ISBN no. 978-1-991085-46-7
Project no. 11.03/PRJ0046811
Public version

Draft Determination

Note: This is a draft determination issued for the purpose of advancing the Commerce Commission's decision on this matter. The conclusions reached in this draft determination are preliminary and take into account only the information provided to the Commission to date.

This is a draft determination under the Commerce Act 1986 in the matter of an application for authorisation of a restrictive trade practice. The application is made by:

Infant Nutrition Council Limited

The Commission:	Sue Begg Joseph Liava'a Nathan Strong
Summary of application:	The Infant Nutrition Council on behalf of its members (current and future) has applied for authorisation of an arrangement allowing the Infant Nutrition Council's members to restrict their advertising and marketing activities for formula products for children up to 12 months of age.
Draft Determination:	The Commerce Commission's preliminary decision is that, on the basis of the information provided to date, it should grant authorisation due to the public benefits that will result, or be likely to result, from the proposed arrangement.
Date of draft determination:	11 October 2023

Confidential material in this report has been removed. Its location in the document is denoted by [ ].

CONTENTS

Introduction

1. On 22 August 2023, the Commerce Commission (Commission) registered an application from the Infant Nutrition Council Limited (INC) under sections 58(1) and (2) of the Commerce Act 1986 (the Act) seeking authorisation on behalf of its current and future members for them to enter into and give effect to an arrangement to which section 27 of the Act may apply (the Application).[1]

Draft determination: grant authorisation

2. The Commission is releasing this draft determination to provide interested parties with an opportunity to comment before the Commission makes its final determination.

3. The Commission's draft determination is to grant authorisation under sections 58(1), (2), (6B), and (6D) of the Act to the Application due to the public benefits that will result, or be likely to result, from the proposed arrangement.

Next steps

4. The Commission now seeks written submissions on the draft determination. Submissions should be received by the Commission by close of business on **25 October 2023**. The process for making a submission is discussed further below.

5. The Commission may determine to hold a conference prior to making a final determination.[2] However, at this stage, it is the Commission's view that a conference is unnecessary.

The proposed arrangement and key parties

The application

6. The INC seeks authorisation to restrict advertising and marketing activities for formula products for infants up to 12 months old. The proposed arrangement involves agreeing to adhere, and give effect, to a Code of Practice for the Marketing of Infant Formula in New Zealand under which INC members agree to restrict advertising and marketing practices for formula products for infants aged up to 12 months old (the Proposed 2023 Code).

7. INC considers the Proposed 2023 Code would restrict:[3]

---

1 The INC submitted that the proposed arrangement does not constitute cartel conduct under section 30 of the Act. However, in the event that the Commission considers that the proposed arrangement might contain a cartel provision, the INC also seeks authorisation under sections 58(6B) and (6D) of the Act. We consider there are reasonable grounds for believing that the proposed arrangement may constitute a cartel provision (including that the proposed arrangement, as a whole, would restrict output). Accordingly, we consider it is appropriate to determine granting authorisation to the INC for conduct that may breach section 30 of the Act as well.

2 Section 62(6) of the Act.

3 The Application at [4] and at [63]-[73].

7.1 advertising infant formula to the general public;

7.2 distributing free samples to pregnant women, parents of infants, or the families and caregivers of infants;

7.3 distributing free samples to healthcare professionals as a sales inducement;

7.4 marketing personnel seeking direct or indirect contact with pregnant women or with parents of infants and young children;

7.5 distributing bulk quantities of free infant formula product to the health system, as a sales inducement;

7.6 distributing gifts of utensils or other articles that may discourage breastfeeding, whether to pregnant women, parents of infants, or caregivers of infants; and

7.7 offering inducements to healthcare professionals.

The Applicant

8. The INC is a limited company incorporated in Australia, owned by its members, which consist of manufacturers and marketers of infant formula and toddler milk products in Australia and New Zealand.

8.1 Its members include Danone Nutricia NZ Limited, Nestlé New Zealand Limited, Fonterra Co-operative Group Limited and The A2 Milk Company Limited.

8.2 Together, INC members account for approximately 99% of infant formula sales in New Zealand.[4]

9. The INC's constitution requires its members to comply with a code of conduct, which in turn requires INC's members to comply with any agreed code of practice.

10. Over time, the INC has updated, and sought authorisation to implement, its code of practice because it places restrictions on the marketing of infant formula. In 2015 and 2018, the Commission authorised the INC members to give effect to a code of practice. These past authorisations are discussed further below, with the most recent authorisation due to expire on 8 November 2023.

11. The Application relates to the authorisation of the Proposed 2023 Code, which contains only minor changes and is almost identical to the code of practice that the Commission authorised in 2018.[5]

---

4 The Application at [89].

5 See the Application at Appendix 1: Proposed INC Code of Practice. The changes include adopting more inclusive language for parents, adding 'social media' to the definition of 'advertising', and adding 'midwife' to the definition of 'health practitioner'.

12. The INC considers the Proposed 2023 Code would be an important part of New Zealand fulfilling its obligations under the World Health Assembly's International Code of Marketing of Breast Milk Substitutes (the WHO Code).

    12.1 The WHO Code aims to protect and promote breastfeeding, and to restrict the marketing of breast milk substitutes in ways that could undermine this aim.

    12.2 The WHO Code was adopted on a voluntary basis by New Zealand in 1983 and the Manatū Hauora - Ministry of Health (the MoH) is committed to giving effect to the WHO Code in New Zealand.[6]

Manatū Hauora - Ministry of Health

13. After its adoption in 1983, the MoH was solely responsible for giving effect to the WHO Code in New Zealand. The MoH chose to do so through a voluntary self-regulatory approach, rather than through legislation.

14. Most recently, the MoH's Maternity and Early Years Unit has been the unit directly responsible for giving effect to the WHO Code although this unit is now part of Te Whatu Ora - Health New Zealand (Te Whatu Ora). Te Whatu Ora works alongside the MoH and Te Aka Whai Ora - Māori Health Authority (Te Aka Whai Ora) in giving effect to the WHO Code.

15. While neither the MoH, Te Whatu Ora nor Te Aka Whai Ora are members of the INC, all work closely with the INC to give effect to the WHO Code, particularly when it comes to resolving public complaints about the marketing and advertising of infant formula. For example, the MoH and Te Whatu Ora are responsible for monitoring compliance with any INC code of practice, which they do through receiving complaints about alleged breaches of any INC code of practice.[7] Te Whatu Ora also provided input into the Proposed 2023 Code.

