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Determination

Infant Nutrition Council Limited [2018] NZCC 20

The Commission:	Dr Mark Berry Sue Begg Anna Rawlings
Summary of application:	The Applicant has applied for authorisation of an arrangement allowing its members to: (a) restrict their advertising and marketing activities for infant formula products for children up to 12 months of age; and (b) on that basis, for revocation of the authorisation granted in April 2015 by the Commission allowing its members to restrict their advertising and marketing activities for infant formula products for children aged up to six months of age (the 2015 Authorisation).
Determination:	The Commerce Commission has decided to: (a) grant the authorisation, as it is satisfied that the public benefits that will result, or be likely to result, from the arrangement will outweigh the lessening of competition which will result, or be likely to result, from the arrangement; and (b) revoke the 2015 Authorisation, as the Commission considers that authorising the arrangement, constitutes a material change of circumstances.
Date of determination:	8 November 2018

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

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Introduction

1. On 2 April 2015, the Commission authorised an arrangement (the 2015 Arrangement),[1] allowing the Infant Nutrition Council Limited (the INC or the Applicant) and its members to enter into, and give effect to, an arrangement to comply with the INC *Code of Practice for the Marketing of Infant Formula in New Zealand* (the INC Code). The INC Code is an arrangement under which the INC members agree to restrict their advertising and marketing activities for infant formula products for children up to six months of age (the 2015 Authorisation).[2]

2. On 22 May 2018, the INC applied for authorisation (the Application) from the Commission for its members to enter into, and give effect to, an arrangement to comply with an extension of the infant formula marketing restrictions in the INC Code to cover infant formula products for children aged up to 12 months of age (the Arrangement). This would require amendments to be made to the INC Code so that the INC Code contains the extended restrictions (the Amended INC Code).

Determination: grant authorisation and revoke the 2015 Authorisation

3. The Commission's determination is to:

    3.1 grant authorisation for the INC's members to enter into, and give effect to, the Arrangement; and

    3.2 revoke the 2015 Authorisation.

Assessment procedure

4. The Commission received 21 submissions and obtained information from a variety of sources.

5. The Commission:

    5.1 reviewed the information and analysis in the Application;

    5.2 sought information from and considered submissions made by various parties on the Application;

    5.3 published a draft determination on 27 August 2018, which explained the Commission's preliminary view that authorisation should be granted and the 2015 Authorisation should be revoked, and called for further submissions on the draft determination; and

    5.4 considered the submissions on the draft determination.

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1 *Infant Nutrition Council Limited* [2015] NZCC 11.

2 A copy of the 2015 Authorisation is available on the Commission's website: https://comcom.govt.nz/case-register/case-register-entries/infant-nutrition-council

Arrangement for which authorisation is sought

6. The INC publishes the INC Code, which is based on the World Health Organisation's (WHO) *International Code of Marketing of Breast Milk Substitutes* (the WHO Code). The WHO Code aims to protect and promote breastfeeding, and to restrict the marketing and distribution of breast milk substitutes in ways that could undermine this aim.

7. The WHO Code was adopted on a voluntary basis by the Government of New Zealand in 1983. The INC Code is an important part of New Zealand's fulfilment of its obligations under the WHO Code.

8. The INC Code currently contains provisions to which section 27 of the Commerce Act 1986 (the Act) may apply. Those provisions are subject to the 2015 Authorisation. In the Application, the INC seeks authorisation to enter into, and give effect to, the Arrangement, under which INC members would restrict the following advertising and marketing activities for children up to 12 months of age:

    8.1 advertising infant formula to the general public;

    8.2 distributing free samples to pregnant women, mothers of infants, or the families and caregivers of infants;

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

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

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

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

    8.7 offering inducements to health workers, health practitioners, or their families to promote infant formula.

9. The INC proposes to amend the definition of "infant formula" in the INC Code to include all formula products for children up to 12 months of age, which in effect will extend the scope of the existing restrictions to include formula products for children aged six to 12 months (commonly known as "follow-on" formula).[3]

10. The INC Code does not place any restrictions on the INC members' pricing decisions.

11. The INC intends to adopt and apply the Amended INC Code as soon as authorisation has been granted by the Commission.[4] Notwithstanding this, the INC has advised

[3] See Appendix 2 of the Application for further details on the proposed amendments to the INC Code.

[4] Email from Buddle Findlay (on behalf of the INC) to the Commerce Commission (26 September 2018).

the Commission that its members will need time to bring their advertising and materials in line with the Amended INC Code. The INC expects this to be completed in a matter of weeks or months from the time authorisation is granted. However, one member, Fonterra Co-operative Group Limited, indicated that it may take up to two years to bring its product labelling in line with the Amended INC Code as its products have a shelf life of approximately two years.[5]

12. The INC submitted that if the Commission grants authorisation for INC members to enter into, and give effect to, the Arrangement, it can revoke the 2015 Authorisation under section 65(1) (b) of the Act because there has been a material change in circumstances since the 2015 Authorisation had been granted.[6]

13. We note that some parties in their submissions asked that the Commission authorise restrictions on the marketing and advertising of formula products for infants aged over 12 months, for example toddlers' milk. However, we did not consider this as the Commission can only consider the Arrangement that was submitted for authorisation; it cannot analyse whether a broader arrangement would result in a greater public benefit.

New Zealand Follow-on Formula Marketing Guidelines

14. The advertising and marketing of formula products for children from six to 12 months of age (follow-on formula) is currently excluded from the provisions of the INC Code. INC members have adopted the *New Zealand Follow-on Formula Marketing Guidelines* (Follow-on Formula Guidelines) for the marketing of follow-on formula.[7] The Follow-on Formula Guidelines are used to assist the Advertising Standards Authority in considering whether advertising or marketing has been prepared with the required standard of social responsibility under the *Code for Advertising Food*.[8]

15. The Follow-on Formula Guidelines state:

> To avoid any confusion with infant formula, which is a breast milk substitute suitable for infants under six months of age, follow-on formula advertising and informational material prepared by INC companies should position this product as being suitable for:
>
> 1. infants already on infant formula when they reach the age of at least six months, and
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> 2. infants of six months of age or over, who are receiving complementary foods.

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5 Email from Buddle Findlay (on behalf of the INC) to the Commerce Commission (23 October 2018).

6 Application at [70] and letter from Buddle Findlay (on behalf of the INC) to the Commission (7 June 2018).

7 A copy of the *New Zealand Follow-on Formula marketing Guidelines* is available on the INC's website: http://www.infantnutritioncouncil.com/marketing-codes/code-in-new-zealand/

8 Submission by the Advertising Standards Authority of New Zealand to the Commerce Commission (9 October 2018).

Follow-on formula is marketed in New Zealand as an alternative to whole cows' milk. Unmodified cows' milk is not suitable as a drink for young children under the age of 12 months, and it is not an alternative to breast milk.

The Applicant

INC

16. The INC is a company based in Australia that represents the infant formula industries in both Australia and New Zealand. The INC is owned by its members, and includes manufacturers, marketers and importers of infant formula.[9] In New Zealand, the most prominent members include:

    16.1 Danone Nutricia Early Life Nutrition (Danone), part of the Groupe Danone, which supplies the Karicare and Aptamil brands of infant formula;

    16.2 H J Heinz Company (New Zealand) Limited (Heinz), which supplies the Nurture brand of infant formula;

    16.3 Nestle New Zealand Limited (Nestle), which supplies the Nan and S-26 brands of infant formula; and

    16.4 Fonterra Co-operative Group Limited (Fonterra).

17. The INC is a voluntary organisation. Nevertheless, its members currently represent over 95% of the volume of infant formula manufactured, sold and exported from New Zealand.[10]

Other relevant parties

Ministry of Health

18. Since its adoption in 1983, the Ministry of Health (MOH) has been responsible for giving effect to the WHO Code in New Zealand. The MOH has chosen to do so through a voluntary self-regulatory approach, rather than through legislation.

