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The Commerce Commission’s draft determination for the authorisation of a ‘restrictive trade practice’ on infant formula (INC code)

FEEDBACK FROM       New Zealand College of Midwives
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The New Zealand College of Midwives is the professional organisation for midwifery. Members are employed and self-employed and collectively represent 90% of the practising midwives in this country. There are around 2,900 midwives who hold an Annual Practising Certificate (APC). These midwives provide maternity care to, on average, 60,000 women and babies each year. New Zealand has a unique and efficient maternity service model which centres care around the needs of the woman and her baby.

Midwives undertake a four-year equivalent undergraduate degree to become registered followed by a first year of practice program that includes full mentoring by senior midwives. The undergraduate curriculum meets all international regulatory and education standards. Midwives are authorised prescribers in relation to their Scope of Practice as determined by the Midwifery Council.

Midwives provide an accessible and primary health care service for women in the community within a continuity of carer model as Lead Maternity Carers. Midwives can also choose to work within secondary and tertiary maternity facilities, providing essential care to women with complex maternity needs.

The College offers information, education and advice to women, midwives, district health boards, health and social service agencies and the Ministry of Health regarding midwifery and maternity issues. Midwives interface with a multitude of other health professionals and agencies to support women to achieve the optimum outcome for their pregnancies, health and wellbeing.
The Commerce Commission’s draft determination for the authorisation of a ‘restrictive trade practice’ on infant formula (INC code)

Thank you for the opportunity to provide feedback on the request to the Commerce Commission, from the Infant Nutrition Council (INC), seeking authorisation of a restrictive trade practice.

There are many issues that require consideration when it comes to optimal and safe infant feeding. The College does not intend to present a full statement about breastfeeding and appropriate infant and young child feeding in this submission, as there are many policy documents, research evidence-based articles, and global strategies that contain this information, but our submission, while supporting the request from INC seeking authorisation to restrict their infant formula marketing activities again, recognises that the INC code is not the International Code of Marketing of Breast-Milk Substitutes,¹ and that the INC code also does not recognise any of the critical World Health Assembly (WHA) infant feeding resolutions ² that update the International Code. This represents a serious undervaluing of the optimal global and New Zealand recommendations for infant and young child feeding, which are not being addressed. The College also addressed the substantial economic advantages for countries that support women who initiate breastfeeding and continue breastfeeding in our previous submission in 2015, so we refer the Commerce Commission to this document, and will not repeat this evidence-based argument in this submission. While the College recognises that some of our following comments are linked to the authorisation process directly, and some are about issues not currently being addressed within New Zealand, we feel that all our comments are relevant in the context of infant and young child feeding.

Feedback from the College is below.

1.0 The College recognises that breastfeeding protection includes the tenets of maternity protection, and broad policy documents that recognise and take account of breastfeeding, alongside the regulation of breast-milk substitute marketing. We also recognise the need for up to date, unbiased commercial-free information about formula and infant and young child complementary foods, to be available, appropriate, and easily accessible to health workers, parents and carers. However, the regulation of the formula industry marketing is a significant part of the landscape which requires attention. A voluntary self-regulated code, even on products up to one year, is insufficient to protect consumers from inappropriate marketing, regardless of the self-imposed restrictions proposed by INC.

2.0 The NZ National Strategic Plan of Action for Breastfeeding was developed by the National Breastfeeding Advisory Committee as advice for the Director-General of Health in 2009. It was recognised by the committee, at that time, that New Zealand’s interpretation and implementation of the International Code did not meet the minimum standards envisaged by the International Code (p. 9). The College awaits the overdue update of the strategic plan with interest, and anticipates that the 2009 statement will remain valid in terms of progress on International Code implementation. We recognise the extensive work the Ministry of Health has carried out on the Code of Practice for Health Workers, which represents part of the NZ response to international recommendations in relation to breastfeeding and breast-milk substitutes, but this work is unable to address marketing issues in terms of meaningful industry regulation.

3.0 The College suggests urgent recognition of a statement within the International Code of Marketing of Breast-milk Substitutes is necessary as this highlights why industry regulation is paramount. “In view of the vulnerability of infants in the early months of life and the risks involved in inappropriate feeding practices, including the unnecessary and improper use of breast-milk substitutes, the marketing of breast-milk substitutes requires special treatment, which makes the usual marketing practices unsuitable for these products.” (p. 7)

4.0 The College has been concerned about the marketing of follow-on (follow-up) formula which has been marketed in a way that has caused confusion for health workers, parents and carers. Studies have found a direct correlation between marketing strategies for follow-on (follow-up) formulae, and perception and subsequent use of these products as breast-milk substitutes. The College is also concerned that a similar issue exists with products such as toddler milks which marketing has created a perceived need for, and we would like to refer the Commerce Commission to point 3

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of this submission, the issue with cross promotion, and also to the fact that follow-on formula and toddler milks are considered to be unnecessary products. 8 9

5.0 The INC restrictions only apply to members of INC, which enables current and future competitors to continue inappropriate marketing practices. This is of some concern to the College as this issue will obviously not be addressed within the current process if the only industry restrictions consist of a voluntary code of practice.

