

## **Commerce Commission**

### **Decision No. 601**

Determination pursuant to the Commerce Act 1986 in the matter of an Application made by the New Zealand Rugby Union (NZRU) to vary the authorisation granted in Decision 580.

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

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

**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 determines, pursuant to s 65 of the Act, to amend Decision 580 to provide salary cap relief for the 2007 year only, subject to specific conditions.

**Date:** 11 May 2007

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## EXECUTIVE SUMMARY<sup>1</sup>

### 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 (**the Application**).
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 were expected to be selected as members of the All Black squad for the Rugby World Cup in 2007. This conditioning programme overlapped with the first seven rounds of the Rebel Sport Super 14 competition, which commenced on 2 February 2007. As a consequence, the 22 players were unavailable for selection for that period, and the Super 14 franchises affected 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. The NZRU seeks approval to vary the authorisation granted in Decision 580 through implementing the following two measures:
  - discounting the notional values of the players who were selected in Super 14 squads as replacements for the players who were 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

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

\$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.

4. The NZRU and the NZRPA have agreed to amend the CEA consistent with these two measures, conditional on Commission approval to vary the authorisation, in order to provide relief from the salary cap for the 2007 year only.

### **Commission Processes**

5. On 16 March 2007, the Commission issued a Draft Determination. Its preliminary conclusions were: that there had been a material change of circumstances; that the Commission had grounds to consider whether to revoke, amend, or revoke and grant a further substitution for Decision 580; and that the Commission should exercise its discretion to amend that authorisation.
6. Written submissions on the Draft Determination were received from four parties. The NZRU expressed its support for the conclusions reached by the Commission in the Draft Determination. The Canterbury Rugby Football Union (Canterbury RFU), the Crusaders Franchise and the Wellington Rugby Football Union (Wellington RFU) were also in support of the Commission's Draft Determination, but expressed concern about the adequacy of the level of relief proposed by the NZRU in its Application.

### **Grounds to Reconsider the Authorisation**

7. Section 65 of the Act enables the Commission either to alter, to revoke, or to revoke and substitute authorisations made under s 58.
8. 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*

9. 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 of the Rugby World Cup 2007 conditioning programme (and any implications of these factors on the Salary Cap Arrangements). The NZRU argued 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) it would be cancelled, and that it had sought to resist the argument for salary cap relief for the absence of the 30 Rugby World Cup 2007 All Blacks.
10. The Commission's conclusion is that in this case, there existed an objective basis for the NZRU's working assumption that the framework the Commission intended to authorise in June 2006 would accommodate the impact of the Rugby World Cup 2007. This

working assumption is not properly regarded as “false or misleading” in terms of s 65(1)(a).

### *Material Change of Circumstances*

11. The NZRU advised that since Decision 580, it had worked through the practical implications of implementing both the conditioning programme and the All Blacks’ attendance at the Rugby World Cup in 2007. This 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.
12. At the time the Commission granted the authorisation in Decision 580, the evidence did not indicate that “exclusions” and other exceptions in the salary cap framework were necessary to take account both of the impact of absent All Blacks for the Air New Zealand Cup in 2007, and of the flow-on effects of a conditioning programme. The NZRU and the NZRPA 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. 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, the Commission considers that a “change of circumstances” has occurred.
13. The Commission considers that, on the evidence before it, the foundation on which the NZRU based its working assumption (that the framework that the Commission intended to authorise in June 2006 would accommodate the impact of the Rugby World Cup 2007) no longer holds. This change has an impact on the conduct authorised, and on the benefits and detriments, that is material. Consequently, the Commission considers that, on the evidence before it, there has been a material change of circumstances in terms of s 65(1)(b).
14. The Commission is, therefore, satisfied that there has been a material change of circumstances since the authorisation was granted.

### **Exercise of Discretion to Reconsider the Authorisation**

15. 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.
16. The Commission considers that if the circumstances have changed, particularly as to the benefits and detriments associated with the authorised arrangement, the Commission must compare the future benefits and detriments both ‘with and without’ the authorisation. Specifically, 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 in a form 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.
18. The Commission, therefore, will exercise its discretion and reconsider the authorisation granted in Decision 580.

### **ANALYSIS OF THE NZRU'S APPLICATION**

19. The Application in the present case is for an amendment to an existing authorisation.
20. The Commission considers that in these circumstances, 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 an amended or substituted new authorisation in force.

