

Email to ██████████ (Commerce Commission) from Buddle Findlay - request for interim authorisation - 7 November 2023

Kia ora ██████████

Further to our calls with ██████████ and ██████████ on 7 November 2023, the Infant Nutrition Council Limited (INC) seeks urgent interim authorisation for the arrangement for which it applied for authorisation on 22 August 2023, being for its members (both current and future) to agree to continue to adhere to, and give effect to, an arrangement under which members restrict their advertising and marketing activities for infant formula products for infants up to 12 months old (as embodied in the INC Code attached as Appendix 1 to the application), effective from 9 November 2023 (the date after INC's existing authorisation will expire) until the Commission makes a decision on the application.

INC submits that the Commission should grant urgent interim authorisation before INC's current authorisation expires on 8 November 2023 for the following reasons:

- If interim authorisation is not granted, then to ensure it complies with the Commerce Act 1986, INC will either have to amend the INC Code to omit the relevant restrictions, or otherwise take steps to ensure that it is clear that the relevant restrictions are not binding. This would mean that:
 - the marketing of infant formula in New Zealand would not be subject to any regulatory restriction and members of INC would be free to market infant formula as they see fit, subject to food standards legislation and the Fair Trading Act; and
 - INC members would have the ability to increase the promotion of infant formula by direct marketing.
- Interim authorisation will maintain the market status quo and is unlikely to materially alter the competitive dynamics of the market because:
 - the relevant markets are mature and stable markets, and there have been minimal changes to the industry and infant formula manufacturers since INC's most recent authorisation application in 2018; and
 - interim authorisation will effectively extend INC's current authorisation under which INC Members are restricted from advertising and marketing activities for which interim authorisation is sought (subject to the minor changes to the INC Code described in the application and our subsequent letter to the Commission dated 27 October 2023); and
 - interim authorisation would only apply for a limited time period until the Commission makes a decision on the application for authorisation.
- The key public benefit that will result from granting interim authorisation are the public health benefits set out in paragraphs 108 to 120 of the application. If interim authorisation is not granted and the marketing of infant formula was not subject to any restriction, it is possible that the marketing of infant formula could increase for a period, which could lead to an increase in the purchase and use of infant formula at the expense of breastfeeding. There are no material detriments that would arise if interim authorisation is granted (for the reasons set out in paragraphs 101-106 of the application, and because interim authorisation would only apply for a limited time). As such, the public benefits to be gained from interim authorisation far outweigh the detriment arising from the lessening of competition.

- The duration of the interim authorisation will be limited to a short period (until the Commission makes a decision on INC's authorisation application), meaning that the likely detriments flowing from the continued loss of competitive activity in the infant formula market will be smaller than set out in the application (meaning that the Commission only needs to find an even lower degree of public benefit).
- There will be potential harm to INC if interim authorisation is not granted, as it would need to incur legal and administrative costs to amend the INC Code to omit the relevant restrictions or otherwise take steps to ensure that the relevant restrictions are not binding, and to engage with the industry about why this change is required.
- If interim authorisation is not granted, and INC is required to amend the INC Code to omit the relevant restrictions or otherwise take steps to ensure that the relevant restrictions are not binding, then there is a risk that it may be difficult or take time for INC to wind back those steps and revert back to the status quo if authorisation is granted. As such, the public benefits arising from the restrictions are at risk of not materialising as promptly than if interim authorisation was granted, which will cause harm to the public.
- INC only became aware that the Commission is unlikely to be able to make a decision on the application by 8 November 2023 after midday on 7 November 2023, and so did not consider it necessary to seek interim authorisation before this point.

Please let us know if there are any formalities required in relation to the above request (ie, if we need to submit this request to the Registrar).

Ngā mihi