expenditures of the Provincial Unions for which they play; and
 - the likely absence of the All Blacks from the entire 2007 Air New Zealand Cup competition by reason of their selection in the Rugby World Cup in 2007. As these players will not be available to be members of the Air New Zealand Cup squads, the Provincial Unions affected will need to find replacements, the cost of which will add to the qualifying salary cap expenditures of the Provincial Unions for which they play.
3. In view of these developments, the NZRU and the NZRPA have agreed to amend the CEA, conditional on Commission approval to vary the authorisation, to provide relief from the salary cap for the 2007 year only.

Commission Processes

4. On 22 December 2006, by press release, the Commission gave public notice that it was considering varying Decision 580. The Commission also wrote to interested

¹ This Executive Summary is provided for the assistance of readers of the Commission's Draft Determination. It does not purport to completely encompass all the details of the Draft Determination. Readers are referred to the body of the Draft Determination for a complete picture of the issues.

parties on 17 January 2007, advising of its intention to consider varying Decision 580. In preparing this Draft Determination, the Commission has sought, and had regard to, the initial submissions on the matter that it has received.

Grounds to Reconsider the Authorisation

5. Section 65 of the Act enables the Commission to alter, revoke, or revoke and substitute authorisations made under s 58. Two stages are involved in considering the application of s 65. The first stage is to consider whether the authorisation was granted on information that is false or misleading in a material particular, or a material change of circumstances has occurred, or whether a condition of the authorisation has not been complied with. The second stage involves determining the appropriate response: to do nothing, to amend the authorisation, revoke the authorisation, or revoke the authorisation and substitute a further authorisation.
6. The two grounds pursuant to s 65(1) with potential application in this case are that:
 - the authorisation was granted on information that was false or misleading in a material particular; and/or
 - there has been a material change of circumstances since the authorisation was granted.

False or misleading in a material particular

7. The NZRU did not advise the Commission, prior to Decision 580, of either the absence of the All Blacks for the Air New Zealand Cup in 2007, or the Rugby World Cup 2007 conditioning programme (and any implications of these factors on the Salary Cap Arrangements). The NZRU submitted that at all material times prior to the announcement of the authorisation (and as late as December 2006) there was a very real prospect that the conditioning programme would either not be adopted by the NZRU Board, or that (post-authorisation) would be cancelled, and it sought to resist argument for salary cap relief for the absence of the 30 Rugby World Cup 2007 All Blacks.
8. The Commission's preliminary conclusion is that it does not consider that, on the evidence before it that, the prediction (that the framework that the Commission intended to authorise in June 2006 would accommodate the impact of the Rugby World Cup 2007) is properly regarded as "false or misleading" in terms of s 65(1)(a). The Commission considers that there existed an objective basis for the NZRU's prediction as to future events in an area of accepted uncertainty.

Material Change of Circumstances

9. Since Decision 580, the NZRU has worked through the practical implications of implementing both the conditioning programme and the All Blacks' attendance at the Rugby World Cup in 2007. These have included consideration of:

- the impact on the Super 14 franchises of the absent All Blacks and funding for the additional Super 14 players;
 - resolution of the sponsorship and broadcasting issues; and
 - obtaining the NZRPA's support and agreement to aspects of the conditioning programme.
10. Consequently, a change of circumstances is evidenced by the fact that the NZRU prediction has been shown to be false due to the practical implications of implementing the conditioning programme and recognising the absence of the All Blacks from the Air New Zealand Cup competition in 2007. Further, the NZRU and the NZRPA have agreed further "exclusions" and other exceptions in an amendment to the CEA to provide salary cap relief, as they now take the view that the salary cap could operate in an unduly harsh or unfair manner without some salary cap relief in the 2007 year.
 11. The Commission considers that the question of whether that change is "material" is not just assessed by reference to its impact on the conduct authorised but also by reference to the impact upon benefits and detriments associated with the authorised conduct.
 12. The Commission's preliminary conclusion is that it considers that, on the evidence before it there has been a material change of circumstances in terms of s 65(1)(b). The foundation on which the NZRU based its prediction no longer holds. This change has an impact on the conduct authorised and the benefits and detriments that is material.
 13. Accordingly, the Commission's preliminary conclusion is that it is satisfied that it may reconsider the authorisation granted in Decision 580.

Exercise of Discretion to Reconsider the Authorisation

14. Once the Commission has decided that it has grounds to reconsider the authorisation it must then exercise its discretion as to whether it should:
 - revoke the authorisation;
 - amend the authorisation;
 - revoke the authorisation and grant a further authorisation; or
 - allow the authorisation to remain in effect.
15. The Commission considers that the distinction between amending the authorisation and revoking the authorisation and substituting a further authorisation under the Act depends on the degree of change to the authorisation that is required. Amendment of the existing authorisation is appropriate where it becomes apparent that the

conduct has changed in a minor way, or the benefits or detriments (or both) associated with the conduct in question differ in a minor way from those on which the authorisation was based, so that the authorisation should remain in force fundamentally unchanged but amended to reflect changes that may be required to ensure the benefits of the conduct are in future realised.

16. If circumstances have changed, particularly as to the benefits and detriments associated with the authorised arrangement, the Commission considers whether or not to amend the existing authorisation, revoke the existing authorisation, or revoke it and substitute a new authorisation. In making this decision, the Commission must compare the future benefits and detriments both ‘with and without’ the authorisation, as follows:
 - if mere revocation is being considered, the Commission should compare benefits and detriments in the future with the extant authorisation continuing in force, against benefits and detriments in the future with no authorisation in force; but
 - if either amendment of the authorisation or substitution of the extant authorisation by a fresh authorisation is being considered, the Commission should compare benefits and detriments in the future with the extant authorisation continuing in force, with benefits and detriments in the future with an amended or substituted new authorisation in force.
17. The Commission must be satisfied that the proposed amendment or substitution is necessary to ensure that the public benefits claimed for the conduct are in fact realised. This means that an amendment or a substitute authorisation should be tailored to meet the change in circumstances or in benefits or detriments. It considers that where an amendment to an existing authorisation is considered, it is for the parties to frame that variation so that the Commission can fully test the potential competition issues.
18. The Commission’s preliminary conclusion is that it considers that the variation proposed by the NZRU in its Application can be categorised as the authorisation remaining in force fundamentally unchanged but amended to reflect changes that may be required to ensure the benefits of the conduct are in future realised.

Analysis of Benefits and Detriments

Factual and Counterfactual

19. To analyse public benefits and detriments arising from an arrangement, the Commission compares the factual with the counterfactual. In this instance, the Commission’s preliminary view is that the relevant scenarios are as follows:
 - the factual: a continuation of the existing authorisation, amended by the variation to provide relief for the impact of the Rugby World Cup for the 2007 year only; and

- the counterfactual: a continuation of the existing authorisation.

Markets

20. The market of primary relevance to the NZRU's Application is the market for the provision and acquisition of premier rugby player services.

Impact on Competition

21. The sole focus is on the likely impact on competition of the proposed variation in the premier player services market.
22. The Commission's position in Decision 580 was that a salary cap would reduce competition in the premier player services market by imposing constraints on the mix of both the quality and quantity of player services that certain larger-resourced unions might otherwise acquire, and would result in situations where certain players would be paid less than they otherwise would.
23. In broad terms, as any effective salary cap is regarded as being anti-competitive, the implications of a relaxation of the cap—as through the proposed amendment—would be pro-competitive. Hence, the factual scenario would in principle be more competitive than the counterfactual.
24. The main difference between the two scenarios is that in the factual the two developments would be 'neutralised' by the proposed temporary amendment to the salary cap, whereas under the counterfactual they would not – rather, there would be some re-distribution of talent to the extent that some unions would be forced to loan players in order to remain within the cap. As it is likely that mainly junior players would be loaned, the overall impact in the premier player services market would be small.

Public Benefit/Detriment Analysis

25. The focus is on the incremental changes to both detriments and benefits brought about by the amendment in the factual, relative to the counterfactual with the original authorisation. These changes are difficult to analyse since the counterfactual involves a significant change compared to what had been expected at the time of the authorisation.
26. A summary of the Commission's preliminary assessment of incremental detriments and benefits brought about by the proposed variation is shown in Table 1.

TABLE 1: Summary of Incremental Detriments and Benefits

Categories of detriments and benefits	Incremental Changes	
	Factual	Counterfactual
Detriments:		
<ul style="list-style-type: none"> Misallocation of players 	No change	Small increase. Minor disruption to squads from more loans of players.
<ul style="list-style-type: none"> Implementation / monitoring / compliance costs 	↑ costs involved in vetting applications for AB replacements.	↑ costs of loaning more players. ↑ scrutiny to check for enhanced risk of breaches.
<ul style="list-style-type: none"> Loss of player talent overseas 	No change.	↑ loss of players overseas.
Benefits:		
<ul style="list-style-type: none"> Greater spectator and TV viewer enjoyment of games 	No discernable change.	No discernable change.

27. Overall, on the basis of the information available, and analysis completed to date, there appears to be no difference in benefits in either scenario, and costs increase slightly in both, albeit to a lesser degree in the factual. As a cost avoided is equivalent to a benefit, it follows that there is a small incremental net benefit attached to the factual scenario over the counterfactual.

Preliminary Conclusions

28. In summary, the Commission's preliminary conclusions, on the information available to it at this time, are that:
- there has been a material change of circumstances since Decision 580 was granted;

- as a result, the Commission has jurisdiction to consider whether to revoke, amend, or revoke and grant a further authorisation in substitution for Decision 580;
- after considering whether to revoke, amend, or revoke and grant a further authorisation in substitution for, Decision 580, the Commission should exercise its discretion to amend the authorisation given in Decision 580; and
- the Commission considers the basic elements of the facts and reasoning on which the determination was based are still in place, but some material detail or details should be altered and these will result in a small incremental net benefit attached to the factual scenario over the counterfactual.

Draft Determination

29. If the Commission's preliminary conclusions are confirmed after its consideration of submissions on this Draft Determination, the Commission proposes to amend the authorisation granted in Decision 580, pursuant to s 65(1)(b) of the Act, so that the NZRU may:
- enter into an agreement with the NZRPA to provide salary cap relief by amending clauses 54.2 and 54.5 of the CEA, as well as introducing a definition for "relief player" into the CEA; and
 - give effect to those amendments by implementing and giving effect to salary cap regulations, such authorisation to apply only insofar as the salary cap regulations implement and give effect to salary cap relief;

as specified in Appendix 6 of the Application.

Next Steps

30. The Commission is now seeking written submissions from interested parties in respect of the preliminary conclusions it has reached in this Draft Determination. The deadline for written submissions to be received by the Commission is 2 April 2007.
31. Interested parties may advise the Commission by 2 April 2007 as to whether they consider it necessary for the Commission to hold a conference to discuss the issues raised by this revised Draft Determination. At present, the Commission does not consider a conference is necessary, but it will consider submissions/requests on the point and then finally decide whether to hold a conference. Interested parties will be notified of the Commission's decision on this matter and will be provided with details, if a conference were to be held.