### **Factual and Counterfactual**

21. To analyse public benefits and detriments arising from an arrangement, the Commission compares the factual with the counterfactual. In this instance, the Commission's 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.
22. Having described the relevant factual and counterfactual scenarios, the Commission now defines the affected markets, considers the impact on competition, and analyses the public benefits and detriments.

### **Markets**

23. 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**

24. The sole focus is on the likely impact of the proposed variation on competition in the premier player services market.
25. 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.

26. 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.
27. The main difference between the two scenarios is that in the factual the two developments would be ‘neutralised’ to a degree by the proposed temporary amendment to the salary cap, whereas under the counterfactual they would not, but 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

28. 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.
29. A summary of the Commission’s 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
<b>Detriments:</b>		
<ul style="list-style-type: none"> <li>▪ Misallocation of players</li> </ul>	No change.	Small increase. Minor disruption to squads from more loaning of players.
<ul style="list-style-type: none"> <li>▪ Implementation / monitoring / compliance costs</li> </ul>	↑ costs involved in vetting applications for All Blacks replacements.	↑ costs of loaning more players. ↑ scrutiny to check for enhanced risk of breaches.
<ul style="list-style-type: none"> <li>▪ Loss of player talent overseas</li> </ul>	No change.	↑ loss of players overseas.
<b>Benefits:</b>		
<ul style="list-style-type: none"> <li>▪ Greater spectator and TV viewer enjoyment of games</li> </ul>	No discernable change.	No discernable change.

30. Overall, on the basis of the information available, and the analysis done, 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.

### **Adequacy of the Salary Cap Relief**

31. During the Commission's consideration of the Application, it received submissions from the Wellington and Canterbury RFUs, and the Crusaders Franchise, that the salary cap relief as proposed by the NZRU would be inadequate, and that alternative approaches should be considered.
32. The following factors have guided the Commission in considering this issue:
- where an amendment to an existing authorisation is considered, it is for the Applicant(s) to frame that variation;
  - the NZRU submitted the Application based on a conservative approach to the relief, partly to ensure that the relief sought did not unduly disturb the balance of benefits/detriments arrived at in Decision 580;
  - the NZRU submitted that the alternative approaches proposed by the Wellington and Canterbury RFU's may have resulted in excessive salary relief, which if so, would likely disturb the balance of the benefits/detriments arrived at in Decision 580;
  - the Commission conducted its analysis based on the information provided by the Applicant and interested parties, and as a result, it formed the view that the proposed amendment would be likely to result in a small net benefit; and
  - the Commission considers that the \$18,000 relief takes account of the need to maintain the tightness of the salary cap.
33. The Commission concludes, therefore, that it is appropriate to consider the Application as the Applicant has framed it.

### **Conclusions Leading to the Determination**

34. The Commission's conclusions are that:
- there has been a material change of circumstances since Decision 580 was granted;
  - as a result, the Commission has grounds 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.

### **Determination**

35. The Commission now determines, pursuant to s 65(1)(b) of the Act, to amend the authorisation granted in Decision 580 so that the NZRU may:
- (a) enter into an agreement with the NZRPA to provide salary cap relief by amending clauses 54.2 and 54.5 of the CEA in accordance with the amendments set out in Appendix A to this Determination, as well as introducing a definition for “relief player” into the CEA in accordance with the amendments set out in Appendix A (together the **salary cap relief amendments**); and
  - (b) give effect to the salary cap relief 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 the salary cap relief amendments.

## 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**)<sup>2</sup> with the New Zealand Rugby Players' Association (the **NZRPA**). In particular, the NZRU has made an 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) (**the Application**).
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 16 March 2007, the Commission issued its Draft Determination. Its preliminary conclusions were: that there had been a material change of circumstances; that the Commission had grounds to consider whether to revoke, amend, or revoke and grant a further substitution for Decision 580; and that the Commission should exercise its discretion to amend that authorisation. Further, the Commission concluded that, if the preliminary conclusions reached in the Draft Determination were confirmed, it proposed amending the authorisation granted in Decision 580 to provide salary cap relief for the 2007 year only.
4. The Commission received submissions on its Draft Determination from the NZRU, the Wellington Rugby Football Union (**Wellington RFU**), the Canterbury Rugby Football Union (**Canterbury RFU**), and the Crusaders Franchise. Further information and comment was sought, and obtained from the NZRU, on certain aspects of the other submissions, viz the alternative approaches to the proposed salary cap relief put forward by the Wellington RFU, the Canterbury RFU and the Crusaders Franchise in their original submissions on the Application.
5. No interested party submitted that the Commission should hold a conference on the matter. The Commission itself did not consider that a conference was necessary, and no conference was held prior to the release of this Determination.

