

10 August 2007

Commerce Act Review
Ministry of Economic Development
PO Box 1473
WELLINGTON

Dear Sir/Madam

Attached please find a copy of Submissions on behalf of the New Zealand Rugby Union in response to the Discussion Document entitled "Review of the Clearance and Authorisation Provisions Under the Commerce Act 1986". We are happy to discuss further any matters raised in the Submission and you should contact the undersigned in this regard.

Yours faithfully



Keith Binnie
General Counsel

Encl.



SUBMISSIONS BY THE NZRU
in response to MINISTRY OF ECONOMIC
DEVELOPMENT'S DISCUSSION DOCUMENT
entitled
"REVIEW OF THE CLEARANCE AND
AUTHORISATION PROVISIONS UNDER THE
COMMERCE ACT 1986"

SUBMISSIONS ON BEHALF OF THE NZRU

INTRODUCTION

Set out below are the submissions on the behalf of the New Zealand Rugby Union (“NZRU”) in response to the Ministry of Economic Development’s (“MED”) Discussion Document headed “Review of the Clearance and Authorisation Provisions Under the Commerce Act 1986”.

BACKGROUND REGARDING NZRU

This submission is made on behalf of the New Zealand Rugby Union Incorporated of 1 Hinemoa Street, Harbour Quays, Wellington (“NZRU”).

The NZRU is responsible for the administration of Rugby in New Zealand, and in doing so its aims are to:

- (a) promote, foster and develop rugby throughout New Zealand and the world and to control rugby throughout New Zealand;
- (b) arrange and participate in international, trial and other rugby matches and tours both within New Zealand and overseas;

- (c) represent New Zealand rugby on the International Rugby Board ("IRB") and to submit any amendments to the laws of the game and the by-laws and regulations of the IRB, to the IRB that the NZRU considers to be in the best interests of New Zealand rugby;
- (d) form and manage New Zealand representative rugby teams;
- (e) foster rugby matches between our member provincial rugby unions;
- (f) encourage participation in, and support for, rugby by all participants in, and supporters of, the game and at all levels (including by way of example, administrators, players, coaches, referees, match officials and supporters); and
- (g) do all such other things to promote the interests of rugby as the NZRU may determine from time to time.

The NZRU is an incorporated society, registered under the Incorporated Societies Act 1908. Our members are:

- (a) Affiliated Unions: the 26 provincial rugby unions who administer rugby in defined geographical zones;
- (b) Associate Members: organisations with aligned aims, such as The New Zealand Universities Rugby Football Council (Incorporated), New Zealand

Schools' Rugby Council, New Zealand Deaf Rugby Football Union
(Incorporated) and The Rugby Museum Society of New Zealand Incorporated;

- (c) Life Members: natural persons elected as life members in recognition of exceptional service rendered to the NZRU and to rugby; and
- (d) the New Zealand Maori Rugby Board Incorporated.

Further information about the NZRU is available in our annual report.

The NZRU is also a shareholder in Rugby New Zealand 2011, a joint venture company formed with the Crown and having the operational responsibility for running the Rugby World Cup 2011 in New Zealand.

SUBMISSIONS

The NZRU's submissions will focus essentially on the restrictive trade practice issues raised in the Discussion Document. Although not all issues raised in that Document will be dealt with, the ones that have the greatest potential to impact on the future activities of the NZRU will be touched on in the submissions set out below.

Issue F: A Possible Clearance Process for Trade Practices

The NZRU supports the introduction of a clearance process for trade practices. In the NZRU's situation, there are a variety of potential innovative options where changes to regulations governing NZRU competitions and/or members might not otherwise be introduced because of the deterrent factors of cost and time related to the authorisation process. The NZRU anticipates that a clearance process will be a much quicker and less costly process as it would not include the public benefit/detriment analysis required when an authorisation is sought.

If there was a clearance process in place (as reflected in the process set out in diagram 2) then that would have considerable potential benefits for the NZRU subject to a minor modification referred to below. It would enable the NZRU to introduce these new initiatives having received a clearance in the knowledge that that would immunise the NZRU from further legal action without the deterrent cost and time factors involved in the authorisation process. The NZRU agrees that even a decision by the Commission to decline a clearance application would still provide greater business certainty about the risks of giving effect to any proposed conduct.

The NZRU also supports the proposition that conduct that falls within the definitions of the *per se* offences (i.e. price fixing and resale price maintenance) should be able to be cleared through this clearance process if they are found in fact not to substantially lessen competition. In particular, the NZRU considers that there are situations where conduct can technically fall within section 30 of the Act governing

price fixing but which have no or no significant anticompetitive effect. There should be a simple process available to allow for clearance of such conduct without the need to go through a time-consuming and expensive authorisation process.

