ANTI-COMPETITIVE PRACTICE IN THE SPORTING ARENA: COMMERCIAL WATCHDOGS ADAPT THEIR GAME

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I INTRODUCTION

Gas, electricity, telecommunications, futures trading and air travel all feature significantly in applications to the New Zealand Commerce Commission for authorisations to implement anti-competitive practices.[1] In each application, the Commerce Commission, charged with promoting healthy competition in the marketplace, applies the well-worn criteria set out in Part II of the *Commerce Act 1986* (NZ) ('the 1986 Act') under which collective and unilateral anti-competitive behaviour is forbidden. Faced with a proposal that may substantially lessen competition, exclude competitors in the relevant market or markets, and/or create a price fixing scenario, the Commission must undertake a balancing exercise. It has power to authorise a scheme that breaches these restrictive trade practice provisions if it can be satisfied that the public benefits of the practice outweigh the detriments arising from the loss of competition.[2]

In the 1990s, the Commission entered the foray of New Zealand sport, dispelling any myths that sport was never in the business of making a profit. Top rugby players were becoming professional. The game was engaging in trade and commerce, thus subjecting itself to all relevant commercial laws. The Commerce Commission has become a new actor in New Zealand's sporting industry. Both parties have had to adapt. The sporting industry must abide by legal regulations and the Commerce Commission must adapt its traditional templates to meet this specialist environment. What happens when a sport seeks authorisation to restrict competition – especially if it wishes to impose a salary cap?

This paper explores the Commerce Commission Determination *Decision 580,* released on 2 June 2006, and highlights the pioneering spirit of the Commission as it grapples with the intricacies of a salary cap imposition. The unique nature of the legal regulation of sport, irrespective of the path from which it derives, already has drawn comment from academics in the field:[3]

> Pure competition between rivals is the objective in sport. The spoils of victory go to the contestant who displays the greater merit. Collusion in

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1 See, for example, Todd Petroleum Mining Company Limited/Todd Taranaki Limited, Commerce Commission Determination *Decision 581*, Revocation of Decision 505, 2 June 2006; Preussage Energie GMBH/Todd (Petroleum Mining Company) Limited/Shell Exploration New Zealand Limited/Shell (Petroleum Mining) Company Limited, Commerce Commission Determination, *Decision 505*, 1 September 2003; Qantas Airways Limited/Air New Zealand, Commerce Commission Determination, *Decision 511*, 23 October 2003; Electricity Governance Board Limited, Commerce Commission Determination, *Decision 473*, 30 September 2002. All determinations available from <http://www.comcom.govt.nz/PublicRegisters/restrictivetradepractices.aspx> at 27 June 2007.

2 See below Part VI.

3 B Dabscheck and H Opie, 'Legal Regulation of Sporting Labour Markets' (2003) 16 *Australian Journal of Labour Law* 259, 260.

> fixing results is anathema and disgraceful. How neatly this fits with the philosophy of the market economy. Yet unlike the capitalist firms, the athlete or team cannot afford to put rivals 'out of business' because the contest necessitates cooperation with opponents.

The Commission is not presented with an anti-competitive proposal that might create a monopoly on the marketplace. On the contrary, it is being asked to authorise an arrangement that keeps the sporting competition in balance:[4]

> … professional teams must not compete too well. On the playing field they must do so. But in a business sense, the stronger team must not drive out the weaker for, if they do so, the whole League, including both the stronger and the weaker, will be worse off and no team will survive profitably.

A challenge indeed! With its 1996 precedent as a useful guide[5] it forges new ground on Australasian shores: a green light is given for a salary cap arrangement. The New Zealand Commerce Commission plays a careful and well-planned game!

II THE ADVENT OF COMMERCIALISM IN NEW ZEALAND SPORT

Broad restraint of trade issues in relation to sport have been well-aired in New Zealand courts. In *Blackler v New Zealand Rugby Football League (Inc)*[6] four essential principles regarding restraint of trade were established,[7] and these were duly tested in subsequent cases.[8]

A key development emerged in 1990. In *Re Speedway Control Board of New Zealand (Inc)*[9] New Zealand first embraced the principles of the *Commerce Act 1986* (NZ) with respect to anti-competitive agreements in the realm of sport. Under the spotlight were two contractual agreements: a 'promoter's agreement' between the Board and various speedway clubs; and a 'competitor's agreement' between the clubs and the competitors. The agreements contained various restrictions, including provisions requiring compliance with the rules of the Board that themselves contained restraints of trade. The Commerce Commission declined authorisation. The agreements did not satisfy the Act's criteria.

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4 W Pengilley, 'Restraint of Trade and Antitrust: A Pigskin Review Post Super League' (1997) 6 *Canterbury Law Review* 610, 618.

5 See below Part II.

6 [1968] NZLR 547.

7 The principles comprise:

- (i) in the absence of special circumstances it is a restraint of trade if it is contrary to public policy;
- (ii) it is a question of law for the court to decide whether the special circumstances do or do not justify the restraint;
- (iii) a justification is only possible if it is reasonable
  - (a) in the interests of the contracting parties, and
  - (b) in the interests of the pubic;
- (iv) the onus of showing whether the restraint of trade is reasonable rests on the person alleging it is reasonable.

8 See, for example, *Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 159; *Stininato v Auckland Boxing Association* [1978] 1 NZLR 1; *Kemp v New Zealand Rugby Football League (Inc)* [1989] 3 NZLR 463.

9 (1990) 2 NZBLC 104, 521.

The Commerce Commission first walked out onto the rugby pitch in 1996 when the New Zealand Rugby Football Union ('the NZRFU') sought authorisation from the Commission to implement three regulations: a player transfer system which introduced a restrictive quota; a limited transfer period; and a transfer fee set at a maximum amount.[10] The reasons for the application were robust. The regulations would prevent richer competitors becoming more dominant, competition becoming less even, and possible prejudice to the development of the game at grass roots level.

Having identified the relevant markets, the Commission took little time identifying several anti-competitive features. Against these, it weighed the public benefits and detriments, and concluded that the public benefits of the scheme comfortably outweighed any detriments.

The NZRFU's delight was quelled quickly. The New Zealand Players' Union appealed the Commission's ruling, resulting in two decisions. The second, and substantive one (*Rugby Union Players' Association Inc v Commerce Commission (No 2)*)[11] provided a detailed discussion from the High Court of New Zealand on the role of the Commerce Commission in this exclusive pocket of competition law. The High Court dismissed the appeal, primarily on two grounds: first, the Commerce Commission was a specialist in the field of restrictive trade practices and its expert advice was not rebutted easily; and, secondly, the Commerce Commission did not use the wrong counterfactual.[12]

Subsequent to that authorisation, at least in the eyes of the now New Zealand Rugby Union ('the NZRU'), the rugby environment and the markets for rugby players have changed dramatically, largely due to the increasing professionalism of all aspects of the game worldwide. The authorised measures it imposed in 1996 were not enough to stem the acceleration of a trend towards uneven competition. To mitigate this, the NZRU again sought to implement measures that would create more even national competition thus contributing, in its terms, to 'more attractive games, greater revenues, better performance of New Zealand Super 14 Rugby and All Black teams and better cost management within New Zealand rugby generally',[13] as well as preserving a commercially viable and sustainable game. The most significant aspect of this proposal was the implementation of a 'salary cap' for the relevant unions.

This was a new-found minefield – would the imposition of a salary cap breach New Zealand's anti-trust legislation?

III THE SALARY CAP – THE COMMERCE COMMISSION ADAPTS ITS TRADITIONAL PRACTICE

The NZRU's application to the Commerce Commission was made in November 2005. It applied under s 58 of the 1986 Act for authorisation to enter into

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[10] Commerce Commission Determination *Decision 281*, 17 December 1996.

[11] [1997] 3 NZLR 301. At the same time, in Australia, fraught industrial allegations of anti-competitiveness with respect to the Australian Rugby Football League were sweeping the courts: *News Ltd v Australian Rugby Football League Ltd* (1996) 135 ALR 33; and, on appeal: *News Ltd v Australian Rugby Football League Ltd* (1996) 139 ALR 193 (FCA). See further discussion under Part VIII.

