

## Response to INC Application to continue self-regulatory process for infant formula marketing.

By Julie Fogarty.

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## Introduction:

I am the member of the public who has submitted almost all of the confirmed INC Code of Practice (INC COP) violations over the past decade. The few other INC COP violations found appear to have been submitted by a health professional or health professionals, as they seem to have related to inappropriate marketing in health professional journals. I sank countless hours into this voluntary work (it even influenced my choice to reduce my hours in paid employment for some years), because I realised the following and felt a keen sense of duty:

- The Ministry of Health cannot submit the violations
- Awareness of the UN's 1981 WHO Code (The International Code of Marketing of Breastmilk Substitutes) is a very niche area and I seemed to have been among the first complaint submitters to have violations upheld (i.e. if I wasn't going to do it, then who would?)
- I hoped that if the violations came to light via going on public record, then maybe ultimately legislation to regulate WHO Code compliance, rather than regulation by the weak self-regulatory system we've seen since 1981, might be commenced by the government. The health sector fully implements the health-worker aspects of the 1981 Code, but the formula industry is not fully held to account for all its relevant aspects of the 1981 WHO Code and its relevant updates.

My interest in the 1981 WHO Code started when I had my first child in 2012; I am not a health worker.

## Statement of my chief concern:

**My chief concern is that this draft Commerce Commission decision is wrongly placing continued self-regulation of infant formula industry marketing tactics as more beneficial than the likely counterfactual scenario of regulation by legislation. This forms an argument, by a government organisation, against the need for breastmilk substitute marketing regulation by legislation.**

What looks to be a one-off 4 to 5 million NZD set-up cost of legislation, and not an annual cost of legislation, is presented among annual calculations. How does that make sense? Those annual calculations are predicting a 1% better breastfeeding rate (bringing \$300K annually in healthcare savings) from keeping up formula industry self-regulation, over the admitted likely counterfactual of shifting to regulation by legislation – a health-impact prediction that also does not seem to make sense, and is damaging to the case for regulation by legislation for public health benefit.

If 5 million NZD on setting up legislation had been spent back in 1981 when the WHO Code came out, and we went by the conservative estimation of breastfeeding rates each year being 1% better than they have been for 42 years (although the draft decision seems to argue legislation equals worse breastfeeding rates), and thus annual health benefits being 300,000 NZD, then public health would be 7.6 million NZD better off. The legislation's set-up cost can't fairly be framed as an annual cost.

With the USA Agency for International Development, (1) the International Breastfeeding Journal (2), and the World Bank Group (3) amongst those presenting that every \$1 invested in breastfeeding protection bringing \$35 in benefits to the economy – and the 1981 WHO Code exists as a key aspect of breastfeeding protection – then 5 million NZD invested to set up this relevant industry-regulating legislation would bring an estimated 175 million NZD to our economy.

- (1) [https://2017-2020.usaid.gov/sites/default/files/documents/1864/Breastfeeding\\_FactSheet\\_7\\_2020.pdf](https://2017-2020.usaid.gov/sites/default/files/documents/1864/Breastfeeding_FactSheet_7_2020.pdf)
- (2) <https://internationalbreastfeedingjournal.biomedcentral.com/articles/10.1186/s13006-020-00277-w>
- (3) <https://documents1.worldbank.org/curated/en/862561490038192552/pdf/113618-BRI-PUBLIC-Breast-4-web.pdf>

## **Summary statement sent to the Commerce Commission, and some key stakeholders in infant health, including the Health and Disability Commission, the Children's Commission, and the Ministry of Health contact for WHO Code compliance, on Friday October 20<sup>th</sup> 2023:**

"Kia ora,

Regarding - Draft NZ Commerce Commission Decision on the Infant Nutrition Council - [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0010/331021/Public-Version-Draft-determination-Infant-Nutrition-Council-authorisation-application-11-October-2023.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0010/331021/Public-Version-Draft-determination-Infant-Nutrition-Council-authorisation-application-11-October-2023.pdf)

I have CCed a range of health-interested (infant and maternal health) stakeholders here, so they might indicate to the Commerce Commission, before October 25th, if they wish to submit to the Commerce Commission about this matter that has a statutory deadline of March 1st 2024.

In the 2016 subsequent World Health Assembly Resolution to the 1981 International Code of Marketing of Breastmilk Substitutes, it was clarified that commercial milks specifically labelled for babies under 36 months are breastmilk substitutes. <https://www.who.int/publications/i/item/9789241513470>

I am concerned that, in a repeat of 2018, the Infant Formula Industry's "Infant Nutrition Council" (INC), and the Commerce Commission, are set to frame continuation of the weak, industry self-regulation agreement, the INC Code of Practice, as meeting our nation's 1981 International Code obligations.