INTRODUCTION

1. On 12 December 2006, the New Zealand Rugby Union (**NZRU**) applied to the Commission to vary Decision 580 (dated 2 June 2006), in which the Commission authorised the NZRU to enter into a Salary Cap Arrangement in accordance with the Collective Employment Agreement (**CEA**)² with the New Zealand Rugby Players' Association (the **NZRPA**). In particular, the NZRU has made the application to permit the NZRU and the NZRPA to vary the CEA to provide salary cap relief to Provincial Unions for the 2007 Air New Zealand Cup competition (and for that year only).
2. The decision to apply for a variation follows two developments that the NZRU and the NZRPA believe warrant some salary cap relief for the Provincial Unions involved in the 2007 Air New Zealand Cup competition. Both developments relate to the impact of the Rugby World Cup in 2007. The NZRU and the NZRPA have agreed to amend the CEA to provide some salary cap relief in the 2007 year only, subject to the Commission authorising the variation.

COMMISSION PROCEDURES

3. On 22 December 2006, by press release, the Commission gave public notice that it was considering varying Decision 580. The Commission also wrote to interested parties on 17 January 2007, advising of its intention to consider varying Decision 580.
4. Initial submissions were requested by 26 January 2007 from likely interested parties, to assist the Commission in its preparation of a Draft Determination. Written submissions were received from the Wellington Rugby Football Union (RFU), the Canterbury RFU, the Crusaders' Franchise, the Manawatu RFU, the Wairarapa-Bush RFU, and ASB Bank Limited. Further information was sought and obtained from the NZRU.

Submissions and Conference on Draft Determination

5. The Commission is now seeking written submissions from interested parties in respect of the preliminary conclusions it has reached in this Draft Determination.³ The deadline for written submissions to be received by the Commission is 5.00 pm on 2 April 2007.
6. Interested parties may advise the Commission by 5.00 pm on 2 April 2007 as to whether they consider it necessary for the Commission to hold a conference to discuss the issues raised by this Draft Determination. Although at present the Commission does not consider a conference to be necessary, the Commission will consider such advice and finally decide whether to hold a conference. Interested

² This refers to the CEA that applies for the 2005-2008 period. All references to the CEA in this Draft Determination are to that document unless otherwise specified.

³ The preliminary conclusions are outlined in paragraph 184 of this document.

parties will be advised of the Commission's decision and will be provided with details, if a conference is to be held.

THE PARTIES

NZRU

7. The NZRU is an incorporated society, and is the administrative body governing the participants involved in the game of rugby union throughout New Zealand. It controls the running of all rugby competitions in New Zealand, both domestic and international competitions.

Provincial Unions

8. The Provincial Unions comprise the 26 entities that, while affiliated to the NZRU, are also constituted as independent incorporated societies. Each Provincial Union has affiliated clubs, mainly consisting of amateur rugby clubs and school teams.

Rugby Players Collective Incorporated (RPC)/NZRPA

9. The RPC is a 400-member registered trade union and an incorporated society. The RPC was the vehicle through which professional rugby players negotiated the CEA with the NZRU. Both organisations have the same membership and board, although the NZRPA was established as the commercial arm for player interests, while the RPC is the players' negotiating body.

THE PREVIOUS AUTHORISATION

10. On 9 November 2005, the NZRU applied to the Commission under s 58 of the Commerce Act 1986 (**the Act**) for authorisation to enter into certain arrangements of the kind prohibited by s 27 (directly and via s 30) and s 29 of the Act.
11. In summary, the NZRU sought authorisation for two arrangements:⁴
 - a salary cap for the Provincial Unions competing in the Premier Division of the then new inter-provincial rugby competition (the Salary Cap Arrangement); and
 - new rules governing the period in which player transfers could occur, and the imposition of maximum transfer fees for players (Player Movement Regulations).
12. The NZRU stated in its previous application that: "The primary objective of this salary cap, along with proposed relaxation of player transfer rules, is to encourage a

⁴ The NZRU also sought authorisation to enter into, and give effect to Regulations that prohibited the payment of any players in Modified Division One of NZRU's National Provincial Championship competition, but that element of the Application was withdrawn after the Commission issued its Draft Determination.

more even distribution of playing talent, thereby contributing to a more even competition.”

13. In Decision 580, the Commission sets out in full its reasoning in considering the NZRU’s Application. Readers are referred to the body of the text of that document, which is on the Commission’s website (<http://www.comcom.govt.nz>). What follows is a brief summary of the Commission’s main conclusions in Decision 580.
14. In Decision 580, the Commission was satisfied that the player services provided by some National Provincial Championship players were likely to be “services” for the purposes of the Act, and that these services were being provided within one or more markets under the Act.
15. The Commission considered the Salary Cap Arrangement would lessen competition by imposing constraints on the mix of both the quality and quantity of player services that certain larger-resourced unions might otherwise acquire in a market constrained only by the player transfer regulations but no salary cap.
16. The Commission also considered that the Salary Cap Arrangement would result in situations where certain players would be paid less than they otherwise would, and therefore result in a controlling or maintaining of prices in the premier player services market, including non-employee players. The Commission concluded, therefore, that the Proposed Arrangements were likely to result in a lessening of competition, or a deemed lessening of competition, in the relevant markets.
17. A lessening of competition would be expected to result in economic detriments to the public of New Zealand, in terms of a loss of economic efficiency. In arriving at its conclusion, the Commission assessed the extent of the impact of the Proposed Arrangements on competition in the relevant markets, and considered the benefits and detriments described below, on the basis of both a quantitative and qualitative assessment. The benefits and detriments were assessed over a five year period and the quantified components discounted to present values.
18. There were a number of aspects of the NZRU’s proposed salary cap that may have limited its effectiveness. There was significant uncertainty about how effective the proposed salary cap would be, particularly in respect of how hard it would be, and how effectively it would be monitored and enforced. In addition, the initial level of the cap appears to have been set at a level not to constrain to any significant degree. Further, there was no provision for revenue-sharing and senior players may be resistant to moving to other unions.

Detriments

19. The detriments were considered under a number of headings: allocative efficiency, productive efficiency, loss of player talent, reduction in player skill levels and loss of innovative efficiency.

20. Allocative inefficiency was measured by player ‘misallocations’. In the premier player services market, the salary cap was considered likely to result in wealthier teams valuing marginal players more highly, and therefore being willing to pay them more, than would less wealthy teams. Some player ‘trades’ would be blocked by the cap. The resulting player ‘misallocations’ provided a measure of the allocative inefficiency in the market.
21. It was noted that salary caps need to be enforced, requiring monitoring to ensure compliance. Salary cap rules can be complex, and hence expensive to enforce. The Commission considered that productive inefficiencies would result from compliance costs being imposed on all unions, and also that enquiry costs would be imposed upon unions who are alleged to have breached the salary cap.
22. The Commission’s analysis also indicated that there was likely to be some loss of player talent. The salary cap, by constraining at least some Provincial Unions, would cause average player remuneration to fall, and therefore the salary cap was likely to increase outward migration of rugby players in the younger and mid-range levels to some degree.
23. The Commission did not consider that there were likely to be any significant innovative efficiency losses or reductions in player skill levels.

Public Benefits

24. The Commission considered direct public benefits under the following headings: spectator enjoyment, television viewer enjoyment, increased funding to Provincial Unions, and a range of indirect benefits. It also considered a range of claimed indirect benefits resulting from enhanced performances by international New Zealand sides.

Direct Benefits

25. The Applicant argued that there was a clear nexus between implementation of the Proposed Arrangements and a range of ‘direct’ public benefits.
26. Of primary importance in the public benefits claimed by the NZRU, was that a more balanced competition is a more attractive one, and that a key driver of demand for viewing professional team sports is the excitement generated by the uncertainty of the outcome of individual games. This proposition is known in the sports economics literature as the *uncertainty of outcome hypothesis* (UOH).
27. The Commission considered research and evidence in relation to two kinds of audiences – those who attend the match and those who watch television coverage of the match.
28. Taking into account all the quantitative and qualitative evidence available, the Commission treated conservatively the substantial public benefits to at-match spectators that were expected to flow from any enhancement in competitive balance

in the domestic provincial competition. The Commission assumed that these benefits would flow only gradually over time.

29. In terms of television viewership, the Commission undertook its own research and concluded that little or no public benefits were likely to flow from increased uncertainty of outcome of Premier Division matches. However, the Commission concluded that any public benefits likely to flow to television viewers were likely to derive from improved contest quality.
30. The NZRU argued that a more attractive domestic competition would lead to stronger financial performance of the Provincial Unions, and counted this as a public benefit. Enhanced financial performance is expected through growth in spectator numbers, broadcasting revenues and sponsorship.
31. The Commission concluded it was likely that enhanced financial performance of the Provincial Unions (and the NZRU), resulting from a more attractive domestic competition, would likely generate some public benefits.

Indirect benefits

32. The Commission accepted that the impact of the Proposed Arrangements could flow through to the performance of representative teams, and to enhanced financial performance of the Provincial Unions (and the NZRU). However, these were considered only likely to give rise to 'indirect' public benefits, and the Commission considered that these effects were likely to be weak.
33. The NZRU submitted that under the factual, both the NZRU and Provincial Unions could expect an increase in Premier Division revenues (i.e., greater broadcasting, merchandising, royalty, advertising, and sponsorship revenues), since a more attractive Premier Division competition would be a more marketable one.
34. However, as the Commission considered that there was likely to be only a weak link between the Proposed Arrangements and these suggested effects, it could not place significant weight on these claimed indirect benefits.
35. The Commission's assessment indicated a net public benefit in the order of \$2 million, in present value terms, over five years.

Conclusions

36. The Commission concluded that, on the balance of probabilities, the Salary Cap Arrangement and the Player Movement Regulations would each result or be likely to result in a lessening of competition, or would be deemed to result in a lessening of competition, in respect of the premier player services market. However, the Commission considered that in the circumstances, the potential benefits would outweigh the competitive detriments, although conditions were necessary to ensure that these benefits would indeed flow.

Decision

37. On 2 June 2006 the Commission granted a conditional authorisation to the NZRU (Decision 580), as follows:

Pursuant to s 61(1)(a) of the Act the Commission grants authorisation to the NZRU, subject to the conditions and for the period set out below, to:

- a. enter into the Salary Cap Arrangement in accordance with clauses 50, and 53 to 59 of the CEA; and
- b. enter into an arrangement consistent with the Player Movement Regulations; and
- c. give effect to that Salary Cap Arrangement by implementing and giving effect to salary cap regulations, such authorisation to apply only insofar as the salary cap regulations implement and give effect to clauses 53 to 59 of the CEA; and
- d. give effect to the Player Movement Regulations.

This authorisation extended to the NZRU, Provincial Unions, any current and future rugby players who were or may in future be playing rugby in a Provincial Union that has a team competing in any competition covered by the Salary Cap and the RPC, and is subject to the following five conditions imposed under s 61(2) of the Act:

Condition 1

The NZRU shall implement and give effect to regulations that provide for the effective audit, monitoring and enforcement of compliance with the salary cap regulations.

Condition 2

Except as expressly provided for in clauses 54.2 and 54.3 of the CEA and including the provision for team quarter final bonuses, all remuneration or other financial or non-financial benefits that are received by or on behalf of or paid for a player for or in connection with the provision of playing services to a Provincial Union, irrespective of the source of the remuneration or other financial or non-financial benefit, is included for the purposes of determining compliance with the salary cap for that Provincial Union.

Condition 3

Except as expressly provided for in clauses 54.2 and 54.3 of the CEA and including the provision for team quarter final bonuses, remuneration or other financial or non-financial benefits received by a player that are unrelated to the provision of playing services to a Provincial Union are excluded for the purposes of determining compliance with the salary cap for that Provincial Union. In this regard, the onus shall be on the Provincial Union to demonstrate that such other remuneration or other financial or non-financial benefit is unrelated to the provision of playing services

Condition 4

All non-financial benefits shall be accorded a financial value that reflects the fair market value of the non-financial benefit.

