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Draft Determination

Note: This is a draft determination issued for the purpose of advancing the Commerce Commission's decision on this matter. The conclusions reached in this draft determination are preliminary and take into account only the information provided to the Commission to date.

This is a draft determination under the Commerce Act 1986 in the matter of an application for authorisation of a restrictive trade practice. The application is made by:

Infant Nutrition Council Limited

The Commission:	Dr Mark Berry Sue Begg Anna Rawlings
Summary of application:	The Infant Nutrition Council (the INC) has applied for authorisation of an arrangement allowing the INC's members to restrict their advertising and marketing activities for infant formula products for children up to 12 months of age and, on that basis, for revocation of the authorisation granted in April 2015 by the Commission allowing the INC's members to restrict their advertising and marketing activities for infant formula products for children aged up to six months of age (the 2015 Authorisation).
Draft Determination:	The Commerce Commission's preliminary decision is that, on the basis of the information provided to date, it should grant authorisation and revoke the 2015 Authorisation.
Date of draft determination:	27 August 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, the INC *Code of Practice for the Marketing of Infant Formula in New Zealand* (the INC Code). The INC Code is an agreement 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 to enter into and give effect to 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 Amended INC Code).

Draft determination: grant authorisation

3. The Commission is releasing this draft determination to provide interested parties with an opportunity to comment before the Commission makes its final determination.

4. The Commission's draft determination is to:

   4.1 authorise the INC to enter into and give effect to the Amended INC Code; and

   4.2 revoke the 2015 Authorisation.

Next steps

5. The Commission now seeks written submissions on the draft determination. Submissions should be received by the Commission on or before **5pm** on **17 September 2018**.

6. The Commission may determine to hold a conference prior to making a final determination.[3] However, at this stage, it is the Commission's view that a conference is unnecessary.

Arrangement for which authorisation is sought

7. 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 of breast milk substitutes in ways that could undermine this aim.

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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/business-competition/anti-competitive-practices/authorisations-2/anti-competitive-practices-authorisations-register/detail/851

3 Commerce Act 1986, section 62(6).

8. The WHO Code was voluntarily adopted by the Government of New Zealand in 1983. The INC Code forms an important part in New Zealand meeting its obligations under the WHO Code.

9. 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 Amended INC Code, under which the INC members would restrict the following advertising and marketing activities for children up to 12 months of age:

    9.1 advertising infant formula to the general public;

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

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

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

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

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

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

10. 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).[4]

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

12. The INC submitted that if the Commission grants authorisation for the Amended INC Code, it can revoke the 2015 Authorisation applying to the current version of the INC Code under section 65(1) (b) of the Act because there has been a material change in circumstances since the 2015 Authorisation had been granted.[5]

The Applicant

INC

13. 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

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

[5] Application at [70] and letter from the INC to the Commission (7 June 2018).

manufacturers, marketers and importers of infant formula.[6] In New Zealand, the most prominent members include:

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

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

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

13.4 Fonterra Co-operative Group Limited (Fonterra).

14. 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.[7]

Other relevant parties

Ministry of Health

15. 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.

16. 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.

17. 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[8] and all affected parties are then notified of the 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.[9]

18. 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

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6 See Appendix 4 of the Application for a full list of existing Members.

7 2015 Authorisation at [12].

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

9 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

not upheld, and one was resolved by the marketer changing its marketing in response to the complaint.[10]

Other relevant agencies

19. Apart from the MOH, there are two other bodies that consider potential breaches of the INC Code:

    19.1 the Advertising Standards Complaints Board, which considers complaints about the advertising of formula products for children over six months of age under the Code for Advertising Food, using the INC Code as guidelines when assessing such complaints; and

    19.2 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

20. Two large supermarket chains, operated by 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

21. In the 2015 Authorisation, the Commission authorised the INC and its members to enter into and give effect to provisions in the INC Code. Specifically, the 2015 Authorisation allowed the INC members to restrict the same infant formula marketing activities as outlined in Paragraphs 9.1 to 9.7 above for infant formula products for children up to six months of age.