The NZRU also supports a clearance system having the same features in terms of timeframes, undertakings, ability to vary, revoke or replace a clearance as for the merger clearance processes.

The modification to the clearance process set out in the document that the NZRU would support relates to the ability for a clearance application to deal with issues of jurisdiction such as whether or not one of the exemptions apply to exempt the proposed arrangement from the coverage by the Commerce Act. This would also be of considerable benefit in terms of giving certainty and avoiding the potentially costly and time consuming process of having to file a full application for clearance or authorisation when any jurisdictional issues should be able to be relatively quickly and easily resolved.

Issue H: The “Lessening Competition” Jurisdiction Test

If there is to be a trade practice clearance system, the interface between the clearance and authorisation processes should be the same as it is for mergers as far as the NZRU is concerned but with the proviso that, as noted above, there should be the ability for parties to obtain a ruling under the clearance process for trade

practices that the Commerce Act does not apply to any proposed arrangement by reason of one of the exceptions under the Commerce Act.

Issue I: The Commission's Powers to Revoke, Amend or Replace Authorisations

The NZRU supports the preliminary view expressed in the Discussion Document that the Commission should not have the power to vary, replace or revoke an authorisation on its own motion under sub-clause (b) of Section 65. The NZRU also supports the proposition that the applicant to the original authorisation should be able to apply for a revocation, replacement or variation in the circumstances covered by Section 65(1).

Issue K: Conference Procedures

In respect of this issue the NZRU does not feel strongly one way or the other, but would support either:

- (a) limiting the right to call a conference to the Commission; or
- (b) limiting the right to call a conference to the Commission and the applicant.

The NZRU does not support a third party having the right to call a conference given that their interests may well be best served by delaying any process. This however does not apply to applicants where it is extremely unlikely that an applicant would have an incentive to delay or extend the authorisation process.

In practice, we suspect that third parties will in the course of the Commission's investigation be encouraging the Commission to call a conference in any event and hence we doubt that, in practice, this issue will be problematic. In the event that the Act is changed to provide that applicants and/or third parties will no longer be able to require a conference, we do not believe it is necessary that the Act should specify that they may request the Commission to do so as it goes without saying that that will have been the feedback to the Commission in the course of the investigation process.

Issue O: The Assessment of Efficiency Gains and Losses

The NZRU does not take any issue with the analytical framework that the Commission uses in relation to taking account of what would happen if a proposed arrangement did not go ahead, i.e. the counterfactual. That is not to say that the NZRU accepts in all cases the Commission's decisions in relation to its assessment of the counterfactual but it agrees that the correct approach is to look at an incremental situation whereby the efficiencies are judged relative to what would have happened without the proposed arrangement going ahead.

Issue Q: The Quantification of Costs and Benefits

The NZRU supports the proposition that the Commission should be able to have the scope to exercise judgements in relation to dynamic efficiency factors along with

other costs and benefits that are more easily quantified. The NZRU is of the view that if quantification is relied on too much, then it may give an unreal and/or false sense of the reliability or accuracy of certain facts and conclusions. NZRU experience has been that there is very considerable scope for disagreement amongst the experts about the reliability of quantification as a means of basing conclusions. There is no doubt that the emphasis on quantification adds to the cost and time that the authorisation process occupies. The NZRU questions whether or not a better quality decision results from such quantification particularly in the sporting context where the quantification of benefits in our view does not necessarily provide a more reliable picture of the likely benefits to the public from introducing proposed arrangements. This is especially so when all of the people within the particular sports industry are supportive of the introduction of the proposed arrangements, and strongly of the view that the arrangements will produce benefits.

Issue R: Timeframes Over Which Costs and Benefits are Assessed

The question is whether or not the costs and benefits timeframes the Commission uses are appropriate. The NZRU accepts the principle that the longer the timeframe, the more doubt arises in relation to the likely reliability and accuracy of the assessment of the costs and benefits. However, our experience is that a ten year timeframe is reasonable and would provide a sufficient degree of certainty about the reliability and accuracy of the assessment particularly in relation to the markets that the NZRU is involved in. Whilst there is scope for competition issues to evolve and change with greater frequency than a ten year timeframe, the NZRU experience has

been that arrangements that have been introduced in the past have lasted for ten years, see for example Decision 281. A shorter timeframe can prejudice an applicant for authorisation as often the public benefits from an arrangement take longer to result than do the anticompetitive effects (which may be immediate but not as significant as the benefits).

CONCLUSION

Overall, the Commerce Act does not need a major overhaul in our view and neither do the Commission's processes but there are a number of improvements that could be made to streamline the process for parties with a view to making them more readily available to participants in competitive markets.

Signature:



Date: 10 August 2007