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

## THE PARTIES

### NZRU

6. 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.

### Provincial Unions

7. 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

8. The RPC is a registered trade union and an incorporated society with around 400 members. 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

9. 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.
10. In summary, the NZRU sought authorisation for two arrangements:<sup>3</sup>
- 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).
11. 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 more even distribution of playing talent, thereby contributing to a more even competition."
12. In Decision 580, the Commission set 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.

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<sup>3</sup> 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.

13. 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.
14. 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 previous player transfer regulations but no salary cap.
15. 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.
16. 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 were discounted to present values.
17. 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 (i.e., binding) it would be, and how effectively it would be monitored and enforced. In addition, the initial level of the cap appeared to have been set at a level that is unlikely 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**

18. 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.
19. The Commission considered that the Proposed Arrangements would be likely to result in:
  - some allocative inefficiency as measured by player ‘misallocations’;
  - productive inefficiencies arising from compliance costs being imposed on all unions, and from inquiry costs that would be imposed upon unions who are alleged to have breached the salary cap;
  - some loss of player talent arising from an increase in outward migration of rugby players in the younger and mid-range levels to some degree; and

- no significant innovative efficiency losses or reductions in player skill levels.

### **Public Benefits**

20. The Commission considered direct public benefits under the following headings: spectator enjoyment, television viewer enjoyment, and increased funding to Provincial Unions. It also considered a range of claimed indirect benefits resulting from enhanced performances by international New Zealand sides, and concluded as follows:
- in relation to spectator enjoyment, the Commission treated conservatively expected benefits to at-match spectators, and assumed that these benefits would flow only gradually over time;
  - in relation to television viewer enjoyment, while little or no public benefits were likely to flow from increased uncertainty of outcome of Premier Division matches, the Commission concluded that public benefits were likely to flow from improved contest quality;
  - in relation to increased funding to Provincial Unions, a more attractive domestic competition would likely generate some public benefits; and
  - in relation to indirect benefits, such as better performance of representative teams, and enhanced financial performance of the Provincial Unions (and the NZRU), these effects were likely to be weak and, therefore, no significant weight was attached to them.

### **Conclusions**

21. Balancing the benefits against the detriments, quantified and unquantified, the Commission's assessment indicated a net public benefit in the order of \$2 million in present value terms over five years.
22. 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**

23. 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.

**AIR NEW ZEALAND CUP SALARY CAP RULES**

24. 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. It is only the latter salary that is subject to the salary cap authorised in Decision 580.

25. 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.

### **Notional Values**

26. Under salary cap rules, 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.
27. 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.
28. 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 Air New Zealand Cup level. For current All Blacks the discount is 60%, meaning, for example, that a salary actually paid of \$40,000 would count only as \$16,000 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**

<b>Notional Values</b>	
•	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.
•	
<b>Discounts</b>	
•	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.

29. 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.
30. 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**

31. 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.
32. 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.
33. 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.

34. 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.
35. 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 afford 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**

36. 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.
37. 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).
38. 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

39. The NZRU has advised that since Decision 580 there have been two new, but temporary, developments related to the 2007 Rugby World Cup, 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 were expected to be members of the All Black squad for the Rugby World Cup in 2007. This conditioning programme overlapped with the first seven rounds of the 2007 Rebel Sport Super 14 competition (that started on 2 February). It meant that the 22 players were not available for that period, and therefore, had to be replaced in the Super 14 squads. The replacements gained notional values that would 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.
40. 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 cater appropriately 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.
41. 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.
42. The potential for breaches of the salary cap would be avoided by the implementation of the proposed two measures, which are outlined later in this report. 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**

43. 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 were selected in Super 14 squads as replacements for the players who were 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.
44. The proposal is explained below in more detail.

### **Discount of notional values**

45. On 18 August 2006, the NZRU Board approved the implementation of a conditioning programme for 22 players who were 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 meant that the conditioning programme overlapped with the first seven rounds of the Super 14 competition (which started on 2 February 2007). It meant that the 22 players were not available for that period, and therefore were required to be replaced in the Super 14 squads.
46. 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 were expected to be drawn from the Wider Training Groups, which are groups of seven or eight players attached to each Super 14 squad who train with the squad and are available to fill gaps created by injuries. Each Wider Training Group 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 Group 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.
47. 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.
48. Hence, the NZRU is proposing to discount the increases to the level 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 had otherwise. These two changes would result in there being no additional notional values being created in total.<sup>4</sup>

### **Discount for Absent All Blacks**

49. 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 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.
50. 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'.
51. 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, he could be paid for the whole season, regardless of the number of games played, or he could be put on a development contract for a minimal retainer, but be paid at a weekly rate for the weeks in which he plays games.
52. 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 in their submissions consider this figure to be too low. This is discussed later in this report. 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).
53. 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

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<sup>4</sup> 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.

uncertainty over the number of games played, subject to the maximum relief being \$18,000 for the season.