19. While the MOH is not a member of the INC, the two organisations have advised that they coordinate closely, particularly when it comes to resolving public complaints about the marketing and advertising of infant formula. For example, the MOH is responsible for monitoring the implementation of the INC Code which it does so through receiving complaints about alleged breaches of the INC Code for infant formula for children up to six months of age.

20. When the MOH receives a complaint regarding an alleged breach of the INC Code, the MOH asks the party that is allegedly in breach for a response which is then sent to the complainant. If the complainant is dissatisfied with the response, it is referred to the MOH's Compliance Panel[11] and all affected parties are then notified of the

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9 See Appendix 4 of the Application for a full list of members.

10 2015 Authorisation at [12].

11 The WHO Compliance Panel for implementing and monitoring the International Code of Marketing of Breast-milk Substitutes in New Zealand.

Compliance Panel's decision. Any of the affected parties can request an appeal with the MOH, which is determined by an Adjudicator. No further appeals can then be lodged with the MOH.[12]

21. For the period 2 April 2015 (when the 2015 Authorisation was granted) to 30 June 2018, the MOH's Compliance Panel considered 10 formal complaints relating to alleged breaches of the INC Code. Of these complaints, one was upheld, eight were not upheld, and one was resolved by the marketer changing its marketing in response to the complaint.[13]

Other relevant agencies

22. Apart from the MOH, there are two other bodies that consider complaints about the advertising of infant formula:

    22.1 the Advertising Standards Complaints Board, which considers complaints about the advertising of infant formula for children over six months of age under the Advertising Standards Code (formerly the Code for Advertising Food), using the Follow-on Formula Guidelines for assistance when assessing such complaints (see paragraphs 14 and 15); and

    22.2 the Ministry of Primary Industries, which considers complaints about the labelling, composition or quality of infant formula or other food products under the Australian and New Zealand Food Standards Code, including health and nutrition claims under the INC Code.

Retailers

23. Two large supermarket chains, operated by Woolworths New Zealand Limited (formerly Progressive Enterprises Limited) and the Foodstuffs group, sell the vast majority of infant formula products consumed in New Zealand. Some infant formula is also sold through alternative channels, such as pharmacies, online retailers and general merchandise stores. Finally, a small volume of formula is supplied through hospitals.

The 2015 Authorisation

24. In the 2015 Authorisation, the Commission authorised the INC and its members to enter into, and give effect to, an arrangement to comply with the INC Code. Specifically, the 2015 Authorisation allowed the INC members to restrict the same infant formula marketing activities as outlined in paragraphs 8.1 to 8.7 above for infant formula products for children up to six months of age.

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12 For further details on the MOH's complaints process see: https://www.health.govt.nz/our-work/who-code-nz/breast-milk-substitutes-complaints-procedure

13 Summaries of all complaints relating to alleged breaches of the INC Code are in the MOH's *Annual Summaries* which can be viewed at: https://www.health.govt.nz/our-work/who-code-nz/compliance-panel/meeting-summaries

25. Other products intended for later-stage use, such as follow-on formula (for children aged six months to 12 months of age) and toddlers' milk (for children aged 12 months onwards) were excluded from the 2015 Authorisation.

The Commission's reasons for the 2015 Authorisation

26. In reaching its decision on the 2015 Authorisation, the Commission:

    26.1 considered that for the purpose of the application the relevant market was stage one infant formula products (ie, for children up to six months of age) sold in New Zealand through retail channels;[14]

    26.2 assumed that, in the factual scenario (with the 2015 Authorisation in place), all existing and future members of the INC would adhere to the INC Code and restrict their infant formula marketing activities accordingly;[15]

    26.3 adopted as the appropriate counterfactual (without the arrangement) the most competitive likely alternative, which was at least two years of unimpeded advertising and marketing, followed by government regulation;[16]

    26.4 concluded that the INC Code was likely to lessen competition. This was because the INC Code deprived the INC Members of the opportunity to engage in common advertising and marketing activities, therefore limiting the information available to potential consumers;[17] and

    26.5 considered that there would be potential benefits, including:

        26.5.1 avoided incremental regulatory costs;[18] and

        26.5.2 improved public health outcomes.[19]

27. After weighing the detriments and benefits, the Commission was satisfied that the 2015 Arrangement would result, or be likely to result, in a benefit to the public that outweighed the likely lessening of competition.[20] As a result, the Commission authorised the 2015 Arrangement.

Developments since the 2015 Authorisation was granted

28. The INC has considered extending the restrictions in marketing infant formula products to children up to 12 months of age for some time.[21] The impetus for the

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14 *Infant Nutrition Council Limited* [2015] NZCC 11 at [29]. As noted in the 2015 Authorisation, the Commission considered that supply to hospitals was potentially a separate market from supply to retailers. However, since the 2015 Arrangement was unlikely to raise significant competition issues for hospital distribution, the Commission did not consider the matter further.

15 *Ibid* at [31].

16 *Ibid* at [37].

17 *Ibid* at [42].

18 *Ibid* at [59] to [63].

19 *Ibid* at [64] and [65].

20 *Ibid* at [88]

21 Application at [8].

Arrangement was a letter dated 12 May 2017 from the MOH's New Zealand Director of Health, Dr Caroline McElnay,[22] encouraging the INC to extend the INC Code for a number of reasons, including that it would:

28.1 align with guidance in 2016 from the World Health Assembly, which included urging member states to end inappropriate promotion of food for infants and young children;[23]

28.2 align with the position in Australia;

28.3 be consistent with the MOH's nutrition guidelines for infants;[24] and

28.4 support public health goals for the protection and promotion of breast feeding in New Zealand.

Position in Australia

29. In Australia, the members of the INC are bound by the *Marketing in Australia of Infant Formulas: Manufacturers and Importers Agreement* (the MAIF Agreement). Like the INC Code, the MAIF Agreement is a voluntary self-regulatory code that contains similar marketing restrictions to the existing INC Code, but unlike the INC Code, currently extends to infant formula products for children up to 12 months of age.

30. On 15 July 2016, the Australian Competition and Consumer Commission (ACCC) granted authorisation for the MAIF Agreement for a further five years, to 8 August 2021 (the ACCC Authorisation).[25] The ACCC considered that:

30.1 on balance, the arrangement was likely to result in significant public benefit from promoting and protecting breastfeeding and avoiding regulatory costs; and

30.2 these benefits outweighed any public detriment, including from any lessening of competition caused by the restrictions on marketing.

31. Therefore, the ACCC was satisfied that the relevant net public benefit tests were met.

Submissions received by the Commission

32. The Commission received a total of 21 submissions from both individuals and organisations on the Application and the draft determination. Submissions received are available for viewing on the Commission's Case Register at:

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22 See Appendix 3 of the Application.

23 See: http://www.who.int/nutrition/topics/guidance-inappropriate-food-promotion-iyc/en/

24 See: https://www.health.govt.nz/system/files/documents/publications/food-and-nutrition-guidelines-healthy-infants-and-toddlers-revised-dec12.pdf

25 See: https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/infant-nutrition-council-limited-revocation-and-substitution-a91506-a91507

https://comcom.govt.nz/case-register/case-register-entries/infant-nutrition-council-limited.

33. The Commission took into account all submissions it received.[26]

34. Fifteen parties supported the overall authorisation. The reasons given for their support included the following:

    34.1 the authorisation is likely to have significant public benefits;

    34.2 the authorisation helps to meet New Zealand's obligations under the WHO Code; and

    34.3 the authorisation would reduce the level of marketing of formula products which would result in an increased breastfeeding rate.