The INC Code of Practice only covers commercial milks for babies under 12 months; it does not fully address the marketing restrictions asked for in the International Code (e.g. these companies target/seek contact with pregnant women and mothers on social media); and there is little to no consequence apparent, for violations of the INC Code of Practice. Decisions finding the companies in violation of the INC Code of Practice (I have previously had twenty complaints upheld) sit on an obscure Ministry of Health webpage and I have never seen media reporting about their existence. The first two social media ads I saw this morning when I went to look at an INC Member's social media page, to see how compliant they are these days, were both discussing "infant formula" or "infants" and "formulas".

I note that in 2018, Ministry of Health communication to the Commerce Commission also framed infant formula products as the only commercial milks subject to the current, updated 1981 International Code obligations of NZ.

This ongoing omission by government departments, of the protection due to babies under 36 months, needs to end. Toddler milks are high sugar (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10195549/>), and heavily marketed in NZ, serving as cross-marketing tools for label-matched infant formulas. Meeting our 1981 International Code obligations is part of NZ's Breastfeeding Strategy, and breastfeeding to age two and beyond has long been a global public health recommendation.

I am concerned that the Commerce Commission is being used as a further marketing tool for the INC ("forum shopping"), given the Commerce Commission is not a health authority. The INC has been able to

publish, via the Commerce Commission, an application document that aligns the INC with "optimal nutrition for all infants". The INC have published, in their application document, health claims about the one or two commercial oligosaccharides they can add to infant formulas. Omitted is the fact that breastmilk has 200 plus, rather than just one or two, oligosaccharides. FSANZ rules (legislation) are that health claims cannot be made about infant formula products.

I am concerned that the Commerce Commission has undertaken their October 2023 draft INC decision without adequate health-authority guidance. Passages such as this surely have no place in the government publications of a UN State that's a signatory to the 1981 International Code:

**"71. The greater marketing and promotion of Infant Formula that could occur if the Proposed 2023 Code were not authorised, even if only temporarily until a legislative response materialised, the more consumers that may be made aware of the potential advantages from using Infant Formula, and the more consumers that may use formula instead of breastfeeding.**

**"72. The value consumers obtain from using formula can include the avoidance of discomfort for mothers who would otherwise suffer from breastfeeding or find it difficult to undertake, and/or increased convenience for mothers who might otherwise find breastfeeding imposes an unwelcome burden. The increased convenience from using formula may also enable some mothers to engage in greater levels of paid employment than would otherwise be practical, generating financial advantages.<sup>59</sup> These positives, less the cost of purchasing formula, generate a 'consumer surplus' for formula consumers."**

The researched cited (at reference 59) for these claimed benefits of infant formula is clearly talking about the need for breastfeeding-supportive policies/frameworks for mother/baby dyads under socio-economic pressures. It is not promoting the idea of formula advertising that tells mothers formula is great because you can earn money, leave your baby.

Similar benefits of infant formula were published in the 2018 Commerce Commission draft decision on the INC, and then the Ministry of Health had submitted that the formula industry is not the appropriate avenue for providing infant feeding recommendations. Where is the Ministry of Health input in 2023?

The draft decision estimates that legislation to regulate infant formula marketing would cost 4 to 5 million. It estimates that having the INC Code of Practice (self-regulation), rather than the likely alternative that includes establishment of legislation, means annual health savings of \$300,000 due to mothers not being convinced not to breastfeed. Concluding that industry self-regulation - where the companies continue to, for example, tell mothers (in their "breast is best" blurbs) that breastfeeding requires a special diet when it does not - will maintain better health outcomes than regulation via legislation, just does not make sense. It seems skewed towards a conclusion that fits with continued industry self-regulation as the ideal for public health outcomes.

I have seen it cited in a range of relevant literature that every dollar invested in breastfeeding brings the economy \$35 in saved costs. The ANU Mothers Milk Tool estimates that for New Zealand, the value of our breastmilk production for the first 36 months of life is 1,458.94 million NZD, the potential value is 4,053.3 million NZD, and the Lost production breastmilk is 2,594.36 million NZD worth. <https://mothersmilktool.org/#/countrycalculator> . These numbers seem at odds with the Commerce Commission number-crunching.

Ngā mihi

Julie Fogarty"

## The claims within the INC Application that I wish to challenge.

### 1. I challenge the claim that the INC Members adhere to the INC COP:

**“Breaking the Rules”:** (official Code violations)

In the years I have engaged with this compliance process, twenty-two complaints alleging INC Member violations of the INC COP have been upheld.

1 submitted in 2013;

6 in 2014;

1 in 2015;

one in 2018 (not submitted by me);

2 in 2019 (one not submitted by me);

5 submitted in 2020;

6 submitted in 2021.

Given the first INC Code authorisation by the Commerce Commission was in 2015, these numbers indicate it (the authorisation) has had no clear improvement on INC Member Code Compliance.