16. Since 2020, the MoH, and now Te Whatu Ora, have been developing The National Breastfeeding Strategy for New Zealand | Aotearoa Rautaki Whakamana Whāngote (the National Breastfeeding Strategy). The National Breastfeeding Strategy is to continue past programmes supporting the exclusivity and duration of breastfeeding to improve the health and wellbeing of infants, young children, breastfeeding parents and whānau, and benefit society as a whole. The National Breastfeeding Strategy has nine outcomes to recognise a holistic, whole-of-system approach to the

---

6 See Manatū Hauora - Ministry of Health *Implementing and monitoring the International Code of Marketing of Breast-milk Substitutes in New Zealand: The Code in New Zealand*. The WHO Code is also given effect in the Advertising Standards Code, Australia New Zealand Food Standards Code, and in past INC code of practices.

7 We do not consider, in resolving public complaints about the marketing and advertising of infant formula and monitoring compliance with any INC code of practice, that MoH, Te Whatu Ora or Te Aka Whai Ora are liable under section 80(1)(e) of the Act (by being directly or indirectly knowingly concerned in the contravention of the Act by the INC). This is because in their complaint resolution and monitoring functions, we do not consider those agencies 'in trade' (for the purposes of section 44(1)(h) of the Act) with the INC.

protection, promotion, and support of breastfeeding. Aspects of the National Breastfeeding Strategy most relevant to the Application are:

16.1 considering breastfeeding in developing relevant policies, guidelines, regulations, and frameworks across government;

16.2 establishing a regular process to review New Zealand's interpretation of the WHO Code;

16.3 reviewing the complaints process for breaches of any INC code of practice; and

16.4 working with Foods Standards Australia New Zealand (FSANZ) to review evidence relating to the marketing, labelling and preparation of breast milk substitutes.

Past authorisations by the Commission

17. In 2015 and 2018, the Commission authorised the INC members to give effect to an INC code of practice. The current authorisation (granted in 2018) expires on 8 November 2023. These two authorisations are:[8]

17.1 Infant Nutrition Council Limited [2015] NZCC 11 (the 2015 Authorisation); and

17.2 Infant Nutrition Council Limited [2018] NZCC 20 (the 2018 Authorisation).

18. In the 2015 Authorisation, the Commission authorised INC members to enter into, and to give effect to, a code of practice which restricted advertising and marketing of infant formula for children under six months of age. This was primarily because, while the code of practice was likely to lessen competition, the Commission considered that there would be public benefits from giving effect to the code of practice including:

18.1 avoided regulatory costs; and

18.2 improved public health outcomes.

19. In the 2018 Authorisation, the INC sought authorisation to amend its code of practice to extend advertising and marketing restrictions to formula for infants aged 6 to 12 months. For very similar reasons to the 2015 Authorisation, the Commission authorised an update of the INC's code of practice. However, unlike the 2015 Authorisation, the 2018 Authorisation was time bound with the Commission granting authorisation for a period of five years.

---

8 Further details of these authorisations can be found on the Commission's website at: https://comcom.govt.nz/case-register.

How the Commission assesses restrictive trade practice and cartel authorisations

20. The INC seeks authorisation under sections 58(1) and (2) of the Act, on the basis that section 27 of the Act might apply to Proposed 2023 Code.

21. Although the INC does not consider that the Proposed 2023 Code constitutes a cartel arrangement, the INC also seeks authorisation under sections 58(6B) and (6D) of the Act, on the basis that section 30 of the Act may apply to the Proposed 2023 Code if there are reasonable grounds for the Commission to believe that the restrictions in the Proposed 2023 Code may include cartel provisions.

22. Based on the restrictions in the Proposed 2023 Code, we consider it is appropriate to assess the Application under section 30 of the Act as well as section 27. This is because section 30(A)(3)(a) of the Act defines "restricting output" in relation to the supply of goods to mean preventing, restricting or limiting, or providing for the prevention, restriction or limitation of the production or likely production by any party to a contract, arrangement, understanding or covenant of goods that any two or more of the parties to that contract, arrangement, understanding or covenant supply or acquire in competition with each other.

    22.1 The restrictions in the Proposed 2023 Code are likely to meet the threshold for "restricting output" on the basis that they would likely result in a restriction on the production and output of formula that INC members supply to downstream retail markets in competition with one another (due to the likelihood of reduced demand for formula as a result of the restrictions in the Proposed 2023 Code).

    22.2 In addition, the restrictions in the Proposed 2023 Code are likely to result in a reduction in the acquisition of advertising services that would otherwise be acquired by INC members in competition with one another (section 30(A)(3)(d)).[9]

Statutory framework

23. The Commission can authorise conduct that may otherwise breach section 27 and/or section 30 of the Act. A two-stage assessment is undertaken to determine any authorisation application submitted under sections 58(1) and (2) (in relation to section 27), and/or (6B) and (6D) (in relation to section 30) of the Act:

    23.1 first, assessing whether the Commission has jurisdiction to authorise (the 'jurisdictional threshold'); and

---

[9] We believe there are reasonable grounds for considering the Proposed 2023 Code includes a cartel provision although we have not formally concluded on this point for the purposes of this Draft Determination. Under section 61(9) of the Act, it is not necessary for the Commission to determine whether a particular provision is in fact a cartel provision, providing there are reasonable grounds for believing that it might be.

23.2 second, assessing whether the associated benefits mean that authorisation should be granted (the 'public benefit test').

Jurisdictional threshold

24. When authorising conduct that would otherwise breach section 27 of the Act, under sections 58(1) and (2) of the Act, the Commission must be satisfied that such conduct would be likely to result in benefits to the public of such a degree as to outweigh any likely lessening of competition (ie, the detriments arising from the loss of competition caused by the conduct). As such, the Commission must first determine whether the conduct is likely to lessen competition. The lessening of competition need not be substantial,[10] although in the authorisation context, the Commission must also determine the extent of the lessening of competition that would result from the proposed arrangement.[11] If the Commission does not consider that a lessening of competition is likely, it does not have jurisdiction to further consider the Application and, consequently, will not go on to consider the public benefits of the conduct. However, if the Commission is satisfied that a lessening of competition is likely, it will go on to conducting the public benefits test.