[12] For an explanation of the factual and the counterfactual, see below n 20.

[13] Commerce Commission Determination, *Decision 580*, 2/6/2006, [9].

certain arrangements of the kind prohibited by s 27[14] (directly and via s 30[15]) and s 29[16] of the 1986 Act.

This time, prior to its application, the NZRU and the Rugby Players' Collective (the 'RPC')[17] entered into a Collective Employment Agreement (the 'CEA') for the period 2006 to 2008. However, as this agreement contained the salary cap framework that was the subject of the application to the Commerce Commission, the NZRU could not give effect to the agreement unless the proposed arrangements were authorised by the Commission. The arrangements to implement the proposed salary cap arrangements were so closely interrelated with the arrangements to implement the proposed player movement regulations that the Commerce Commission chose to consider them together. Throughout this paper, they are referred to jointly as the 'proposed arrangements'.

The process of collectivism in sport began in the 1990s 'driven by a sea change in the product markets and the governance of sport',[18] and the trend is seen as the ideal solution[19]

> to take over from reliance upon implied employment terms and the use of restraint of trade litigation as the main legal means of market regulation.

This New Zealand sporting collective agreement became an important pivot in the Commerce Commission's determination. It is significant that its appraisal took place away from the courts.

A *What Were the Proposed Arrangements?*

The proposed arrangements centred around the implementation of a new National Provincial Championship ('the NPC') competition structure, comprising a 14 team Premier Division ('the PD') and the 12 team Modified Division One ('the MDI'). The NZRU proposed a salary cap of $2 million for the PD; a transfer period of approximately 34 weeks; and transfer fees for transfers from MDI to PD unions.

B *The Traditional Template for a Commerce Commission Determination*

Faced with an antitrust proposal far from the norm of capitalist aspirations, the Commerce Commission fed the proposed arrangements into its normal template for anti-competitive considerations:

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[14] *Commerce Act 1986* (NZ) s 27: contracts, arrangements, or understandings substantially lessening competition prohibited.

[15] *Commerce Act 1986* (NZ) s 30: certain provisions of contracts, etc., with respect to prices deemed to substantially lessen competition.

[16] *Commerce Act 1986* (NZ) s 29: contracts, arrangements, or understandings containing exclusionary provisions prohibited.

[17] The RPC is a 400-member registered trade union and an incorporated society. The RPC was the vehicle through which professional rugby players negotiated the CEA.

[18] Dabscheck and Opie, above n 3, 283. For further academic comment, see S Duggan, 'Sporting Entities and Trade Practices: What is Best and Fairest?' (1999) 7 *Trade Practices Law Journal* 201; R Ahdar, 'Professional Rugby, Competitive Balance and Competition Law' [2007] *European Competition Law Review* 36.

[19] Dabscheck and Opie, above n 3, 283.

- What was a suitable counterfactual against which the proposed arrangements (the factual) could be compared?[20]
- Did the CEA and the Player Movement Regulations constitute a 'contract, arrangement or understanding'?;
- What were the relevant 'services' and markets'?
- In this case, did s44 of the Act prevent Part II of the Act from applying to all or any of the proposed arrangements?;
- What were the effects of the salary cap (s 27 and s 27 via s 30), transfer fees and transfer period (s 27), and transfer fees (s 27 via s 30) in those markets?.
- If there were a lessening of competition in any of the proposed arrangements, did the public benefits outweigh the public detriments?

As space precludes a discussion of all six features, this paper addresses the last four. In order to emphasise the new parameters with which the Commerce Commission had to wrestle, where appropriate this paper provides a comparative analysis with a traditional Commerce Commission determination. The contrast demonstrates the unique position the Commission holds as an actor in the sports market.

C *A Comparative Decision: Air New Zealand and Qantas*

In 2002, the Commerce Commission received two independent applications for authorisation from Air New Zealand Ltd (Air NZ) and Qantas Airways Ltd (Qantas).[21]

The first application by Qantas was made pursuant to s 67(1) of the 1986 Act. It related to a proposed 'share purchase agreement' whereby Qantas would acquire 22.5% of the voting equity in Air NZ.

The second application was made by both Air NZ and Qantas pursuant to s 58 of the 1986 Act. It related to the proposed implementation of a 'strategic alliance arrangement' between the two airlines. This arrangement would, inter alia, create a joint airline operation comprising every Air NZ flight and those Qantas flights to, from and within New Zealand; coordinate all aspects of the joint airline operation including passenger fares, freight rates, flight schedules, the quantum of passenger and freight capacity, code-sharing, marketing, frequent flyer programmes and profit-sharing; and cooperate in relation to other airline operations outside the scope of the joint airline operation. In addition, Air NZ and Qantas proposed that Qantas would have the right to be represented by two directors, which it would appoint to Air NZ's board of directors; and Air NZ would have the right to be represented by one director, which it would appoint to Qantas's board of directors.

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[20] In order to determine the principle of whether the public benefits of a restrictive trade practice will outweigh the detriments flowing from the lessening of competition, the Commission compares a factual with a counterfactual.
In this case, the proposed arrangements were the factual.
After some consideration, the Commission adopted the following counterfactual: the new competition format; a certain transfer window; and certain player transfer fees.
A comparison between the factual and the counterfactual enables the Commission to ascertain whether competition in the factual is likely to be lessened relative to the counterfactual.

[21] The final determination: Commerce Commission Determination *Decision 511*, 23 October 2003.

The Commerce Commission adopted its normal framework to decide:

(i) whether the proposed share purchase agreement would be likely to have the effect of substantially lessening competition in a number of relevant markets and, if so, whether it would be likely to result in such a benefit to the public that it should be permitted; and

(ii) whether the proposed strategic alliance arrangement would result in a lessening of competition or a deemed lessening of competition (by operation of s 30 of the 1986 Act) in a number of relevant markets and, if so, whether it would be likely to result in such a benefit to the public that would outweigh the lessening or deemed lessening of competition that it should be authorised.

While the proposed strategic alliance arrangement is more directly relevant to the NZRU application, the Commission's determinations on both help to highlight the 'extra mile' the Commerce Commission had to run with respect to the latter application. Appropriate comparisons are made below.

IV SERVICES

Section 27 of the 1986 Act is defined with reference to a 'market' while s 29 is defined with reference to 'services'. No breach of ss 27 or 29 can occur unless a relevant 'market'[22] or 'services' can be established.

Were the proposed arrangements 'services' within the meaning of that term in the Act? And did any of the relevant exemptions in the Act apply?

The definition of 'services' in the 1986 Act has both inclusive and exclusive components.[23]

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[22] For market definition, see below Part V.

[23] Commerce Commission Determination*, Decision 580*, 2/6/2006, [279]. The definition is as follows (s 2(1) *Commerce Act 1986* (NZ):

> 'services' includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges, or facilities that are or are to be provided, granted, or conferred in trade; and, without limiting the generality of the foregoing, also includes the rights, benefits, privileges, or facilities that are or are to be provided, granted, or conferred under any of the following classes of contract:
>
> (a) A contract for, or in relation to,-
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> (i) The performance of work (including work of a professional nature) whether with or without the supply of goods; or
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> (ii) The provision of, or the use or enjoyment of facilities for, accommodation, amusement, the care of persons or animals or things, entertainment, instruction, parking, or recreation;
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> (iii) The conferring of rights, benefits, or privileges for which remuneration is payable in the form of a royalty, tribute, levy, or similar exaction;
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> (iv) To avoid doubt, the supply of electricity, gas, telecommunications, or water, or the removal of waste water:
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> (b) A contract of insurance, including life insurance, and life reassurance;
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> (c) A contract between a bank and a customer of the bank;
>
> (d) Any contract for or in relation to the lending of money or granting of credit, or the making of arrangements for the lending of money or granting of

A *Commission Forced to Embrace the Employee/Independent Contractor Debate*

By necessity, the Commission was drawn into the fraught question, often debated in sporting circles, as to whether a player is an employee or an independent contractor.[24] As an employee, the player, pursuant to a paid employment contract, plays rugby as a 'performance of work under a contract of service'. This type of performance is expressly excluded from the definition of 'services' under the 1986 Act, and thus ss 27 and 29 of the Act would not apply.[25] However, players who are not employees (and neither are volunteers) may be independent contractors who participate on a paid basis, outside any employer/ employee basis.

