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Submission on the draft decision for the 2018 INC Code change:

Main point:

1.

Please ensure the final decision addresses main concerns raised in the invited submissions, as was done in the 2015 INC Code decision.

This draft decision names me personally and states my chief, opposing concern, but omits both the reason I have that concern and any explanation of the Commerce Commission's dismissal of that concern. This is an unfair representation, given how the whole document reads*.

I ask that the final decision completes that sentence about me, and states WHY I am of the view that competition will likely not decrease (meaning the application does not qualify for authorisation) -

- (e.g. complete the sentence about my view with something to the effect of: "..., because the scope's wording changes create a technical loophole allowing formula products to be promoted if not literally referred to as breastmilk substitutes in the promotional instance").

And include at least one sentence on WHY utilisation of their proposed new loopholes by the INC is not something the Commerce Commission views as a likely scenario. Have the INC promised they will not use the various loopholes they are adding to their code? Have the Ministry of Health promised they will not let the loopholes be used within their monitoring system? If either of those things are the case, that needs to be stated. Because I currently see no explanation as to why that additional criterion (of infant formula products needing to be represented as breastmilk substitutes to be in scope) would be written in if there is no promotional activity that the INC wants to START excluding from its Code's scope.

The fact the Ministry of Health's submission on the draft determination says the INC want a two-year grace period to change their labelling, when nothing in the INC Code's labelling section (Article 9) asks for anything additional to what the Food Standards Code already legally demands of INC members, is a strong indication that members will indeed change their product descriptions to utilise their new scope loophole.

These three global corporations that command 97.1 of the NZ formula market cannot be assumed likely to follow the spirit rather than letter of their WHO Code version. In 2010, 500 WHO Code violations were documented in 46 countries (see Kean YJ, Allain A, Razak RA. Breaking the Rules, Stretching the Rules 2010: Evidence of Violations of the International Code of Marketing of Breastmilk Substitutes and subsequent resolutions. Penang, Malaysia: International Baby Food Action Network and International Code Documentation Centre; 2010).

*Nothing in the draft decision addresses the issue of the technical loopholes that I pointed out are within the INC's proposed Code change. Yet where I am discussed, the draft indicates that the remainder of the document disproves my (un-explained) point.

Additional points:

2.

Various submitters are saying they'd prefer the INC's marketing restrictions being either stronger or weaker than the proposed change on the table: please include a sentence or two for addressing/explaining that such issues are outside your remit in your decision, as you did for submitters to the 2015 INC Code decision.

3.

None of the promotional activity visible at part 54 of the draft decision would cease on Commerce Commission authorisation of the INC application. Nestle's provision of range cards to health-care professionals would continue, as Articles 6 and 7 of the INC Code allow for it. Ditto for any industry information to the health sector.

All the promotional activity visible in parts 52 and 55 could technically continue, on authorisation of the INC application, as all can be achieved without the product being explicitly referred to as a breastmilk substitute, as will be required for promotional activity to be in scope of the proposed new code.

Infant formula promotion for ages 0 to 6 months could technically be added into the mix of this activity under the new code, if it too isn't explicitly called a breast-milk substitute in the adverts.

This all indicates how unlikely it is that competition will decrease with authorisation of this application.

4.

At parts 52 to 55, the Commerce Commission appears to have asked the three market dominators, who have 97.1 of the NZ market, what their current and future promotional activity for follow on formula might be in NZ under the existing code. However, current and future promotions by other means should not be ignored. Toddler milk ads are a dominant marketing tool, and numerous studies indicate that profits carry on as usual for companies advertising toddler milk (marketing formula products by proxy), or doing health-sector sponsorship and material-provision where infant formula products are not advertised.

e.g. <https://trove.nla.gov.au/work/151300515?q&versionId=164934955>

and

https://www.researchgate.net/publication/269712410_Advertisements_of_follow-on_formula_and_their_perception_by_pregnant_women_and_mothers_in_Italy/links/55069600cf231de07780624/Advertisements-of-follow-on-formula-and-their-perception-by-pregnant-women-and-mothers-in-Italy

and

<https://www.ncbi.nlm.nih.gov/pubmed/21719442>

5.

Claims of lost consumer benefits made in different points of the draft decision (parts 50, and 102 through to 104 at least) are redundant. Please remove your framing of formula industry promotions as beneficial "information" for the public. It is a flawed, highly subjective narrative that evidently is causing anguish, given the alarmed submissions made since your draft decision.

Take for example the benefits listed at parts 50 to 50.3 of the draft decision:

Part 50.1 -

This suggests that restricting INC advertising can make prices higher because restrictions on pricing advertising generally soften pricing competition. But in fact, those who are advertising prices of formula in NZ are retailers (discussed at part 20 of the draft decision), who are exempt from the INC Code.

Also ignored is the fact that formula-feeding families are the ones paying for promotional activity in the premiums they pay for the products. In 2014, research commissioned by the New Zealand Board of the Pacific Economic Cooperation Council (NZPECC), titled UNDERSTANDING THE INFANT FORMULA VALUE CHAIN (1), showed that formula manufacturers are spending 14% (of the money they receive from sales) on advertising and promotion, (and in comparison, only 2% is channeled towards research and development). 2010 research on the formula industry by the Vietnamese government found more than 30% of their overall costs went on promotional spending (2).

Commerce Commission calculations of promotional activity's benefits and detriments need to account for that fact (that marketing activity is paid for by consumers), as you seem to be just assuming promotional activity can only SAVE consumers money ("loss in allocative efficiency").