22. 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

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

    23.1 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;[11]

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[10] 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

[11] *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

23.2 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;[12]

23.3 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;[13]

23.4 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;[14] and

23.5 considered that there would be potential benefits, including:

23.5.1 avoided incremental regulatory costs;[15] and

23.5.2 improved public health outcomes.[16]

24. 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.[17] As a result, the Commission authorised the 2015 Arrangement.

Developments since the 2015 Authorisation was granted

25. The INC has considered extending the restrictions in marketing infant formula products to children up to 12 months of age for some time.[18] The impetus for the Amended INC Code was a letter dated 12 May 2017 from the MOH's New Zealand Director of Health, Dr Caroline McElnay,[19] encouraging the INC to extend the INC Code for a number of reasons, including that it would:

25.1 align with guidance in 2016 from the World Health Assembly (WHA), which included urging member states to end inappropriate promotion of food for infants and young children;[20]

25.2 align with the position in Australia;

25.3 be consistent with the MOH's nutrition guidelines for infants;[21] and

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retailers. However, since the arrangement was unlikely to raise significant competition issues for hospital distribution, the Commission did not consider the matter further.

12 *Infant Nutrition Council Limited* [2015] NZCC 11 at [31].

13 *Infant Nutrition Council Limited* [2015] NZCC 11 at [37].

14 *Infant Nutrition Council Limited* [2015] NZCC 11 at [42].

15 *Infant Nutrition Council Limited* [2015] NZCC 11 at [59] to [63].

16 *Infant Nutrition Council Limited* [2015] NZCC 11 at [64] and [65].

17 *Infant Nutrition Council Limited* [2015] NZCC 11 at [88]

18 Application at [8].

19 See Appendix 3 of the Application.

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

25.4 support public health goals for the protection and promotion of breast feeding in New Zealand.[22]

Position in Australia

26. 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.

27. 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).[23] The ACCC considered that:

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

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

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

Submissions received by the Commission

29. Four healthcare organisations[24] have provided the Commission with submissions on the Application. All of these parties expressed their general support for the Application. The Commission has also received a submission from Ms Julie Fogarty, a private citizen, who considers that (among other things), authorisation of the Application would likely result in an increase in competition rather than a decrease in competition, so it does not qualify for authorisation.[25] As discussed below, given that the Commission is satisfied that the Amended INC Code is likely to result in a lessening of competition, the Commission considers it has jurisdiction to further consider the Application.

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21 See: https://www.health.govt.nz/publication/implementing-and-monitoring-international-code-marketing-breast-milk-substitutes-nz-code-nz

22 Application at [63].

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

24 Dieticians NZ, WellSouth Primary Health Network, The New Zealand Nurses Organisation and the Southern District Health Board.

25 All submissions received by the Commission are available for viewing on the Commission's website: https://comcom.govt.nz/business-competition/anti-competitive-practices/authorisations-2/anti-competitive-practices-authorisations-register/detail/1122

How the Commission assesses restrictive trade practice authorisations

30. The Applicant seeks authorisation on the basis that section 27 of the Act might apply to the Amended INC Code. 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).

31. In assessing an application, the Commission determines whether the conduct would likely lessen competition. The lessening of competition need not be substantial,[26] although in the authorisation context, the Commission must also determine the extent of the lessening of competition that would result from the proposed arrangement.[27] 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.

32. 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

33. 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.

34. 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.

35. As described in the 2015 Authorisation,[28] 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", is designed to be used from approximately one year of age onwards. The composition of stage three formula differs significantly enough from stage one and two formula that they are not generally substitutable.[29]

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

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

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

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

36. Stage two and three formulas are designed primarily as dietary supplements, rather than complete dietary replacements. Stage one formula, on the other hand, is intended to be a substitute for breast milk as the sole source of an infant's nutrition.

37. While stage one formula can continue to be used in place of stage two formula, 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.

38. 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.

39. 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:

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

    39.2 follow-on formula for children aged six to 12 months (ie, stage two formula).[30]

40. 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 Amended INC Code.