Condition 5

The NZRU shall commission and meet the costs of an independent review on the operation of the salary cap and Player Transfer Regulations to be commenced not before the fourth anniversary of the date of the granting of the authorisation and to be completed at least six months prior to the expiry of the authorisation.

Time Period

Pursuant to s 61(2) of the Act, this Authorisation expires on the sixth anniversary of the date of the granting of the authorisation.

BACKGROUND ON PLAYER SALARIES

38. A Provincial Union's aggregate player payments qualifying to be counted for the purposes of the salary cap comprise not only the remuneration it pays to its players, but also "notional values" and "discounts". These are set out in Table 1 below.
39. The system is complex, but works broadly as follows. Each year the NZRU contracts with roughly 200 of the best rugby players who will play for NZRU teams: the All Blacks, Junior All Blacks, the Sevens, and the five franchise Super 14 teams. These players are paid by the NZRU, and by accepting the contracts, they commit to staying in New Zealand for the year, playing their rugby for one or more of the above teams, and making themselves available to play for one of the 14 Air New Zealand Cup Provincial Unions. They are free to choose which Provincial Union side they would like to play for, and to negotiate a separate contract and salary with a Provincial Union. This salary is paid entirely by the Provincial Union. So typically an All Black receives two NZRU salaries—one for being available to play for the All Blacks, and one for playing for one of the Super 14 franchises—and a Provincial Union salary for being contracted to play in the Air New Zealand Cup competition.
40. All NZRU-contracted players are assigned a notional value, depending upon playing level and experience, as specified in the CEA. The purpose of the notional value system is to reflect the value of the NZRU salaries paid to players in provincial teams, and the competitive advantage that comes with having NZRU-contracted players in a team. A top player may be happy to accept a relatively modest salary for playing for his home province, because the bulk of his income comes from NZRU sources, and that union will also benefit financially from having a high-profile, professional player on its books. In short, his provincial salary is assumed to understate his value to his union.
41. The notional values are \$10,000 for players who have not played Super 14 rugby (including those in the Wider Training Groups associated with each of the Super 14 squads); and for those who have, the values are one of \$20,000, \$35,000 or \$50,000, depending upon Super 14 and All Black experience. The notional values of players are set at the beginning of the year when they contract with the NZRU, and those values remain unchanged for that year. They are also included within the salary caps of the Provincial Unions with whom they subsequently contract. The Provincial Unions are aware of the notional values of the players at the time of

contracting. For the larger unions, the total of the notional values may come close to half of the salary in the cap.

42. In addition, for the purposes of calculating the salary cap aggregate, certain discounts are applied to the provincial salaries (or “retainers”) of current and former All Blacks, and to “veteran” players. Veteran players are defined as players who have played for eight or more years at National Provincial Championship level. For current All Blacks the discount is 60%, meaning, for example, that a salary actually paid of \$40,000 would count only as \$24,000 in the cap. This discount is designed to reflect the fact that due to commitments to playing for the All Blacks, it will almost always be the case that players will be unable to play in a significant number of the Air New Zealand Cup matches. Therefore, the Provincial Union concerned will have to engage and pay for other players to take the place of the absent All Blacks for part of the competition. However, it is important to note that the Provincial Union contracts provide that the actual salary is paid regardless of the number of appearances the player makes in Air New Zealand Cup matches, or even when he makes none at all, as typically happens in Rugby World Cup years.

TABLE 1: Summary of Notional Values and Discounts

Notional Values	
•	10+ capped (tests) All Black and has played a test in the last three years = \$50,000.
•	3+ years Super Rugby = \$35,000.
•	Less than 3 years Super Rugby = \$20,000.
•	Party to NZRU Contract but not selected in Super Rugby = \$10,000.
•	Party to a Wider Training Group Contract = \$10,000.
Discounts	
•	60% discount on Salary Cap Remuneration Payments for Current All Blacks.
•	40% discount on Salary Cap Remuneration Payments for Former All Blacks.
•	40% discount on Salary Cap Remuneration Payments for Veteran Players.
•	Current All Black discount applies regardless of availability and is not pro-rated per game.

43. The salary cap applies to all salary payments paid by a Provincial Union (including those paid by third parties) to a player (or to a third party on behalf a player). This includes “non-financial” benefits, such as cars, free accommodation, or other benefits.

44. The salary cap does not apply to salary payments of \$7,500 or less, nor to a range of other forms of remuneration or benefits, including: remuneration paid under genuine employment or player agreements; player apparel; meals and match tickets; relocation expenses for loan players; relocation expenses up to \$1,500 for relocation of Premier Division players; certain fixed Provincial Union performance/win bonuses (up to a certain maxima); financial loans and interest; and monies paid in settlement of an employment dispute.

Loaning Provisions

45. In terms of loaning players a distinction needs to be drawn between the salary cap implications for Provincial Unions of a loan on the one hand, and the financial implications of a loan on the other. They are not the same.
46. Where the loan is for all of the Air New Zealand Cup games, then all the salary cap payments attributable to the player, as outlined above, accrue to the borrowing Provincial Union irrespective of who actually pays the player.
47. The situation is more complicated when the loan period is for part of the competition, when the rules require that the salary cap payments attributable to the player must be apportioned between the lending and borrowing Provincial Unions depending on how many “round robin” games each loan player affected plays for either the borrowing or lending union during the competition. This can be illustrated as follows. Suppose a player has a notional value of \$35,000 and is paid a retainer by Provincial Union A of \$55,000, and that he plays two games before being loaned to Provincial Union B, and there played seven games after the loan commenced. In this case, Provincial Union A will have a salary cap charge of 2/9ths of \$90,000 (i.e. \$20,000), and Provincial Union B will have a cap charge of 7/9ths of \$90,000 (i.e. \$70,000). In this way the salary cap charge is apportioned, or pro-rated, between the two Provincial Unions on the basis of the number of games the loan player played for each.
48. However, it may be that before the loan occurred the Provincial Unions entered into a negotiation about who should pay the player’s retainer. This will obviously change each Provincial Union’s financial cost of the loan player, depending on the deal done, but it will not change the salary cap treatment as outlined above: this is determined by the games played, not by who pays the player. The only exception to this is if a borrowing Provincial Union pays the player more than he was due under his original retainer, in which case all this additional cost will accrue to the borrowing Provincial Union.
49. In many situations the borrowing Provincial Union may be in a better bargaining position and not have to pay the full (or any of the) retainer cost of the player. Indeed, there have been some situations where the borrowing union has had use of a player for the entire season and paid none of the player's retainer (but incurred all of the player's salary cap charge). It is considered that this sort of result—encouraging the spread of talent—is exactly what the lending provisions are trying to facilitate.

Moreover, if a Provincial Union contracts more players than it can have under the salary cap, and has to ‘unload’ some players during the year to fit within the cap and receives little compensation for doing so because of its weak bargaining position, then this is simply a result of its earlier decision to try and hold on to all its players.

Injury Provisions

50. Part 16 of the Salary Cap Regulations sets out the injury relief provisions. When a player is unavailable to play in the Air New Zealand Cup competition for three or more consecutive matches due to illness or injury, his Provincial Union can claim an injury relief amount under the salary cap based on the number of games missed.
51. For example, suppose that a player has a notional value of \$20,000 and is paid a retainer of \$25,000, so his salary cap charge to his Provincial Union would be \$45,000. If the player misses four consecutive games of the Air New Zealand Cup competition due to injury or illness his Provincial Union would receive salary cap relief of \$20,000 (i.e. \$45,000 x 4/9ths). If the player were to miss six consecutive games, then the relief amount would be \$30,000 (e.g. \$45,000 x 6/9ths).
52. A player must miss three or more consecutive games for his Provincial Union to qualify for relief. So if a player missed two games, then played a game, then missed two more and played the rest of the season, no relief would be available.

DEVELOPMENTS SINCE DECISION 580

53. The NZRU has advised that there have been two new, but temporary developments related to the 2007 Rugby World Cup since Decision 580, that affect the operation of the salary cap for 2007, viz:
 - Conditioning programme: a decision by the NZRU Board in August 2006, on the advice of the All Blacks’ coaching staff, to implement a conditioning programme for 22 players who are expected to be members of the All Black squad for the Rugby World Cup in 2007. This conditioning programme overlaps with the first seven rounds of the 2007 Rebel Sport Super 14 competition (that started on 2 February). It has meant that these 22 players are not available for that period, and therefore, must be replaced in the Super 14 squads. The replacements will gain notional values that will add to the qualifying salary cap expenditures of the Provincial Unions for which they play.
 - All Blacks’ absence: the All Blacks are almost certain to be absent from the entire 2007 Air New Zealand Cup competition by reason of their selection in the Rugby World Cup 2007. As these players will not be available to be members of Air New Zealand Cup squads, the Provincial Unions affected will need to find replacements, the cost of which will also add to the qualifying salary cap expenditures of the Provincial Unions for which they play.

54. The NZRU has advised the Commission that at the time of Decision 580, the NZRU believed that the Salary Cap Arrangements as authorised would be able to appropriately cater for any impact of the 2007 Rugby World Cup. Subsequent to Decision 580 the NZRU has explained that additional qualifying salary cap expenditures will be incurred in fielding their teams for the 2007 competition. In view of these developments, the NZRU and the NZRPA consider that the salary cap for the 2007 Air New Zealand Cup competition could operate in an unduly harsh or unfair manner, particularly for the largest Provincial Unions who operate on, or close to the salary cap, and, therefore, that some temporary salary cap relief is warranted in 2007 only.
55. The NZRU contends that as the existing authorisation is quite specific, a failure to respond to these two factors would mean that some of the five largest Provincial Unions would be in danger of operating outside the salary cap for the 2007 season. The failure of a Provincial Union to stay within the cap would lead to automatic penalties being levied on it under the terms of the authorised salary cap regulations. Provincial Unions in this position would be forced to shed players, but at the expense of disrupting the make-up of their squads.
56. The potential for breaches of the salary cap would be avoided by the implementation of the proposed two measures. However, the NZRU considers that these measures, if adopted, would result in it operating outside the terms of the existing authorisation. Accordingly, the NZRU considers that a variation to Decision 580 is required. This would involve permitting the NZRU and the NZRPA to vary the CEA so as to provide certain forms of salary relief to the Provincial Unions for the Air New Zealand Cup competition for the 2007 year only.

THE PROPOSED VARIATION

57. The NZRU seeks approval from the Commission to vary the authorisation granted in Decision 580 so as to permit the NZRU and the NZRPA to vary the CEA to provide salary cap relief to Provincial Unions for the 2007 Air New Zealand Cup competition (and for that year only) by:
- discounting the notional values of the players who are selected in Super 14 squads as replacements for the players who are on a conditioning programme to the notional values that the replacement players would otherwise have had in the absence of the conditioning programme; and
 - providing a discount to each Provincial Union in respect of each of the 33 players (32 current All Blacks plus Greg Somerville) who are most likely to comprise the 30 players who will be absent for the whole of the 2007 Air New Zealand Cup of \$18,000 per player, but only to the extent that a Provincial Union can show that it has incurred additional costs as a result of the All Blacks being absent at the Rugby World Cup 2007.
58. The proposal is explained below in more detail.