35. Three individuals opposed the overall authorisation because they considered the Arrangement reduces the ability of mothers to make an informed decision on whether or not to breastfeed.

36. Although the authorisation would reduce information publicly available on infant formula, the Commission does not consider that the availability of such information will be materially reduced. This is because, as submitted by the MOH, such information will remain available from other sources, including health care practitioners and the MOH itself.[27]

37. All of the organisations that provided submissions expressed their overall support for the authorisation. The organisations that provided submissions were:

    37.1 WellSouth Primary Health Network;

    37.2 Dietitians NZ;

    37.3 The Southern District Health Board;

    37.4 The New Zealand Nurses Organisation;

    37.5 Birth Wise (Wellington) Inc;

    37.6 New Zealand College of Midwives;

    37.7 Royal New Zealand Plunket Trust;

    37.8 Ministry of Health;

    37.9 Advertising Standards Authority;

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26 Commerce Act 1986, section 61(3).

27 Information on formula feeding, including information about preparing and using infant formula is available on the Ministry of Health's website: https://www.health.govt.nz/your-health/pregnancy-and-kids/first-year/helpful-advice-during-first-year/formula-feeding.

37.10 Women's Health Action Trust; and

37.11 Breastfeeding Advocacy Australia Facebook Group.

How the Commission assesses restrictive trade practice authorisations

38. The Applicant seeks authorisation on the basis that section 27 of the Act might otherwise apply to the Arrangement. The Commission can authorise conduct that may otherwise breach section 27 of the Act. However, 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). Our approach to assessing benefits and detriments is outlined in more detail at paragraphs 86 to 90.

39. In assessing an application, the Commission determines whether the conduct would likely lessen competition. The lessening of competition need not be substantial,[28] although as part of our authorisation assessment, the Commission must determine the extent of the lessening of competition that would result from the proposed Arrangement.[29] 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.

40. If the Commission is satisfied that a lessening of competition is likely and 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.

Relevant market

41. 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.

42. 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) so as 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.

43. As described in the 2015 Authorisation,[30] there are three stages of infant formula. Stage one formula is designed for children aged up to approximately six months. Stage two formula, also known as "follow-on" formula, is designed for children aged from approximately six months to one year. Stage three formula, also known as "toddlers' milk" or "toddler milk drink", is designed to be used from approximately

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28 Commerce Act 1986, section 61(6A).

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

30 *Infant Nutrition Council Limited* [2015] NZCC 11 at [26].

one year of age onwards. The composition of stage three formula differs significantly enough from stage one and two formula that they are not substitutable.[31]

44. Stage one and two formulas are intended to be the principal source of nourishment for infants between six and 12 months of age as solid foods are gradually introduced to an infant's diet. Stage two formulas are considered a substitute for either breast milk or stage one formulas for infants between six and 12 months of age. Stage three formulas, on the other hand, are a formulated supplementary food intended to supplement a normal diet where intakes of energy and nutrients may not be adequate.

45. While stage one formula can continue to be used in place of stage two formula for infants between six and 12 months of age, the composition of stage two formula typically renders it inappropriate for children under approximately six months of age. As such, from the demand-side, stage two formula cannot generally be a substitute for stage one formula for infants under approximately six months of age.

46. In considering the scope of the relevant markets the Commission is of the view that there is a degree of overlap between breastfeeding and each of the separate infant formula products as described above.

47. However, as submitted by the Applicant, the Commission considers that, for the purposes of analysing the Application, it would be appropriate to define the relevant markets as the national market for the supply of the following products sold through retail channels:

    47.1 infant formula for children aged up to six months (ie, stage one formula); and

    47.2 follow-on formula for children aged six to 12 months (ie, stage two formula).[32]

48. The Commission considers that defining the relevant markets separately provides it with an appropriate framework for assessing both the effects on competition and the likely benefits and detriments arising from the Arrangement.[33]

With and without the Arrangement

49. 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

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31 For example, most stage three formula is casein-dominant, while most stage one and stage two formula is whey-dominant.

32 Application at [74]. Consistent with the 2015 Authorisation, the Applicant considers, and the Commission agrees, that it is not necessary to define separate markets for the supply of infant formula or follow-on formula to hospitals, because the volumes sold through hospitals are very small and the Arrangement is unlikely to raise competition issues for hospital distribution. Therefore, we have not given any further consideration to this issue.

33 We note that from a supply side substitution perspective there may be a justification for defining a broader market that encompasses both infant formula and follow-on formula. However, this alternative approach would have no material impact on this analysis.

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.

With the Arrangement

50. With the Arrangement in effect, the current marketing restrictions under the 2015 Authorisation would be extended to the marketing of formula products for infants aged six to 12 months.

Without the Arrangement

51. If the Arrangement does not come into effect, the likely outcome is that:

    51.1 the existing restrictions on the marketing of formula products for children aged up to six months of age would continue; and

    51.2 the ability of the INC members to market formula products for children aged six to 12 months of age would continue unrestricted by the INC Code and there is a real chance that the level of marketing of formula products would increase, at least until the introduction of any regulations by the Government to prohibit such marketing. However, regulations prohibiting such marketing would not seem to be likely introduced for at least five years.

52. Given the likelihood that, in the without-the-Arrangement scenario, the marketing of formula products for children aged six to 12 months would not be restricted by the INC Code, the Commission considers that formula manufacturers would have the ability and, potentially, the incentive to increase the marketing of their products in the future. As such, the Commission considers that, in the without-the-Arrangement scenario, there is a real chance that there would be an increase in the level of marketing of formula products. The Commission also considers that, should an increase in the level of marketing occur, this will likely prompt a regulatory response from the Government.

53. A difference between the Commission's proposed without-the-Arrangement scenario and the without-the-Arrangement scenario adopted by the Commission when considering the 2015 Arrangement (see Paragraph 26.3) relates to the likelihood and timing of any eventual Government regulation. The MOH recently advised the Commission that, absent the Commission authorising the Application, the introduction of restrictions on the marketing of formula products for children aged six to 12 months through regulatory reform is unlikely in the short term. This is because:

    53.1 the marketing of formula products for children aged up to six months of age remains restricted; and

53.2 the high costs associated with the introduction of a regulatory regime and the ensuing compliance and enforcement costs.[34]

54. The MOH has yet to brief the current Minister of Health on New Zealand's implementation of the WHO Code (on which the INC Code is based); however, the MOH considers that regulatory intervention within a two year period, as adopted by the Commission in the 2015 Authorisation, is unlikely.[35]

55. Given this advice from the MOH, the Commission's view is that marketing restrictions would not be introduced by regulatory reform for at least five years.

56. Therefore, for the purpose of considering whether the Application would be likely to result in a lessening of competition, the Commission adopts the likely without-the-Arrangement scenario of:

56.1 marketing restrictions for formula products for children aged up to six months, through the 2015 Authorisation still being in place;

56.2 the ability to market products for children six to 12 months of age is not restricted by the INC Code;

56.3 an increase in the level of marketing of formula products; and

56.4 marketing restrictions being introduced by regulatory reform but not for at least five years.

How the Arrangement could lessen competition

57. In the without-the-Arrangement scenario, the INC members would be able to market follow-on formula for children aged six months up to 12 months unrestricted by the INC Code. The Arrangement restricts this ability.

58. As described in the 2015 Authorisation, restrictions on advertising and marketing can prevent or limit consumers and suppliers from obtaining the benefits of competition in the following ways:

58.1 by limiting the price information consumers receive about rival products. Restrictions on advertising can lead to higher prices if they prevent suppliers 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);[36]

58.2 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

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34 Email from the MOH to the Commerce Commission (20 July 2018) and telephone call between the Commerce Commission and the MOH (24 July 2018).

35 *Ibid*.

36 *Infant Nutrition Council Limited* [2015] NZCC 11 at [39].