With and without the arrangement

41. 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 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

42. With the Amended INC Code, 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

43. Without the Amended INC Code, the likely outcome is that:

[30] 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 Amended INC Code is unlikely to raise competition issues for hospital distribution. Therefore, we have not given any further consideration to this issue.

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

43.2 the ability of the INC members to market formula products for children aged six to 12 months of age would continue unrestricted, at least until the introduction of any regulation by the Government to prohibit such marketing.

44. 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 23.3) 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, at least in the short to medium term. This is because:

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

44.2 the high costs associated with the introduction of a regulatory regime and the ensuing compliance and enforcement costs.[31]

45. 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.[32]

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

47. Given the likelihood that, in the without-the-arrangement scenario, there would not be regulation to prohibit the marketing of formula products for children aged six to 12 months for at least the first five years, the Commission considers that formula manufacturers would have the ability and, potentially, the incentive to increase the marketing of their products in the future.

48. 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:

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

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

32 *Ibid*.

48.2 an unrestricted ability to market products for children six to 12 months of age, with no marketing restrictions being introduced by regulatory reform for at least five years.

How the arrangement could lessen competition

49. In the without-the-arrangement scenario, the INC members would be free to market follow-on formula for children aged six months up to 12 months. The Amended INC Code restricts this ability.

50. 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:

50.1 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);[33]

50.2 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 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);[34] and

50.3 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).[35]

Current and planned advertising of follow-on formula

51. 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.

52. 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".[36] For example, the INC provided the following examples of advertising that currently take place:[37]

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33 *Infant Nutrition Council Limited* [2015] NZCC 11 at [39].
34 *Ibid* at [40].
35 *Ibid* at [41].
36 Application at [77].
37 Application at [78].

52.1 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;

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

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

53. The Commission also requested further information from each of the three largest manufacturers/suppliers of follow-on formula (Danone, Nestle and Heinz),[38] for further information on existing or likely future promotional activity.

54. Nestle[39]and Danone[40] advised that they do not carry out any promotional or marketing activities for follow-on products in New Zealand. However, Nestle does provide range cards to healthcare professionals [ ][41] [ ].

55. Heinz advised that it:[42]

55.1 advertises follow-on formula combined with its advertising for toddler milk, however in such instances it does not provide any information that is not acceptable for infants six to 12 months of age;

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

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

56. [ ]

Whether the arrangement would lessen competition

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

[38] Together, the three manufacturers account for about 97.1% of grocery sales of follow-on formula in New Zealand (See Application at [90]).

[39] Nestle response to information request from Commerce Commission (15 July 2018).

[40] Danone response to information request from Commerce Commission (16 July 2018).

[41] Range cards are information guides provided to health professionals that, for example, list the ingredients in the formula and provide nutritional information.

[42] Heinz response to information request from Commerce Commission (24 July 2018).

58. The Commission agrees with the Applicant that the advertising and promotional activity of the type restricted under the Amended INC Code would normally be expected to form part of the normal competitive process.[43] Therefore, the Commission considers that by depriving the 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.

59. However, as noted in the 2015 Authorisation, the Commission does not consider that the Amended INC Code 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.

60. The Commission also considers that the marketing and promotional restrictions, as proposed under the Amended INC Code, 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 who have international research and development programmes based elsewhere.[44] Therefore, any restrictions on advertising in New Zealand are unlikely to have any material impact on product innovation.

61. Instead, as with the 2015 Authorisation, the Commission considers that any harm arising from the Amended INC Code would likely arise from restricting the ability of suppliers to inform potential purchasers of the benefits of follow-on formula more generally. So, the Amended INC Code would likely hinder to some extent the ability of formula manufacturers to effectively 'compete' with breastfeeding.

62. While the Commission considers that the Amended INC Code 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 how marketing and advertising would differ in the absence of the Amended INC Code.

63. At a minimum, the Commission considers that without further restriction the current levels of marketing and promotional activity in relation to follow-on formula would be likely to continue. As shown by the responses of the three INC members above, the current level of marketing activity regarding follow-on formula is minimal.