25. When authorising conduct that would otherwise breach section 30 of the Act under sections 58(6B) and (6D) of the Act, the Commission needs to have reasonable grounds to believe that the contract, arrangement, understanding or covenant contains a cartel provision. We set out our brief assessment of our jurisdiction under sections 58(6B) and (6D) of the Act above; however, we note that it is not necessary for the Commission to determine whether a provision is in fact a cartel provision.[12] If the jurisdictional threshold under sections 58(6B) and (6D) is met, for the Commission to authorise conduct that would otherwise breach section 30 of the Act, the Commission must be satisfied that the contract, arrangement, understanding or covenant to which the application relates will in all the circumstances result or be likely to result in such a benefit to the public that it should be permitted.[13]

Public benefit test

26. Although the jurisdictional thresholds differ under sections 58(1) and (2), and sections 58(6B) and (6D) of the Act, we consider that the public benefit test is materially the same.[14]

27. Where the courts have previously considered various types of authorisation decisions allowed for in the Act, there has been overall consistency in the approach taken to assessments of public benefit (ie, a facts-based assessment of the benefits and detriments, adopting a quantitative approach where possible).[15]

---

10 Section 61(6A) of the Act.

11 *New Zealand Vegetable Growers Federation (Inc) v Commerce Commission (No.3)* (1988) 2 TCLR 582.

12 Section 61(9) of the Act

13 Section 61(8) of the Act.

14 See *News Publishers' Association of New Zealand Incorporated* [2022] NZCC 35, at [37]. We note that section 65AA of the Act referred to in the News Publishers' Association Authorisation since has been repealed, and that section 58(6) of the Act substantively replaced section 65AA.

15 *News Publishers' Association of New Zealand Incorporated* [2022] NZCC 35 at [38].

28. If the public benefits either outweigh the detriments or are likely to do so, the Commission may grant the authorisation. Otherwise, the Commission will decline to grant the authorisation.

Market definition

29. When the Commission considers an application for authorisation of potentially restrictive trade practices, it assesses the competitive effects of those practices in respect of the relevant market(s) in New Zealand.

30. Determining the relevant market requires a judgement as to whether, for example, two products are sufficiently close substitutes (as a matter of fact and commercial common sense) to provide significant competitive constraints on each other. Markets are defined in a way that best isolates the key competition issues that arise from the application.

31. There are two types of formula relevant to the Proposed 2023 Code:

    31.1 formula for children aged up to 6 months; and

    31.2 follow-on formula for children aged 6 to 12 months.

32. There is likely to be limited demand-side substitution between these formulas. However, as noted below, we consider that it is appropriate to assess the Application on the basis of a single national market for the supply of infant formula via retail channels because of supply-side substitution.

Relevant markets for formula

33. In the 2018 Application, the Commission identified three main types (or stages) of formula, namely:[16]

    33.1 stage one formula (starter formula), which is designed for infants from birth to the age of approximately 6 months as a substitute for breastmilk as the sole source of an infant's nutrition;

    33.2 stage two formula (follow-on formula), which is designed for infants from approximately 6 months to 12 months old. Follow-on formula is considered inappropriate for infants below 6 months old (however starter formula can be used up to 12 months); and

    33.3 stage three formula (toddler milk), is designed to be used from 12 months onwards. Toddler milk differs significantly from stage one and two formula, as it is designed to supplement the diet rather than be a sole source of nutrition.

34. All three products are likely supply-side substitutes,[17] and the competitive constraints for all three are similar, if not the same, as they are all produced by

---

16 As in the past, we also note that there is a degree of overlap between breastfeeding and each type of formula.

17 For example, see 2018 Authorisation at [48].

formula manufacturers and distributed through the same channels. However, from a demand-side perspective, the degree of substitutability differs between the three product types. In particular, the composition of stage three formula differs significantly from stage one and two formula such that stage three products are not substitutes for the other two products.[18]

35. Further, the Proposed 2023 Code relates to starter formula and follow-on formula but not toddler milk. Consequently, we have defined a single product market for 'Infant Formula' which consists of both starter formula and follow-on formula. This is consistent with the INC's definition of infant formula.[19]

36. The INC and other industry participants advised there have been no substantial changes in the production, supply, and distribution of Infant Formula since the Commission last considered this industry in 2018.[20] The vast majority of infant formula (of all stages) is distributed to end-customers via retailers, such as the major grocery retailers[21] and, to a lesser extent (albeit growing), retail pharmacies.[22] All manufacturers supply on a national basis.

37. As a result, similar to our 2018 Authorisation, we have defined a market for the supply of Infant Formula via retail channels, which is nationwide in scope.

With and without the arrangement

38. When assessing the likelihood of a lessening of competition arising from an arrangement, the Commission compares the likely state of competition with the arrangement, and the most competitive likely state of competition without the arrangement. By assessing the relative state of competition in each of these scenarios, the Commission can determine whether the restrictive trade practice is likely to result in a lessening of competition.

---

18 For example, most stage three formula is casein-dominant, while most stage one and stage two formula is whey-dominant. See 2018 Authorisation at [44]–[45] for more detail on the differences between the stages of formula.

19 Specifically, the INC defines infant formula to be "Any food described or sold as an alternative for human milk for the feeding of infants up to the age of twelve months and formulated in accordance with all relevant clauses of the Australia New Zealand Food Standards Code."

20 The Application at [67]; Commerce Commission interview with Te Whatu Ora (18 September 2023); email from [ ] to Commerce Commission (21 September 2023); and email from [ ] to Commerce Commission (19 September 2023). However, the Commission notes that FSANZ is currently undertaking a review relating to the regulatory framework, composition, labelling, category definitions and representation of infant formulation products to reflect the latest scientific evidence and make sure it aligns with international regulations where possible (see here: www.foodstandards.govt.nz/code/proposals/Pages/P1028.aspx). However, any potential changes would likely impact all industry participants equally.

21 The major grocery retailers in New Zealand are Woolworths New Zealand Limited, Foodstuffs North Island Limited, and Foodstuffs South Island Limited.

22 For example, see the Application and Commerce Commission interview with [ ](22 September 2023).

With the arrangement

39. With the Proposed 2023 Code, the current marketing restrictions under the 2018 Authorisation would continue. While the current restrictions are due to expire on 8 November 2023, the Proposed 2023 Code is almost identical to the current INC code of practice with regards to marketing restrictions on Infant Formula.[23]

Without the arrangement

40. We understand that without the Proposed 2023 Code:[24]

    40.1 the INC would amend the existing INC Code of Practice to omit the relevant restrictions or take steps to ensure that it is clear that the relevant restrictions are not binding;

    40.2 the marketing of Infant Formula in New Zealand would not be subject to any regulatory restriction and members of the INC would be free to market Infant Formula as they see fit subject to other legislation; and

    40.3 formula manufacturers would have the ability to increase the promotion of Infant Formula by direct marketing, and the level of marketing would likely increase, which may, in turn, increase the level of formula consumed.