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);[37] and

58.3 by enabling firms to publicise new products to consumers that are 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).[38]

Current and planned advertising of follow-on formula

59. To help assess the lessening of competition, we have reviewed the marketing and promotional activities of the INC members of follow-on formula, both current and planned.

60. In the Application, the INC stated that it "…is aware that several of its members currently advertise follow-on formula to the New Zealand public".[39] The INC provided the following examples of advertising that currently take place:[40]

60.1 Heinz advertises a money back guarantee on its website in relation to follow-on formula, and also offers discount coupons for in-store purchases on its website;

60.2 New Image Group Limited offers free samples of follow-on formula; and

60.3 Fonterra advertises a money back guarantee on its website in relation to its follow-on formula.

61. The Commission also requested further information from each of the three largest manufacturers/suppliers of follow-on formula (Danone, Nestle and Heinz),[41] for further information on existing or likely future promotional activity.

62. Nestle[42]and Danone[43] advised that they do not carry out any promotional or marketing activities for follow-on products to the public in New Zealand. However, Nestle provides range cards to healthcare professionals [

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37 *Ibid* at [40].
38 *Ibid* at [41].
39 Application at [77].
40 Application at [78].
41 Together, the three manufacturers account for about 97.1% of grocery sales of follow-on formula in New Zealand (See Application at [90]).
42 Nestle response to information request from Commerce Commission (15 July 2018).
43 Danone response to information request from Commerce Commission (16 July 2018).

63. Heinz advised that it:[44]

63.1 advertises follow-on formula combined with its advertising for toddler milk;

63.2 offers discount vouchers and a money-back guarantee on their website to first-time purchasers of follow-on formula; and

63.3 shows images of follow-on formula on generic digital advertising.

64. [

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Whether the Arrangement would lessen competition

65. Given that the INC has sought authorisation to extend the existing restriction on marketing and promotional activities for infant formula products, the Commission's focus in assessing the likely competitive effect of the Arrangement has been on follow-on formula for children six to 12 months of age.

66. The Commission agrees with the Applicant that the advertising and promotional activity of the type restricted under the Arrangement would normally be expected to form part of the normal competitive process.[45] Therefore, the Commission considers that depriving INC Members of the opportunity to engage in the advertising of infant formula products for children aged six to 12 months, and limiting the information available to potential purchasers of those products, would likely result in a lessening of competition.

67. However, as noted in the 2015 Authorisation, the Commission does not consider that the Arrangement would necessarily result in significantly higher prices. This is because the INC Code does not prevent suppliers from price discounting, nor does it prevent retailers from advertising those price discounts, for example in supermarket catalogue mail-outs.

68. The Commission also considers that the marketing and promotional restrictions, as proposed under the Arrangement, are unlikely to result in any material reduction in the level of product innovation. As noted in the 2015 Authorisation, the New Zealand market is relatively small in global terms and the market is mainly supplied by large multi-national companies that have international research and development programmes based elsewhere.[46] Therefore, any restrictions on advertising in New Zealand are unlikely to have any material impact on product innovation.

69. Instead, as with the 2015 Authorisation, the Commission considers that harm resulting from the Arrangement would likely arise from restricting the ability of suppliers to inform potential purchasers of the benefits of follow-on formula more

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44 Heinz response to information request from Commerce Commission (24 July 2018).

45 Application at [103].

46 The three largest manufacturers in New Zealand, which have a 97% market share in New Zealand, are based overseas.

generally. So, the Arrangement would likely hinder to some extent the ability of formula manufacturers to effectively displace breastfeeding.

70. While the Commission considers that the Arrangement is likely to result in a lessening of competition, it is difficult to evaluate the extent to which competition would likely be affected. This is because it is difficult to predict precisely the degree to which marketing and advertising would differ in the absence of the Arrangement.

71. The Commission considers that without further restriction the levels of marketing and promotional activity in relation to follow-on formula would be likely to continue at least at the current levels and there is a real chance they would increase. Although it is not possible to predict the magnitude of any increase, nor the specific forms of marketing and promotion that could be adopted, such an increase could be material.

72. Without some form of arrangement that limits marketing activity, the INC members face the risk of losing market share should one or more of their rivals increase their current level of marketing activity. To the extent such an increase in marketing could prove effective at increasing market share, there may be an incentive for the INC members to be the first to increase their level of marketing activity (ie, to obtain a "first mover advantage"). Consequently, the Arrangement would prohibit such an increase in marketing activity and would likely lessen competition.

73. Acknowledging the scope for the marketing of these products to increase materially in the absence of the Arrangement is consistent with the position taken by the ACCC in the ACCC Authorisation.[47] While the Commission is unable to measure the specific changes in demand for either follow-on or infant formula that may result from the Arrangement, some increase in demand may occur without the Arrangement.

Conclusion on lessening of competition

74. The Commission therefore considers that some lessening of competition is likely to result from the Arrangement. As such, the Commission must assess whether the Arrangement would result, or be likely to result, in such benefit to the public as to outweigh any lessening of competition.

Assessment of benefits and detriments

75. 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. The Commission may only authorise the conduct if it is satisfied that the conduct will result in benefits that outweigh the detriment caused by the lessening of competition resulting from the conduct.

76. The Commission assesses benefits and detriments that may be caused in a future state of affairs. As the Court of Appeal noted in *NZME*, the effects of the arrangement "…need not be proved on the balance of probabilities, and the weight assigned to a given effect may reflect not only its extent of impact but also its

[47] ACCC Authorisation at [81].

likelihood. To decide where the balance lies, then, is to compare one future state of affairs…in which benefits outweigh detriments with another in which they do not."[48]

77. Relevant benefits and detriments are those that are likely to occur, in the sense that there is a real and substantial risk that they will happen as a result of the Arrangement.[49]

Benefits relevant to our assessment

78. Section 3A of the Act is the only section giving a specific indication of what constitutes a "benefit". It refers to "efficiencies" that are likely to arise from the conduct. However, while efficiencies are a mandatory consideration, efficiencies are not the only public benefits that can be counted.

79. A public benefit is:[50]

> … anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.[51]

80. In *Godfrey Hirst*, 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.[52] [53]

81. Accordingly, we regard a public benefit as any gain to the public of New Zealand that would result from the proposed Arrangement regardless of the market in which that benefit occurs or to who in New Zealand benefits.[54] We do not take into account any benefits that would occur both with and without the Arrangement.

82. In *NZME* the Court of Appeal noted that New Zealand's legislation, like that in Australia,[55] permits but does not require the use of the modified total welfare approach.[56] Under the modified total welfare approach in Australia, benefits that flow only to a limited number of members in the community could be given less

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48 *NZME Limited & Ors v Commerce Commission* [2018] NZCA 389 at [88].

49 *NZME* (CA) above at [83] citing *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA) at 562-563.

50 Commerce Commission, *Authorisation Guidelines* (July 2013) at [35].

51 See *Air NZ No 6* above at [319] and *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 473 (HC) (AMPS-A HC) at 527-530 quoting *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 12,242 and *In Re Rural Traders Co-operative (WA) Ltd* (1979) ATPR 40-110 at 18,123.

52 *Godfrey Hirst NZ v Commerce Commission* [2016] NZCA 560 (CA) at [36].

53 The Commission notes that it is updating its *Authorisation Guidelines* in line with the Court of Appeal's judgments in *Godfrey Hirst* and *NZME* above .

54 An example of this is *Air NZ No 6* above. In that case, the High Court considered the Commission's assessment of increased tourism as a benefit.

55 See *Qantas Airways Ltd* [2005] ACompT 9, (2005) ATPR 42-065 at [185] and *Australian Competition and Consumer Commission v Australian Competition Tribunal* [2017] FCAFC 150, (2017) 254 FCR 341 at [67].