6.0 The College does recognise that the INC voluntary and self-regulated code, whilst containing a diluted set of principles, provides limited protection for our most vulnerable citizens. Meaningful sanctions for violations would possibly increase this limited protection.

7.0 The College would prefer to see the International Code of Marketing of Breast-milk Substitutes and subsequent, relevant, World Health Assembly (WHA) infant feeding resolutions enacted into regulation and legislation to protect breastfeeding, and to support unbiased information about the safe and appropriate use of breast-milk substitutes for parents and carers.

8.0 The College supports the draft authorisation of the INC code extension to cover products up to the age of one year in the absence of other marketing protections, and whilst we would prefer that the New Zealand Government met their international obligations and strengthened and aligned the restrictions on marketing of breast-milk substitutes to reflect the original intent of the Global Strategy for Infant and Young Child Feeding, the International Code and WHA resolutions, 10 11 12 we recognise the current and proposed INC code gives some minor degree of protection in the absence of any regulatory progress.

9.0 The College is concerned about the lack of understanding about this authorisation process on behalf of the general public. Media reports have suggested that changes will limit the access of parents to formula, and/or information about formula feeding, which is not the case. Our concerns are in two parts; the unnecessary distress caused to parents who use formula products; and the inappropriateness of industry providing education about any aspect of infant feeding to health professionals, parents and the public. It is the role of the Ministry of Health and health professionals

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to provide unbiased, commercial-free information about infant feeding to parents /carers, and this includes breastfeeding, formula feeding, complementary foods, and bottles and teats.

10.0 Dr Natalie Shenker drew attention to the inappropriateness of infant and young child feeding education provision by industry following the recent events at the World Health Assembly where corporate industry lobbying succeeded in watering down protections for breastfeeding support.13

11.0 Referring to point 9, the College supports and welcomes the recent statement made by the Ministry of Health to explain the Commerce Commission process, but we have some concerns that this information may be inaccessible to many people.14

12.0 As described in the Ministry of Health statement referred to in point 11, the College welcomes the change which will enable complaints about the advertising of follow-on formula for infants aged six – twelve months to come into scope within the Ministry’s complaints process.

13.0 The College is aware that advertisements on television are no longer for follow-on formula, but in fact for toddler milks, and these products will continue to fall out of scope of the NZ interpretation of the International Code, which remains a disappointment given that reports suggest that sales of toddler milks in developed countries are expected to increase by approximately 20.7 percent by 2020.15 Toddler milks appear to represent the growth market for industry. The World Health Organisation draws attention to the cross promotion of products and misleading health and nutrition claims, and re-emphasised the definition of breast-milk substitutes; “Products that function as breastmilk substitutes should not be promoted. A breastmilk substitute should be understood to include any milks (or products that could be used to replace milk, such as fortified soy milk), in either liquid or powdered form, that are specifically marketed for feeding infants and young children up to the age of 36 months (including follow-up formula and growing-up milks).”16

Executive summary

(1) The College strongly supports the regulation of all breast-milk substitutes, as per the International Code and subsequent, relevant WHA infant feeding resolutions.

(2) The College considers that if the INC self-regulated and voluntary code of practice was to be disestablished, by being deemed anti-competitive, then there would be an urgent need for Government intervention to implement regulatory measures.


(3) The INC voluntary and self-regulated code, whilst containing a diluted set of principles, provides at least some small protection for our most vulnerable consumers.

(4) We are concerned about the marketing of, and the growth of, the toddler milk markets and would welcome restrictions on these unnecessary products in line with the International Code and WHA resolutions.

(5) The College supports the authorisation for the INC code changes in the absence of other marketing protections, and whilst we would prefer that the New Zealand Government met their full international obligations under the Global Strategy of Infant and Young Child Feeding, the International Code and WHA resolutions, we recognise the current INC Code gives a minor degree of protection in a climate of industry regulatory absence.

The College is grateful to have the opportunity to make a submission on this authorisation request by the marketers association (INC), as the implications of the marketing of breast-milk substitutes is of critical positive importance to infant and young child health and well-being, the health and wellbeing of women, health economics, the environment, and society in general. Therefore we consider that the public benefits of granting authorisation outweigh any potential lessening of competition.

If further information is required in regards to this submission please do not hesitate to contact the College.

Ngā mihi
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