41. Following the above, the INC submits that, given New Zealand's commitment to the WHO Code, the Government would likely impose marketing restrictions similar to the current INC Code of Practice. The INC submits this would either be through legislation or, the less likely route of, bilateral contracting with Infant Formula manufacturers.[25] The INC submits that two or more years is a realistic timeframe for such Government action to come into effect, but that the 2023 general election could impact this timing.[26]

42. We agree that these outcomes reflect the likely without-the-arrangement scenario.

How the arrangement could lessen competition

43. The Proposed 2023 Code would restrict INC members from employing common promotional (including marketing and advertising) activities to promote their Infant Formula products. For the reasons set out below, and consistent with our past determinations, we consider the Proposed 2023 Code is likely to lessen competition:

    43.1 by limiting the price information consumers receive about rival products. Restrictions on advertising can lead to higher prices if they prevent suppliers

---

23 The Proposed 2023 Code is identical to the INC code of practice currently authorised; however, it would also prohibit the advertising of Infant Formula on social media. See the Application at Appendix 1: Proposed INC Code of Practice.

24 The Application at [77]-[81] and [ ]

25 The Application at [77]-[81]. [ ].

26 The Application at [77]-[81]. [ ].

from publicising price reductions and can soften price competition more generally. Higher prices can lead to fewer purchases, resulting in reduced economic activity (ie, a loss in allocative efficiency);

43.2 by limiting the provision of product information about certain products generally or products produced by certain manufacturers in relation to rival products. Incomplete information can lead to consumers making fewer purchases or making purchasing decisions that do not provide them with the best possible outcome. As a result, consumers may miss out on benefits they would otherwise obtain from these products (ie, a loss of allocative efficiency); and

43.3 by restricting firms from publicising new products that could be beneficial for consumers. Restrictions on advertising can reduce the incentive of firms to undertake product innovation, to the long-term detriment of consumers (ie, a loss in dynamic efficiency).

44. In the without-the-arrangement scenario, the INC members would be free to advertise and market their Infant Formula to consumers, as well as offer sales inducements.

45. Accordingly, we consider that some lessening of competition is likely to result from the Proposed 2023 Code. Below we assess whether the Proposed 2023 Code would result, or be likely to result, in such benefit to the public as to outweigh any detriments.

Assessment of the benefits and detriments

General approach to assessing authorisation applications

46. In considering whether to grant an authorisation under section 58 of the Act, the Commission will consider the public benefits and detriments arising from the conduct.

47. The Commission will grant authorisation if it is satisfied, on the evidence before it, that the Proposed 2023 Code will result, or be likely to result, in a benefit to the public that outweighs the detriments resulting from the Proposed 2023 Code.

48. In making this assessment, we have regard to the quality of the evidence available and make judgements as to the weight to be given to the evidence. We may also adjust the weight of evidence to reflect the distribution of benefits and detriments within the community.[27] This is known as the "modified total welfare approach".[28]

49. The Court of Appeal in *NZME* confirmed that the Act permits us to apply the modified total welfare approach (ie, adjust the weight of evidence we give to the benefits and detriments of an arrangement depending on distribution of such

---

27 *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 (CA) (NZME), at [66]-[67], citing *Re Howard Smith Industries Ltd* at 17,334; [75].

28 *NZME* at [67].

benefits and detriments within broader society), however the Act does not require it.[29] For example, the Commission may give less weight to benefits flowing from an arrangement to a limited number of shareholders,[30] but may give more weight to a benefit that is realised by the wider community and sustained for a period of time.[31]

50. In *Godfrey Hirst,* the Court of Appeal noted that in determining whether to grant authorisation the Commission must consider a broad range of benefits and detriments. This includes any efficiencies and may include non-market factors in appropriate cases.[32]In particular, the Court of Appeal indicated that in making an authorisation decision the Commission is to have regard to efficiencies when weighed together with long-term benefits to consumers, the promotion of competition, and any economic and non-economic public benefits at stake in the relevant market. In assessing these various factors, the Court stated that "[w]here possible these elements should be quantified; but the Commission and the courts cannot be compelled to perform quantitative analysis of qualitative variables".[33]

51. The Commission's approach is to quantify benefits and detriments to the extent that it is practicable to do so;[34] however, as the Court of Appeal in *Godfrey Hirst* noted, this must not be allowed to obscure the Commission's primary function of exercising a qualitative judgment in reaching its final determination and "…making what is an essentially evaluative judgment on any application".[35] The Court re-emphasised the guidance given in *New Zealand Bus Ltd v Commerce Commission*, where it was stated:

> It is true that some data will be weighed or considered in deciding whether the law is violated and some will not. Yet all the suggestions about more systematic ways to inform that judgment are merely techniques, or hand tools. In short, this Court should not allow a kind of false scientism to overtake what is in the end a fundamental judgment which is required by the Act itself.[36]

Key assumptions in assessing benefits and detriments arising from the Application

52. The likely benefits or detriments from the Proposed 2023 Code primarily relate to the relationship between the marketing of Infant Formula and the effect this marketing would likely have on breastfeeding rates, as well as the likely regulatory response if the Proposed 2023 Code were not authorised. However, there is considerable uncertainty regarding these factors.[37] As such, in assessing the likely

---

29 *NZME* at [75].

30 *NZME* at [67] citing *Re Howard Smith Industries Ltd* at 17,334.

31 This approach is reflected in the Australian Competition Tribunal's decision *Qantas Airways Ltd* [2005] ACompT 9, (2005) ATPR 42-065 at [185]-[189] cited in *NZME* at [66]; also see *NZME* at [64]-[68].

32 *Godfrey Hirst NZ v Commerce Commission* [2016] NZCA 560(CA) at [24] and [31].

33 *Godfrey Hirst* (CA) at [36].

34 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) (AMPS-A CA) at 447; *Air New Zealand and Qantas Airways Limited v Commerce Commission* (2004) 11 TCLR 347 (Air NZ No 6) at [319]; and *Ravensdown Corporation Ltd v Commerce Commission* High Court, Wellington(16 December 1996) AP168/96.

35 *Godfrey Hirst* (CA) at [35].