56 *NZME* (CA) above at [75]. The Court noted at [75] that it "…should not be taken to say, however, that the Commission must follow the modified total welfare approach in practice".

weight than detriments (or benefits) that are spread widely among members of the community generally. For example, cost savings that are likely to be retained by a small number of shareholders may be given less weight than cost savings that are likely to be passed onto customers.

83. In quantifying benefits, we take into account any costs that might be incurred in achieving those benefits.

Detriments that are relevant to our assessment

84. Our assessment of detriments that are likely to arise from the Arrangement include, but are not limited to, allocative efficiency detriments (welfare losses from increased prices/reduced quality), productive efficiency losses (higher costs over time), and dynamic efficiency losses (reduced incentive to innovate).[57]

85. As the Courts have long recognised, efficiency considerations are relevant but do not exhaust society's interest in a transaction or conduct.[58] It would be an error to exclude a public benefit or detriment on the ground that the Act is concerned with efficiency alone.[59] The Commission must therefore also consider non-economic detriments in appropriate cases.

Our approach to assessment

86. The Commission will grant authorisation if it is satisfied, on the evidence before it, that an arrangement will result, or be likely to result, in a benefit to the public that outweighs the lessening of competition resulting from the arrangement.

87. The Commission is required to exercise its judgement, in what has been described by the Courts as a "qualitative judgment",[60] to determine whether in its view the Arrangement is likely to produce a benefit to the public so that it should be authorised.

88. As directed by the Courts, we have endeavoured so far as is possible to make quantitative assessments of the likely benefits and detriments attributable to the Arrangement.[61] However, as the Courts also recognise, there is in many cases a limit to the assistance that quantification can provide, and factors that are unquantifiable should weigh no less in our assessment.[62]

89. While the Act contains two versions of the 'public benefit test' for authorisations, one for anti-competitive arrangements and one for business acquisitions, the Courts

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57 In appropriate cases these may include economic detriments arising in markets other than where the competition is lessened: *NZME* (CA)above at [69] to [76], and *NZME Ltd v Commerce Commission* [2017] NZHC 3186 at [210] to [214].

58 *NZME* (CA) above at [71], and AMPS-A (HC) at p528.

59 *NZME* (CA) above at [76].

60 *Godfrey Hirst 2* above at [35] and [37].

61 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) (AMPS-A CA) at 447 and *Air NZ No 6* above at [319], *Ravensdown Corporation Ltd v Commerce Commission* High Court, Wellington (16 December 1996) AP168/96.

62 *Godfrey Hirst 1* above at [115] to [117].

have held that there is no material difference between the two versions.[63] Therefore, case law concerning authorisations for business acquisitions is relevant to authorisations for anti-competitive arrangements, and vice versa.

90. We also have regard to the quality of the evidence available and make judgements as to the weight to be given to the evidence.

Assumptions made in our assessment

91. The without-the-Arrangement scenario involves marketing restrictions on infant formula for children aged up to six months (through the 2015 Authorisation still being in place), and the with-the-Arrangement scenario involves the same marketing restrictions on infant formula for children aged up to 12 months (through the Arrangement).

92. Although the same marketing restrictions apply for infant formula for children up to six months of age in both scenarios, there could be some spill-over effects of the marketing and promotion of follow-on formula on the use of infant formula. Therefore, extending the restrictions to apply to follow-on formula could reduce the use of infant formula and increase breastfeeding for infants up to six months.

93. However, we consider that any such impacts on infant formula usage from amending the INC Code would be difficult to quantify, and in any case, are likely to be smaller than impacts on follow-on formula usage. The main focus of our analysis is therefore on the benefits and detriments resulting from the Arrangement with respect to infant formula for children aged six to 12 months.

94. Given the relatively low current levels of marketing, the Arrangement is unlikely to result in a material fall in follow-on-formula use, and therefore would be unlikely to significantly increase breastfeeding rates above the status quo. However, it would act as a safeguard against any potential increase in advertising in the future which may otherwise lead to a decrease in breastfeeding and associated negative public health impacts.

95. Various studies have attempted to estimate the relationship between the marketing of formula and the effect on breastfeeding rates.[64] However, it is not possible to predict with any certainty the magnitude of any difference in breastfeeding rates between the scenario with the Arrangement compared to the scenario without the Arrangement.[65] Consequently, the Commission has simply assessed the relevant

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63 See *Air New Zealand and Qantas Airways Limited v Commerce Commission* (2004) 11 TCLR 347 at [33] and also *Godfrey Hirst NZ Ltd v Commerce Commission* (2011) 9 NZBLC 103,396 at [88]-[90].

64 For example, Julie P Smith, Ginny M Sargent et al. *"A rapid evidence assessment: Does marketing of commercially available complementary foods affect infant and young child feeding",* WHO, 2015. This study surveyed 75 academic papers and 22 marketing industry papers on the effects of marketing commercially available complementary food on optimal feeding of children aged six to 24 months. The evidence suggested that marketing indirectly encourages early introduction of complementary foods and breast milk substitutes.

65 For example see Piwoz EG & Huffman SL *"The Impact of Marketing of Breast-Milk Substitutes on WHO-Recommended Breastfeeding Practices", Food and Nutrition Bulletin,* 2015.

benefits and detriments on the basis of a zero to two percentage point difference in the breastfeeding rate for children aged six to 12 months, in order to illustrate the potential public benefits and detriments.[66]

Commission's approach in relation to its analysis of benefits and detriments

96. For the reason outlined in Paragraph 93 above, the focus of our analysis is on the benefits and detriments resulting from the Arrangement with respect to follow-on formula for children aged six to 12 months.

97. It is widely accepted, including by the industry participants that would be subject to the Arrangement, that breastfeeding is important for both maternal and infant health and that there are likely to be significant public health benefits arising from breastfeeding.[67] The key question for the Commission in relation to the Arrangement is whether such public health benefits, along with any avoided regulatory costs, are likely to outweigh any detriments stemming from a lessening in competition.

98. To better inform our assessment, we have sought to generate quantitative estimates of likely benefits and detriments where practicable to do so. In coming to our view that there is likely to be a net public benefit from the Arrangement, our evaluative judgment has been informed by both the quantified and unquantified benefits and detriments.

Benefits

99. The main potential benefit of the Arrangement arises from better public health outcomes that could result if the restriction on marketing follow-on formula were to prevent an uptake of follow-on formula use and a corresponding drop in breastfeeding, effectively reducing the duration of breastfeeding.

100. As with the 2015 Authorisation, the Commission considers that it is difficult to assess what the potential impact of an increase in advertising and marketing on formula (whether infant or follow-on) could have on breastfeeding rates. This is because of the current lack of any robust evidence directly assessing the impact of specific marketing activities on the consumption of formula products in New Zealand.

101. Nevertheless, the Commission considers it reasonable to assume that marketing of follow-on formula could lead to an increase in the purchase of follow-on formula with the likelihood of a corresponding decrease in breastfeeding in children aged six to 12 months. It may also be the case that, depending on the specific nature of any subsequent promotional activity, any increase in the marketing and advertising of

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66 As outlined in paragraph 11, the INC intends to allow its members a two year period to provide time for its members to bring their advertising and materials in line with the Amended INC Code. Therefore the full extent of the increase in the breastfeeding rate for children aged six to 12 months may not come into effect until two years after the INC adopts the Amended INC Code. Nonetheless, for the purpose of modelling benefits and detriments, the Commission considers it reasonable to assume that the full extent of any potential change in the breastfeeding rate (and therefore potential benefits and detriments) would occur at the start of this period.

67 For example see the MOH's "*Implementing and Monitoring the International Code of Marketing of Breast-milk Substitutes in New Zealand: The Code in New Zealand*", MOH, 2007.

follow-on formula could also increase demand for infant formula, further reducing breastfeeding rates amongst children aged up to six months.