64. However, there is a real chance that current levels of marketing and promotion could increase if the INC Code is not amended. Although it is not possible to predict the magnitude of any potential increase, nor the specific forms of marketing and promotion that could be adopted, such an increase could be significant.

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[43] Application at [103].

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

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

66. Acknowledging the scope for the marketing of these products to increase materially in the absence of the Amended INC Code is consistent with the position taken by the ACCC in the ACCC Authorisation.[45]

Impact on breastfeeding

67. 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.

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

69. While the Commission is unable to measure the specific changes in demand for either follow-on or infant formula that may result from the introduction of the Amended INC Code, some increase in demand may occur without the Amended INC Code.

Conclusion on lessening of competition

70. The Commission therefore considers that some lessening of competition is likely to result from the Amended INC Code. As such, the Commission must assess whether the Amended INC Code 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

General approach

71. In considering whether to grant an authorisation under section 58 the Act the Commission will consider the public benefits and detriments arising from the conduct.

[45] ACCC Authorisation at [81].

72. The Commission will grant authorisation if it is satisfied, on the evidence before it, that the Amended INC Code will result, or be likely to result, in a benefit to the public that outweighs the detriments resulting from the Amended INC Code.

73. In making this assessment, we have regard to the quality of the evidence available and make judgements as to the weight to be given to the evidence.

74. In *Godfrey Hirst,* the Court of Appeal noted that in determining whether to grant authorisation the Commission must consider a broad range of benefits and detriments. This includes any efficiencies and may include non-market factors in appropriate cases.[46]

75. In particular, 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. In assessing these various factors, the Court stated that "[w]here possible these elements should be quantified; but the Commission and the courts cannot be compelled to perform quantitative analysis of qualitative variables".[47]

76. The Commission's approach is to quantify benefits and detriments to the extent that it is practicable to do so;[48] however, as the Court of Appeal in *Godfrey Hirst* noted, this must not be allowed to obscure the Commission's primary function of exercising a qualitative judgment in reaching its final determination and "…making what is an essentially evaluative judgment on any application".[49] The Court re-emphasised the guidance given in *New Zealand Bus Ltd v Commerce Commission*, where it was stated:

> It is true that some data will be weighed or considered in deciding whether the law is violated and some will not. Yet all the suggestions about more systematic ways to inform that judgment are merely techniques, or hand tools. In short, this Court should not allow a kind of false scientism to overtake what is in the end a fundamental judgment which is required by the Act itself.[50]

Assumptions

77. 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 Amended INC Code).

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46 *Godfrey Hirst NZ v Commerce Commission* [2016] NZCA 560(CA) at [24] and [31].

47 *Godfrey Hirst* (CA) at [36].

48 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) (AMPS-A CA) at 447 and *Air New Zealand and Qantas Airways Limited v Commerce Commission* (2004) 11 TCLR 347 (Air NZ No 6) at [319]. *Ravensdown Corporation Ltd v Commerce Commission* High Court, Wellington.

49 *Godfrey Hirst* (CA) at [35].

50 *New Zealand Bus Limited and Infratil Limited v Commerce Commission* [2007] NZCA 502 at [104].

78. Although the same marketing restrictions apply for infant formula for children up to six months 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. However, we consider that any such impacts on infant formula usage from amending the INC Code would be likely be to smaller than impacts on follow-on formula usage. The focus of our analysis is therefore on the benefits and detriments resulting from the Amended INC Code with respect to infant formula for children aged six to 12 months.

79. Given the relatively low current levels of marketing, the Amended INC Code 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.

80. Various studies have attempted to estimate the relationship between the marketing of formula and the effect on breastfeeding rates.[51] However, it is not possible to predict with any certainty the magnitude of any difference in breastfeeding rates between the scenario with the Amended INC Code compared to the scenario without the Amended INC Code[52]. Consequently, the Commission has simply assessed the relevant 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.

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

81. For the reason outlined in Paragraph 78 above, the focus of our analysis is on the benefits and detriments resulting from the Amended INC Code with respect to follow-on formula for children aged six to 12 months.