The Commission noted that the distinction between the two depended on 'the real nature of the relationship' between the parties,[26] and cited relevant academic comment.[27] Within the CEA was a provision[28] which provided for the possible engagement of players as contractors. The NZRU, while acknowledging this, submitted that there was little prospect that players would be engaged other than under an employment agreement. It would be an option open only to 'star' players and all of the star players (bar one existing contractor) were currently employees, and any likely candidates had signed three year contracts at the end of 2005. However, the Commission was not so persuaded. The CEA specifically provided for the possibility that the targeted players might in the future provide their services to the NZRU by way of contracts for services (independent contractors) rather than under contracts of service (employees).[29] If they provided services as independent contractors, they did not fall within the exclusion.

B *Is Rugby Played by Independent Contractors a 'Service'?*

If there was a possibility of rugby players providing their services as independent contractors, it then had to be established whether their playing of rugby was a service.

The Commission made the following findings:[30]

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credit, or the buying or discounting of a credit instrument, or the acceptance of deposits;-

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

[24] For a detailed discussion on this issue in New Zealand, see D Rutherford, 'Employer and Employee in Professional Rugby: One Game or Two Sides' in E Toomey (ed), *Keeping the Score: Essays in Law and Sport* (2005). More generally see, for example, *Commission of Taxation v Stone* [2005] HCA 21; *Market Investigations Management Ltd v Minister of Social Security* [1968] 3 All ER 732; *Kirk v Accident Compensation Commission* [1995] NZAR 1; *Commissioner of Taxation (Cth) v Maddalena* (1971) 45 ALJR 426; *Buckley v Tutty* (1971) 125 CLR 353; *Zuijs v Wirth Bros Proprietary Limited* (1955) 93 CLR 561; *Barnard v Australian Soccer Federation* (1988) 81 ALR 51.

[25] For the exclusion provisions in s 44 of the 1986 Act, see below.

[26] *Employment Relations Act 2000* (NZ) s 6(2). See Commerce Commission Determination, *Decision 580*, 2/6/2006, [285].

[27] See, for example, *Bryson v Three Foot Six* [2005] 3 NZLR 721 (SC), [35]; *Rugby Union Players' Association v Commerce Commission* [1997] 3 NZLR 301, [328-9].

[28] Clause 4(2) of the CEA makes provision for the engagement of contractors.

[29] Commerce Commission Determination, *Decision 580*, 2/6/2006, [290].

[30] See Commerce Commission Determination, *Decision 580*, 2/6/2006,[292-305].

(i) Such a player would provide the right or benefit 'in trade'.[31] With reference to the further definition of 'business',[32] professional rugby players would consider their playing of rugby their occupation or trade and as contractors, they would play for gain or reward;

(ii) Contractor players participate in rugby playing activities pursuant to a contract for services; and

(iii) Any such contract would be for or in relation to the 'performance of work'. The Commission noted that 'work' is not defined in the 1986 Act. However, using other signposts,[33] the Commission concluded that:[34]

> … players who participate in rugby pursuant to a contract for services in return for remuneration over and above their direct expenses do provide rights or benefits under a contract for, or in relation to, 'the performance of work'

Thus, while a rugby player who provides his services as an employee falls within the necessary exclusion, one who plays as an independent contractor does not. As the CEA expressly made provision for the latter, it was clear that such a player would provide 'services' within the meaning of the 1986 Act.

C *The s 44 Exclusion*

Having established the potential for some of the players to provide 'services' in a relevant market, the Commission then had to decide whether s 44 of the 1986 Act[35]

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[31] *Commerce Act 1986* (NZ) s 2(1):

> 'trade' means any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land

[32] *Commerce Act 1986* (NZ) s 2(1):

> 'business' means any undertaking –
> (a) that is carried on for gain or reward; or
> (b) in the course of which –
> (i) Goods or services are acquired or supplied; or
> (ii) Any interest in land is acquired or disposed of –
> otherwise that free of charge.

[33] For example, dictionary definitions; the decisions of Widgery CJ in *Clear v Smith* [1981] 1 WLR 399 (QBD), [406-7] and McGechan J in *Re Fehling* (unreported, NZHC, 1 July 1997, AP294/96); and legislation such as s 58(1) *Social Security Act 1964*.

[34] See Commerce Commission Determination, *Decision 580*, 2/6/2006, [304].

[35] The relevant paragraphs in this context are s 44(1)(c),(f),(h) and (i).

Section 44(1)(c) excludes Part II from applying

> to the entering into of a contract of service or a contract for the provision of services in so far as it contains a provision by which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which that person may engage during, or after the termination of, the contract.

Section 44(1)(f) excludes Part II from applying

> to the entering into of a contract or arrangement, or arriving at an understanding in so far as it contains a provision that relates to the remuneration, conditions of employment, hours of work, or working conditions of employees.

Section 44(1)(h) excludes Part II from applying

> to any act done, otherwise than in trade, in concert by users of goods or services

applied to exempt conduct in those markets from Part II of the Act, within which lie the relevant anti-competitive provisions.

It concluded that the exclusions in s 44 did not apply to exempt completely from Part II any of the salary cap arrangements or the player regulations that were the subject of the authorisation. However, s 44 did exclude its application to a limited extent:[36]

> (i) the CEA was exempt from Part II in so far as it provided for the enactment of the salary cap regulations in relation to employees; and
> (ii) the player movement regulations were exempt in so far as they might limit transfers of players who were (or otherwise would be) employees.

V WHAT MARKETS?

The Commission in its *Decision 580* emphasised the importance of market definition:[37]

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

Section 3(1A) of the 1986 Act defines a market as:

> … a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.

A *The Comparative Model: Qantas /Air New Zealand Decision*

In its decision, the Commerce Commission identified the markets it considered relevant to its examination of the competitive impacts of the airlines' two proposals. Its market definition reflects a traditional economic analysis of possible affected markets in the airline industry:

- New Zealand main trunk passenger air services;
- New Zealand provincial passenger air services;
- Tasman passenger air services;
- New Zealand to Asia passenger air services;

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against the suppliers of those goods and services

Section 44(1)(i) excludes Part II from applying

> to any act done to give effect to a provision of a contract, arrangement or understanding, or to a covenant referred to in paragraphs (a) to (g) of this subsection.

[36] Commerce Commission Determination, *Decision 580*, 2/6/2006, [324].

[37] Commerce Commission Determination, *Decision 580*, 2/6/2006, [326].

- New Zealand to the Pacific Islands and beyond air services;
- New Zealand to the United States air services;
- other international passenger air services;
- domestic freight;
- Tasman belly-hold freight;
- international belly-hold freight; and
- national wholesale travel distribution services.

In its competition analysis, the Commission concluded, on the balance of probabilities, that there was likely to be a substantial lessening of competition in the identified markets. It also found that the strategic Alliance agreement was an agreement to fix prices and, as such, substantially lessened competition in each of the markets under s 30 of the 1986 Act.

Where two airlines are seeking an authorisation for arrangements that may create a monopoly in the marketplace, the above markets and the resulting competition analysis are no surprise.

How then does the Commerce Commission define the relevant markets when an organisation seeks authorisation for antitrust provisions which are designed not to decimate the opposition, but to create a balanced sporting competition? The answer of course lies at the feet of the independent contractor sportsperson, adding a further, rather complex, layer to traditional market definition.

B *The NZRU Application*

The Commission noted that the only relevant 'services' for the purposes of market definition were those provided by players who play rugby pursuant to a contract (that is, a contract *for* services) and possibly by players who are 'volunteers'.[38]

In order to analyse the competitive impact of the proposed arrangements, it identified three[39] relevant New Zealand markets.

1 *The 'Premier Player Services' Market*

In its 1996 decision,[40] the Commerce Commission identified the premier player services market as one of three relevant markets. In its 2006 application, the NZRU argued that this market was no longer relevant as the relevant services were now provided under employment agreements. If, in the alternative, such a market did exist, it related only to services under independent contract arrangements and, as

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[38] 'Volunteers' are players who receive no payment or remuneration other than for expenses. Their rugby playing may be a '*service*' in particular circumstances.