36 *New Zealand Bus Limited and Infratil Limited v Commerce Commission* [2007] NZCA 502 at [104].

37 See 2015 Authorisation at [57] and 2018 Authorisation at [95].

benefits and detriments arising from the Application, the Commission has made the following assumptions:

52.1 the most likely timeframe in which the Government would implement a regulatory response in the absence of the Proposed 2023 Code would be two to three years, although there is a smaller likelihood that it would take longer;[38] and

52.2 an increase in the marketing and promotion of Infant Formula during a period within which there was no direct regulation would lead to a small to moderate decrease in the rate of breastfeeding and commensurate increase in consumption of Infant Formula. As outlined in our previous Authorisations, there is a high degree of uncertainty around the likely magnitude of any changes in breastfeeding rates that would arise in the counterfactual.[39] Similar to our previous Authorisations, we have assumed a 1% change in breastfeeding as a 'base case' but note that if the actual change were larger, then the various benefits and detriments would scale accordingly.

What the applicant submitted

53. The INC submits that it is not aware of any information to suggest that the public benefits and detriments that the Commission has previously assessed would have changed in the last five years.[40] Overall, the INC submits that, consistent with the Commission's previous authorisations:

53.1 there would be detriments associated with the Proposed 2023 Code from reduced consumer and producer surpluses compared to the scenario without the Proposed 2023 Code; but

53.2 there are clear public benefits that will, or will be likely to, result from restricting the marketing of Infant Formula as a result of the Proposed 2023 Code compared to the scenario without the Proposed 2023 Code. These benefits include the avoidance of regulatory costs that would otherwise be incurred.

Benefits

54. We consider that there are likely to be two main benefits from the Proposed 2023 Code being:

54.1 avoided regulatory costs; and

54.2 improved public health outcomes.

---

38 Commerce Commission interview with Te Whatu Ora (18 September 2023). Te Whatu Ora considered [ ].

39 See 2015 Authorisation at [57] and 2018 Authorisation at [95].

40 The Application at [98].

Benefits from avoided regulatory costs

55. We consider there are likely benefits from Proposed 2023 Code from the avoidance of regulatory costs primarily because self-regulation (via the Proposed 2023 Code) is likely to be less expensive than the cost of introducing legislation.

56. Without the Proposed 2023 Code, we consider it likely that the Government would institute a regulatory response, in which the MoH would sponsor legislation to ensure New Zealand is fulfilling its obligations under the WHO Code. The implementation of such regulations would impose societal costs, through both time and resourcing on Parliament and the related policy agencies. We expect that this process would likely take approximately two to three years and estimate it would cost approximately $4.0 million to $5.0 million.[41] Avoiding this cost generates a public benefit, as these resources could be productively deployed on other activities.

57. However, offsetting this to some degree is the fact that the INC would be incurring some costs in administrating the Proposed 2023 Code. These costs would not be incurred if the Proposed 2023 Code was not authorised because there would be no relevant industry code to administer. We estimate the administrating cost of the Proposed 2023 Code would be roughly equal to half of a full-time equivalent employee per year.[42] Based on a two to three year period for which these administrative costs would be avoided, we estimate this value to be approximately $0.1 million. This amount is therefore netted off against the 'gross' benefit of avoided regulatory costs above.

58. Aside from this initial two to three year period, we consider the difference in ongoing administrative costs between the two scenarios is unlikely to be significant.[43] We also consider the difference in compliance costs for Infant Formula suppliers in the two scenarios to also be relatively insignificant.

59. Consequently, our estimate for the overall benefit of the Proposed 2023 Code from avoided regulatory costs is in the vicinity of $4.0 million to $5.0 million.

Benefits from improved public health outcomes

60. We consider there are likely benefits from the continuation of the existing marketing restrictions under the Proposed 2023 Code in the form of improved health outcomes. Such outcomes would also result in a reduction in associated healthcare costs.

61. If the Proposed 2023 Code is not authorised there would be a period during which there would be no direct restrictions on the marketing of Infant Formula. We consider that there is a real chance that there would be a corresponding increase in

---

41 See the Attachment for more detail on how we have estimated this amount.

42 Application at [122] uses the figures estimated by the Commission in its previous authorisations. Also see [ ]).

43 To the extent that there is a difference in ongoing administrative costs, we expect these to be lower with the Proposed 2023 Code, given the strong incentives for cost efficiency under a self-regulatory approach. See Application at [126].

marketing activity for these products.[44] This increase would in turn be likely to lead to a reduction in the rate of breastfeeding and an associated worsening in public health outcomes.[45]

62. These public health impacts include:

62.1 infant health: when compared to infants that are not breastfed, breastfed infants aged 0 to 12 months have a decreased risk of 'all-cause' infant mortality, a decrease in prevalence and mortality from diseases, and an increase in IQ.[46] Breastmilk also provides optimum nutrition and assists the physical and emotional development of infants;[47] and

62.2 maternal health: breastfeeding can help mothers return to their pre-pregnancy weight and reduce the risk of ovarian and breast cancer.[48]

63. The Commission has previously generated quantitative estimates for some of these public health impacts, in particular reduced public health costs from fewer treatments. In the 2015 Authorisation we estimated that a two year reduction in the breastfeeding rate by 1% would be likely to reduce public healthcare costs related to breast cancer, gastrointestinal infections, lower respiratory tract infections, necrotising enterocolitis, and acute otitis media by approximately $300,000.[49]

64. However, this quantitative estimate does not include other aspects of these public health outcomes, including the pain and distress that would accrue to the infants and/or their caregivers from contracting these illnesses. These impacts are difficult to quantify.

65. For instance, increased breastfeeding would reduce other negative public health outcomes for infants, such as:[50]

---

44 For example, see Commerce Commission interview with Te Whatu Ora (18 September 2023). In addition, certain INC members are unable to predict their response to marketing and advertising restrictions in absence of the authorisation which could depend on the response of their competitors. See 2015 Authorisation and 2018 Authorisation.

45 For example, see Baker, Smith et al "The political economy of infant and young child feeding: confronting corporate power, overcoming structural barriers, and accelerating progress", *The Lancet* breastfeeding series at page 508. This outlined the lack of commitment from global companies to the Breastmilk Substitutes Call to Action from WHO, UNICEF, and leading non-governmental organisations (June 2020) as an example of limited meaningful change.