Discount of notional values

59. On 18 August 2006, the NZRU Board approved the implementation of a conditioning programme for 22 players who are expected to be members of the All Black squad for the Rugby World Cup in 2007, to take place over the first twelve weeks of the year. This timing means that the conditioning programme overlaps with the first seven rounds of the Super 14 competition (which started on 2 February). It has meant that these 22 players are not available for that period, and have therefore required to be replaced in the Super 14 squads.
60. The conditioning programme has thus resulted in the usual 140 players in the Super 14 squads (five squads with 28 players per team) being increased by 22. These replacement players are expected to be drawn from the Wider Training Groups, which are groups of seven or eight players attached to each Super 14 squad that train with the squad and are available to fill gaps created by injuries. Each Wider Training Groups player, as a replacement, will be accorded a higher notional value—at a minimum, \$20,000, instead of \$10,000—according to his playing experience. Likewise, each ‘promoted’ Wider Training Groups player will be replaced in the Wider Training Groups by another player next in line outside the Wider Training Groups, who is likely not to have an NZRU contract, in which case his notional value would increase from zero to \$10,000.
61. Since all of the players mentioned are more senior players, and therefore would be expected to be contracted by Provincial Unions to play in the Air New Zealand Cup competition, all of the increases in their notional values would be carried through into the salary caps of those Provincial Unions involved.
62. Hence, the NZRU is proposing to discount the increases back to what they would have been but for the conditioning programme. This would involve the 22 players being given notional values of \$10,000 (the ones they would have had as Wider Training Groups members), rather than the \$20,000 or higher figure that would normally apply with Super 14 experience. Similarly, the players promoted to the Wider Training Groups as replacements for the 22 would be allocated a notional value of zero, which is what they would have got otherwise. These two changes would result in there being no additional notional values being created in total.⁵

Discount for Absent All Blacks

63. The NZRU advised that the 30 players in the All Blacks’ squad for the Rugby World Cup 2007 are almost certain to be absent from the entire 2007 Air New Zealand Cup competition by reason of their selection in the Rugby World Cup 2007, rather than, as in a ‘normal’ year, missing only a proportion of games. Hence, the NZRU considered that the Provincial Unions losing players in this way

⁵ The notional values under the salary caps would still increase in aggregate in 2007 compared to 2006, because of the rise in the average experience levels of the players, but not increase because of the conditioning programme. The figures are: 2006. \$4,928,000; 2007 (without relief): \$5,635,000; 2007 (with relief): \$5,155,000.

will need to find replacements, and thereby may incur additional salary costs. Note that in accordance with Decision 580, the salary cap provides that the actual and notional salaries of the All Black players will continue to be included in the Provincial Unions' salary caps.

64. The NZRU is proposing that as the All Blacks' squad will not be named until August 2007, which will be too late to allow for the contracting of replacements to start in the competition in July, 33 named players comprising those who went on the 2006 end of year tour, plus one other, will be eligible for 'salary relief'.
65. The NZRU has noted that it was difficult to set the level of relief per player, in part because different Provincial Unions have proposed alternative solutions to the problem. One has said that it intends to use its young development players to fill the gaps, which will be relatively low cost to it; another has said that it might import more expensive players from overseas; and another again has suggested that it will consider upgrading contracts from a development player contract to a full contract, with consequent higher remuneration. The cost will also depend upon the type of contract with the replacement player; for example, they could be paid for the whole season, regardless of the number of games played, or they could put on a development contract for a minimal retainer but be paid at a weekly rate for the weeks in which they play games.
66. The NZRU has proposed a maximum figure of relief per player of \$18,000, which is at the lower end of the range in its estimation. This relief means that a Provincial Union could add up to \$18,000 per replacement player to its allowable salary cap. The Wellington and Canterbury RFUs consider this figure is too low. To avoid the possible exploitation of this relaxation of the cap, the Provincial Union would have to convince the NZRU's salary cap team that the relief was warranted on the basis that the costs were truly additional, and that the replacement players were type-for-type (e.g., a lock replacing a lock).
67. Flexibility would be provided for Provincial Unions using replacements on weekly contracts to claim relief, where the cost would be subject to variation because of uncertainty over the number of games played, subject to the maximum relief being \$18,000 for the season.

Views of Interested Parties on the Proposed Variation

68. As noted previously, the Commission has written to interested parties stating that it was considering varying Decision 580. The Commission also sought initial submissions from interested parties on whether it would be appropriate to vary the Decision.
69. The Commission received written submissions from six parties, although Mr Hamish Riach made the same submission in his capacity as CEO for the Canterbury RFU and the Crusaders' Franchise.

70. The Wellington RFU considered that the salary cap relief proposed by the NZRU was insufficient to address the restrictions placed on teams with a significant number of All Blacks. It proposed that the provision of relief should be extended to exclude in full the notional values and Provincial Union salaries of the All Blacks absent from the Air New Zealand Cup because of Rugby World Cup commitments. The Canterbury RFU and Crusaders' Franchise concurred with the NZRU's view that the two developments referred to by the NZRU amounted to a material change of circumstances since Decision 580 was granted. These parties agreed with the proposed relief regarding the conditioning programme, but disagreed that the proposed relief ensuing from the absence of the All Blacks from the Air New Zealand Cup should be limited to a flat discount of \$18,000.
71. The remaining written submissions were broadly in support of the temporary salary cap relief as proposed by the NZRU. Commission staff also interviewed a number of Provincial Unions, and while concerns were raised about aspects of the proposed relief, none of the parties expressed any objection to the Application itself.

FACTS RELEVANT TO RECONSIDERATION OF DECISION 580

72. Prior to Decision 580, the NZRU advised it had made no decision to introduce a conditioning programme. The NZRU advised the Commission that the concept of the programme was first presented to the NZRU Board at its 23 and 24 March 2006 meeting. In its presentation to the Board, the NZRU advised that All Black management sought approval for a conditioning programme for players certain to be selected for the 2007 Rugby World Cup (likely to be between 22 and 26 players). The NZRU Board approved "in principle" to support the need for these so-called "Core" All Blacks to have a conditioning break, subject to consultation with key stakeholders as required.
73. Subsequent to the March meeting, the NZRU advised that the NZRU management had to work through a number of significant issues before the Board could consider adopting a conditioning programme. This included consideration of:
- the impact on the Super 14 franchises of the absent All Blacks;
 - funding for the additional Super 14 players;
 - resolution of the sponsorship and broadcasting issues; and
 - obtaining the NZRPA's support and agreement to aspects of the conditioning programme.
74. Accordingly, the NZRU advised that it engaged in a consultation process with interested parties, including sponsors, broadcasters, the NZRPA, the Super 14 franchises, Provincial Unions and broadcasters, the process commencing around April 2006, and continuing for several months thereafter. [

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75. The NZRU advised that the salary cap implications of introducing the conditioning programme was raised by Super 14 franchises and the NZRPA at these meetings. The NZRU stated: "Hence as far as the Provincial Unions and Players Association were concerned the issue of the salary cap implications of such a programme being introduced was an issue that needed to be addressed by the NZRU, albeit that the salary cap itself was still subject to final authorisation."
76. The NZRU advised that it sought to resist argument for salary cap relief for the absence of 30 Rugby World Cup All Blacks for an extended period, and in particular at all times prior to final authorisation, despite the protestations of the NZRPA and the major Provincial Unions. The NZRU stated:
- "...there was at all material times prior to the announcement of the authorisation (and as late as December 2006) a very real prospect that the conditioning programme would either not be adopted by the NZRU Board or that (post-authorisation) would be cancelled, particularly in light of the reaction of some of the NZRU's main broadcasters" . . .
- "[NZRU] sought to resist argument for salary cap relief for the absence of the 30 Rugby World Cup All Blacks for a long time and in particular at all times prior to the final authorisation despite protestations of the NZRPA and the major Provincial Unions and it was only agreed on the basis that it would be effectively salary cap neutral."
77. The NZRU advised that no consideration was factored into the final architecture to take account of how the impact of the likely absence of the All Blacks from the 2007 Air New Zealand Cup might impact on each Provincial Union's salary cap. The NZRU also advised that at the time of negotiating the CEA and salary cap regulations it was not envisaged by any party that the NZRU would implement a conditioning programme that would add 22 notional values. The NZRU advised that unless the 22 additional notional values and Wider Training Groups notional values were removed, the salary cap calculation would be artificially high because more players would carry notional values for the year due to the conditioning programme than was envisaged at the time the salary cap architecture was finalised.
78. In applying for the variation, the NZRU confirmed that no decision had been made by the NZRU about proceeding with the conditioning programme when Decision 580 was issued. The NZRU noted that the minutes of the NZRU's June 2006 Board meeting show that there remained substantial areas of disagreement around how the proposed conditioning programme would be funded and that: "These issues had the potential to derail the whole proposal".
79. Minutes of the July 2006 Board meeting provided to the Commission by the NZRU regarding the 2007 Rugby World Cup showed that management was still debating whether to apply for salary cap relief, and if so on what basis. It was noted that a paper would be put to the August 2006 Board meeting regarding whether to apply for such relief and on what basis. ("The Board noted the intention to approach the Commerce Commission for salary cap relief.")

80. The NZRU advised that the NZRU Management then consulted with the Provincial Unions and submitted a paper for consideration by the NZRU Board at its August 2006 meeting recommending adoption of the conditioning programme and the making of an application to the Commission for salary cap relief.
81. On 18 August 2006, the NZRU Board gave approval for the conditioning programme to proceed. The Board also authorised NZRU management to enter into negotiations with the NZRPA to vary the CEA to provide salary cap relief in 2007, conditional on Commerce Commission approval of the variation to the authorisation granted in Decision 580.
82. The NZRU advised that it wrote to all Provincial Unions on 25 September 2006 outlining its intention to seek agreement with the NZRPA and then to seek Commerce Commission authorisation, to grant salary cap relief. After obtaining feedback from the Provincial Unions on the proposed salary relief, the NZRU wrote to the NZRPA on 6 November 2006 requesting an agreement to vary the CEA. The NZRU advised that on 30 November the NZRU and NZRPA agreed to vary the CEA, subject to Commission approval, and final agreement between the parties was reached on 6 December 2006.
83. The NZRU advised that it had reached the view that the authorisation given in Decision 580 was insufficient to cover the impact of the 2007 Rugby World Cup, and in particular the conditioning programme and the absence of the Rugby World Cup All Blacks from the Air New Zealand Cup. The NZRU advised that both it and the NZRPA considered that these developments meant that the salary cap could operate in an unduly harsh or unfair manner and that some salary cap relief was warranted in 2007. The NZRU advised that unless the relief was given, then the loaning of players could increase due to a Provincial Union's salary cap cost increasing as a result of the additional notional values and contracting costs. Some Provincial Unions consider that what the NZRU and the NZRPA have agreed as the proposed salary cap in the Application is insufficient to address the restrictions placed on teams with a significant number of All Blacks.
84. As a consequence, the NZRU advises that it had formed the view that the belief it had at the time of the authorisation that the impact of the 2007 Rugby World Cup could be addressed under the Salary Cap Arrangement as authorised in Decision 580 no longer applies.

GROUNDINGS FOR RECONSIDERATION OF AN AUTHORISATION

85. Section 65 of the Act enables the Commission to alter, revoke, or revoke and substitute authorisations made under s 58. Section 65 of the Act provides:

Section 65 Commission may vary or revoke authorisations

- (1) Subject to subsection (2) of this section, if at any time after the Commission has granted an authorisation under section 58 of this Act the Commission is satisfied that—

- (a) The authorisation was granted on information that was false or misleading in a material particular; or
- (b) There has been a material change of circumstances since the authorisation was granted; or
- (c) A condition upon which the authorisation was granted has not been complied with—

the Commission may revoke or amend the authorisation or revoke the authorisation and grant a further authorisation in substitution for it.

