

**NZRU Submission**  
**In response to**  
**DRAFT DETERMINATION of COMMERCE COMMISSION**

**INTRODUCTION:**

1. In June 2006, the Commerce Commission (“the Commission”) issued a Determination (580) in which it granted authorisation to the NZRU to enter into arrangements for a salary cap and player movement regulations on certain conditions. The authorisation was for a 6 year term expiring June 2012.
2. In 2009/10 the NZRU, Provincial Unions and Franchises renegotiated the Collective Employment Agreement (“the 2010-2012 CEA”) including the structure of the Premier Division of the Domestic Competition and the salary cap. The NZRU has been corresponding with Commission Management about those changes including the NZRU’s views of the implications those changes in terms of the Commerce Act (“the Act”).
3. The NZRU is supportive of a decision to revoke the authorisation.

**BACKGROUND:**

4. One of the key findings in Decision 580 was that it was plausible that Premier Division rugby players could be engaged otherwise than as an employee, potentially as independent contractors and that therefore there was a real possibility of some current or future Premier Division players providing ‘services’ as defined in the Commerce Act.
5. This finding was key because a ‘market’ can only apply to ‘goods’ or ‘services’ and the Commission went on to find that:
  - There were a number of markets that were relevant to its consideration including a market for the provision and acquisition of premier rugby player services;
  - The proposed salary cap and player movement regulations would be likely to breach some parts of Part II namely sections 27, 29, and/or 30 in some of the relevant markets; and
  - Although section 44 of the Commerce Act was likely to mean that sections 27-30 had no application to the proposed salary cap where the Premier Division rugby players were employed, it was not likely to apply to such players who were or may in future be engaged as independent contractors.
6. Since Decision 580 a number of changes to the circumstances applying prior to Decision 580 have taken place. Key aspects of the changes include:
  - There are no players being paid to play rugby in the Premier Division who are engaged as contractors, and no contractors have been engaged to play in the Premier Division since 2007 when the sole contracting player in the Premier Division retired; and

- There is no prospect under the 2010-2012 CEA for players playing in the Premier Division to be retained to play rugby in that competition otherwise than under an employment agreement.
7. The Commission's draft conclusion in paragraph 11 that as a result of those changes, the Commission considers there can be no breach of the Act in relation to the salary cap and player movement regulations, is supported by the NZRU.

### **GROUNDINGS TO REVOKE THE AUTHORISATION**

8. Under s.65(1) of the Act, there must be a material change in circumstances in order for the Commission to have the ability to revoke or amend an authorisation.
9. The NZRU agrees that there has been a material change to the circumstances on which Decision 580 was based. The inability of a rugby player to be engaged on any basis other than employment is a fundamental difference from the situation prior to Decision 580 as it means that the Commerce Act no longer has any application to the arrangements in question.
10. The NZRU also agrees that amending the authorisation or substituting a new authorisation is inappropriate as pursuant to s.44(1)(f) of the Act, the provisions of Part 2 of the Act no longer have any application to the employment arrangements.
11. Ultimately, the NZRU considers that the authorisation in Decision 580 should be revoked for the following reasons:
- a) As a result of the material changes in circumstances referred to above, the current authorisation is no longer required.
  - b) A variation to the authorisation to coincide with the changes to the salary cap in the 2010-2012 CEA is not appropriate in light of the effect of s.44(1)(f) of the Act.
  - c) The current authorisation expires during the currency of the 2010-2012 CEA, and there is no prospect of it having any application during the balance of its term.
  - d) The NZRU will not be applying to extend, renew or vary the current authorisation on its expiry.
  - e) The NZRU does not see any benefit in leaving the option open to vary the current authorisation if a market for player services re-emerges at a later date.

### **CONCLUSION:**

The NZRU supports the preliminary conclusions set out in the Draft Determination namely:

- a) Under the 2010-2012 CEA, the players are employees of the NZRU and s.44(1)(f) of the Act applies to that CEA so that there can be no breach of the anti-competitive provisions of the Act;
- b) There has been a material change of circumstances in terms of s.65; and
- c) The Commission should exercise its discretion to revoke the authorisation given in Decision 580.

18 March 2011

A handwritten signature in blue ink that reads "Keith Binnie". The signature is written in a cursive style with a light blue background behind the text.

**Keith Binnie**  
**General Counsel**