46 See the Attachment more detail of how we have estimated this amount.

47 For example, see Healthy Eating Guidelines for New Zealand Babies and Toddlers (0-2 years old) at page 11 and World Health Organisation Fact Sheet: https://www.who.int/news-room/fact-sheets/detail/infant-and-young-child-feeding.

48 For example, see Ranadip Chowdhury and others "Breastfeeding and maternal health outcomes: a systematic review and meta-analysis*", National Library of Medicine* (Online ed, 4 November 2015): https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4670483/.

49 This estimate has been adjusted from the original 2015 figure to account for inflation.

50 Other illnesses which may correlate with reduced breastfeeding but for which the evidence is less robust include asthma; diabetes; leukaemia; coeliac disease; cardiovascular disease, sepsis; ovarian cancer (in mother); and type 2 diabetes (in mother). See 2015 Authorisation and 2018 Authorisation.

65.1 reduce the incidence of Sudden Infant Death Syndrome;[51]

65.2 improve cognitive outcomes;[52] and

65.3 reduce childhood obesity.[53]

66. Further, the loss of productivity from caregivers who would otherwise take time off work to care for individuals affected by the above health outcomes would also be avoided.

67. We note that, although there are numerous public health benefits from higher rates of breastfeeding, breastfeeding itself can give rise to some negative health impacts for mothers, including mastitis and abscesses, which can in turn also give rise to public health costs.

68. Nevertheless, we consider the $300,000 estimate figure above is a substantial underestimate of the likely magnitude of actual total public health impacts, where total impacts include not only avoided public health costs but also the avoided pain and distress from avoided negative public health outcomes and other beneficial outcomes.[54]

69. We have considered the possibility that if the Proposed 2023 Code were not authorised, any subsequent government imposed legislative response could result in more restrictive or effective regulation, which could be more successful in increasing breastfeeding rates.[55] However, we do not consider it necessary to assess this further because most industry participants that have contacted us to date are supportive of the current code of practice and the Proposed 2023 Code.[56]

Detriments

70. As in our previous Authorisations, we consider there are likely detriments from the Proposed 2023 Code primarily arising from a reduction in consumer surplus (ie, benefits to formula consumers) flowing from a lessening in competition and the associated reduction in Infant Formula use.[57] There is potentially also an associated reduction in producer surplus.[58]

---

51 See 2015 Authorisation at [74]–[75].

52 See 2015 Authorisation at [77].

53 See 2015 Authorisation at [76] and 2018 Authorisation at [113]–[114].

54 For example, our previous estimates of value of reducing the risk of Sudden Infant Death Syndrome and improving cognitive outcomes suggest these impacts could be significant. See our 2015 Authorisation at [74]–[75] and our 2018 Authorisation at [113]–[114].

55 See Australian Competition & Consumer Commission Determination on application lodged by Infant Nutrition Council Limited Decision AA1000534-1 (27 July 2021) at [4.136].

56 For example, see Commerce Commission interview with Te Whatu Ora (18 September 2023); Submission from WellSouth on Infant Nutrition Council Authorisation 2023 (7 September 2023); and Submission from Advertising Standards Authority on Infant Nutrition Council Authorisation 2023 (26 September 2023).

57 See 2015 Authorisation at [82]–[84].

58 As in the past, we consider there are unlikely to be detriments from higher prices given the Proposed 2023 Code would not prevent price discounting from supplier or retailers. In addition, the Proposed 2023

Reduced consumer surplus

71. The greater marketing and promotion of Infant Formula that could occur if the Proposed 2023 Code were not authorised, even if only temporarily until a legislative response materialised, the more consumers that may be made aware of the potential advantages from using Infant Formula, and the more consumers that may use formula instead of breastfeeding.

72. The value consumers obtain from using formula can include the avoidance of discomfort for mothers who would otherwise suffer from breastfeeding or find it difficult to undertake, and/or increased convenience for mothers who might otherwise find breastfeeding imposes an unwelcome burden. The increased convenience from using formula may also enable some mothers to engage in greater levels of paid employment than would otherwise be practical, generating financial advantages.[59] These positives, less the cost of purchasing formula, generate a 'consumer surplus' for formula consumers.

73. We categorise the lower amount of these advantages that would arise from less Infant Formula use resulting from the Proposed 2023 Code as a reduction in consumer surplus from lower Infant Formula use. As outlined in our previous authorisations, it is difficult to quantify any reduction in consumer surplus.[60]

74. The INC submits that, in line with the Commission's previous authorisations, it cannot quantify the reduced consumer surplus but the INC expects it to be insignificant.[61] We also consider that this impact is unlikely to be relatively large. Those mothers that stand to gain the most from formula feeding are more likely to be already using it, given that information regarding formula feeding would continue to be available via other channels. Consequently, the incremental formula uptake that would arise from increased promotional and marketing activity may be more likely to arise amongst those consumers for whom the advantages of formula are relatively small.

75. The continuation of the restriction on marketing and promotional activity if the Proposed 2023 Code were authorised would make it more difficult for other formula suppliers with superior or innovative products to expand or enter, and could reduce incentives for suppliers to innovate.[62] This may effectively deny consumers the advantages of higher quality products (for example, the development of products that could potentially reduce the associated health impacts of formula feeding), also reducing total consumer surplus.

76. However, given that we expect that any relaxation of marketing restrictions if authorisation were not granted would likely be temporary, before a legislative

---

Code is unlikely to result in any material reduction in the level of product innovation given such innovation is typically undertaken in a global context.

59 For example, see Mahoney SE, Taylor SN, Forman HP "No such thing as a free lunch: The direct marginal costs of breastfeeding." Journal of Perinatology (2023) May; 43(5):678-682.

60 See 2015 Authorisation and 2018 Authorisation.

61 The Application at [106].

62 For example, see Commerce Commission interview [ ](18 September 2023).

response by the Government, we consider that the benefits of new entry or expansion by higher quality formula suppliers would likely be limited. Similarly, we expect that reductions in longer term dynamic efficiency from a reduced incentive to improve product quality would also be limited.

77. Further, relaxation of marketing restrictions could also enable greater promotional activity by lower quality formula suppliers which, if successful, could reduce the gains otherwise obtained from new entry or expansion. This could arise to the extent that some consumers may not be able to accurately judge the quality of rival Infant Formula products based on marketing and promotional activity.

Reduced producer surplus

78. Lower sales of Infant Formula arising from authorisation of the Proposed 2023 Code would reduce the returns (producer surpluses) that would otherwise accrue to formula manufacturers. This lower level of returns would constitute a detriment.