- (2) The Commission shall not revoke or amend an authorisation or revoke an authorisation and substitute a further authorisation pursuant to subsection (1) of this section unless the person to whom the authorisation was granted and any other person who in the opinion of the Commission is likely to have an interest in the matter is given a reasonable opportunity to make submissions to the Commission and the Commission has regard to those submissions.
86. Under s 65 the Commission may revoke the authorisation, amend the authorisation, or revoke and substitute a new authorisation if it is satisfied that any of the matters set out in s 65(1)(a)-(c) are fulfilled. The Commission is not obliged to amend, revoke, or revoke and substitute a new authorisation. It may elect to do nothing, even though there may be grounds available to amend or revoke.
87. In each of the Commission’s two previous decisions where it has exercised its discretion pursuant to s 65 of the Act⁶, the Commission reached the view that the only appropriate course of action was to revoke the authorisation. The issue arises in the present situation, however, whether the same analytical approach taken in those two decisions is appropriate when considering a situation such that revocation may not be warranted and an amendment would suffice.
88. Section 65 differentiates between the Commission’s ability to revoke an authorisation, amend an authorisation, or revoke an authorisation and substitute a further authorisation. The Commission’s powers pursuant to s 65 provide a mechanism to ensure that the authorisation remains effective and up-to-date. Parliament enacted provisions that give the Commission a range of responses to address different scenarios. One scenario may justify amendment at one end of the spectrum of the qualifying criteria in s 65(1), while another scenario may be at the other end of that spectrum and justify revocation. Where the Act provides a range of responses, the Commission should not adopt an approach to the grounds pursuant to s 65(1) that fetters that discretion.
89. In this context and as previously outlined in Decision 238 (the “*Kiwifruit Decision*”:

“[Section 65] is permissive rather than mandatory, but the general tenor of its wording (“a material particular”; “a material change of circumstances”; “a condition . . . has not been complied with”) makes it clear that it requires something more than a merely trivial change.

⁶ Commerce Commission, *Decision No. 238: Revocation of Decision 221*, 13 September 1989 and Commerce Commission, *Decision No. 581: Revocation of Decision 505*, 2 June 2006.

It would be only in very unusual circumstances that the existence of one of the conditions did not make it appropriate for the Commission to utilise one of the remedies.

There is no presumption, however, that all three of the remedies are equally applicable to all of the conditions. For example, misleading information in a material particular may nevertheless not be so germane to the whole reasoning of the authorisation as to require any more than an amendment, but equally it could call for replacement or revocation. On the other hand, a “material change of circumstances” implies a wider discrepancy which is unlikely to be satisfactorily dealt with by mere amendment.⁷

90. Of course, any assessment of the appropriate remedy will always be based on the facts, circumstances, and merits of the particular case before the Commission.
91. Two stages are involved in considering the application of s 65 of the Act. The first stage is to consider whether the authorisation was granted on information that was false or misleading in a material particular, or a material change of circumstances has occurred, or whether a condition of the authorisation has not been complied with. The second stage involves determining the appropriate response: to do nothing, to amend the authorisation, revoke the authorisation, or revoke the authorisation and substitute a further authorisation.
92. The two grounds pursuant to s 65(1) with potential application in this case are that:
 - there has been a material change of circumstances since the authorisation was granted; and/or
 - the authorisation was granted on information that was false or misleading in a material particular.
93. For convenience, the grounds set out in s 65(1)(a)-(c) are considered in turn.

APPLICATION OF SECTION 65(1)

False or Misleading in a Material Particular?

94. Section 65(1)(a) of the Act allows the Commission to reconsider the authorisation if it was granted on information that was false or misleading in a material particular. The NZRU submitted that the information provided at the time of the authorisation was neither false nor misleading.
95. In dealing with this ground for reconsideration, the Commission takes the view that it first has to determine if information provided to it was “false or misleading”. It then has to determine if that information was false or misleading in a “material particular”. Both limbs must be met to satisfy s 65(1)(a).

⁷ Commerce Commission, *Decision No. 238: Revocation of Decision 221*, 13 September 1989 at paragraph 29.

False or misleading?

96. As set out in Decision 581⁸ (the “*Pohokura Decision*”), the Commission considers that “false or misleading” in the context of s 65 means untrue or misleading in fact and does not necessarily import any element of deliberate falsehood or intent to mislead.
97. In the *Pohokura Decision*, the information in question involved predictions as to a future state of affairs in an area of accepted uncertainty. An argument was raised that such information is not “false or misleading” in the sense required by s 65(1)(a) if the predictions were based on an objective foundation, notwithstanding that they have subsequently proved false. The Commission considered that there existed an objective basis for the forecast that, absent an authorisation allowing three joint venture partners to enter into arrangements to jointly market and sell gas produced from the Pohokura gas field, production from the Pohokura field would have been delayed by one year. However, in the *Pohokura Decision*, if there had not been an objective foundation for the information at issue at the time, the information could be properly regarded as “false or misleading” in terms of s 65(1)(a).
98. In the circumstances here, the Commission formed the view in Decision 580, on the basis of representations made by the NZRU and interested parties and information provided by them, that imposition of specified conditions and placing a finite period on the authorisation were necessary to satisfy the Commission that the proposed salary cap and player transfer regulations would result in a benefit to the public that would outweigh the lessening in competition. The Commission was conscious that the proposed Salary Cap Arrangements created a new and untested regime.⁹ In its earlier Draft Determination the Commission had sought submissions from the parties on suitable conditions to enhance certainty as to the scope of the “exclusions” and other exceptions in the salary cap framework.¹⁰
99. The NZRU’s submissions on the initial Draft Determination and subsequent correspondence (provided at intervals up until 24 May 2006) as to the appropriate drafting of the substantive authorisation and conditions were silent as to both the absence of the All Blacks for the Air New Zealand Cup in 2007 and the conditioning programme with its implications on the Salary Cap Arrangements for which authorisation was being sought.
100. The unavailability of All Blacks due to Rugby World Cup commitments in France in 2007 was explicitly recognised in Decision 580 as the Commission had become aware of this matter from interested parties.¹¹ NZRU also acknowledges that the Provincial Unions and NZRPA were concerned in April and May 2006 that the

⁸ Commerce Commission, *Decision No. 581: Revocation of Decision 505*, 2 June 2006.

⁹ Commerce Commission, *Decision No. 580: New Zealand Rugby Football Union Incorporated*, 2 June 2006 at paragraph 821.

¹⁰ Commerce Commission, *Draft Determination: New Zealand Rugby Football Union Incorporated*, 9 March 2006 at question 55.

¹¹ Commerce Commission, *Decision No. 580: New Zealand Rugby Football Union Incorporated*, 2 June 2006 at paragraph 64.

issue of the salary cap implications of the conditioning programme needed to be addressed by the NZRU, albeit that the salary cap itself was still subject to final authorisation.

101. Further, NZRU has since confirmed that the NZRU Board resolved in principle in March 2006 to support the need for a 12-week conditioning programme from January to March 2007 for between 22 and 26 core All Blacks. The presentation to the Board at that time also noted that [

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102. The Commission considers that silence, as a result of half truth and failure to correct statements that had become incorrect due to subsequent developments or expanded knowledge, can amount to misrepresentation or misleading or deceptive conduct when there is a reasonable expectation of disclosure.¹² Further, a statement relating to the future may contain an implied statement as to present or past fact,¹³ and such an implied statement as to present or past fact may be false or misleading.¹⁴
103. Applying the reasoning from *the Pohokura Decision* to the present setting, the question is whether information provided to the Commission at the time of the authorisation (which suggested—by omission—that the framework that the Commission intended to authorise in June 2006 would accommodate the impact of the Rugby World Cup 2007) can be characterised as false or misleading. This assessment is made in light of the fact that both the NZRU and the NZRPA now take the view that the salary cap for the 2007 Air New Zealand Cup competition could operate in an unduly harsh or unfair manner due to the implementation of the conditioning programme and the absence of All Blacks from the entire 2007 Air New Zealand Cup. As the information in question involved predictions as to a future state of affairs in an area of accepted uncertainty, the Commission sought NZRU's views on whether the grounds in s 65(1)(a) were made out.
104. The NZRU submitted that it “*did not deliberately withhold any information from the Commerce Commission that it knew would affect the factual and counterfactual by reason of it having been decided or even probable prior to the final determination*”, and that:

"...there was at all material times prior to the announcement of the authorisation (and as late as December 2006) a very real prospect that the conditioning programme would either not be adopted by the NZRU Board or that (post-authorisation) would be cancelled, particularly in light of the reaction of some of the NZRU's main broadcasters" . . .

¹² *Heiber v Barfoot & Thompson Ltd* (Unreported HC Auckland, CT165/98, 17 December 1999).

¹³ *Thompson v Mastertouch TV Service Pty Ltd (No 2)* (1977) 15 ALR 487.

¹⁴ *Commerce Commission v Telecom Corporation of New Zealand Ltd* (1990) 4 TCLR 1.

"[NZRU] sought to resist argument for salary cap relief for the absence of the 30 Rugby World Cup All Blacks for a long time and in particular at all times prior to the final authorisation despite protestations of the NZRPA and the major Provincial Unions and it was only agreed on the basis that it would be effectively salary cap neutral."

105. The Commission's preliminary conclusion in this case is that there existed an objective basis for suggesting that the framework that the Commission intended to authorise in Decision 580 would accommodate the impact of the Rugby World Cup 2007.

Material particular?

106. Section 65(1)(a) requires that to establish that grounds exist on which to amend, revoke, or revoke and substitute a further authorisation, the authorisation must have been granted on information that was false or misleading "in a material particular". The NZRU submitted that failing to tell the Commission about the conditioning programme and the absence of the All Blacks from the Air New Zealand Cup in 2007 did not relate to a material particular in any event:

"the benefit/detriment analysis is essentially not affected by the two decisions on which this application was based and therefore the absence of the information that might have been in the pipeline (the conditioning programme and likely absence from the Air New Zealand Cup, and consequently potentially different notional values) cannot have had a material impact on the Commerce Commission's final determination."

107. As set out in *the Pohokura Decision*¹⁵, the Commission considers that "material" means that the particular must be relevant and of moment and significance in relation to the purpose for which it was provided.¹⁶ It will be relevant if it may, will or must be taken into account.
108. In Decision 580, certainty as to exactly what is included and the scope of all exclusions and other exceptions in the salary cap were clearly material as the Commission considered such certainty necessary otherwise the potential benefits could be placed at risk. The Commission considered information provided by the NZRU when framing the terms of the authorisation, the specified conditions and identifying the term of a finite period.
109. If the information was false and misleading, it would be so in a "material particular" as the facts in issue are relevant and of moment and significance in relation to the grounds on which the authorisation was granted.
110. In summary, however, the Commission's preliminary conclusion is that it does not consider that on the evidence before it the prediction (that the framework that the Commission intended to authorise in June 2006 would accommodate the impact of the Rugby World Cup 2007) is properly regarded as "false or misleading" in terms of s 65(1)(a). The Commission considers that there existed an objective basis for the NZRU's prediction as to future events in an area of accepted uncertainty.

¹⁵ Commerce Commission, *Decision No. 581: Revocation of Decision 505*, 2 June 2006

¹⁶ *Minister of Immigration, Local Government and Ethnic Affairs v Dela Cruz* (1992) 110 ALR 367.