[39] In its 1996 decision, the Commerce Commission identified a New Zealand market for the provision and acquisition of the rights to (premier) rugby union player services. This reflected the focus of the 1996 Application – a player transfer system. The NZRU argued that this discrete rights market was no longer relevant as, in any transfer under the current transfer system, the receiving union did not require the consent of the transferring union. Although it noted there may be some circumstances in which a transferring union might be able to block or delay a transfer, generally it agreed that a transferring union could not prevent a transfer by refusing consent. This, together with other factors, persuaded the Commission that it would not be appropriate in the 2006 Application to define a discrete rights market.

[40] Commerce Commission Determination *Decision 281*, 17 December 1996.

such, was so small it did not warrant Commission scrutiny. However the Commission, citing *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited*,[41] observed that the fact that little or no trade presently occurs in a market does not negate the need to analyse the impact of any relevant arrangement on competition in that market.[42]

2 *The 'Non-Premier Player Services' Market*

The Commission identified the Modified Division 1 (MD1)[43] rugby union players as a group of players that, although it was not included in the above 'premier player services' market, could still be impacted upon by the proposed arrangements. Generally, MD1 players are selected from club sides to represent their respective unions in the MD1 competition. Therefore, in a sense, these players are in direct competition with club players to be selected for their union.[44]

The A and B club sides comprise the highest level of club rugby, and these sides would be the most likely substitutes for MD1 players.[45] On this basis, the Commission defined a discrete New Zealand market for the provision and acquisition of non-premier player services provided by MD1 and A and B club side players.

3 *'Sports Entertainment Services' Market*

The third relevant market identified by the Commission was the 'sports entertainment services' market. In its 1996 decision the Commission concluded that rugby union competes with other forms of sporting and, in some cases, non-sporting entertainment, thus creating a market for the provision and acquisition of sports entertainment services. It found similar evidence in the 2006 Application:[46] 70% of New Zealanders are 'theatre goers' for whom rugby union is one of many entertainment choices available; international and provincial rugby union matches typically are scheduled in such a way as to void clashes with other major sporting and non-sporting events; the NZRU and provincial unions both have regard to other forms of entertainment when pricing spectator tickets; and viewers are becoming more 'time poor' forcing rugby to compete with other sporting and non-sporting programmes.

C *The Effects of the Proposed Arrangements in These Markets*

In its competition analysis,[47] the Commission made the following findings:

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41 (1989) ATPR 40-925.

42 Commerce Commission Determination *Decision 580,* 2 June 2006, [339].

43 For an explanation of MD1 players, see above Part III.

44 Commerce Commission Determination *Decision 580,* 2 June 2006, [353].

45 The Commerce Commission noted that players from the A and B sides were called upon in the event of an injury in a MD1 team and the practice of 'loan players' existed.

46 Commerce Commission Determination, *Decision 580,* 2 June 2006, [368- 375].

47 The Commission considered it highly likely that both the CEA and the Player Movement Regulations amounted to a contract, arrangement or understanding for the purposes of ss 27, 29 and 30 of the 1986 Act. It also concluded, for the purposes of s 30 of the 1986 Act, that there was an arrangement or understanding between competitors through the CEA and the Regulations both with respect to players providing services and provincial unions acquiring those services: see [389- 415].

(i) *in the market for premier player services*

- the salary cap arrangement would, or would be likely to lessen competition under s 27 of the 1986 Act.[48] Moreover, it would constitute an artificial restraint on, or interference with, a competitive determination of prices (s 30)[49] thus having the purpose, effect or likely effect of substantially lessening competition for the purposes of s 27;
- the transfer fees would not have, nor would be likely to have, the effect or likely effect, of lessening competition under s 27.[50] However, they would have the effect or likely effect of fixing, controlling or maintaining prices under s 30;[51]
- the transfer period would not result, nor was likely to result, in a lessening of competition under s 27.[52]

(ii) *in the market for non-premier player services*

- the transfer fees would not have, nor would be likely to have, the effect of lessening competition under s 27, but they would have, or be likely to have, the effect of controlling prices under s 30;[53]
- the transfer period would not have, nor would be likely to have, the effect of lessening competition under s 27.[54]

(iii) *in the market for sports entertainment services*

- the proposed arrangements as a whole would not result, or be likely to result, in a lessening of competition under s 27.[55]

The Commission also concluded that the salary cap would result, or would be likely to result, in a lessening of competition under s 29, by giving effect to a boycotting arrangement amongst provincial unions competing for player services, including non-employee players, even although this effect may be small.[56]

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48 Commerce Commission Determination *Decision 580,* 2 June 2006, [416-434].

49 Ibid [436- 455].

50 The Commission compared this to the counterfactual where the proposed transfer fees and transfer period were now similar to those proposed in the factual, at least in the first year. See Commerce Commission Determination *Decision 580,* 2 June 2006, [465-479].

51 Commerce Commission Determination *Decision 580,* 2 June 2006, [480-488]. The Commission noted that the NZRU situation had some similarities to that considered in the Australian case *Competition and Consumer Commission v CC (NSW) Pty Limited* (1999) ATPR 41-732 (FC).

52 Commerce Commission Determination *Decision 580*, 2 June 2006, [489-496]. It was not necessary to consider whether the transfer period would have the effect or likely effect of fixing, controlling or maintaining prices under s 30 of the Act as the transfer window did not contain a pricing element.

53 Commerce Commission Determination *Decision 580,* 2 June 2006, [506-512].

54 Ibid [513-516].

55 Ibid [529-539].

56 Ibid [518-528].

VI WHAT PUBLIC BENEFITS AND DETRIMENTS?

Pursuant to s 61(6) of the 1986 Act, the Commission will not grant authorisation of an anti-competitive provision unless it is satisfied that the entering into of the contract or arrangement or associated negotiations will in all of the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result, or be likely to result. The lessening in competition includes a lessening in competition that is not substantial: s 61(6A).

Similarly, pursuant to s 61(7) of the Act, the Commission will not grant authorisation unless it is satisfied, inter alia, that an exclusionary provision will result, or be likely to result, in a benefit to the public.

Thus it had to determine whether the public benefits that would arise from the NZRU's anti-competitive provisions, the most important being the imposition of the salary cap, would outweigh any corresponding public detriments.[57]

A *The Comparative model: Qantas/Air New Zealand Decision*

Although coming from a completely different perspective, the Commerce Commission reached the same point in both the Qantas/Air New Zealand and the NZRU deliberations. Both had arrangements that would result, or were likely to result, in a lessening of competition in the relevant markets.

What were the public detriments and benefits in the Qantas/Air New Zealand proposals? The Commission estimated single-year benefits and detriments, based on year three of the proposals, but also considered how benefits and detriments would accrue over an initial five-year period.

1 *The Benefits*

The Commission reviewed the benefits that both airlines claimed would arise from the proposals. The claims were predictable. They comprised cost savings, additional number of tourists in New Zealand, the continuation of Qantas's purchase of aircraft engineering and maintenance services from Air New NZ at existing levels; improved aircraft and freight schedules; new direct flights; and a number of unquantified benefits. The latter included productive and dynamic inefficiencies (considered in the context of the detriments outlined below), the avoided social cost of public funds, the preservation of New Zealand's national carrier, enhanced global competitiveness and improved governance of Air New Zealand. After a careful analysis, the Commerce Commission predicted that the most likely dollar benefit to the New Zealand public would be $40.5 million dollars over the designated period.[58]

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[57] The Commission's model to identify a public benefit and a public loss in *Decision 580* was as follows:

> … a public benefit is any gain, and a detriment is any loss, to the public of New Zealand, with an emphasis on gains and losses being measured in terms of economic efficiency …
>
> [I]t is not correct to say that only those gains and losses that can be measured in dollar terms are to be included in the assessment; those of an intangible nature, which are not readily measured in monetary terms, must also be assessed.
>
> (Commerce Commission Determination *Decision 580,* [543,545]).

[58] See also below Part VII.