79. The INC submitted that this detriment would be relatively insignificant.[63] We estimate the reduction in producer surplus from a reduction in sales of Infant Formula that equates to a 1% increase in the breastfeeding rate to be approximately $200,000.[64]

Balancing the benefits and detriments

80. In Table 1 below, we compare the benefits and detriments outlined above. As indicated, there are both quantifiable and unquantifiable benefits and detriments. Note that all quantified estimates are approximate only and are intended to provide a sense of likely magnitude, not precise value.

Table 1: Summary of benefits and detriments

Benefits	Approximate estimates
Avoided regulatory costs	$4.0 million - $5.0 million
Improved public health outcomes	Likely greater than $300,000*
Detriments	**Approximate estimates**
Lost consumer surplus	Unquantified but likely insignificant
Lost producer surplus	$200,000

Source: Commission estimates. * Likely to be an underestimate.

81. Weighing the estimated magnitude of the benefits against the estimated magnitude of detriments indicates that the likely benefits would significantly outweigh the likely detriments.[65]

63 The Application at [104].

64 This estimate is based on the same methodology as our 2015 and 2018 Authorisations. See the Attachment for more detail of how we have estimated this amount.

65 See the Attachment for more detail of how we have estimated this amount.

82. Further, similar to our past determinations, the Proposed 2023 Code is supported by the relevant public health authorities and industry bodies.[66] This indicates to the Commission that we should continue to place weight on the unquantified benefits that can be attributed to the Proposed 2023 Code.

83. By considering together both the quantified and unquantified benefits and detriments that will result, or be likely to result, from the Proposed 2023 Code, our preliminary view is that the Proposed 2023 Code would result in public benefits that are likely to significantly exceed the detriments arising from the lessening of competition.

Draft determination

84. The Commission's Draft Determination is that the Proposed 2023 Code will result, or be likely to result, in such a benefit to the public that it should be permitted, and so the Commission proposes to grant an authorisation for the Proposed 2023 Code under section 58 (1), (2), (6B) and (6D) of the Act.

Next steps in our investigation

85. The statutory deadline for the Commission to make a decision on whether or not to give authorisation to the Proposed 2023 Code is **1 March 2024**.[67] However, this date may change as our investigation progresses.

86. As part of our investigation, we have been contacting parties that we consider will be able to help us assess the application.

Making a submission

87. If you wish to make a submission on the Draft Determination, please send it to us at registrar@comcom.govt.nz with the reference 'Infant Nutrition Council' in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **25 October 2023.**

88. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website. If you make a submission and we do not acknowledge receipt of that submission within two working days, you should resubmit your submission.

89. If you would like to make a submission but face difficulties in doing so within this timeframe, please ensure that you register your interest with us at registrar@comcom.govt.nz so that we can work with you to accommodate your needs where possible.

---

66 See Commerce Commission interview with Te Whatu Ora (18 September 2023); Submission from WellSouth on Infant Nutrition Council Authorisation 2023 (7 September 2023); and Submission from Advertising Standards Authority on Infant Nutrition Council Authorisation 2023 (26 September 2023).

67 The statutory timeframe to authorise or decline to authorise an agreement or unilateral conduct under the Commerce Act 1986, s 61(1A) is 120 working days.

90. All parties will have the opportunity to cross-submit on the public versions of submissions received from other parties by the close of business on **1 November 2023**.

91. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would be likely to unreasonably prejudice the commercial position of the supplier or subject of the information.

Attachment: Assessment of benefits and detriments

A1. This attachment outlines the assumptions and analysis underpinning our assessment of various benefits and detriments. All future impacts have been discounted using a 5% discount rate.

Public health benefits

A2. The public health benefits of breastfeeding are well established.[68] Many of these effects were discussed in the 2018 Authorisation, which included Table A1 below.[69]

A3. The 'Effect' columns of the table show either the odds ratio (OR) or the risk ratio (RR) of a given public health outcome based on whether infants have been breastfed compared to not breastfed. Risk ratio is the ratio of the probability of an event occurring among people exposed to a particular treatment and the probability of an event occurring among people not exposed. Odds ratio is the ratio of the odds of an event occurring among people exposed to a treatment and the odds of an event occurring amongst people not exposed.

A4. Although odds ratios and risk ratios are slightly different, both measure the association between breastfeeding and a specific health outcome.[70] An odds ratio of 0.5 means that the odds of a public health outcome are 50% less for the group that breastfed compared to the group that did not breastfeed.[71]

A5. As shown in Table A1 the relative risk of these illnesses significantly decreases with breastfeeding. In general, the marginal effect is larger when breastfeeding occurs from 0 to 6 months compared to 6 to 12 months. Overall health benefits are strongest when breastfeeding continues for 12 months.

---

68 Victora et al"*Breastfeeding in the 21st century: epidemiology, mechanisms, and lifelong effect"*, The Lancet, 2016. See also The Lancet, "*Breastfeeding 2023",* 7 February 2023.

69 See 2015 Authorisation at Table 1.

70 Because the illnesses considered in this report are relatively rare, the odds ratio and risk ratio tend to be approximately the same, therefore we can compare both. See: Bonita et al *"Basic epidemiology 2nd ed"*, WHO, 2006.

71 The exception to this is for all-cause mortality (Sankar, 2015). This paper estimates a risk ratio greater than 1.0 because it is measuring the effect of breastfeeding on *not* contracting the disease ie on the infant not dying. Therefore, the risk ratio of not contracting all-cause infant mortality when not breastfeeding is 1.0, whilst the risk ratio of not contracting all-cause infant mortality will be greater than 1.0 when breastfeeding.