Question 1: The Commission seeks comments on whether parties agree that this is a correct assessment of whether the authorisation in Decision 580 was granted on information that was false or misleading for the purposes of s 65(1)(a) of the Act.

Material Change of Circumstances?

111. The Commission may reconsider an authorisation if there has been a material change of circumstances since the granting of the authorisation. In this case, the Commission must determine whether the absence of the All Blacks for all of the Air New Zealand Cup competition, the decision by the NZRU Board to implement a conditioning programme, and an agreement between the NZRU and the NZRPA to vary the CEA amounts to, or occurred in the context of, a material change of circumstances.
112. As in the *Pohokura Decision*, the existence, or otherwise, of a material change of circumstances is determined firstly by examining the circumstances as they existed at the time the authorisation was granted; and secondly, by considering the circumstances as they exist at the time the revocation (or amendment) is being considered.¹⁷
113. Previously, the Commission has considered the application of s 65(1)(b) in two decisions: the *Kiwifruit Decision* in 1989, and the *Pohokura Decision* in 2006. In the *Kiwifruit Decision* the change of circumstances was such that the detriments remained, but the benefits were lost.¹⁸ In the *Pohokura Decision* the change of circumstances related directly to the element proposed as crucial for achieving the benefits of the authorisation.¹⁹ The impact of the change was such in both of these two decisions that the Commission reached the view that the only appropriate course of action was to revoke the authorisations.
114. In the *Pohokura Decision*, the Commission noted the absence of judicial consideration of s 65 of the Act in New Zealand and considered a similarly worded provision in the Australian Trade Practices Act 1974²⁰ which enabled the Australian Competition and Consumer Commission (the **ACCC**) to revoke an authorisation or to revoke an authorisation and substitute a further authorisation. Relevant Australian case law on that provision²¹ was considered by the Commission, and applied in the *Pohokura Decision*, whereby:

¹⁷ *Re Media Council of Australia & Ors* (1996) ATPR 41-497 at 42,241.

¹⁸ Commerce Commission, *Decision No. 238: Revocation of Decision 221*, 13 September 1989 at paragraph 40.

¹⁹ Commerce Commission, *Decision No. 581: Revocation of Decision 505*, 2 June 2006 at paragraph 43.

²⁰ Section 91(4) of Australia's Trade Practices Act 1974 (as it was prior to amendment in 1998).

²¹ *Re Media Council of Australia & Ors* (1996) ATPR 41-497; *Re AGL Cooper Basin Natural Gas Supply Arrangements* (1997) ATPR 41-593.

“A material change in circumstance includes a change in circumstances which has a significant impact upon the benefits to the public or upon the detriment, including anticompetitive detriment, arising out of the conduct or the provision in question.”²²

115. The point of the discussion above relates to what is a “material” change of circumstances. In *Re Media Council of Australia & Ors* a material change of circumstances was found to include a significant impact on benefits to the public or on detriment arising out of the conduct. In each of the Commission’s decisions to reconsider an authorisation, a significant impact on benefits was found and the authorisation revoked. In the present case, the issue arises as to whether that is the appropriate test given the factual situation outlined in the NZRU’s Application.
116. While similar to s 91(4) of Australia’s Trade Practices Act (as it was when *Re Media Council of Australia & Ors* and *Re AGL Cooper Basin Natural Gas Supply Arrangements* were decided), s 65 of the Act is broader. It confers on the Commission the ability to amend – as well as to revoke an authorisation or to revoke an authorisation and substitute a further authorisation. The fact that s 65 of the Act enables the Commission to amend is significant and affects the interpretation of the section and the weight of the previous decisions as to the application of s 65. Parliament anticipated in s 65 of the Act that the Commission should be able to make amendments to an authorisation. It is difficult to contemplate that before the Commission is able to amend an authorisation, it must first find a **significant** impact on benefits to the public or on detriment arising out of the conduct.
117. With this background in mind in dealing with this ground for reconsideration, the Commission takes the view that it first has to determine whether there has been a “change of circumstances”. It then has to determine if that change of circumstances was “material”. Both limbs must be met to satisfy s 65(1)(b).

Change of circumstances?

118. In its Application, the NZRU submitted:

“ . . . the very decision by the NZRU and players that they wish to amend the salary cap structure (because they have formed the view that the structure will operate unfairly and harshly), is a “change of circumstance”. Further, that change in circumstance is “material” because the amendment to the salary cap structure goes to the very question of whether the authorisation is operable or not”

119. The Commission does not consider that it is necessary in this proceeding to determine whether the absence of the All Blacks for the entire Air New Zealand Cup in 2007, the implementation of the conditioning programme, and/or the decision to change the proposed salary cap structure **in and of themselves** are properly regarded as a “change of circumstances” in terms of s 65(1)(b).

²² *Re Media Council of Australia & Ors* (1996) ATPR 41-497 at 42-241.

120. At the time the Commission granted the authorisation in Decision 580, the evidence indicated that “exclusions” and other exceptions in the salary cap framework were not necessary to take account of the impact of absent All Blacks for the Air New Zealand Cup in 2007, nor for the flow-on effects of the conditioning programme. Since that time, the NZRU has worked through the practical implications of implementing both the conditioning programme and the All Blacks’ attendance at the Rugby World Cup in 2007. These have included consideration of:
- the impact on the Super 14 franchises of the absent All Blacks and funding for the additional Super 14 players;
 - resolution of the sponsorship and broadcasting issues; and
 - obtaining the NZRPA’s support and agreement to aspects of the conditioning programme.
121. Consequently, a change of circumstances is evidenced by the fact that the NZRU prediction (that the framework that the Commission intended to authorise in June 2006 would accommodate the impact of the Rugby World Cup 2007) has been shown to be false due to the practical implications of implementing the conditioning programme and recognising the absence of the All Blacks from the Air New Zealand Cup competition in 2007. If, at the time the authorisation was granted, it was true that the NZRU’s prediction was objectively justifiable, then it appears there has been a change of circumstances. Further, the NZRU and the NZRPA have agreed further “exclusions” and other exceptions in an amendment to the CEA to provide salary cap relief as they now take the view that the salary cap could operate in an unduly harsh or unfair manner without some salary cap relief in the 2007 year.
122. Consistent with the situation in the *Pohokura Decision*, the Commission was provided with information (the NZRU indicated, by its silence, that the framework that the Commission intended to authorise in June 2006 would accommodate the impact of the Rugby World Cup 2007) which was objectively justified at the time the authorisation was made but subsequently proves to be incorrect. Standing back and comparing the circumstances as they existed at 2 June 2006, and the circumstances as they exist as a whole at the present time, objectively viewed the Commission considers that a “change of circumstances” has occurred.

Material?

123. The NZRU advised that the absence of the All Blacks from the Air New Zealand Cup competition and the implementation of the conditioning programme mean salary cap calculations would be artificially high. Additional contracting costs to replace those All Blacks included in the Rugby World Cup 2007 squad have been, or might be, incurred by Provincial Unions. Salary cap calculations will be higher than was envisaged at the time the salary cap architecture was finalised for two reasons. First, salary cap calculations will be up to \$[] higher (because more players will carry higher notional values for the year due to the flow-on effects of the conditioning programme) than was envisaged at the time the salary cap

architecture was finalised. Secondly, salary cap calculations will be higher as the All Blacks chosen for the Rugby World Cup 2007 are unlikely to take part in the 2007 Air New Zealand Cup competition.

124. The five largest unions provided estimates that their additional costs associated with the absence of the All Blacks (i.e. not including the 40% of an All Black's remuneration which is already included in the salary cap regardless of whether he is available to play) would be in the region of [] per All Black. The NZRU advised that there will be 30 All Blacks named in the Rugby World Cup squad, thus the total additional costs are estimated to be in the region of [] These additional funds are to cover the cost of contracting replacement players for the whole season, and Provincial Unions have pointed out that the new players must be contracted at a higher level than they would be in a non-Rugby World Cup year, as increased demand/reduced supply have pushed their value up in the market.
125. In order to manage their salary cap position (without relief), NZRU advises that it expects the loaning of players could increase as a result of the additional notional values and contracting costs factored into a Provincial Union's salary cap cost.
126. In terms of the benefits and detriments identified by the Commission in Decision 580, the change of circumstances increases the detriment by constraining the freedom of Provincial Unions to pay players what they choose in an open market. While the impact of that increase on benefits and detriments is unlikely to be significant, the Commission also considers this impact as part of its assessment of whether the change of circumstances is "material".
127. Regarding the materiality of the change in circumstances, the Australian case of *Re Media Council*²³ highlighted that the question of materiality is not just assessed by reference to its impact on the conduct authorised (which clearly must be a relevant factor) but also by reference to the impact upon benefits and detriments. However, the Commission considers that its assessment of what is a "material" change of circumstances must encompass a broader range than only those that have a **significant** impact upon the benefits to the public or upon the detriment. To do otherwise would remove the statute of part of its effect, that is, it would fetter the Commission's ability to amend an authorisation.
128. While similar to s 91(4) of Australia's Trade Practices Act (as it was when *Re Media Council* and *AGL Cooper Basin* were decided), s 65 of the Act is broader in that it confers on the Commission the ability to amend – as well as to revoke, or revoke and substitute – an authorisation. As previously outlined in the *Kiwifruit Decision*:

²³ *Re Media Council of Australia & Ors* (1996) ATPR 41-497; *Re AGL Cooper Basin Natural Gas Supply Arrangements* (1997) ATPR 41-593.

The section is permissive rather than mandatory, but the general tenor of its wording (“a material particular”; “a material change of circumstances”; “a condition . . . has not been complied with”) makes it clear that it requires something more than a merely trivial change.²⁴

129. The foundation on which the NZRU based its prediction (that the Salary Cap Arrangements would accommodate the impact of the Rugby World Cup 2007) no longer holds. This change has an impact on the conduct authorised and the benefits and detriments that is material. The Commission’s preliminary conclusion is that it considers that, on the evidence before it, there has been a material change of circumstances in terms of s 65(1)(b).

Question 2: The Commission seeks comments on whether interested parties agree that this is a correct assessment of whether the circumstances outlined by the NZRU constitute a material change of circumstances for the purposes of s 65(1)(b) of the Act.

Condition has not been Complied With?

130. In this case, the ground pursuant to s 65(1)(c) is not relevant.

Conclusion on Application of Section 65(1)

131. On the information currently available to it, the Commission concludes that there has been a material change of circumstances since the authorisation was granted. As a result, the Commission’s preliminary conclusion is that it is satisfied that it may reconsider the authorisation granted in Decision 580.

EXERCISE OF THE COMMISSION’S DISCRETION

Discretion of the Commission

132. Once the Commission is satisfied that one of the grounds in 65(1) of the Act exists, the second stage of the inquiry is to consider whether it should:
- revoke the authorisation;
 - amend the authorisation;
 - revoke the authorisation and grant a further authorisation in substitution for it;
or
 - allow the original authorisation to remain in effect.

²⁴ Commerce Commission, *Decision No. 238: New Zealand Kiwifruit Exporters Association (Inc), New Zealand Kiwifruit Growers, New Zealand Kiwifruit Coolstorers Association (Inc)*, 13 September 1989 at paragraph 29.