## **VIEWS OF INTERESTED PARTIES ON THE APPLICATION**

54. As noted previously, the Commission received written submissions on its Draft Determination from four parties, although Mr Hamish Riach made the same submission in his capacity as CEO for the Canterbury RFU and for the Crusaders Franchise.
55. In its initial submissions on the Application dated 26 January 2007, the Canterbury RFU and Crusaders Franchise agreed with the proposed relief regarding the conditioning programme, but disagreed that the proposed relief for the absence of the All Blacks from the Air New Zealand Cup should be limited to a flat discount of \$18,000 per replacement player. In addition, these parties submitted that, in making the salary cap calculation in 2007, a Provincial Union should be entitled to exclude from that calculation: the notional value of a player that is included in the All Blacks 2007 Rugby World Cup squad, and the actual payments made by that Provincial Union to that player. The Canterbury RFU and Crusaders Franchise expressed their support for the Commission's Draft Determination in their submissions dated 29 March 2007, although they again raised concern about the adequacy of the level of relief proposed by the NZRU in the Application.
56. In its initial submission on the Application dated 25 January 2007, 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. In its response to the Draft Determination received on 2 April 2007, the Wellington RFU stated that, while it was disappointed that the suggestions presented in its initial submission had not been incorporated in part or full in the Draft Determination, it had no additional comments or submissions to make on the proposed variation to the salary cap.
57. The Commission invited the NZRU to comment on the submissions made by the Wellington RFU, the Canterbury RFU, and the Crusaders Franchise, regarding their alternative approaches to the salary cap relief proposed in the NZRU's Application.
58. The NZRU's response was that its approach to salary cap relief had always been to try to remove the additional salary cap costs associated with the absence of the All Blacks from the entire Air New Zealand Cup competition, while at the same time balancing the interests of all Provincial Unions participating in that competition, and keeping the players' interests in mind as reflected in a need to negotiate a variation to the CEA with the NZRPA. It notes that in non-Rugby World Cup years, the All Blacks would usually be expected to be available for at least part of the Air New Zealand Cup programme, so it was from this baseline position that NZRU has targeted its relief proposals.
59. The NZRU stated that when it considered the Canterbury and Wellington RFU proposals it reached the view that the adoption of either proposal would result in the granting of excessive salary cap relief, thereby significantly undermining the salary cap for 2007, which would have flow-on effects in later years. For example, the NZRU

estimated that adoption of the Wellington RFU model would give Wellington notional value relief of [ ], and Canterbury notional value relief of [ ], and would also give these unions an additional [ ] (Wellington) and [ ] (Canterbury)<sup>5</sup> relief by increasing the All Black discount to 100%. Further, the NZRU considered that applying the Canterbury RFU model would deliver even more relief as it would also provide relief to the extent a Provincial Union incurred additional contracting costs to replace the All Blacks.<sup>6</sup>

60. In the view of the NZRU, adoption of either of the alternative models would have resulted in Provincial Unions receiving salary cap relief that did not directly relate to the difference in costs associated with the All Blacks being absent from the entire Air New Zealand Cup competition as against the costs a Provincial Union would expect to face in a non-Rugby World Cup Year through the absence of the All Blacks at other international fixtures. Besides, the NZRU believed that the proposals would have also provided some avoidance opportunities by allowing Provincial Unions to “front-load”<sup>7</sup> payments in 2007. Accordingly, the NZRU considered that the proposed alternative models were not appropriate for delivering the appropriate level of salary cap relief.
61. The Commission’s response to these submissions, and how it proposes to address the relevant matters, is provided later in this report.

#### **FACTS RELEVANT TO RECONSIDERATION OF DECISION 580**

62. The NZRU advised it had made no decision prior to Decision 580 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.
63. 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

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<sup>5</sup> These figures are current estimates, but they could change depending on Provincial Union contracting behaviour during the year.

<sup>6</sup> In addition to the amounts set out in this paragraph, the NZRU noted that the Provincial Unions will also receive the notional value relief requested in the first part of the NZRU’s Application removing the 22 additional notional values occurring as a result of the conditioning programme.