2 *The Detriments*

(a) *Allocative Inefficiency*

The Commission noted that allocative inefficiency arose from the impact of reduced competition and, in this case, would be expected to cause the market price (air fares and freight rates) to be increased above, and the market output (number of aircraft seats and volume of freight capacity provided) to be reduced below, the level that would prevail in the absence of the proposals. Its mid-level measure of the extent to which New Zealand air travellers and producers would be affected, directly and adversely, by the proposals was estimated (for the designated year) at the most likely value of $90 million.

(b) *Productive Inefficiency*

Traditional productive inefficiency measures the extent to which a business's costs are above the minimum necessary to produce a given output. The Commission identified this as a real loss in the sense that resources are being wasted that could be used elsewhere in the economy to produce valued outputs which are foregone due to their unproductive use by the inefficient firm. Noting, inter alia, that as both airlines had announced plans to substantially reduce costs there was a clear suggestion that costs had been excessive in the past and there was an intention by both to reduce them in the future, it concluded that productive inefficiency was likely to arise in all markets in which there would be a substantial lessening of competition. The mid-level loss in the designated year was estimated at $5 million.

(c) *Dynamic Inefficiency*

Dynamic inefficiency occurs when a business or industry is less innovative than it might be. As aviation was a dynamic industry, the Commission noted that there would be substantial losses arising from a reduction in the competitive spur to innovate. These losses were estimated at $50 million per annum in year three.

The most likely total of annual detriments in year three was $195 million.[59]

Although very thoroughly analysed by the Commerce Commission, the possible benefits and detriments resulting from the airlines' proposed arrangements were apposite in a traditional economic market. They had an air of predictability. How would it affect various groups of air travellers? Would it result in more tourists flying into New Zealand? Would there be more new flights? Would the airlines rest on their laurels?

A detailed analysis of the possible benefits and detriments of the NZRU's proposed arrangements perhaps best illustrates how innovative the Commerce Commission needed to be to produce a deliberation that accommodated its regulatory framework. To consider whether nail-biting competition was the answer to balanced competition is a far cry from analysing competitive airline routes.

B *The NZRU and its Salary Cap Proposals*

To quantify the likely public benefits and detriments, the Commission adopted a five-year window within which the effects would be measured.[60]

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[59] See also below Part VII.

1 *The Direct Benefits*

The NZRU argued that there was a clear nexus between its proposed anti-competitive provisions and a range of 'direct' public benefits. The scheme would result in a more even distribution of talent and thus more balanced competition. And more balanced competition would lead to greater public enjoyment and thus produce direct public benefits. Indirect benefits would result from enhanced performances of the Super 14 and All Black teams. The NZRU did not ignore possible detriments outlined below.

The Commission regarded these claims with some scepticism. It considered a number of factors that might impede the effectiveness of a salary cap in promoting balance: the uncertainty of the 'hardness' of the cap and its constraining effect on only a few provincial unions; the income disparity of the various unions; the incentive of top players to take a reduction in salary to remain with a strong union; the importance of team-specific talent; and the limitations of the 'uncertain hypothesis outcome'.[61]

(a) *The Uncertainty of Outcome Hypothesis (the 'UOH')*

The Commission had to address the following essential question. Was a more balanced competition a more attractive one to live spectators and/or television viewers? Would they attend or watch more matches because they were more exciting – the uncertainty of outcome hypothesis (the UOH')?[62]

In the face of an enormous amount of literature that endorses the idea that 'spectator interest is heightened when contests are close and unpredictable'[63] the Commission conducted its own extensive investigation.[64]

Viewing the UOH theory with some misgivings and desiring a domestic picture, the Commission examined available evidence on rugby union in New Zealand, specifically the findings of Owen and Weatherston,[65] whose very recent

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[60] A detailed analytical commentary on this part of Commerce Commission Determination *Decision 580* – the potential effects of the proposed salary cap and its likely success or otherwise – is the subject of a discrete article to be published in a forthcoming issue of the *Asia Pacific Law Review*.

[61] Commerce Commission Determination, *Decision 580*, [554].

[62] The Commission noted many economic theories that suggested that demand is driven by the excitement generated by the uncertainty of the outcome of individual games. It referred, at [635, and fn 132], to the following articles: Rottenberg, 'The Baseball Players' Labor Market' (1956) 64(3) *The Journal of Political Economy*; W C Neale, 'The Peculiar Economics of Professional Sports; A Contribution to the Theory of the Firm in Sporting Competition and in Market Competition' (1964) 78(1) *The Quarterly Journal of Economics* 1-14; El-Hodiri and M Quirk, 'An Economic Model of a Professional Sports League' (1971) 79(6) *The Journal of Political Economy* 1302-19; R Fort and J Quirk, 'Cross-subsidisation, Incentives, and Outcomes in Professional Team Sports Leagues' (1995) 33(5) *Journal of Economic Literature* 1265-99. For further discussion, see R Ahdar, 'Professional Rugby, Competitive Balance and Competition Law' [2007] *European Competition Law Review* 36.

[63] Dabscheck and Opie, above n 3, 260.

[64] Commerce Commission Determination *Decision 580*, [636].

[65] D P Owen and C R Weatherston, 'Uncertainty of Outcome and Super 12 Rugby Union Attendance: Application of a General-to-Specific Modeling Strategy' (2004) 5(4) *Journal of Sports Economics* 347-70; D P Owen and C R Weatherston, 'Uncertainty of Outcome, Player Quality and Attendance at National Provincial Championship Rugby

studies shed doubt on the nexus between evenness of competition and spectator enjoyment, the connection upon which the NZRU's argument for the imposition of a salary cap and associated arrangements primarily rested.[66]

With respect to live spectator enjoyment, the Commission used a model of demand for rugby union and other forms of sports entertainment, augmented by some econometric techniques. For live matches, two components were ticket price and the number of spectators. Assuming that the sports entertainment market remained constant, the Commission estimated that the net public benefits from greater spectator interest in rugby union following the implementation of the proposed arrangements over a five year period would be between $0 and $1,100,000.[67]

The Commission undertook its own empirical investigation in two areas where no research could be found. With regard to the relationship between inter-seasonal uncertainty and spectator demand, it found no evidence from its prescribed data[68] that a more balanced competition (over successive seasons) would lead to stronger crowd attendance. Factors such as ticket prices and the historical record of a union being a semi-finalist were significant in explaining demand.[69]

In order to evaluate the impact of competitive balance on television viewership, it collected extensive data that included: match-by-match SKY ratings; match-level data such as game dates, kick-off times, and round-robin rosters; match results publicly available from the TVNZ website; and household income and provincial population available from Statistics New Zealand. Applying a sophisticated model, its results were revealing. The UOH did not hold with respect to television viewers of 1st Division NPC matches. Other factors were the important drivers of demand:[70] household income; prime-time scheduling of broadcasts; spectacle matches; the number of other 1st Division matches broadcast on match day; Sunday broadcasts; and match quality (in particular, the number of Super players involved in a contest). With respect to the last factor, the Commission came to the following surprising conclusion:[71]

> The transfer of a Super player from a strong contest to a weak contest results in an increase in the combined television audience, because the loss of audience in the first is more than offset by the increase in the second. Hence, player redistribution policies, such as a salary cap scheme, may increase viewer demand, not because of a more even competition, as

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Union Matches: An evaluation in light of the Competitions Review' (2004) 23(4) *Economic Papers* 301-25. See Commerce Commission Determination *Decision 580*, [646-7], fns 140, 140.

66 Strong arguments were put forward by the NZRU's expert advisors challenging the Commission's use of his empirical data.

67 Commerce Commission Determination *Decision 580*, [737].

68 Factors included market size; average weekly income; average ticket prices; certainty and uncertainty of a union's overall performance in a season; a union's previous successes; a union's marketing expenditure; and other unobserved union-specific characteristics. See Commerce Commission Determination *Decision 580*, [665].

69 Commerce Commission Determination *Decision 580*, [666].

70 Ibid [674].

71 Ibid [675]. Not unexpectedly, the NZRU experts attacked the Commission's findings on the grounds of data limitations; incorrect interpretation; and deficiencies in the econometric techniques used. The Commission sought expert advice on these criticisms, and concluded that most were very weak or unfounded.

proponents of the UOH would claim, but rather because of an increase in the average quality of games.

