COMMERCE COMMISSION

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DECISION NO. 721

Determination pursuant to the Commerce Act 1986 (the Act) in the matter of the revocation of the authorisation granted to the New Zealand Rugby Union Incorporated in Decision 580.

REVOCATION OF AN AUTHORISATION GRANTED TO THE NEW ZEALAND RUGBY UNION INCORPORATED IN DECISION 580

The Commission: Dr Mark Berry
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Determination: On 2 June 2006, in its Decision 580, the Commission determined, pursuant to section 61(1) (a) of the Act, to grant a conditional authorisation, enabling the NZRU to enter into a Salary Cap Arrangement and player movement regulations.

The Commission now determines, pursuant to section 65(1)(b) of the Act, to revoke the authorisation granted in Decision 580.

Date of Determination: 31 March 2011

INTRODUCTION

1. In Decision 580, issued on 2 June 2006, the Commerce Commission (the Commission) granted a conditional authorisation in terms of sections 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 (in accordance with clauses 50 and 53-59 of the Collective Employment Agreement (CEA) for 2006 to 2008 (2006-2008 CEA)) between the NZRU and the New Zealand Rugby Players' Association, and to the player movement regulations. This authorisation extended to the NZRU, Provincial Unions and any players playing for a Provincial Union in the Premier Division (PD) of domestic rugby in New Zealand (formerly the Air New Zealand Cup and now the ITM Cup).
2. NZRU has advised the Commission that, as a result of changes to the players' employment arrangements and structure of the NZRU's domestic rugby competition, it has formed the view that the Act no longer applies to the arrangements which had been authorised by the Commission in Decision 580.

COMMISSION PROCESSES

3. On 4 March 2011, the Commission issued its Draft Determination. The Commission's preliminary conclusions were that:
   - all players are now employees of the NZRU, and as such the exception in section 44(1)(f) applies and the anti-competitive provisions of the Act no longer have any application. (Section 44(1)(f) provides an exemption from the anti-competitive provisions of the Act for arrangements that relate to the remuneration, conditions of employment, hours of work, or working conditions of employees.);
   - there has been a material change of circumstances in terms of section 65; and
   - the Commission should exercise its discretion to revoke the authorisation granted in Decision 580.
4. The Commission received one submission from the NZRU in support of the proposed revocation of the authorisation. In preparing this decision the Commission has had regard to this submission together with other information provided by the NZRU during the Commission's consideration of this matter. The Commission now determines to revoke the authorisation granted in Decision 580.

BACKGROUND

5. The 2006-2008 CEA contemplated that players could be engaged as independent contractors. This possibility was provided for under clauses 4.2 and 5.1.
6. Neither the 2009 version of the CEA, which expired on 31 December 2009 (2009 CEA),[1] nor the most recent version of the CEA, which came into force on 1 January 2010 and expires on 31 December 2012 (the 2010-12 CEA) includes an equivalent of the former clause 4.2.
7. Clause 5.1 of the 2009 CEA and the 2010-12 CEA expressly confirm that players may only be retained as employees. Clause 5.1 provides that *"Players may be employed to play Rugby for a New Zealand Team* ***(and, for the avoidance of doubt, may not be retained on any basis other than employment).*** *"(emphasis added)*

[1] The term of the 2009 CEA was 1 January 2009 to 31 December 2009.

8. The effect of the removal of the former clause 4.2, and the addition of the words in brackets in clause 5.1, is that in order to play Rugby for a New Zealand Team (which includes any NZRU Team and Provincial Union Team), players must be employed and cannot be engaged as independent contractors.

9. Following a review of the new CEA, the Commission is of the view that the 2010-12 CEA does not give rise to the prospect of players participating in the PD being engaged as independent contractors.

10. In its Decision 580, the Commission considered that a market for player services existed under the Act to the extent "*that there presently are, or is the potential in the future, for players to provide services to the NZRU under independent contract arrangements*".[2] At the time of the authorisation there was one independent contractor, and as referred to above, a clause in the CEA which allowed for the engagement of independent contractors.

