

## Addendum to Draft Determination

### Infant Nutrition Council Limited

1 November 2023

#### Introduction

1. This is an addendum (Addendum) to the draft determination published on 11 October 2023 (Draft Determination), in relation to the Infant Nutrition Council Limited (INC)'s application for authorisation of an arrangement (being specific articles in the Proposed 2023 Code) allowing the INC's members to restrict their advertising and marketing activities for formula products for infants up to 12 months of age, under sections 58(1), (2), (6B), and (6D) of the Commerce Act 1986 (the Act).
2. Unless otherwise defined, all capitalised terms in this Addendum have the meaning given to them in the Draft Determination.

#### Amendment to the Proposed 2023 Code

3. On 27 October 2023, the INC advised that it wishes to make an amendment to clause 6.6 of the Proposed 2023 Code (the Revised Proposed Clause 6.6) following discussions with the Ministry of Health and the Ministry of Primary Industries.<sup>1</sup> The purpose of the amendment is to ensure the Proposed 2023 Code is consistent with the WHO Code so that it allows for donations of Infant Formula to health organisations at any time (not just in times of emergency relief or poverty).
4. The original clause 6.6 of the Proposed 2023 Code in the INC's application<sup>2</sup> is set out in the table below alongside the Revised Proposed Clause 6.6.

**Table 1: Proposed amendment to clause 6.6 of the Proposed 2023 Code**

Original clause 6.6 (as per the INC's application)	Revised Proposed Clause 6.6
<p>In circumstances of emergency relief or poverty, donations of infant formula may be made to support safe and adequate nutrition for infants. Donated supplies need to meet the following conditions:</p> <ul style="list-style-type: none"> <li>• they are given to a health organisation or food charity to control, and are not</li> </ul>	<p>Donations of infant formula may be made to support safe and adequate nutrition for infants. Donated supplies need to meet the following conditions:</p> <ul style="list-style-type: none"> <li>• they are given to a health organisation to control and distribute appropriately, including to food</li> </ul>

<sup>1</sup> See INC Amendment to application – Infant Nutrition Council application (27 October 2023). Available at [www.comcom.govt.nz/case-register/case-register-entries/infant-nutrition-council-limited2](http://www.comcom.govt.nz/case-register/case-register-entries/infant-nutrition-council-limited2)

<sup>2</sup> As per INC's application at Appendix 1: Proposed INC Code of Practice.

Original clause 6.6 (as per the INC's application)	Revised Proposed Clause 6.6
<p>provided directly from industry to consumer;</p> <ul style="list-style-type: none"> <li>• they are for infants who are medically required to be fed, or are already being fed infant formula;</li> <li>• the supply is continued for as long as the infants concerned need it;</li> <li>• the supply is not used as a sales inducement;</li> <li>• in the case of emergency relief, the donations are in accordance with national emergency preparedness plans and supporting documents.</li> </ul>	<p>charities, and are not provided directly from industry to consumer;</p> <ul style="list-style-type: none"> <li>• they are for infants who are medically required to be fed, or are already being fed infant formula;</li> <li>• the supply is continued for as long as the infants concerned need it;</li> <li>• the supply is not used as a sales inducement.</li> </ul>

### Our assessment

5. The Revised Proposed Clause 6.6 varies clause 6.6 of the Proposed 2023 Code by:
  - 5.1 allowing donations of Infant Formula in all circumstances – not just circumstances of emergency relief or poverty; and
  - 5.2 only allowing donations of Infant Formula to be made to health organisations, who can then decide whether to distribute that Infant Formula, including to food charities.
  
6. Our view is that the Revised Proposed Clause 6.6 does not materially impact our assessment of the public benefits and detriments arising from the conduct sought to be authorised by the INC when compared to the amendments originally proposed in the Proposed 2023 Code. This is because:
  - 6.1 while the Revised Proposed Clause 6.6 widens the circumstances under which the INC members may make donations of Infant Formula, the INC members' ability to make donations remains limited by the conditions set out at Revised Proposed Clause 6.6; and
  - 6.2 the first condition of Revised Proposed Clause 6.6 has been narrowed to allow only health organisations to receive donations of infant formula. It is then at the discretion of the health organisation(s) to pass on the Infant Formula to food charities. This has the effect of further limiting the promotional and/or marketing reach of the INC members. The original clause 6.6 in the INC's application would have allowed INC members to donate Infant Formula directly to food charities. However, we understand that, unlike health organisations, these food charities may not: be subject to the WHO Code, be responsible for carrying out New Zealand's National

Breastfeeding Strategy and/or necessarily possess special knowledge of the benefits of breastfeeding versus Infant Formula.

7. Consequently, we consider the Revised Proposed Clause 6.6 does not impact the Commission's Draft Determination that the Proposed 2023 Code will result, or will be likely to result, in such a benefit to the public that it should be permitted, and so the Commission continues to propose to grant an authorisation in respect of the specific articles within the Proposed 2023 Code (which would be amended to include the Revised Proposed Clause 6.6) which are the subject of the INC's application, under section 58(1), (2), (6B) and (6D) of the Act.

#### **Next steps**

8. The statutory deadline and process set out at [85]-[86] of the Draft Determination continues to apply in respect of this Addendum and the Revised Proposed Clause 6.6.
9. If you wish to make a submission on the Addendum, please send it to us at [registrar@comcom.govt.nz](mailto: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. Submissions should be received by the Commission by close of business on **6 November 2023**.
10. 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.
11. 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](mailto:registrar@comcom.govt.nz) so that we can work with you to accommodate your needs where possible.
12. 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.