<sup>7</sup> This refers to the practice of paying a player a higher amount in the initial part of the contract, and offsetting that during the remaining period of the contract.

- obtaining the NZRPA's support and agreement to aspects of the conditioning programme.
64. Accordingly, the NZRU advised that it had engaged in a consultation process with interested parties, including sponsors, broadcasters, the NZRPA, the Super 14 franchises, Provincial Unions and broadcasters. The NZRU advised that this process commenced around April 2006, and continued for several months thereafter.
65. 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."
66. 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 . . .
- ...the 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...
67. The NZRU advised that no consideration was factored into the final architecture to take account of the impact of the likely absence of the All Blacks from the 2007 Air New Zealand Cup 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.
68. 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".
69. 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.”)

70. 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.
71. 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.
72. The NZRU advised that it formed 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.
73. 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.
74. 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.
75. 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.

## **GROUNDS FOR RECONSIDERATION OF AN AUTHORISATION**

76. 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.

77. 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. Further, any assessment of the appropriate remedy will always be based on the facts, circumstances, and merits of the particular case before the Commission.

### **APPLICATION OF SECTION 65(1)**

78. In its Draft Determination, the Commission set out its preliminary view 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 not properly regarded as “false or misleading” in terms of s 65(1)(a) as the Commission considers that there existed an objective basis for the NZRU’s prediction as to future events in an area of accepted uncertainty;
- there has been a material change of circumstances in terms of s 65(1)(b) as 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 and this change has an impact on the conduct authorised and the benefits and detriments that is material; and
- in this case, the ground pursuant to s 65(1)(c) is not relevant.

79. 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.

80. For convenience, the grounds set out in s 65(1)(a) and (b) are considered in turn.

### **False or Misleading in a Material Particular?**

81. The NZRU accepts the Commission’s conclusion in its Draft Determination that the authorisation in Decision 580 was not granted on information that was false or

misleading in terms of s 65(1)(a) of the Act. No further submissions on this issue were provided.

82. 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. In dealing with this ground for reconsideration, the Commission takes the view that it has to determine if information provided to it was “false or misleading” and if that information was false or misleading in a “material particular”. Both limbs must be met to satisfy s 65(1)(a).

*False or misleading?*

83. 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. Further, 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.<sup>8</sup>
84. In 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.
85. The information in question involved predictions as to the future state of affairs in an area of accepted uncertainty (being the operation of the Air New Zealand Cup competition under the salary cap arrangements which, at the time, were still to be authorised). Although:
- the unavailability of All Blacks due to Rugby World Cup commitments in France in 2007 was explicitly recognised in Decision 580;
  - Provincial Unions and NZRPA were concerned in April and May 2006 that the issue of the salary cap implications of the conditioning programme needed to be addressed by the NZRU; and
  - 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 NZRU argued 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) it would be cancelled. Further, the NZRU submitted it had

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<sup>8</sup> *Heiber v Barfoot & Thompson Ltd* (Unreported HC Auckland, CT 165/98, 17 December 1999).

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. The NZRU also submitted that the information provided at the time of the authorisation was neither false nor misleading.

86. The Commission considers that, in this case, there existed an objective basis for the NZRU's working assumption that the framework that the Commission intended to authorise in June 2006 would accommodate the impact of the Rugby World Cup 2007. This working assumption is not properly regarded as "false or misleading" in terms of s 65(1)(a).

*Material particular?*

87. If the information was false and misleading, it would be so in a "material particular" as the facts in issue are relevant and significant in relation to the grounds on which the authorisation was granted.

**Material Change of Circumstances?**

88. The NZRU agrees with the conclusion reached by the Commission in the Draft Determination that there has been a material change of circumstances since the Commission granted its authorisation in Decision 580 in terms of s 65(1)(b) of the Act.
89. Section 65(1)(b) of the Act allows the Commission to reconsider the authorisation if there has been a material change of circumstances since the granting of the authorisation. 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?*

90. The NZRU, after consulting with All Black management, has advised that it is the intention of the All Black management to allow All Blacks to play in the 2007 Air New Zealand Cup only in certain circumstances, such as when a player needs to get match fit. However, the final decision on which, if any, All Black selected for 2007 Rugby World Cup plays in the Air New Zealand Cup competition before departing for the 2007 Rugby World Cup, will rest with the All Black's management.
91. At the time the Commission granted the authorisation in Decision 580, the evidence did not indicate that "exclusions" and other exceptions in the salary cap framework were necessary to take account of the impact both of absent All Blacks for the Air New Zealand Cup in 2007, and the flow-on effects of a conditioning programme. The NZRU and the NZRPA 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. 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, the Commission considers that a "change of circumstances" has occurred.