The broadcasters argued that it was just plain 'commonsense that the UOH holds'.[72] It was no surprise that the Commission was not minded to use the subjective notion of commonsense in a rigorous assessment of the hypothesis.[73] The Commission concluded that no likely benefits were likely to flow to television viewers from greater uncertainty of outcome, as a result of the salary cap implementation. Uncertainty of outcome 'is not a driver of audienceship of NPC rugby'.[74]

There was clear evidence, however, that spectators and viewers were attracted to the quality of contests, as measured, for example, by the number of Super players involved in a match.[75]

The Commission analysed the effect on expected demand on the assumption that in the long run (that is, when the salary cap is in full effect), the salary cap would force the redistribution of 30% of the Super players from each of the five unions that currently have the most Super players in their squads (as at 2006) to the five unions that currently have the fewest Super players (as at 2006). In this 'best case scenario,[76] it estimated that the redistribution would lead to an eventual expected increase in television demand of approximately 8% per match when the proposed salary cap was fully functioning.[77] Of course, in the exercise of assessing a public benefit, the Commission then had to evaluate the net change in viewers, surplus per match – that is the difference in the surplus gained, as above, less the surplus lost by reduced demand for other forms of sports entertainment. Having accounted for this, the Commission estimated the net public benefits from greater television viewer interest as a result of redistribution of players pursuant to the proposed arrangements to be between $0 to $10,800,000 over five years. [78]

(b) *Enhanced Provincial Union Financial Performance*

The NZRU submitted that a more attractive domestic competition would lead to stronger financial performance of the provincial unions. The Commission was somewhat sceptical of the NZRU's nexus between this and a true public benefit.[79] It did not consider changes in the distribution of income or economic welfare, where one group gains at the expense of another, as 'benefits' when weighing up the overall gain to society. It expected that the NZRU's reasoning was along the following lines:[80]

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[72] Commerce Commission Determination *Decision 580*, [686]; fn 164: submission on 'What Drives Television Demand for NPC Rugby Matches?', 22 May 2006, R Friesen, CEO, TVworks, Can West, [2].

[73] The Commission was cautious as to how much weight to place on the broadcasters' views. Their claims that viewers find uncertainty of outcome attractive lacked rigorous analysis. The Commission noted that it was relatively costless for them to support the proposed arrangements: all to be gained; nothing to be lost.

[74] Commerce Commission Determination *Decision 580*, [698].

[75] Ibid [691].

[76] Ibid [748].

[77] Ibid [753].

[78] Ibid [759].

[79] Ibid [693].

[80] Ibid.

> First, greater financial strength may mean more resources are spent on player development, which in turn may make for a more interesting competition. Second, unions may have greater means to provide better facilities for spectators. Third…unions may enjoy the greater wherewithal to attract talent from overseas and/or keep local talent from migrating abroad.

Despite its reluctance to be drawn into this debate, the Commission considered it likely that *if*[81] and when provincial unions became more financially secure, as a result of more attractive domestic competition (as noted above, deriving more from redistribution of talent than from unexpected outcomes), the NZRU's expectations might bear fruit.[82]

(c) *Increased Funding: Broadcasting and Sponsorship Revenues*

The NZRU submitted that one of the direct benefits likely to flow from the introduction of the proposed arrangements was an increase in the level of broadcasting and sponsorship revenues to the NZRU and provincial unions. In other words, a more attractive domestic provincial competition is a more marketable product.[83] Applying a number of checks and balances and approaching the argument with some scepticism,[84] the Commission estimated that the expected increase in funding to the NZRU and PD provincial unions under this head would create a public benefit of between $0 and $360,000 over five years.[85]

(d) *The Problem of the Hardness of the Cap*

The Commission noted that uncertainty as to any likely direct benefits will remain while there is doubt as to the hardness of the salary cap, and as to the speed with which the salary cap can constrain the various provincial unions.[86]

2 *The Indirect Benefits*

The NZRU claimed that a number of indirect benefits would flow from the proposed arrangements:[87] greater enjoyment for New Zealand spectators and

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[81] The Commission noted that these benefits would only be realised to the extent that the implementation of the proposed arrangements did actually lead to more attractive competition, [699].

[82] Commerce Commission Determination *Decision 580*, [699].

[83] The NZRU had to connect this to a *public* benefit. It argued that as all television broadcasting revenues derive from the sale of rights to News Limited, a foreign company, any potential reduction in these revenues in the counterfactual (no salary cap) would represent a net loss to the New Zealand public, as no other New Zealand entity would receive this income. Instead, News Limited would purchase alternative overseas sports or other entertainment for New Zealand audiences ('The Application, Schedule J: Brown Copeland Report, [51]). Thus it was argued that any increase in overseas television broadcasting revenues would represent a public benefit: Commerce Commission Determination *Decision 580*, [762].

[84] The Commission quite correctly noted that added sponsorship to rugby would divert sponsorship funds from other recipients, such as other sports and the arts. It also noted that some economists regarded excessive advertising expenditure as socially harmful.

[85] Commerce Commission Determination *Decision 580*, Table 13 ([793]); [795].

[86] Commerce Commission Determination *Decision 580*, [700].

viewers of New Zealand international matches; greater leverage for the NZRU over international television rights, sponsorship and revenue sharing arrangements; greater sponsorship expenditure by New Zealand firms spent in New Zealand with the NZRU instead of being spent overseas; improved international trading opportunities for New Zealand firms via the 'association with success' factor; increased tourism to New Zealand; and a 'feel good' factor for many New Zealanders.

The Commission felt that the link between the proposed arrangements and these perceived 'indirect' public benefits was probably weak. As a result, it placed little weight on the latter.

3 *The Detriments*

The Commission identified a number of detriments that could potentially arise from the proposed measures.[88]

(a) *Allocative Inefficiency*

There was the possibility of a 'misallocation' of players between unions if a salary cap was imposed. As the cap had the ability to restrict the amounts that provincial unions would be able to spend on players, this could happen in one of two ways:[89]

(i) a player might be prevented from transferring by the inability of the potential receiving union to pay his free market salary; or
(ii) a player would be forced to transfer because the releasing union would be unable to afford his free market salary.

However, taking into account relevant factors,[90] the Commission considered that the allocative inefficiency detriments over a five year period were likely to be small.[91]

(b) *Productive Inefficiency*

The Commission noted the real possibility of a constrained union's incentive to 'cheat' the cap. Therefore, it would be essential to enforce the cap. Compliance costs, enquiry costs and setting up costs would be considerable. The Commission's estimate as between $678,000 and $788,000 in the first year of operation, and between $460,000 and $540,000 per year for the next four years.[92]

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87 Ibid [710]; [797-803].
88 Ibid [563].
89 Ibid [565].
90 The salary cap would only constrain a few unions; factors other than salary influence a player's willingness to move between unions; and the salary cap was a cap on the total player payroll, not individual salaries, so there was some flexibility within the cap to allocate salaries.
91 The value of the detriment was $133,000 (rounded) when discounted at a real rate of 6.8%, which assumed a nominal discount of 10% and an inflation rate of 3%.
92 Commerce Commission Determination *Decision 580*, [581]. This took into account the NZRU's estimate of two breach inquiries per year at the cost of $70,000 per year. The Commission considered this an optimistic estimate.

(c) *Loss of Player Talent*

On the Commission's modelling, in order for the salary cap to achieve its purpose,[93] a reduction in players' salaries would occur. It concluded that the imposition of the salary cap and the other proposed arrangement would probably have a 'dampening effect'[94] on average player salaries and the greater impact would be felt by salaries at the lower end, rather than evenly across all salary levels. This cost of lost output would range from $948,000 to $1,895,000.

(d) *Reduction of Player Skill Levels*

The Commission's assessment of the allocative inefficiency of the proposed arrangements suggested that there would be some restriction on player movements. Would this affect team morale? The Commission concluded that this detriment, if it existed at all, was likely to be small.

(e) *Innovative Efficiency Losses*

Such losses such as the diversion of a union's energies in order to devise ways to circumvent the new regulations, or the lobbying for changes to soften the cap generally were considered under other headings. The Commission felt that it was unlikely that there would be any further significant detriment under this head.