102. Another potential benefit would be avoided regulatory costs, to the extent that the Arrangement would eliminate any potential intervention by the Government to introduce regulatory reform restricting the marketing of infant formula for children aged six to 12 months.

Improved public health outcomes

103. Breastfeeding has been shown to improve public health outcomes in comparison to the use of formula. For instance, a recent paper in the Lancet summarised an extensive literature review on the effects of breastfeeding which identified a number of health benefits to both infants and their mothers from breastfeeding.[68] A number of these health benefits are dose-dependent and relate to breastfeeding duration with a longer duration resulting in greater health benefits. These results are shown in Table 1.

104. 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. Although odds ratios and risk ratios are slightly different, both measure the association between breastfeeding and a specific health outcome.[69] 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.[70]

105. As shown in Table 1 the relative risk of these illnesses significantly decreases with breastfeeding. In general the marginal effect is larger when breastfeeding occurs from zero to six months compared to six to 12 months. Overall health benefits are strongest when breastfeeding continues for 12 months.

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

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

70 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 i.e. 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 1: 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, Short-term effects of breastfeeding, 2013)[71]	RR 0.10-0.75	RR 0.12-1.18[72]	RR 0.12-1.26[73] (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, Short-term effects of breastfeeding, 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, Short-term effects of breastfeeding, 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, Short-term effects of breastfeeding, 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[74]	3.44 IQ points (Lifetime[75])	Consistent effects of about 3 IQ points across observational studies
Breast cancer (Chowdhury, 2015)	OR 0.93	OR 0.91[76]	OR 0.74 (> 12 months)	Consistent protective effect of breastfeeding against breast cancer

71 Only studies comparing predominant/partial versus not breastfeeding were used in this study.

72 One study (Wray, 1978) found an increase in the mortality from diarrhoea, all other studies used in the meta-analysis found a decrease.

73 One study (Cunningham, 1979) found an increase in the incidence of diarrhoea, all other studies used in the meta-analysis found a decrease.

74 Less than six months versus greater than six months.

75 Lifetime effect from any breastfeeding versus no breastfeeding.

76 Age range six to 12 months.

Ovarian cancer (Chowdhury, 2015)	OR 0.83	OR 0.72[66]	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[77]	RR 1.8[78]		Consistent evidence of major protection

Source: Commerce Commission.[79]

106. The MOH outlines the following health benefits to both infants and mothers from breastfeeding.[80]

106.1 Benefits to infants from breastfeeding include:

106.1.1 providing optimum nutrition for infants;

106.1.2 assisting the physical and emotional development of infants;

106.1.3 decreasing the incidence and severity of childhood infectious diseases;

106.1.4 being associated with decreasing infant mortality and hospitalisation; and

106.1.5 being associated with decreasing the risk of chronic disease for infants.

106.2 Benefits to mothers from breastfeeding include:[81]

106.2.1 helping the mother return to her pre-pregnancy weight; and

106.2.2 reducing the risk of pre-menopausal breast cancer.

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77 Compared to 1.0 relative risk for breastfeeding

78 Compared to 1.0 relative risk for breastfeeding

79 Based on the studies referred to in Table 1.

80 MOH "*Food and Nutrition Guidelines for Healthy Infants and Toddlers (Aged 0-2): A background paper (4th Ed)", (*Partially Revised December 2012) MOH, 2008. Sourced from: https://www.health.govt.nz/system/files/documents/publications/food-and-nutrition-guidelines-healthy-infants-and-toddlers-revised-dec12.pdf

81 Several other benefits relate to breastfeeding in the first six months, including: helping to protect a mother's iron status by minimising postpartum maternal blood loss; reducing the risk of postpartum haemorrhaging (this effect relates to immediate post birth breastfeeding); encouraging contraction of the uterus after birth; having a 98% contraceptive effect in the first six months after the infants birth, provided the infant is exclusively breastfed in response to their hunger cues and the mother does not resume menstruation.

Quantifying the benefit of health outcomes

107. In addition to the Lancet breastfeeding series, a report commissioned by UNICEF UK (the UNICEF Study)[82] suggests there are three illnesses which the scientific research is sufficiently robust to allow the relationship between breastfeeding during six to 12 months and reduced health outcomes to be estimated and modelled. These illnesses are:

    107.1 breast cancer;

    107.2 gastrointestinal infection; and

    107.3 lower respiratory tract infection.

108. The UNICEF Study estimated the relationship between the prevalence of these illnesses and the rate of breastfeeding between six to 12 months, which allowed for an estimation of the costs to the UK health system that could be avoided by higher levels of breastfeeding.

109. With the exception of breast cancer treatment, the Commission has converted these costs into New Zealand dollar equivalents based on effective average purchasing power parity exchange rates during the relevant period.[83] The Commission has also compared these estimates with those from alternative sources where available and applicable.[84] In the case of breast cancer, an average treatment cost from MOH was used.[85]

110. Through this exercise, the Commission has estimated the expected cost to the New Zealand health system arising from a reduction of up to two percentage points in the New Zealand breastfeeding rate for children aged from six to 12 months.[86] The Commission has then multiplied the estimated health care costs for an individual treatment by the number of additional treatments expected without the Arrangement.

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82 Unicef United Kingdom *"Preventing disease and saving resources: the potential contribution of increasing breastfeeding rates in the UK",* UNICEF United Kingdom, 2012.

83 The UNICEF Study utilised data from 2009-2010.

84 For example, see Nikki Fisher *"Prolonged and exclusive breastfeeding significantly reduces hospital costs",* 2010 (Paper prepared for UNICEF NZ and the New Zealand Breastfeeding Authority Inc,). Sourced from https://www.parliament.nz/resource/0000260181

85 *'The Price of Cancer: The public price of registered cancer in New Zealand'* Ministry of Health.

86 On average, 59,208 infants have been born annually in New Zealand over the past five years. Consequently, a two percentage point reduction in the breastfeeding rate equates to 1,180 infants per year.

Table 2: Estimate of cost per treatment

Public health impact	Estimated average UK treatment cost	Estimated NZ equivalent 2018
Breast Cancer	£11,726	$31,650[87]
Gastrointestinal infection	£989	$2,065[88]
Lower respiratory tract infection	£1,078	$2160-3100[88]
GP Visit	£36	$35-70[89]

Source: Commerce Commission[90]

111. Based on these costs associated with the three public health impacts listed above, the present value of public health cost savings arising from avoiding a decrease in the breastfeeding rate of up to two percentage points over the next five years is estimated to be around $1 million ($1.7 million over 10 years).

Unquantified health benefits

112. These quantified estimates do not, however, take into account the following unquantified benefits:

112.1 the avoided distress that would be imposed on infants and/or their caregivers from contracting these illnesses;

112.2 the effect of illnesses identified by the Lancet study and the MOH as likely affected by breastfeeding, but for which the relationship between breastfeeding and illness incidence was not considered robust enough by the UNICEF Study to allow quantitative estimation; and

112.3 the loss of productivity from caregivers taking time off work or the potential for any admissions to hospital to lead to further illnesses.

113. A further benefit of breastfeeding is higher IQ. As outlined in Table 1, evidence indicates that some breastfeeding past six months results in an average IQ that is approximately one point higher than no breastfeeding past six months. The UNICEF Study suggested that an increase of one IQ point leads to an increase in lifetime earnings of between £17,468 and £36,396, depending on the extent of the

87 Ministry of Health *'The Price of Cancer: The public price of registered cancer in New Zealand'*.

88 Nikki Fisher *"Prolonged and exclusive breastfeeding significantly reduces hospital costs",* 2010 (Paper prepared for UNICEF NZ and the New Zealand Breastfeeding Authority Inc,). Sourced from https://www.parliament.nz/resource/0000260181

89 Hill Marika. (February 17 2013) Free healthcare? Yeah right. *Stuff*. Retrieved from http://www.stuff.co.nz/the-press/news/8315208/Free-healthcare-Yeah-right

90 Based on the 'UNICEF' Study and *'The Price of Cancer: The public price of registered cancer in New Zealand'* Ministry of Health.

individual's education.[91] Adjusting these figures to New Zealand dollars, and accounting for the difference in GDP per capita, a one IQ point increase for an individual in New Zealand could have a lifetime earnings impact of between $34,000 and $72,000, depending on the level of education.