*Material?*

92. Section 65 is permissive rather than mandatory. The general tenor of its wording makes it clear that it requires something more than a merely trivial change.
93. The Commission considers that, on the evidence before it, the foundation on which the NZRU based its working assumption (that the framework that the Commission intended to authorise in June 2006 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. Consequently, the Commission considers that, on the evidence before it, there has been a material change of circumstances in terms of s 65(1)(b).

**Conclusion on Application of Section 65(1)**

94. The Commission is, therefore, satisfied that there has been a material change of circumstances since the authorisation was granted.

**EXERCISE OF THE COMMISSION'S DISCRETION****Discretion of the Commission**

95. 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 either:
- 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.
96. The Act provides no direction on how the Commission should exercise its discretion and choose among the four options open to it. 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 authorised conduct are realised.
97. Revocation is appropriate where it becomes apparent that the benefits of the conduct in question no longer outweigh the detriments associated with the lessening in competition.
98. 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 by an amendment. 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.

99. The Commission must exercise its discretion based on the facts of the particular situation before it. The Commission considers under the circumstances of this Application that it will exercise its discretion and reconsider the authorisation granted in Decision 580.

### **The Commission's Approach to the Exercise of its Discretion**

100. 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, the NZRU submitted that 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.
101. The Commission considers that it has to determine, in the exercise of the discretion, whether or not the change of circumstances is of a kind to warrant amending the authorisation previously granted. 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.
102. 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.
103. Alternatively, if circumstances have changed, particularly as to the benefits and detriments associated with the authorised arrangement, then the Commission should

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.

104. The Commission must be satisfied that the proposed amendment or substitution is in a form 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.

#### **ANALYSIS OF THE NZRU’S APPLICATION**

105. The Application in the present case is for amendment to an existing authorisation. The Commission has determined how to exercise its discretion in accordance with the methodology described above.

106. 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.<sup>9</sup> In this context, the Commission 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.

107. The Commission considers that in these circumstances, 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 an amended or substituted new authorisation in force.

#### **The Factual and Counterfactual Scenarios**

108. Applying the methodology as outlined earlier, in the Draft Determination, the Commission proposed the following factual and counterfactual scenarios for the public benefits and detriments analysis:

- 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
- counterfactual: a continuation of the existing authorisation during 2007.

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<sup>9</sup> Commerce Commission, *Decision No. 580: New Zealand Rugby Football Union Incorporated*, 2 June 2006 at paragraph 814.

109. The NZRU argued that if the Commission has grounds to reconsider under s 65(1) of the Act, it should carry out a 'now versus then' analysis comparing the authorisation with the proposed variation, and the situation with no authorisation at all. In commenting on the approach taken by the Commission in its Draft Determination, it stated:

The Commission's current approach to the counterfactual means an amendment to an authorised arrangement could only be granted where it increases net benefits. However, an amendment to such an arrangement may be necessary due to various changes in circumstances and arguably such an amendment should be permitted as long as overall benefits of the arrangement still outweigh the detriments and it should not matter whether incrementally the change increases or decreases net benefits as long as overall benefits do still outweigh detriments.

110. However, in the circumstances of this case, the Commission's view is that the relevant scenarios are as set out in the Draft Determination.
111. The Commission considers that the approach as set out in its Draft Determination represents the most pragmatic assessment of what would happen absent the authorisation. Moreover, it considers that such an approach is consistent with what the NZRU outlined in its Application of what would occur absent the authorisation, and it has received no evidence that would cause it to alter its views on the appropriate factual and counterfactual scenarios.
112. 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.
113. 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 an 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.
114. The difference between the factual and counterfactual scenarios in terms of the impact on competition in the premier player services market is determined by assessing 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. This is discussed below.

*Conclusion on the Factual and Counterfactual Scenarios*

115. The Commission concludes that for the purpose of considering this Application, the factual is 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 appropriate counterfactual is a continuation of the existing authorisation during 2007.
116. Having described the relevant factual and counterfactual scenarios the Commission proposes to adopt in considering this Application, the remainder of this analysis involves the following sequence of steps:
- specifying the relevant markets;
  - considering the impact on competition; and
  - analysing the public benefits and detriments.
117. Each is now considered in turn.