Part 50.2 -

This part talks about "limiting the provision of product information about certain products generally or products produced by certain manufacturers in relation to rival products." But nothing in the INC Code prevents infant formula product information, all INC members have infant formula product information available to the public, and INC members do provide product comparisons too. For example, New Image Group claims: "Goat milk naturally contains higher levels of calcium than cow's milk and some vitamins (Vit A, Vit B6, Niacin, Vit E, Vit D) and minerals (Calcium, phosphorous, iron, zinc, selenium and Magnesium) (3)". Which is an unfair, misleading claim for consumers by the way, and another reason why industry material should not be called "information", as infant formula is highly standardised and ALL formulas must contain those vitamins and minerals in stipulated amounts. This New Image Group webpage (3) may well be in violation of the Food Standards Code requirement that nutrient and health claims are not allowed on infant formula products. It also talks of prebiotic and probiotic benefits when these are not listed as allowable claims (for any food) by Food Standards).

Part 50.2 of the draft decision also says: "Incomplete information can lead to consumers making fewer purchases, or making purchasing decisions that do not provide them with the best possible outcome". This too is misleading in the context of INC marketing activity.

For example, INC members position their follow-on formulas as the appropriate breast-milk substitute for age 6 to 12 months, and toddler milk the appropriate product once babies are 12 months old – yet, as per the Ministry of Health submission of this draft decision, and the stances

of health authorities across the globe, both follow-on formula and toddler milk are unnecessary products for consumers. Toddler milk is multiple times more expensive, and higher in sugar, than the MoH-supported option of standard cows' milk after 12 months. The 2014 New Zealand research on the formula industry at reference (1) states: "Infant formula is typically defined as "birth to six months"; the product is then renamed for a range of reasons (primarily to avoid regulation and restrictions on advertising)" (page 9).

Because follow on formula is unnecessary for consumers - i.e. of no benefit over infant formula - Part 50.3's claim "by enabling firms to publicise new products to consumers that are beneficial for consumers" is redundant. It too should not factor in the calculations for this decision.

Regarding the assertions made at parts 102 to 104 of the draft decision, I support the Ministry of Health's points about them (in their submission), and add the following points:

This decision looks for public detriments of the lost ability to advertise follow-on formula benefits specifically. The fact that follow-on formula is unnecessary for consumers, as stated in the MoH submission, means that any related claims of lost consumer benefit are false.

The implied claims at Part 102 (that breastfeeding imposes an unwelcome burden, is an unpleasant experience, or difficult to undertake) are highly subjective, non-evidence-based claims. Research, for example, indicates that mothers (and fathers) of breastfed babies get more, not less, rest than those of formula fed babies – see "Breastfeeding Increases Sleep Duration of New Parents", Doan et al, 2007.

Also, if a mother is in the minority who has exclusively breastfed her baby to 6 months (the age for the additional product proposed to now be restricted in terms of promotion; follow-on formula), it is highly unlikely she will either commence experiencing breastfeeding difficulties then rather than much earlier, or not have heard of the option of formula feeding as done by the majority of her contemporaries.

Further, breastfeeding is a human right, and physiological norm. If, for example, a woman desires to breastfeed, but (as per one of part 104's implied claims) is experiencing pain or discomfort, then lack of adequate support to help her breastfeed comfortably is a detriment, subtracting from that norm – it is flawed logic to position the option of follow-on formula use at that disempowered stage as a "benefit".

And another point: this voluntary code doesn't prevent INC Members from promoting benefits of infant formula products in ads, the Food Standards Code does. Both Standard 2.9.1 and 1.2.7 of that Code stipulate that, by law, claims of health benefits and nutrition benefits cannot be made about infant formula products.

With regard to part 103 specifically: it is highly problematic to suggest that formula industry advertising material could "correct incorrect assertions held", given their tendency to influence incorrect assertions. These are the companies advertising their brands as "helping to grow clever little minds" and "support your child's cognitive function" (as shown in my first submission), while the Commerce Commission calculates the population-level economic detriment of reduced IQ in non-breastfed babies (parts 88, 96 and 97 of the draft decision).

And specifically regarding part 104: A Ministry of Health-produced Well Child Tamariki Ora My Health Book is given to the parents of every single newborn in NZ, and that book says, among other formula feeding information and further links: "Feeding equipment (including any items

used with breast milk) must be washed and sterilized until your baby is at least 3 months old and thoroughly washed and rinsed once your baby is over 3 months.” (p120) The appropriate milk options for non-breastfed babies are covered too. Also, INC members do, and are expected to by law on their labelling, provide infant formula preparation information – and their proposed INC code change won’t change that.

The health sector is the appropriate source of infant feeding information – for both breastfeeding (as our breasts cannot inform us and have no marketing budget) and formula feeding. This is stated in the relevant United-Nations-level documentation for this matter that government departments like the Commerce Commission should be using (and that I also pointed the Commerce Commission to in my first Submission), the “Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children: Implementation Manual”. Check page 21.

Framing formula industry promotional material as "information", as this Commerce Commission draft decision does by suggesting industry information benefits consumers, positions formula-feeding families as uniquely (compared to breastfeeding families) expected to subsidise their health care through premiums paid for the product and "information" package. That is wrong.

- (1) https://drive.google.com/file/d/1tp1anM9fYD6e7_ARxnyJEMS8fuHIELD0/view?usp=drivesdk
- (2) <http://www.infactcanada.ca/whatsnew/vietnam-law.html>
- (3) <https://babystepsnz.co.nz/goat-milk/>