VII THE COMMISSION'S ULTIMATE FINDINGS

By balancing the overall quantified detriments and benefits,[95] and taking the mid-point of the range as being a reasonable estimate of the likely public benefit, it concluded that the net public benefit over five years was approximately $2 million.

Thus the public benefit outweighed the public detriment, and the Commission authorised the implementation of the proposed arrangements.

However this was not done unconditionally. The Commission identified three areas where it remained concerned that the potential benefits could be at risk:

- the salary cap arrangement could create incentives for provincial unions to evade or avoid the cap;
- the draft salary cap regulations had not yet been finalised or agreed upon; and
- the proposed arrangement created a new and untested regime for which quantification of the benefits was difficult to assess.

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[93] The NZRU disagreed with this analysis claiming, inter alia, that spending on salaries would increase as the incomes of unions rise, caused by a more even and attractive competition. The Commission was not attracted to these arguments, preferring the Dr Rodney Fort Report in 'The Application, Schedule H, [22], [24-26], [31] in which Professor Fort commented repeatedly that a salary cap 'reduces pay to players'.

[94] Commerce Commission Determination *Decision 580*, [608].

[95] The Commission considered that the overall unquantified detriments and benefits were small and its table suggests that the two balance each other out.

In an attempt to address these concerns, the necessary authorisation to implement the scheme was given to the NZRU but subject to five stringent conditions:

(i) the NZRU was to implement and give effect to regulations that provided for the effective audit, monitoring and enforcement of compliance with the salary cap regulations;
(ii) generally, all remuneration received by or on behalf of or paid for a player for or in connection of playing services to a provincial union was to be included in the salary cap;
(iii) any remuneration received by a player unrelated to the provision of playing services to a provincial union was to be excluded from the salary cap amount;
(iv) all accountable non-financial benefits were to be accorded a financial value for salary cap purposes; and
(v) the NZRU was to commission and meet costs of an independent review of the operation of the salary cap after four years and six months before the expiry of the authorisation.

The authorisation was to expire on the sixth anniversary of the date of the granting of the authorisation.

Following this authorisation, the NZRU filed a request to the Commerce Commission[96] to vary the authorisation as a result of two subsequent developments relating to the impact of the Rugby World Cup in 2007. The NZRU and the New Zealand Rugby Players' Association (the 'NZRPA') [97] believed that these developments warranted some salary cap relief for the provincial unions involved in the 2007 Air New Zealand Cup competition. Both the NZRU and the NZRPA agreed to amend the CEA to provide some salary cap relief in the 2007 year subject to having that variation authorised by the Commerce Commission.[98]

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[96] Letter from NZRU to Commerce Commission, 21 December 2006: 'Application to Vary Commerce Commission *Determination 580* – New Zealand Rugby Union Incorporated'.

[97] The CEA was negotiated between the NZRU and the RPC. The RPC is a 400-member registered trade union and an incorporated society and it was through the RPC that professional rugby players negotiated the agreement. The NZRPA is a player-representative body, comprising All Black, New Zealand Sevens, Super Rugby, NPC 1st Division, National Representative and academy players. The RPC and the NZRPA have the same membership and board, although the NZRPA was established as the commercial arm for player interests, whilst the RPC is the players' negotiating body.

[98] The NZRU requested that the Commerce Commission vary the authorisation so as to permit the NZRU and the NZRPA to vary the CEA to provide the necessary salary cap relief for the 2007 year only by:

(a) discounting the notional values of the players who are selected in Super 14 squads as replacements for the players who are on a conditioning programme to the notional values that the replacement players would otherwise have had in the absence of the conditioning programme; and
(b) providing a discount to each provincial union in respect of each of the 33 players 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 away at the Rugby World Cup 2007.

The Commerce Commission issued an invitation to interested parties for initial submissions on this application.[99] At the time of writing, a number of these submissions had been filed.

A *The Comparative Model: The Qantas/Air New Zealand Decision*

In the same purely monetary evaluation, as the checks and balances returned a detriment value higher than benefit value, authorisation for the two airlines' strategic proposals was declined.

This decision went on appeal to the New Zealand High Court.[100] The Court was charged with deciding whether the Commerce Commission had erred in finding that the appellants had not satisfied it that the proposed alliance would result in such a benefit to the public that it should be permitted.

The High Court accepted that the Commerce Commission was entitled to find that allocative, productive and dynamic efficiencies would be likely to result from the proposed alliance. It rejected the quantification of losses the Commission attributed to allocative inefficiencies and expressed reservations about the figure the Commission put on productive inefficiencies. However the Court was satisfied that the Commission was entitled to find that substantial detriments were likely to arise in both categories and had been fairly quantified in the case of dynamic inefficiencies.[101]

While the Court noted that the Commerce Commission's quantified benefits were modest, it was satisfied that the quantified public benefits were significantly less than the quantified detriments, even after giving due weight to its reservation as to the quantified losses.[102] The unquantified benefits were not sufficient to tip the balance to such an extent that would persuade the Court that the Commission's assessment was wrong.[103] The appeal was dismissed.

VIII AN AUSTRALIAN PERSPECTIVE

There is plethora of writing on the legal regulation of sporting labour markets in Australia, and this paper does not retrace the extensive debate and the controversial viewpoints.[104]

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[99] Letter from Commerce Commission, 17 January 2007.

[100] *Air New Zealand v Commerce Commission* (2004) 11 TCLR 347.

[101] Ibid [427].

[102] Ibid [428].

[103] Ibid [429].

[104] See, for example, N Bicker and P von Nessen, 'Sports and Restraint of Trade: Playing the Game the Court's Way' (1985) 13 *Australian Business Law Review* 180; A Buti, 'Salary Caps in Professional Team Sports; An Unreasonable Restraint of Trade?' (1999) 14 *Journal of Contract Law* 130; A Humphreys, 'Sport, Restraint of Trade and the Australian Courts: Adamson v New South Wales Rugby League Ltd' (1993) 15 *Sydney Law Review* 92-100; W Pengilley, 'Sporting Drafts and Restraint of Trade' (1994) 10 *Queensland University of Technology Law Journal* 89; B Dabscheck, 'Playing the Team Game: Unions in Australian Professional Team Sports' (1996) 38 *Journal of Industrial Relations* 600; B Dabscheck, 'Sport, Human Rights and Industrial Relations' (2000) 6 *Australian Journal of Human Rights* 129; W Pengilley, above n 4; Dabscheck and Opie, above n 3, 259; C Davies, 'The Use of Salary Caps in Professional Team Sports and the Restraint of Trade Doctrine' (2006) 22 *Journal of Contract Law* 246. These are by no means exclusive.

In brief, however, before the mid-1990s, Australian courts considered that similar provisions in Australia's *Trade Practices Act 1974* (Cth)[105] took the employment of football players outside competition law. This was confirmed by the Full Federal Court of Australia in *Adamson v NSW Rugby Football League.*[106] Clearly it was considered that the prohibitions in s 45(2)(a) and (b) of the Act related only to contracts for the supply of goods and services, as defined in s 4. The players were not providing 'services' within the definition of that term, as 'the performance of work under a contract of service' is excluded by the concluding words of the definition.[107] The Court held, inter alia, that the internal draft rules did little to protect the interests of the New South Wales Rugby League, and did much to infringe the freedom and interests of the players. The attempted justification for the restraint of trade failed and the appeal was allowed.

Burchett J in *News Ltd v Australian Rugby Football League Ltd*[108] endorsed the view that competition law should not apply. In this case, his Honour concluded that the particular contractual agreements under review had been chosen deliberately because it took the employment of players outside the Act. However, on appeal,[109] referring to *Hughes v Western Cricket Association Inc*,[110] the Full Federal Court of Australia observed:[111]

> In these circumstances, it seems to us that in the competition and rivalry between clubs for premier players there was a real chance or possibility that there could be competition to engage players otherwise than under a contract of service. It follows that, at the time the Commitment Agreements and Loyalty Agreements were executed, the clubs were likely to be in competition with each other for the 'services' of premier players.