**Market Definition**

118. 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.
119. 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, has raised any objections to the appropriateness of these markets, and so the Commission proposes to continue to use them.

**Impact on Competition**

120. 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.
121. 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.



122. 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 relatively inexpensive one of bringing on junior players in their development squads, to the more expensive one of importing overseas players. The latter is not viable for a potentially breaching Provincial Union, given the \$18,000 maximum figure put forward by the NZRU.
123. In the counterfactual scenario, where no relief would be provided, Provincial Unions in risk of breaching their caps would be forced to reduce the 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 contributions to the cap, as explained earlier. Potentially breaching Provincial Unions would not only lose their All Blacks, but would also have to loan players to avoid breaching their caps.
124. 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.
125. 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.
126. 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.
127. 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 NZRU 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.

128. 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.
129. 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**

130. 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.
131. 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 to that assessment.
132. 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.
133. 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."
134. 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.

135. The Commission's view is that the 'incremental' approach, based on the current authorisation with and without the proposed variation, is the appropriate analytical approach.
136. A summary of the Commission's 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
<b>Detriments:</b>		
<ul style="list-style-type: none"> <li>▪ Misallocation of players</li> </ul>	No change.	Small increase. Minor disruption to squads from more loaning of players.
<ul style="list-style-type: none"> <li>▪ Implementation / monitoring / compliance costs</li> </ul>	↑ costs involved in vetting applications for All Blacks replacements.	↑ costs of loaning more players. ↑ scrutiny to check for enhanced risk of breaches.
<ul style="list-style-type: none"> <li>▪ Loss of player talent overseas</li> </ul>	No change.	↑ loss of players overseas.
<b>Benefits:</b>		
<ul style="list-style-type: none"> <li>▪ Greater spectator and TV viewer enjoyment of games</li> </ul>	No discernable change.	No discernable change.

137. 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.
138. 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. Otherwise, the costs involved in preparing for the relief scheme have already been incurred, and being sunk, are no longer relevant.

139. 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 may 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.
140. On the benefits, it is important to note that the All Blacks concerned 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.
141. 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.
142. 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.

### **Adequacy of the Relief**

143. Throughout this analysis, the Commission has assessed the benefits and detriments of the proposed amendment as framed by the NZRU in its Application. This is in accordance with the Commission's general approach that where an amendment to an existing authorisation is sought, it is for the Applicant to frame that variation so that the Commission can fully test the potential competition issues arising.
144. As noted previously, the Canterbury and Wellington RFUs, and the Crusaders Franchise, expressed concern during the Commission's consideration of this Application that the NZRU's proposed relief would not put the Provincial Unions back in the position they would have been absent the impact of the 2007 Rugby World Cup, and put forward alternative approaches to address those concerns.
145. The NZRU advised the Commission that the Provincial Unions were consulted about how much it would cost to replace the All Blacks absent at the 2007 Rugby World Cup. It stated that at the conclusion of this process, the costs were estimated as somewhere between [ ] and [ ].
146. The NZRU advised in its Application that, in relation to the aspect of the salary cap relief relating to the discounting of the salary of absent all Blacks from the salary cap "... it adopted a conservative approach to relief in this instance with the \$18,000 being at the lower end of the Provincial Unions' estimates of the additional costs they will face." Further, the NZRU stated that it adopted this approach because it considered it was the best way of ensuring that the relief did not alter the Commission's previous benefits/detriment analysis, and was reflected in the conclusions of its economics consultants, Brown, Copeland & Co. Ltd. The NZRU also advised that it took into account a range of other considerations.
147. In its Draft Determination, the Commission considered the Application as put forward to it by the NZRU. After establishing that it had grounds to consider the Application, the Commission then conducted its analysis of the benefits and detriments on the basis of the information provided in the Application, and from interested parties. It formed the view that the proposed amendment was likely to result in a small net benefit, and that the amendment as sought by the NZRU, was tailored appropriately to the circumstances. The Commission also took into consideration the importance of preserving the tightness of the salary cap to ensure that the benefits of the cap were likely to continue to flow.
148. The Commission considers that, in the circumstances of the present case, it is for the NZRU to frame the proposal for salary cap relief to put before the Commission. It is consistent with the purpose of the Act that, when the Commission receives an application for amendment of an existing authorisation, it is for that applicant to make a commercial assessment to determine how to frame the amendment sought. The Commission then exercises its discretion pursuant to s 65 of the Act.
149. The Commission is, however, concerned to ensure that potential benefits are not placed at risk. In Decision 580, in order that it could be satisfied that it was appropriate to authorise the arrangements, the Commission limited the period of the authorisation and imposed certain conditions to increase the likelihood that the potential benefits would eventuate. That limitation period and those conditions were intended to address the