Table A1: Assessment of risks

Health outcome	Effect of breastfeeding between 0-6 months	Effect of breastfeeding between 6-11 months	Effect of breastfeeding over other infant age ranges	Conclusion
Prevalence of and hospitalisation from diarrhoea (Horta & Victora, 2013)#	RR 0.10-0.75	RR 0.12-1.18†	RR 0.12-1.26‡ (0-12 months)	Strong evidence of major protection against diarrhoea morbidity and admissions to hospitals, based on a larger number of studies
Mortality from diarrhoea (Horta & Victora, 2013)	RR 0.11-0.16	RR 0.53	RR 0.05-0.25 (0-12 months)	See above
Prevalence and hospitalisation from respiratory illness (Horta & Victora, 2013)	RR 0.22-0.95	RR 0.72	RR 0.06-0.96 (0-12 months)	Strong evidence of a reduction in severe respiratory infections in breastfed children
Mortality from respiratory illness (Horta & Victora, 2013)	RR 0.42	RR 0.40	RR 0.35 (0-12 months)	See above
Decrease in acute otitis media (Bowatte, 2015)	OR 0.57		OR 0.85 (> 3-4 months)	Consistent evidence of reduction in acute otitis media during the first 2 years of life.
Decrease in dental cavities (Tham, 2015)			OR 0.50 (0-12 months)	Breastfeeding in infants may protect against dental caries.
Increase in IQ (Horta, 2015)		0.97 IQ points~	3.44 IQ points (Lifetime+)	Consistent effects of about 3 IQ points across observational studies
Breast cancer (Chowdhury, 2015)	OR 0.93	OR 0.91^	OR 0.74 (> 12 months)	Consistent protective effect of breastfeeding against breast cancer
Ovarian cancer (Chowdhury, 2015)	OR 0.83	OR 0.72	OR 0.63 (> 12 months)	Suggestive evidence of a protective effect of breastfeeding against ovarian cancer
Mortality due to infectious diseases (Sankar, 2015)	OR 0.12		OR 0.48 (6-23 months)	See above
All-cause mortality (Sankar, 2015)	RR 14.4*	RR 1.8*		Consistent evidence of major protection

Notes: # Only studies comparing predominant/partial versus not breastfeeding were used in this study. † One study (Wray, 1978) found an increase in the mortality from diarrhoea, all other studies used in the meta-analysis found a decrease. ‡ One study (Cunningham, 1979) found an increase in the incidence of diarrhoea, all other studies used in the meta-analysis found a decrease; ~ Less than 6 months versus greater than 6 months; + Lifetime effect from any breastfeeding versus no breastfeeding; ^ Age range 6 to 12 months; * Compared to 1.0 relative risk for breastfeeding.

A6. The MoH summarises some of the benefits of breastfeeding for the baby as follows:[72]

A6.1 helps build a strong emotional bond between the mother and baby, and this bond supports healthy brain development in the baby and reduces the risk of mental health conditions later in life (Horta and Victora 2013);

A6.2 boosts the baby's immune system and helps protect the baby against common childhood illnesses, particularly diarrhoeal infections and pneumonia, and hospitalisation (Sankar et al 2015; SACN 2018);

A6.3 protects against sudden unexplained death in infancy (SUDI) (Hauck et al 2011; Sankar et al 2015);

A6.4 decreases the chance of health problems later in life, such as type 2 diabetes (Horta and Victora 2013; Horta et al 2015; Koletzko et al 2019);

A6.5 may reduce the chance of obesity in childhood, adolescence, and early adulthood (Horta et al 2015); and

A6.6 exposes the baby to flavours originating from the maternal diet through their mother's milk, which helps them accept new foods better once they are eating solid foods (Spahn et al 2019; Stoody et al 2019).

Avoided healthcare costs

A7. In our 2015 Authorisation, we estimated the healthcare costs that would be avoided from a 1% reduction in the breastfeeding rate over a two year period.[73] The 2015 estimate was $225,646.

A8. Adjusting for inflation we estimate an equivalent 2023 figure to be $284,976.[74] This total is broken down by different treatments in Table A2.

---

72 See https://www.health.govt.nz/system/files/documents/publications/healthy-eating-guidelines-for-new-zealand-babies-and-toddlers-nov21-v3.pdf.

73 Based on Renfrew et al "Preventing disease and saving resources: the potential contribution of increasing breastfeeding rates in the UK" (report commissioned by UNICEF UK, October 2012). See 2015 Authorisation at [67]–[70].

74 Inflation adjustment based on a 26% increase in CPI since the first quarter of 2015, see https://www.rbnz.govt.nz/monetary-policy/about-monetary-policy/inflation-calculator. Both estimates are based on 61,548 births per year. Actual births between 2015 and 2023 have fluctuated around 60,000, see https://www.stats.govt.nz/information-releases/births-and-deaths-year-ended-december-2022-including-abridged-period-life-table/.

Table A2: Incremental healthcare costs

Illness	Incremental cost
Breast cancer	$143,733
Gastrointestinal infection	$38,061
Necrotising enterocolitis	$31,520
Lower respiratory tract infection	$71,581
Acute otitis media[75]	$80
Total	**$284,976**

Source: Commission estimates

A9. Higher rates of breastfeeding are likely to also reduce healthcare costs of numerous other illnesses as outlined above but given the difficultly of estimating these other impacts, we have not been able to generate quantified estimates for these other impacts.

Producer surplus impacts

A10. In our 2015 Authorisation, we estimated that the average revenue per infant from formula feeding was $885.[76] Adjusting for inflation we estimate an equivalent 2023 figure to be $1,113,[77] which is similar in magnitude to other estimates.[78]

A11. In our 2015 Authorisation, we assumed a 20% gross margin to estimate producer surplus.[79] We have continued to use this gross margin percentage given it is similar to more recent financial figures.[80]

A12. Assuming a 1% higher rate of breastfeeding, this equates to approximately 575 fewer infants being formula fed per year.[81] As a result, we estimate that the reduced producer surplus stemming from lower formula sales over two years would be approximately $238,145.[82]

---

75 Unlike the other illnesses listed here, infants are only uncommonly admitted to hospital following a clinical diagnosis of otitis media. Consequently, this cost figure for acute otitis media only incorporates visits to general practitioners (see UNICEF Study at 49).

76 See 2015 Authorisation at [81].

77 Inflation adjustment based on a 26% increase in CPI since the first quarter of 2015, see https://www.rbnz.govt.nz/monetary-policy/about-monetary-policy/inflation-calculator.

78 For example, a US study estimated a minimum spend on formula in one year of $1,257, see https://plutusfoundation.org/2020/costs-breastfeeding-formula/. US$ values converted to NZ$ at US$1:NZ$1.68.

79 See 2015 Authorisation at [81].

80 For example Nestle's Underlying Trading Operating Profit Margin is listed as 19.1%, see https://www.nestle.com/media/pressreleases/allpressreleases/full-year-results-2022.

81 This figure is based on 57,534 births per year, see https://www.stats.govt.nz/information-releases/births-and-deaths-year-ended-june-2023/.

82 This assumes that the reduction in formula feeding is driven by a switch to exclusive breastfeeding. This may overestimate the actual reduction in formula sales if some of the reduction results in partial breastfeeding.