11. The position under the new employment environment has changed to the extent that there are currently no players playing in the PD who are engaged as independent contractors and there is no prospect under the current contractual arrangements of players being engaged as independent contractors in the future. As a consequence, all rugby players participating in the PD are now employees of the NZRU, which means that the exception in section 44(1)(f) of the Act applies and the anti-competitive provisions of the Act have no application to such employment arrangements.

12. Accordingly, and after reviewing the 2010-12 CEA, and the player movement regulations for 2011, the Commission considers that there can be no breach of the Act in relation to the salary cap and player movement regulations.

GROUNDS TO REVOKE OR AMEND THE AUTHORISATION

13. Under section 65(1)(b) of the Act the Commission may revoke or amend an authorisation if there has been a material change of circumstances since the authorisation was granted.

14. The Commission concludes that there has been a material change of circumstances in terms of section 65(1)(b) in this instance.

15. The two options available to the Commission on the basis that there is a material change of circumstances in this case are to revoke the authorisation (at any time until it expires in June 2012), or to leave the authorisation in place.[3]

16. The relevant factors for the Commission to consider in deciding whether it should revoke the authorisation or leave it in place include the following:

    (a) Australian case law and the Commission's own previous decisions support the proposition that if authorisations are no longer required, they should be revoked.

    (b) A negative perception and uncertainty could be created if the Commission does not enforce conditions in a current authorisation.

    (c) The basic framework of the arrangements that were authorised (albeit amended) still remains (the salary cap and player movement regulations). Leaving the authorisation in place would leave the option open to vary the authorisation if a market for player services under the Act re-emerged at a later date.

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[2] Decision 580, para 335.

[3] Amending the authorisation or substituting a new authorisation is not appropriate as the exception in s44(1)(f) applies and Part II of the Act no longer has any application to such employment agreements.

(d) There is a low risk of continued authorisation of arrangements that would otherwise be in breach of the Act.

17. Section 65 of the Act is permissive not mandatory so there is no 'legal requirement' under the Act that the Commission must revoke the authorisation. However, weighing all the factors discussed above, the Commission intends to revoke the authorisation. The Commission is of the view that, in this instance, particular weight should be given to paragraph 16(a) above because as a general rule it is inappropriate to leave 'dead letter' authorisations in place. In the Australian case of *Re Media Council*[4] the Court accepted the Australian Competition and Consumer Commission's submission in principle on this point but deferred consideration of whether it applied to the matter. The relevant passage is as follows:

> *"It was the Commission's submission that a straight conduct test is sufficient, not only to establish "material change of circumstances" but also to warrant revocation. Various possibilities were envisaged at the level of principle. It could be that* ***the conduct was never in fact undertaken****; it could be that the* ***parties have moved away from the conduct****; it could be that the* ***evidence shows that the parties do not intend in future to engage in conduct that is authorised*** *or* ***intend to engage in conduct that is inconsistent with the conduct which is authorised. If so, such a "dead letter authorisation" should be removed from the books."*** *(emphasis added)*

CONCLUSIONS

18. The Commission concludes that:

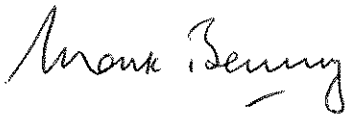
- under the 2010-12 CEA all players are now employees of the NZRU. As such, the exception in section 44(1)(f) applies to the employment agreement, and there can be no breach of the anti-competitive provisions of the Act;
- there has been a material change of circumstances in terms of section 65; and
- the Commission should exercise its discretion to revoke the authorisation given in Decision 580.

[4] *Re Media Council of Australia & Ors* (1996) ATPR 41-497.

DETERMINATION

19. The Commission now determines pursuant to section 65(1)(b) of the Act to revoke the authorisation granted in Decision 580.

Dated this 31st day of March 2011



Dr Mark Berry

Chair