Commission's three areas where it remained concerned that potential benefits could be placed at risk, namely that the Salary Cap Arrangement creates incentives for Provincial Unions to evade or avoid the cap; that the inclusion and exclusion of certain financial and non-financial benefits had not been finalised; and that the proposed Salary Cap Arrangement created a new and untested regime for which quantification of benefits was difficult to assess. In a similar context, the Commission has considered the submissions of the Canterbury and Wellington RFUs, and the Crusaders Franchise, in relation to whether the benefits of the NZRU's proposed salary cap relief could be placed at risk, particularly relating to the adequacy of the \$18,000 relief for All Blacks attending the 2007 Rugby World Cup.

150. The NZRU advised that adoption of either of the models proposed by the Canterbury and Wellington RFUs, and the Crusaders Franchise, would have resulted in Provincial Unions receiving salary cap relief bearing no relationship to the increase in costs associated with the All Blacks being absent from the entire Air New Zealand Cup competition. Further, the NZRU advised that the proposals would have also provided some avoidance opportunities by allowing Provincial Unions to "front-load" payments in 2007. Accordingly, the NZRU believed that the proposed models were not a suitable way to deliver salary cap relief.
151. The Commission concludes, therefore, that it is appropriate to consider the Application as the Applicant has framed it.

#### **Balance of the benefits and detriments**

152. Overall, on the basis of the information available and the Commission's analysis of the relief measures proposed by the Applicant, 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.
153. 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, and that amendment to vary the CEA to provide the salary cap relief sought by the NZRU for 2007 is likely to result in a small incremental net benefit being realised, and leaves the balance of detriments/benefits expected from the authorisation granted in Decision 580 largely undisturbed.
154. 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.

#### **CONCLUSIONS LEADING TO THE DETERMINATION**

155. The Commission's conclusions 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 authorisation was granted are still in place, that some material detail or details should be altered, and that this will result in a small incremental net benefit attached to the factual scenario over the counterfactual.

## **DETERMINATION**

156. The Commission now determines, pursuant to s 65(1)(b) of the Act, to amend the authorisation granted in Decision 580 so that the NZRU may:

- (a) enter into an agreement with the NZRPA to provide salary cap relief by amending clauses 54.2 and 54.5 of the CEA in accordance with the amendments set out in Appendix A to this Determination, as well as introducing a definition for “relief player” into the CEA in accordance with the amendments set out in Appendix A (together the **salary cap relief amendments**); and
- (b) give effect to the salary cap relief 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 the salary cap relief amendments.

## Appendix A

### CHANGES TO THE COLLECTIVE EMPLOYMENT AGREEMENT TO GIVE EFFECT TO PROPOSED NOTIONAL VALUE RELIEF

Clause 54.5 will be amended to include a proviso after clause 54.5(e), being:

“Provided that for the Contract Year 2007 only:

“**Conditioning Player**” means a Player who has been identified by the All Blacks selectors as requiring a conditioning break prior to the Rugby World Cup 2007

“**Replacement Player**” means a player selected to replace a Conditioning Player in the Final Super Rugby Squad in accordance with the 2007 Rebel Sport Super 14 Squad Selection Protocols and Process

- a Player who is a Replacement Player will have a notional value of \$10,000; and
- a Player who would not have been in a Wider Training Group but for the conditioning programme will have a notional value of \$0 (unless that player is a De-Listed Player in which case the Player will have a notional value of \$10,000). The NZRU will determine the players who would not otherwise have been selected in the Wider Training Group and will notify the appropriate Provincial Unions.”

### Changes to the Collective Employment Agreement to give effect to the \$18,000 Relief

The Collective Employment Agreement will be amended to add a new definition:

“**Relief Player**” means one of the 33 players identified by the NZRU as qualifying for the Provincial Union to whom they are contracted in 2007 for salary cap relief in accordance with the Salary Cap Regulations.”

Clause 54.2 will be amended by adding a new bullet point after the 5<sup>th</sup> bullet point in paragraph (c):

- for the 2007 Contract Year only a Provincial Union will be entitled to subtract an amount of \$18,000 from their Salary Cap Payments in respect of each Relief Player contracted to that Provincial Union in 2007 to the extent that the Provincial Union can show that the amount was incurred by the Provincial Union to replace their Relief Players.”