133. Unlike the Australian Trade Practices Act, the Act provides no direction on how the Commission should exercise its discretion and choose among each of the four options open to the Commission.
134. The Commission considers that the distinction between “amending the authorisation” and “revoking the authorisation and substituting a further authorisation” under the Act also depends on the degree of change to the authorisation that is required. The *Kiwifruit Decision* described an amendment to an authorisation as being appropriate when all the basic elements of the facts and reasoning on which the determination was based are still in place, but some material detail or details should be altered.²⁵ Amendment of the existing authorisation is appropriate where it becomes apparent that the conduct has changed in a minor way, or the benefits or detriments (or both) associated with the conduct in question differ in a minor way from those on which the authorisation was based, so that the authorisation should remain in force fundamentally unchanged but amended to reflect changes that may be required to ensure the benefits of the conduct are in future realised.
135. Revocation is appropriate where it becomes apparent that the benefits of the conduct in question do not outweigh the detriments associated with the lessening in competition.
136. Revoking and substituting a new authorisation is appropriate when the benefits or detriments associated with an authorisation have fundamentally altered, so that a ‘fresh authorisation’ is justified. An amendment would be appropriate where it is proposed to alter the existing authorisation but not to the extent that it would become, in effect, a new authorisation. The existing authorisation would remain fundamentally unchanged, if it were ‘amended’. Revocation and substitution of a fresh authorisation would be appropriate where it becomes apparent that the conduct has changed or the benefits or detriments (or both) associated with the conduct in question differ significantly from those on which the authorisation was based, so that a new consideration of the matter is warranted.
137. In each case the Commission must exercise its discretion based on the facts of the particular situation before it.

The Commission’s Approach to the Exercise of its Discretion

138. The NZRU submitted that the approach of the Commission must be different depending on whether it is deciding to revoke an authorisation altogether, or to amend an authorisation. Further, amendment to an authorisation was appropriate here when all the basic elements of the facts and reasoning on which the determination was based are still in place but some material detail or details should be altered.

²⁵ Commerce Commission, *Decision No. 238: Revocation of Decision 221*, 13 September 1989, p5.

139. As set out in the *Pohokura Decision*,²⁶ the Commission considers that once it is satisfied that one of the three qualifying criteria has been met, then it has to determine, in the exercise of the discretion, whether or not such change of circumstances was of a kind, or of such magnitude or significance to warrant revoking the authorisation previously granted. The determination of public benefit and detriment is relevant to both determining whether there has been a material change of circumstances and, if so, whether such change warrants revocation of the authorisation. While a public benefit/detriment analysis is not explicitly required under s 65 of the Act, the Commission considers it relevant, and consistent with Commission practice in considering authorisation applications, to have regard to relevant benefits and detriments when considering how to exercise its discretion under s 65.
140. The NZRU considers that if the Commission has grounds to reconsider under s 65(1) of the Act, it should carry out a ‘now versus then’ comparing the authorisation with the proposed variation, and the situation with no authorisation at all. Its approach is explicitly one of restoring the status quo under the salary cap:

The NZRU’s request is for a variation of an existing authorisation. Accordingly it is necessary to consider whether the variation would have affected the Commission’s original decision. The counterfactual therefore remains the same one considered by the Commission in its authorisation decision. The NZRU has not applied for a completely new authorisation.

Accordingly the NZRU’s view is that the counterfactual does not include the present authorisation that is in force. The salary cap (including the proposed relief) should be compared with the original counterfactual where there is no salary cap.

141. The Commission concludes that when it decides that it has grounds to reconsider under s 65(1) of the Act, it should carry out a ‘now versus then’ comparison of the circumstances surrounding the authorisation at both the present time and at the time it was granted, as follows:
- if, despite false or misleading information, the circumstances now are the same as they were at the time of the authorisation, the Commission should leave the existing authorisation in place. In the Commission’s view, this will seldom occur when false or misleading information has been relied on and rarely where there has been a material change in circumstances; and
 - if, despite false or misleading information, circumstances are fundamentally unchanged and have altered in only a minor way, particularly as to the benefits and detriments of the authorised arrangement, the Commission may amend the authorisation, for example, by changing a condition on which it was granted, in order to ensure that the anticipated net benefits will in fact be achieved.
142. Alternatively, if circumstances have changed, particularly as to the benefits and detriments associated with the authorised arrangement, then the Commission should

²⁶ Commerce Commission, *Decision No. 581: Revocation of Decision 505*, 2 June 2006.

consider whether or not to amend the existing authorisation, revoke the existing authorisation or revoke it and substitute a new authorisation. In making this decision, the Commission must compare the future benefits and detriments both ‘with and without’ the authorisation, as follows:

- if mere revocation is being considered, the Commission should compare benefits and detriments in the future with the extant authorisation continuing in force, against benefits and detriments in the future with no authorisation in force; but
- if, as in this case, either amendment of the authorisation or substitution of the extant authorisation by a fresh authorisation is being considered, the Commission should compare benefits and detriments in the future with the extant authorisation continuing in force, with benefits and detriments in the future with an amended or substituted new authorisation in force.

143. The Commission must be satisfied that the proposed amendment or substitution is necessary to ensure that the public benefits claimed for the conduct are in fact realised. This means that an amendment or a substitute authorisation should be tailored to meet the change in circumstances or in benefits or detriments.

Question 3: The Commission seeks the views of interested parties on whether the approach to the exercise of its discretion, as described above, is appropriate.

Conclusion on the Exercise of Discretion

144. The Commission’s preliminary conclusion is that it has grounds to consider whether to revoke, amend or grant a further authorisation in substitution for that granted in Decision 580. It has determined how to exercise its discretion in accordance with the methodology described above.

145. The Commission considers that where an amendment to an existing authorisation is considered, it is for the parties to frame that variation so that the Commission can fully test the potential competition issues. NZRU submits that an amendment is appropriate here in the situation where all the basic elements of the facts and reasoning on which the determination was based are still in place, but some material detail or details should be altered. The variation sought is to allow the NZRU and the NZRPA to agree to vary the CEA to provide salary cap relief to Provincial Unions for the 2007 Air New Zealand Cup competition on the basis that:

- "the additional portion of the notional value for those players selected in final Rebel Sport Super 14 squads as replacements for the prospective All Blacks who are conditioning plus the notional values for the additional Wider Training Group players who would not otherwise had [sic] been selected in the Wider Training Group should be discounted to what they would have been if they had not been selected in Rebel Sport Super 14 squads or Wider Training Groups respectively; and

- a flat discount of \$18,000 for each of the 32 current All Blacks plus Greg Somerville, who are most likely to comprise the 30 players selected in the Rugby World Cup squad contracted to each Provincial Union would be applied to the 2007 salary cap year but only to the extent that a Provincial Union can show that they have incurred additional costs as a result of the All Blacks being away at the Rugby World Cup 2007."

146. The Commission notes that, absent **any** authorisation, the Salary Cap Arrangements and the player movement regulations would each result or be likely to result in a lessening of competition, or would be deemed to result in a lessening of competition, in respect of the premier player services market.²⁷ In this context, the Commission's preliminary conclusion is that it considers that the variation proposed by the NZRU in its Application can be categorised as the authorisation remaining in force fundamentally unchanged but amended to reflect changes that may be required to ensure the benefits of the conduct are in future realised.
147. Accordingly, as part of this Draft Determination the Commission compares the benefits and detriments in the future with the authorisation granted in Decision 580 continuing in force, with benefits and detriments in the future with an amended authorisation in force.

Question 4: On the assumption that the Commission has established grounds pursuant to s 65(1), the Commission seeks the views of interested parties on whether the circumstances outlined by the NZRU are appropriately dealt with by an amendment to the authorisation granted in Decision 580.

ANALYSIS OF BENEFITS AND DETRIMENTS OF VARYING THE AUTHORISATION GRANTED IN DECISION 580

148. This analysis involves the following sequence of steps:

- defining the factual and counterfactual scenarios;
- specifying the relevant markets;
- considering the impact on competition; and
- analysing the public benefits and detriments.

149. Each is now considered in turn.

²⁷ Commerce Commission, *Decision No. 580: New Zealand Rugby Football Union Incorporated*, 2 June 2006 at paragraph 814.

The Factual and Counterfactual Scenarios

150. Applying the analytical framework as outlined in paragraph 142, the Commission now considers the factual and counterfactual scenarios that it should use for the public benefits and detriments analysis.
151. Applying the analytical framework discussed previously, the Commission's preliminary view is that the relevant scenarios are as follows:
- the factual: a continuation of the existing authorisation, amended by the variation to provide relief for the impact of the Rugby World Cup for the 2007 year only; and
 - the counterfactual: a continuation of the existing authorisation during 2007.
152. In considering the characteristics of the factual and counterfactual, it is important to recognise that both share two common features, at variance with 'normal' years, namely, the inflation of aggregate notional values through the addition of the replacements for the players in the conditioning programme, and the salary cost of the replacements for the absent All Black players. Provincial Unions have reported that the latter aspect in particular would be likely to create an upward pressure on the salaries of replacement players, because of the 'tightness' produced in the premier player services market. The 22 conditioning players, and the wider group of 33 All Blacks, tend to be concentrated in the five largest Provincial Unions, which are also the ones closest to their salary caps.
153. The need to find replacements for the absent All Blacks will recreate 'tightness' in the premier player services market, relative to what would otherwise have been the case. For example, players next in line to absent All Black in Air New Zealand Cup squads may be able to drive hard bargains in negotiations with their Provincial Unions ([]). In addition, the conditioning programme will raise the notional values attached to a number of players. Both will contribute to raising the salary cap values of most Provincial Unions in the Air New Zealand Cup competition, and there is a risk that a small number ([]) may breach their caps.
154. The difference between the factual and counterfactual scenarios lies in how the Provincial Unions would be able to react to the salary cap implications of the two Rugby World Cup-related developments applying in 2007.
155. In the factual scenario, where relief would be provided by means of the variation, all Provincial Unions - including those in danger of breaching their caps - would in effect be 'compensated', such that they would be left in the position they would have been in without the Rugby World Cup. The premier player services market would still be tighter than in a normal year, but the Provincial Unions that might have breached would not now do so. They would be able to recruit replacements for their absent All Blacks, albeit at a much lower level, and would not have to take

the step of loaning players to mitigate the risk of breaching their caps. Provincial Unions in this position have indicated various options are being considered, ranging from the relative inexpensive one of bringing on junior players in their development squads, to the more expensive one of importing overseas players. The latter does not seem viable for a potentially breaching Provincial Union, given the \$18,000 maximum figure put forward by the NZRU.

156. In the counterfactual scenario, where no relief would be provided, Provincial Unions in risk of breaching their caps would be forced to reduce their salary components contributing to the caps. This would most likely be done by loaning players to other Provincial Unions, either for the whole competition or for a portion of it. The effect of this would be to lower those players' salary contribution to the cap, as explained earlier. Potentially breaching Provincial Unions would not only lose their All Blacks, but also have to loan players to avoid breaching their caps.
157. Loaning the higher value players would have a bigger impact in this regard, but also have a greater effect in weakening the loaning Provincial Union's squad. One possibility canvassed is that Provincial Unions could avoid their salary caps by loaning All Blacks, even though the players would not be available to play. However, the NZRU would regard this as not being a legitimate loan under the salary cap regulations. It seems likely that lower level players would be loaned, but they presumably would still have to be of sufficient merit to be acceptable to the borrowing Provincial Union, and to justify displacing one or more of its existing players. Loaned players are likely to get more playing time than had they remained with the loaning Provincial Union. It also seems a likely consequence that some lower level players would be driven overseas in order to pursue their rugby playing careers.

Question 5: The Commission seeks further views on whether the factual and counterfactual scenarios described in this Draft Determination are appropriate for conducting the public benefits/detriments analysis?