114. Based on the available evidence, it is not possible to determine the precise effect that breastfeeding children past six months all the way to 12 months has on IQ. Therefore, it is difficult to generate a robust quantitative estimate for the potential IQ benefit associated with the Arrangement. However, if the Arrangement were to result in a one point IQ increase in only, say, 10% of the 1,180 children per year that might otherwise not be breastfed past six months,[92] over a five year period this would lead to future economic gains in terms of higher incomes worth around $2 million in present value terms (around $3 million over 10 years).

Net avoided regulatory costs

115. Without the Arrangement, the Commission's view is that there is a real chance that in response to any increase in advertising and marketing activity there would be a regulatory response.[93] This response would impose costs on society including the time and resources spent by Parliament and policy agencies in enacting the necessary legislation. A study carried out by the University of Otago estimated the average cost of enacting new public health legislation in New Zealand at around $4 million.[94] However, the MOH has indicated that marketing restrictions for follow-on formula through regulatory reform are unlikely, at least in the short term. If legislation were to occur, the Commission's view is that it would not be within five years. The present value of the cost of this legislation, if enacted in five years would be around $3 million. If no legislation was enacted, this cost would be zero.

116. Against this the Commission considers that the regulatory costs incurred by the INC would be slightly higher in the with-the Arrangement scenario. The Commission understands that the resources currently spent on administering the INC Code consist of INC staff time. The Commission has estimated the amount of time spent on administering the INC Code to be in the order of half of a full-time equivalent employee. Based on an average salary, the Commission estimates the present value of this over a five year period is approximately $0.1 million ($0.2 million over 10 years).[95]

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91 The lower value relates to no formal education qualification and the higher to a degree qualification or higher.

92 1,180 is the estimated total number of children effected per year if the breastfeeding rate changed by two percentage points. In the absence of any data regarding how many of these infants could ultimately obtain an IQ benefit from greater breastfeeding, we have used 10% of this figure for the purposes of producing a more conservative estimate than if we assumed 100% of these infants would obtain an IQ benefit.

93 Such a response may be sought by the INC itself, similar to how it has sought authorisation for the proposed Arrangement.

94 Nick Wilson, Nhung Nghiem, Rachel Foster, Linda Cobiac and Tony Blakely *"Estimating the cost of new public health legislation",* Bull World Health Organ. 2012. This study applied a method developed by the WHO for costing the implementation of new laws in the health sector.

95 This assumes half of a FTE costing $50,000 per year (equivalent to the median income) over five years.

Detriments

117. The main potential detriments of the Arrangement arise from allocative efficiency detriments relating to reduced choice for consumers and lower levels of returns for manufacturers. As outlined above, we do not consider that the Arrangement would result in any material productive or dynamic efficiency detriments.

Allocative efficiency detriments[96]

Lost producer surplus

118. If authorisation were to result in lower sales of formula than in the scenario without the Arrangement because of continued advertising restrictions, this would reduce the returns (producer surpluses) that would otherwise accrue to formula manufacturers. This lower level of returns to manufacturers would constitute a detriment of authorisation.

119. The Commission has estimated that a 2% point increase in the formula feeding rate would mean that around 1180 more infants each year would be fed exclusively with formula rather than breast fed. Based on an assumed revenue per infant of $915 from formula feeding[97] and a 20% profit margin on net sales of additional advertising expenditure,[98] the total loss to manufacturers could be in the order of $220,000 per year. The present value of this loss of producer surplus over a five year period is about $0.9 million ($1.6 million over 10 years).

Lost consumer surplus

120. Similar to a reduction in producer surplus, fewer sales of formula under the with-the-Arrangement scenario would also be likely to entail a lower overall level of consumer surplus. This is because, in comparison to the without-the-Arrangement scenario, the continued restriction on advertising would mean fewer sales because fewer potential consumers would be aware of the benefits they might obtain from formula feeding. These benefits may include increased convenience for mothers who might otherwise find breastfeeding imposes an unwelcome burden, is an unpleasant experience, or is difficult to undertake. These benefits are evidenced by the fact that there exists a market for follow-on formula. However, as we outline below, in the with-the-Arrangement scenario, the Commission considers that information on the benefits of formula feeding would continue to be available via other channels.

121. For instance, it is possible that some mothers may decide not to use infant formula because they believe that all teats and bottles used for infant formula feeding must always be sterilised. However, the ability to advertise direct to consumers could allow manufacturers to inform this group that sterilisation of this equipment is only

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96 For clarity we have characterised lost producer and consumer surplus as allocative efficiency detriments whereas we have characterised the public health impacts (externalities) as separate benefits. This is despite our view that the combination of these impacts would result in authorisation leading to an overall increase in allocative efficiency.

97 Assumed average cost of six months of infant formula feeding based on discussions with MOH in 2015. This figure has been used as an estimate of the equivalent cost of six months of follow-on formula feeding.

98 Based on operating margins as reported by Nestle and Danone financial reports.

necessary for the first three months, after which standard dishwashing is sufficient. If there are individuals who would otherwise prefer to formula feed if they had this knowledge, then the advertising restrictions under the with-the-Arrangement scenario would prevent these potential consumers from receiving the net (consumer surplus) benefits they would otherwise obtain. There is also the risk of caregivers choosing formula which is not suitable for their infant, for example feeding their infant cows' milk or toddler milk if advertising restrictions were to prevent individuals receiving correct information about formula feeding practices.

Authorisation assessment

122. This Application involves a balancing of the public benefits and detriments which will, or be likely to result, from the Arrangement. The Commission will only grant authorisation if it is satisfied that an arrangement will result, or be likely to result, in a benefit to the public that outweighs the lessening in competition resulting from the arrangement.[99]

Quantified benefits and detriments

123. In Table 3 below, we have compared the benefits and detriments outlined above. All quantified public health estimates are based on a potential change in breastfeeding rates of between zero to two percentage points. These impacts have been estimated over a time period of five years and 10 years. When coupled with the Commission's overall qualitative assessment, these estimates help inform the Commission of the likely net public benefit of the Arrangement.

Table 3: Summary of benefits and detriments from a 2% increase in the breastfeeding rates over 5 and 10 years

Years of Effect	5	10
Benefits		
Public health benefits		
• Breast cancer, Gastroenteritis and LRTI	$1m	$1.7m
• Other benefits[100]	Unquantified	Unquantified
Net regulatory savings	-$0.1	-$0.2 – $2.9m
Detriments		

[99] Commerce Act 1986, section 61(6).

[100] This includes lifetime income benefits from cognitive benefits, ovarian cancer in mothers, acute otitis media, dental cavities, mortality due to infectious diseases, helping mothers return to pre-pregnancy weight, distress imposed on infants and/or their caregivers due to illnesses, time taken off work by caregivers to care for sick infants, and trans-Tasman harmonization. There is also the possibility of 'spill-over' effects and for the breastfeeding rate to increase for infants aged 0-6 months. The Commission also notes that there is the potential for environmental benefits from an increase in the breastfeeding rate, see: http://ibfan.org/docs/FormulaForDisaster.pdf.