Gaining authorisation for anti-competitive practices in sport has not, until very recently, been part of the Australian playground.[112] Any Australian decisions in this sphere have been court decisions. This highlights a very significant difference in the countries' approaches to the regulation of sport. It has been suggested that New Zealand's approach has become one which is very economist driven:[113]

> The [New Zealand]Commerce Commission's determination[114] speaks in the language of economists. Economists think in terms of 'players not allocated at the margin' and 'a price elasticity of supply and demand which

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[105] Comparative provisions comprise: s 4(1) *Trade Practices Act 1974* (Cth) (s2(1) *Commerce Act 1986* (NZ): 'services'); s 4D *Trade Practices Act 1974* (Cth) (s29 *Commerce Act 1986* (NZ)); ss 45, 45A *Trade Practices Act 1974* (Cth) (ss 27, 29, 30 *Commerce Act 1986* (NZ)); s 51(2)(a) *Trade Practices Act 1974* (Cth) (s 44(1)(f) *Commerce Act 1986* (NZ)); s 90 *Trade Practices Act 1974* (Cth) (s 61 *Commerce Act 1986* (NZ)).

[106] (1991) ATPR 41-084 (Federal Court of Australia); (1991) ATPR 41-141 (Full Federal Court of Australia).

[107] The Court followed *ASZ Operations Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460; 97 ALR 513 and *Adamson v West Perth Football Club (Inc)* (1979) 39 FLR 199. The internal draft system was held void as a restraint of trade.

[108] (1996) ATPR 41-466.

[109] *News Ltd v Australian Rugby Football League Ltd* (1996) ATPR 41-521.

[110] (1986) ATPR 40-736, 48,046-48,047.

[111] *News Ltd v Australian Rugby Football League Ltd* (1996) ATPR 41-521, 42,654.

[112] Pengilley, above n 4, 610-670, 612, fn 11.

[113] Ibid 654 (citations omitted).

[114] A reference to Commerce Commission Determination *Decision 281*, 17 December 1996.

> would be one. But what about the lawyer? Mr Justice Wilcox, when reviewing the NSW Rugby League Draft did not, in his judgment, use words of allocative efficiency … He reflected the lawyer's traditional consideration of the fairness of what was being evaluated …
>
> Would the New Zealand Rugby draft, which found favour in economic reasoning, pass the lawyer's common law restraint of trade evaluation, focusing as it does on civil rights and individual freedom issues?

These sage words were written before the outcome of the appeal against the Commerce Commission's 1996 decision. It is significant that the New Zealand courts bowed to the expertise of the Commerce Commission as a specialist in the field of restrictive trade practices and dismissed the players' appeal. Within that court decision, it was held that the imposition of a transfer fee would not automatically lead to a restraint of trade:[115]

> It all depends on the circumstances and a balancing of the interests of the individual player and the wider interests of the game and all players.

That said, it is clear that the common law doctrine of restraint of trade is still alive and well – in both countries, competition law recognises its existence.[116] In Australia, as actions under the relevant provisions of the *Trade Practices Act 1974* (Cth) have consistently foundered under the impact of s 4 of the Act, there has been heavy reliance on the common law doctrine.

In *Buckley v Tutty,*[117] the High Court concluded that the NSWRL's transfer rules were an unreasonable restraint of trade and, as well documented by Dabscheck and Opie,[118]subsequent decisions have ruled that zoning and residential rules;[119] the internal draft;[120] restrictions on transfers within a league;[121] and between leagues[122] were unreasonable restraints of trade.

In the light of this Australian model, it is interesting to note that in 2006 a coalition of major Australian professional sports – Australian Rugby Union Limited, Cricket Australia, Football Federation of Australia Limited, Lawn Tennis Association of Australia Limited, National Rugby League Limited and PGA Tour of Australia Limited (the 'COMPS') – sought authorisation from the Australian

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[115] *Rugby Union Players' Association Inc v Commerce Commission (No 2)* [1977] 3 NZLR 301, 318.

[116] See s 7(1) *Commerce Act 1986* (NZ); s 4M(a) *Trade Practices Act 1974* (Cth).

[117] (1971) 125 CLR 353.

[118] Dabscheck and Opie, above n 3, 272.

[119] Dabscheck and Opie, above n 3, 272: *Hall v Victorian Football League* [1982] VR 64; *Nobes v Australian Cricket Board* (unreported, Vic SC, 16 December 1991, BC9102902); *Avellino v All Australia Netball Association Ltd* (unreported, SA SC, 5 September 2003).

[120] Dabscheck and Opie, above n 3, 272: *Adamson v New South Wales Rugby League* 103 ALR 319.

[121] Dabscheck and Opie, above n 3, 272: see for example *Foschini v Victorian Football League* (unreported, Vic SC, 15 April 1983, BC8300014); *Carfino v Australian Basketball Federation* (1988) ATPR 40-895.

[122] Dabscheck and Opie, above n 3, 272: *Adamson v West Perth Football Club* (1979) 27 ALR 475; *McCarthy v Australian Rough Riders Association* (1988) ATPR 40-836; *Barnard v Australian Soccer Federation* (1988) 81 ALR 51.

Competition and Consumer Commission (the 'ACCC') to negotiate collectively a product fee with sports betting operators. Reversing its earlier draft proposal to deny the application, the ACCC granted authorisation on 13 December 2006.[123]

With respect to any anti-competitive detriment, the ACCC considered that the proposed collective bargaining arrangements had the potential to inhibit a growing level of competition between COMPS members to supply information to sports betting operators;[124] could lead to market distortions;[125] and, depending on the outcome of the negotiations, could also result in increased costs for sports betting operators who would probably pass that on to consumers.[126] However these factors were measured against the voluntary nature of the arrangement[127] and the absence of boycott activity,[128] both of which were likely to lessen the potential for the scheme to reduce economic efficiency.[129] The fact that there was no opposition from sports betting operators was significant.[130]

The ACCC considered that the proposed arrangements could generate some public benefits from allowing COMPS members to have greater input into contractual arrangements, and from the fact that the revised collective negotiation structure might allow for some cost savings. However, any such benefits would be reduced by the diverse nature of the parties.[131]

The ACCC's overall conclusion was that although the balance between benefit and detriment was close the public benefit was likely to outweigh the public detriment.[132] Authorisation to the proposed arrangements was granted until 28 February 2009.

Is this a new era for Australia in this sporting field?

IX CONCLUSION

This paper leaves little doubt that the Commerce Commission is a new actor in New Zealand's sporting industry. The New Zealand sporting industry can no longer turn a blind eye to the Commission's regulatory powers and, unlike its Australian cousins (at least until very recently), it has adopted a 'prevention better than cure' approach by seeking authorisation for possible anti-competitive arrangements. Its first attempt failed to avoid litigation but, wiser and more astute, in 2006 the NZRU embraced the trend of collectivism and entered into an appropriate agreement with its players. Any appeal on the Commission's determination seems highly unlikely.

Not only is the Commerce Commission a fresh actor in the country's sporting environment but it has had to learn a new act on its own stage. The role of deciding whether a salary cap imposition is an antitrust provision and, if so, whether it should be authorised, does not fit easily within the long-established philosophy of the market economy. The NZRU was not presenting the Commission with a proposal designed to purge its opposition. That would produce a death knell to New Zealand's

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[123] Australian Competition and Consumer Commission, *Authorisation* A91007, 13 December 2006.
[124] Ibid [6.11-6.21], [6.29].
[125] Ibid [6.26], [6.29].
[126] Ibid [6.33-6.34].
[127] Ibid [6.7-6.8].
[128] Ibid [6.9-6.10].
[129] Ibid [8.3].
[130] Ibid [8.3].
[131] Ibid [8.5-8.6].
[132] Ibid [8.9-8.10].

sacrosanct sport. Rather, the proposals were designed to implement a more even national competition in an attempt to preserve a commercially viable and sustainable game. This is far from the norm of capitalist aspirations and the Commission has had to learn how to play with this new ball. Its 2006 Determination displays remarkable adaptation. A very dogged and determined investigative approach has given all sporting codes a wealth of information with which to arm themselves in an increasingly professional environment. One of the most significant findings of the Commission was that the 'uncertainty of outcome' hypothesis, heralded by so many as the answer to balanced competition, was not a main driver of demand for sport, at least in New Zealand.

This is a pioneering decision which forges new ground on Australasian shores. It provides an important precedent for all sporting codes. There is indeed a new performer on both the commercial and sporting stage!