82. It is widely accepted, including by the industry participants that would be subject to the Amended INC Code, that breastfeeding is important for both maternal and infant health and that there are likely to be significant public health benefits arising from breastfeeding.[53] The key question for the Commission in relation to the Amended INC Code is whether such public health benefits, along with any avoided regulatory costs, are likely to outweigh any detriments stemming from a lessening in competition.

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51 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.

52 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.*

53 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.

83. 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 preliminary view that there is likely to be a net public benefit from the Amended INC Code, our evaluative judgment has been informed by both the quantified and unquantified benefits and detriments.

Benefits

84. The main potential benefit of the Amended INC Code 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.

85. Another potential benefit would be avoided regulatory costs, to the extent that the Amended INC Code 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

86. 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.[54] These results are shown in Table 1.

87. 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.[55] 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.[56]

88. 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

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

[55] 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

[56] 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.

from zero to six months compared to six to 12 months. Overall health benefits are strongest when breastfeeding continues for 12 months.

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)[57]	RR 0.10-0.75	RR 0.12-1.18[58]	RR 0.12-1.26[59] (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[60]	3.44 IQ points (Lifetime[61])	Consistent effects of about 3 IQ points across observational studies
Breast cancer (Chowdhury,	OR 0.93	OR 0.91[62]	OR 0.74 (> 12	Consistent protective effect of

[57] Only studies comparing predominant/partial versus not breastfeeding were used in this study.

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

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

[60] Less than six months versus greater than six months.

[61] Lifetime effect from any breastfeeding versus no breastfeeding.

2015)			months)	breastfeeding against breast cancer
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[63]	RR 1.8[64]		Consistent evidence of major protection

Source: Commerce Commission.[65]

89. The MOH outlines the following health benefits to both infants and mothers.[66]

89.1 Benefits to infants from breastfeeding include:

89.1.1 providing optimum nutrition for infants;

89.1.2 assisting the physical and emotional development of infants;

89.1.3 decreasing the incidence and severity of childhood infectious diseases;

89.1.4 being associated with decreasing infant mortality and hospitalisation; and

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

89.2 Benefits to mothers from breastfeeding include:[67]

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

89.2.2 reducing the risk of pre-menopausal breast cancer.

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62 Age range six to 12 months.

63 Compared to 1.0 relative risk for breastfeeding

64 Compared to 1.0 relative risk for breastfeeding

65 Based on the studies referred to in Table 1.

66 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

67 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 benefit of health outcomes

90. In addition to the Lancet breastfeeding series, a report commissioned by UNICEF UK (the UNICEF Study)[68] 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:

    90.1 breast cancer;

    90.2 gastrointestinal infection; and

    90.3 lower respiratory tract infection.

91. 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.

92. 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.[69] The Commission has also compared these estimates with those from alternative sources where available and applicable.[70] In the case of breast cancer, an average treatment cost from MOH was used.[71]

93. 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.[72] The Commission has then multiplied the estimated health care costs for an individual treatment by the number of additional treatments expected without the Amended INC Code.

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

69 The UNICEF Study utilised data from 2009-2010.

70 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

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

72 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[73]
Gastrointestinal infection	£989	$2,065[74]
Lower respiratory tract infection	£1,078	$2160-3100[74]
GP Visit	£36	$35-70[75]

Source: Commerce Commission[76]

94. 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.

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

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

    95.2 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

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

96. 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 individual's education.[77] Adjusting these figures to New Zealand dollars, and

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

74 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

75 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

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

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

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.

97. 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 proposed Amended INC Code. However, if the Amended Code 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,[78] 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.

Avoided regulatory costs

98. The MOH has indicated that marketing restrictions for follow-on formula through regulatory reform are unlikely, at least in the short to medium term. If legislation were to occur, the Commission's view is that it would not be for at least five years. This activity 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 $3.5 million.[79] The present value of the cost of this legislation, if enacted in five years would be around $2.6 million. If no legislation was enacted, this cost would be zero.

Detriments

Lost producer surplus

99. If authorisation were to result in lower sales of formula than in the scenario without the Amended INC Code 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.