Lost producer surplus	$0.9m	$1.6m
Lost consumer surplus	Unquantified	Unquantified

Source: Commission estimates

124. As shown in Table 3, the estimates of the quantified public health benefits and the lost producer surplus detriments are broadly similar in magnitude and effectively offset each other. Net potential regulatory impacts range from close to zero[101] up to a benefit of $2.9 million in avoided regulatory costs when assessing effects over 10 years.

125. Balancing only the quantified impacts in isolation would suggest a potential net quantified impact that ranges broadly neutral to significantly positive. However, we must consider the unquantified impacts of the Arrangement as part of this assessment.

Unquantified benefits and detriments

126. The Commission considers that the unquantified benefits, which include a broad range of positive public health impacts, are difficult to quantify but we have sufficient evidence to suggest that these benefits are likely to occur. We consider that these benefits outlined below may be substantial.

127. Likely significant public health impacts which we have not been able to quantify include reduced treatment costs for ovarian cancer (which has a significant individual treatment cost comparable to that of breast cancer), acute otitis media, dental cavities, and mortality due to infectious diseases.

128. While it is difficult to quantify the likely effect, available evidence indicates that higher breastfeeding rates feed through into higher IQ, leading to lifetime income benefits which are likely to be significant.

129. Evidence also indicates that there are costs associated with mothers and caregivers taking time off work either due to illness or to take care of a sick infant. We have not been able to quantify the potential benefits from any reduction in these costs, nor from benefits associated with reduced deaths from illnesses which may be avoided due to breastfeeding been quantified, but we consider these may be significant.

130. The Commission also considers that avoided distress to infants, mothers and caregivers from reduced illnesses and deaths is a likely material benefit albeit we have not been able to quantify these impacts.

131. The Commission considers that the unquantified detriments of the Arrangement from lost consumer surplus would be relatively minor. This is because, although restrictions of information regarding follow-on formula would reduce the flow of information to consumers, and potentially subsequent usage of follow-on formula,

[101] If no regulatory intervention would occur in the without-the-Arrangement scenario, then there would be a negative impact of -$0.1 million associated with the cost of administering the Amended INC Code.

this information would continue to be available via other channels to some degree, such as the MOH website.

132. Furthermore, the Commission considers that there are unlikely to be material detriments from a reduction in direct competition because existing levels of price competition via the supermarket distribution channel would be unaffected. Similarly, we consider that the incentive for these manufacturers to compete on quality, and to innovate, would remain largely unchanged. This is because the New Zealand sales of these manufacturers constitute only a small fraction of their global sales.

Balancing exercise

133. Having attempted to quantify the benefits and detriments, and having assessed the nature and significance of the unquantified benefits and detriments, we are required to exercise our judgement on the Application in the round. Whether the benefits outweigh the detriments of an arrangement is ultimately a qualitative judgement.[102]

134. On balance, we are satisfied that the benefits of the Arrangement outweigh the detriments of the Arrangement. Although the difference between the quantified benefits and detriments arising from the Arrangement are minimal, we consider that the likely unquantified benefits of the Arrangement are significant such that the Commission should authorise the Arrangement on that basis.

135. In reaching this determination, the Commission has considered that it is well acknowledged that breastfeeding has significant health benefits for mother and child. That consensus is international, and is reflected in the WHO recommendations. These benefits have been acknowledged in our previous 2015 Authorisation, and have resulted in authorisations in Australia of the same conduct.

136. While the public health benefits of breastfeeding appear greatest for children aged up to six months, the benefits for children aged six to 12 months also appear significant. At paragraphs 103 to 105 we attempted to identify evidence on the nature and magnitude of those benefits. We also attempted at paragraphs 107 to 111 to quantify some of the avoided costs of medical treatment, but these are incomplete.

137. However, in some cases we lack the information to quantify these benefits and in other cases the benefits are inherently unquantifiable. Nevertheless, as we outline at paragraphs 112 to 114, and discuss at paragraphs 126 to 132, we consider that there remain significant unquantified health benefits.

138. Given the domestic and international view on breastfeeding, we also consider it is likely that there would be pressure for regulatory intervention in the absence of an authorisation (see paragraphs 53 to 56). That is particularly so if, as we consider likely, there is the potential for advertising to increase in the absence of the Arrangement (see paragraphs 51, 71 and 72). We note that there is potentially significant cost associated with such a regulatory intervention. Consistent with our

[102] *Godfrey Hirst 2* (CA) above at [35].

2015 Authorisation, we have attempted at paragraphs 115 to 116 to estimate the amount of those costs that will be avoided by the Arrangement.[103]

139. Against these benefits, we consider there will be quantifiable economic detriment in the form of the lost producer surplus (see paragraphs 118 to 119) that almost negates the quantified benefits of the Arrangement. We have also weighed this, however, against the fact that we do not consider that, in the circumstances of this industry, there will be a material reduction in the incentives on producers to remain efficient and invest in innovation.

140. There will also be lost consumer surplus from the Arrangement as discussed at paragraphs 120 to 121. We are unable to quantify this detriment, but consider the magnitude of these effects is likely to be relatively minor, as discussed at paragraph 124.

141. Therefore, our assessment of detriments does not outweigh our overall assessment of the combined effect of the quantified and unquantified benefits of the Arrangement. When we consider the effects of the Arrangement in the round, we consider that the likely benefits of the Arrangement (both quantified and unquantified) outweigh the detriments (both quantified and unquantified) of the Arrangement.

Conclusion

142. By considering together both the quantified and unquantified benefits and detriments that will result, or be likely to result, from the Arrangement, our view is that the Arrangement would result in public benefits that are likely to outweigh the detriments arising from the lessening of competition.

Revocation of the 2015 Authorisation

143. Under section 65 of the Act, the Commission may amend or revoke a restricted trade practices authorisation (or substitute a new authorisation to replace the original), if the Commission is satisfied that (relevantly) there has been a "material change in circumstances" since the authorisation was granted.[104]

144. The Commission considers that authorising the parties to agree to comply with the Amended INC Code, such that the current INC Code will be rendered redundant, constitutes a material change of circumstances under section 65(1)(b) of the Act.

145. Accordingly, the Commission determines to revoke the 2015 Authorisation.

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[103] We note that, even if we had found that regulatory intervention is not likely in the without-the-Arrangement scenario and therefore not considered avoided regulatory cost as a benefit of the Arrangement, we would still have considered that the likely benefits of the Arrangement outweigh the detriments of the Arrangement.

[104] Section 65(1) also permits the Commission to amend or revoke a restricted trade practices authorisation (or substitute a new authorisation to replace the original) if the Commission is satisfied that the authorisation was granted on information that was false or misleading in a material particular, or a condition upon which the authorisation was granted has not been complied with.

Length of the proposed authorisation

146. The Act allows the Commission to grant authorisation for a restrictive trade practice for such a period as the Commission thinks fit.[105] For this Application, the Commission has decided to grant authorisation for a period of five years.

147. The Commission has decided on a period of five years because this would be consistent with the period granted by the ACCC in the ACCC Authorisation in July 2016, and will provide the Commission and the INC with the flexibility in the future to reconsider the proposed authorisation in light of any future developments or change in circumstances.

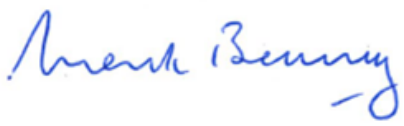
Determination

148. The Commission's determination is that:

148.1 the Arrangement will result, or be likely to result, in such a benefit to the public that it should be permitted, and so the Commission grants authorisation for the INC's members to enter into, and give effect to, the Arrangement under section 58 of the Act for a period of five years from the date of this authorisation; and

148.2 on the grounds there has been a material change of circumstances since the 2015 Authorisation was granted, the Commission revokes the 2015 Authorisation under section 65(1)(b) of the Act.

Dated this 8 November 2018



Dr Mark Berry
Chairman

[105] Commerce Act 1986, section 61(2).