Market Definition

158. In Decision 580 the Commission defined the markets relevant to its consideration of the Application as being:
- the market for the provision and acquisition of premier rugby player services;
 - the market for the provision and acquisition of non-premier rugby player services; and
 - the market for the provision and acquisition of sports entertainment services.
159. Of these, the first and the last are relevant to the Application for variation of the authorisation. Neither the NZRU, nor any other interested party, have raised any

objections to the appropriateness of these markets, and so the Commission proposes to continue to use them.

Question 6: The Commission seeks further views on whether the markets described in this Draft Determination are appropriate for analysing the competitive impact of the proposed variation.

Impact on Competition

160. In Decision 580 it was considered that there would be no lessening of competition in the sports entertainment services market from the salary cap, and so it is likely that the amendment would have no impact on this market. Consequently, the sole focus is on the likely impact on competition of the amendment in the premier player services market.
161. The Commission's position in Decision 580 was that a salary cap would reduce competition in this market by imposing constraints on the mix of both the quality and quantity of player services that certain larger-resourced unions might otherwise acquire, and would result in situations where certain players would be paid less than they otherwise would.
162. It is worth noting that the 'problem' the amendment seeks to address is really an artefact of the salary cap regulations: if non-available players were not to be included in the salary cap, then the problem would be less significant. It is the expansion of the sizes of squads, and hence of notional and actual salaries, through the inclusion of non-available players that lies at the root of the issue. It is for this reason that the conditioning programme and All Blacks' absence will occur under both the factual and the counterfactual: the change proposed in the factual seeks to address the issue indirectly by varying the cap.
163. A second general issue concerns the possible impact on the Provincial Unions if no relief through the proposed variation were granted. Information provided by the NZRU as at January 2007 on the salary cap positions of each Provincial Union, based on their current contractual commitments to players, showed that only one Provincial Union was breaching the cap, and one other might do so once it had finalised all of its player contracts. However, it is important to recognise that a salary cap breach is determined only at the end of the year, and there are many factors that influence whether a Provincial Union will actually breach.
164. These factors include the amount of injuries sustained by players in the squad, and the amount of loan activity undertaken during the year. In particular, it is thought that the loaning of players is one of the key mechanisms used by Provincial Unions to manage their salary cap positions. In addition, they may contract in such a way as to breach the cap on a provisional basis, and rely on the inevitable injuries to players to give them the necessary relief to bring their salary outlays within the cap.

165. Overall, the evidence suggests that the two Rugby World Cup-related developments in 2007 are likely to cause no more than one to three out of the 14 Provincial Unions to breach their caps, in the absence of any relief being given, and they themselves not taking remedial action. Any such breaches seem likely to be small. However, the NRZU has informed the Commission that it is their understanding that all Provincial Unions are committed to staying within the cap, so that in the absence of relief, they individually would take steps to ensure this happens.
166. In broad terms, as any effective salary cap is regarded as being anti-competitive, the implications of a relaxation of the cap - as through the proposed amendment - would be pro-competitive. Hence, the factual scenario would in principle be more competitive than the counterfactual.
167. The main difference between the two scenarios is that in the factual the two developments would be 'neutralised' by the proposed temporary amendment to the salary cap, whereas under the counterfactual they would not – rather, there would be some re-distribution of talent to the extent that some unions would be forced to loan players in order to remain within the cap. As it is likely that mainly junior players would be loaned, the overall impact in the premier player services market would be small.

Public Benefit/Detriment Analysis

168. In Decision 580 it was found that the principal detriments flowing from a salary cap stemmed from: the misallocation of players; the implementation, monitoring and compliance costs; and the loss of player talent overseas. The benefits flowed primarily from greater spectator and TV viewer enjoyment of games. Here, the focus is on the incremental changes to both detriments and benefits brought about by the amendment in the factual, relative to the counterfactual with the original authorisation. These changes are difficult to analyse since the counterfactual involves a material change compared to what had been expected at the time of the authorisation.
169. The NZRU applied the test as to whether there would have been any difference to the assessment of benefits and detriments if the proposed relief had been taken into account at the time of Decision 580. It concluded that the introduction of this factor would have made no significant difference.
170. The NZRU submitted that the salary cap (including the proposed relief) should be compared with the original counterfactual where there is no salary cap. As the proposed relief does not significantly change the benefit/detriment analysis in Commission decision 580 the Commission should approve the proposed variation.
171. The NZRU went on to elaborate that neither the benefits nor the detriments would be materially changed, and to claim that in these circumstances "it is appropriate for the Commission to approve a variation to the authorisation to include the proposed relief."

172. When asked to reconsider this view in light of the Commission’s suggested factual/counterfactual scenarios, as outlined previously, the NZRU considered that the variation should still be approved because there would be a small increase in net benefits, as detriments would reduce slightly without any apparent impact on public benefits. The reduction in detriments is put down to competition being reduced slightly less in the factual relative to the counterfactual, resulting in a slight reduction in the allocative efficiency losses and loss of player talent.
173. The Commission’s preliminary view is that the ‘incremental’ approach, based on the current authorisation with and without the proposed variation, is the appropriate analytical approach.
174. A summary of the Commission’s preliminary assessment of incremental detriments and benefits brought about by the proposed variation is shown in Table 2.

TABLE 2: Summary of Incremental Detriments and Benefits

Categories of detriments and benefits	Incremental Changes	
	Factual	Counterfactual
Detriments:		
<ul style="list-style-type: none"> Misallocation of players 	No change	Small increase. Minor disruption to squads from more loans of players.
<ul style="list-style-type: none"> Implementation / monitoring / compliance costs 	↑ costs involved in vetting applications for AB replacements.	↑ costs of loaning more players. ↑ scrutiny to check for enhanced risk of breaches.
<ul style="list-style-type: none"> Loss of player talent overseas 	No change.	↑ loss of players overseas.
Benefits:		
<ul style="list-style-type: none"> Greater spectator and TV viewer enjoyment of games 	No discernable change.	No discernable change.

175. The absent All Blacks would have to be replaced under both scenarios, and in the counterfactual the increase in notional values from the Super 14 replacements would also have an impact. Hence, there would be changes forced on Provincial Unions’ Air New Zealand Cup squads in both scenarios, and the premier player services market would be likely overall to ‘tighten’. Provincial Unions will have to

reach further down the ranks of players to complete squads. These ‘out of trend’ features have to be factored into both scenarios. The difference between the two scenarios lies in whether salary cap relief is provided or not. The salary cap relief in the factual scenario is aimed at preserving the status quo, in the sense that it would be the outcome that would have happened if 2007 had not been a Rugby World Cup year. The incremental detriments and benefits are assessed in this light.

176. Consequently, in terms of incremental detriments, the factual results in none, except for a small additional cost in vetting, monitoring and compliance costs associated with the applications by the Provincial Unions for the use of up to \$18,000 relief for each All Black replacement (33 in all). Otherwise, the costs involved in preparing for the relief scheme have already been incurred, and being sunk, are no longer relevant.
177. In contrast, the counterfactual results in the salary cap biting deeper. Players may have slightly less ability to play where they would like, and some Provincial Unions might not be able to retain players that they would like to keep. There may be some minor disruption to squads. Indeed, some Provincial Unions may have to loan more players, and incur the administrative cost that this involves. Loaning a player can be a time-consuming and difficult process as the loaning Provincial Union needs to reach agreement with both the player and with the borrowing Provincial Union. The process can take weeks, starting with presenting a proposal to a player, giving him and his family time to consider the idea, and then organising the practical aspects. In addition, some players—especially those displaced by loan players in borrowing Provincial Unions—may chose to move overseas instead, adding to the loss of player talent.
178. On the benefits, it is important to note that 33 All Blacks would be removed from the Air New Zealand Cup competition in both factual and counterfactual scenarios. The impact of this, in terms of removing ‘star’ players, and possibly of making the competition more even, would thus occur in both scenarios. In Decision 580 the Commission concluded, on the basis of extensive econometric analysis, that it was not so much the evenness of competition, but the presence of star players, that attracted audiences and sponsors. This produced benefits from imposing the cap through the cap ‘forcing’ a more even distribution of quality players.
179. It seems likely that slightly more redistribution would occur in the counterfactual through the loaning of players, as it is in this scenario that the cap would impose a greater constraint. However, the calibre of players that would be loaned may not be that high. If the counterfactual only saw a distribution of more junior players, then the resulting benefits flowing from that redistribution might be negligible: the presence of Super 12 players was used as a measure of ‘star quality’ in the econometric analysis in the authorisation. This point is supported by the fact that the proposed relief is quite small, at \$18,000 per All Black—which is well under the average Air New Zealand Cup salary—implying that quality replacements could not be afforded, even if they were available.

180. Apart from the relatively minor nature of the changes discussed above, as the relief is only intended for a single year, the impact of the amendment on detriments and benefits would be likely to be further reduced. In the authorisation the Commission looked at these over a five year period, and so a change involving only one year out of five is likely to have a further diminished impact.

Balance of the benefits and detriments

181. Overall, on the basis of the information available, and analysis completed to date, there appears to be no difference in benefits in either scenario, and costs increase slightly in both, albeit to a lesser degree in the factual. As a cost avoided is equivalent to a benefit, it follows that there is a small incremental net benefit attached to the factual scenario over the counterfactual.

182. On balance, the Commission considers that all the basic elements of the facts and reasoning on which Decision 580 was based are still in place, but amendment to vary the CEA to provide the salary cap relief sought by the NZRU is likely to result in a small incremental net benefit being realised.

Question 7: The Commission seeks the views of interested parties on its preliminary assessment of the public benefits and detriments arising from the proposed variation.

183. The Commission considers that the amendment to the authorisation granted in Decision 580, as sought by the NZRU, is appropriately tailored to meet the change of circumstances.

PRELIMINARY CONCLUSIONS

184. The Commission's preliminary conclusions, on the information available to it at this time, are that:

- there has been a material change of circumstances since Decision 580 was granted;
- as a result, the Commission is satisfied that it may consider whether to revoke the authorisation, amend the authorisation, or revoke and grant a further authorisation in substitution for Decision 580;
- after considering whether to revoke, amend, or revoke and grant a further authorisation in substitution for, Decision 580, the Commission should exercise its discretion to amend the authorisation given in Decision 580; and
- the Commission has taken into account that the basic elements of the facts and reasoning on which the determination was based are still in place, but some material detail or details should be altered and will result in a small incremental net benefit attached to the factual scenario over the counterfactual.

DRAFT DETERMINATION

185. If the Commission’s preliminary conclusions are confirmed after its consideration of submissions on this draft determination, the Commission proposes to amend the authorisation granted in Decision 580.

Question 8: What matters not covered by this Draft Determination should be taken into account by the Commission before it makes its final determination?

186. At this stage, the Commission proposes, pursuant to s 65(1)(b) of the Act, to amend the authorisation granted in Decision 580 so that the NZRU may:

- enter into an agreement with the NZRPA to provide salary cap relief by amending clauses 54.2 and 54.5 of the CEA, as well as introducing a definition for “relief player” into the CEA; and
- give effect to those amendments by implementing and giving effect to salary cap regulations, such authorisation to apply only insofar as the salary cap regulations implement and give effect to salary cap relief;

as specified in Appendix 6 of the NZRU’s Application.

Question 9: The Commission seeks the views of interested parties on the drafting of a suitable amendment to provide sufficient certainty as to the scope of the salary cap relief in the salary cap framework.