100. 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[80] and a 20% profit margin on net sales of additional advertising

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78 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.

79 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.

80 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.

expenditure,[81] 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

Regulatory costs incurred by the INC

101. 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 Code consist of INC staff time. The Commission has estimated the amount of time spent on administering the 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.[82]

Lost consumer surplus

102. 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.

103. The existence of these net (consumer surplus) benefits of formula feeding for many mothers is evidenced by the fact that 84% of mothers stop exclusively breastfeeding after six months and 34% of mothers stop any breastfeeding when the child is between six and 11 months[83]. Advertising might otherwise generate net benefits for potential consumers if it were to correct incorrect assertions held by some individuals about formula feeding.

104. For instance, it is possible that some mothers may decide not to use formula because they believe that all teats and bottles used for 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 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

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

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

83 Castro et al. *"Breastfeeding indicators among a nationally representative multi-ethnic sample of New Zealand children"* New Zealand Medical Journal, 2017. Study completed within New Zealand's contemporary child cohort study, *Growing Up in New Zealand*, which enrolled 6,822 pregnant women. The child cohort consists of 6,853 children. 'Any breastfeeding' is defined as receiving some breast milk but also receiving other milk and/or solids. 'Exclusive breastfeeding' is defined as receiving only breast milk.

choosing formula which is not suitable for their infant, for example feeding their infant cows' milk or toddlers' milk if advertising restrictions were to prevent individuals receiving correct information about formula feeding practices.

Weighing benefits and detriments

105. 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. When coupled with the Commission's overall qualitative assessment, these estimates help inform the Commission of the likely net public benefit of the Amended INC Code.

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

Benefits	
Public health benefits	
• Breast cancer, Gastroenteritis and LRTI	$1m
• Other health benefits[84]	Unquantified
Regulatory Savings	$0 – $2.6m
Detriments	
Producer Surplus[85]	$0.9m
Additional regulatory costs	$0.1m
Consumer Surplus	Unquantified

Source: Commission estimates

106. As shown in Table 3, the estimates of the quantified public health benefits and the lost producer surplus detriments are broadly similar in magnitude (approximately $1 million each) and effectively offset each other. Net potential regulatory impacts range from close to zero[86] up to a benefit of $2.5 million in avoided regulatory costs. Balancing only the quantified impacts in isolation would suggest a potential net

[84] 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.

[85] This doesn't include costs for the INC administrating the code estimated to be around $0.1 million over 5 years.

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

quantified impact that ranges broadly neutral to significantly positive. However, to this assessment must be added consideration of the unquantified impacts.

107. In regard to unquantified impacts, the Commission considers that the unquantified benefits, which include a broad range of public health benefits, may be substantial. In contrast, the unquantified detriments of the Amended INC Code (lost consumer surplus) are likely to be relatively moderate in comparison.

Conclusion on Commission's analysis of benefits and detriments

108. The Amended INC Code is supported by the public health authorities, and its only competitive effect would be to cease the already minimal advertising of follow-on formula and prevent any potential future increase in advertising of follow-on formula. 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.

109. By considering together both the quantified and unquantified benefits and detriments that will result, or be likely to result, from the Amended INC Code, our preliminary view is that the Amended INC Code would result in public benefits that are likely to significantly exceed the detriments arising from the lessening of competition.

Revocation of the 2015 Authorisation

110. 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.[87]

111. The Commission considers that authorising the parties 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.

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

Length of the proposed authorisation

113. The Act allows the Commission to grant authorisation for a restrictive trade practice for such a period as the Commission thinks fit.[88] For this Application, the Commission proposes to grant authorisation for a period of five years.

114. 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

[87] 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.

[88] Commerce Act, Section 61(2).

to reconsider the proposed authorisation in light of any future developments or change in circumstances.

Draft determination

115. The Commission's Draft Determination is that:

115.1 the Amended INC Code will result, or be likely to result, in such a benefit to the public that it should be permitted, and so the Commission proposes to grant an authorisation for the Amended INC Code under section 58 of the Act for a period of five years from the date of this authorisation; and

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