And these are essentially (i.e. almost all; 20 out of 22) the violations spotted by just one person only; myself. And the above tally does not identify when multiple INC COP articles were violated by the advertising in question. Then there is the fact that many other complaints I submitted lapsed because I had been unable to complete the work of making specific referral to the compliance panel after the company’s response (as this referral is not automatic). For example, in 2021, 15 of my complaints made it to the compliance panel for consideration, but 14 lapsed. Then there are the Code violations I saw but did not have time to submit on. Below are the upheld complaint details I have gleaned from the MoH Compliance Panel meeting summaries (I am having difficulty finding where all my versions are filed):

- **Complaint 10-2013-02:** Heinz (Nurture Gold brand) was in violation of Article 5.1, using the words ‘infant formula’ in the advertisement. (This was a television advertisement).
- **Complaint 04-2014-01:** against NuZtri brand formula milk for promoting infant formula on their website. Information on the website was in violation of Article 4.1 and 4.2 of the INC Code of Practice.
- **Complaint 06-2014-02:** Fresco Nutrition (Fresco) was found in violation of Articles 5.1 and 5.5 of the INC COP for placing an editorial for its Goat milk formula on the Kidspot website, a pregnancy and parenting website. In relation to Fresco’s own website, the Panel found Fresco in violation of Articles 4.1 and 8.2 of the INC Code of Practice for the provision of educational material that is contrary to the policies of the health care system.
- **Complaint 06-2014-03:** The Panel found New Image Group (Baby Steps brand) in violation of Articles 4.3, 5.1 and 5.5 of the INC Code of Practice for placing an editorial for its Goat milk infant formula on the Kidspot website. In relation to Baby Steps own website, the Panel found New

Image Group in violation of Article 8.2 for providing educational material concerning infant feeding.

**What is interesting here is my subsequent complaints about the big companies that I made after that New Image Group decision – the companies were Nestle, Danone and Heinz if I recall right – also providing infant feeding educational material, where not upheld as Article 8.2 violations, because the material was deemed as given by health professionals (employed by these bigger companies). Yet the relevant Ministry of Health Health Workers Code excludes formula company employees from needing to comply with that code.**

- **Complaint 07-2014-05:** The Panel found New Image Group (Baby Steps brand) in violation of Articles 4.2, 4.3 and 5.1 of the INC Code of Practice for a video advertisement for Baby Steps Goat milk infant formula product range on YouTube.
- **Complaint 10-2014-06:** The Panel found New Image Group (Baby Steps brand) in violation of Articles 4.2, 4.3, 5.1 and 8.2 of the INC Code of Practice for placing an advertorial for Baby Steps goat milk infant formula, titled "Goat Milk Infant Formula to NZ Mothers" in eLocal, an online magazine.
- **Complaint 10-2014-07:** The Panel found New Image Group (Baby Steps brand) in violation of Articles 4.2, 4.3, 5.1 and 8.2 of the INC Code of Practice for an advertorial for Baby Steps goat milk infant formula, titled "Goat milk based formula" on DIY Father, a parenting website.
- **Complaint 08-2015-08:** concerned advertising of Cowala infant formula on the Baby Show website under information about exhibitors involved in past Baby Shows. The Panel found GMP Dairy Limited, (manufacturer of Cowala infant formula) in violation of Articles 4.2, 4.3 and 5.1 of the INC COP.
- **Complaint 02-2019-02:** which concerned an online advertisement for Nutricia Karicare regarding packaging changes to stage 1 and stage 2 infant formula was upheld by the Panel.
- **Complaint 04-2019-02:** which concerned Plunket receiving ongoing funding, funding for education or indirect funding from several producers/distributors of breast milk substitutes was upheld by the Panel in relation to its sponsorship/acceptance of payment for conference attendance. (My own note here; Heinz, owner of Nurture formulas, is a company involved. The Plunket / Heinz relationship seems to have continued regardless.)
- **Complaint 10-2018-02:** concerned a Nutricia Aptamil advertisement for infant formula in the New Zealand Doctor magazine which the complainant alleged was aimed at the 0-12 month age group and did not provide factual and educational information for medical professionals. The complaint was upheld by the Panel.
- **Complaint 09-2020-02:** concerned a NIG/Baby Steps advertisement for infant formula in the which the complainant alleged was aimed at the 0-12 month age group and did not provide factual and educational information for medical professionals. The complaint was upheld by the Panel for article 5.1.
- **Complaint 09-2020-05:** against Little Oak and Natural Kids FB ads. The Panel considered the complaint in relation to Article 5.1. The Panel found there was a violation of Article 5.1 because of the reference in the advertising material to 'formula'.
- **Complaint 09-2020-06:** against Little Oak and Little Adventures FB ads. The Panel considered the complaint in relation to Article 5.1. The Panel found there was a violation of Article 5.1 because of the reference in the advertising material to 'formula'.
- **Complaint 11-2020-01:** against NIG/Baby Steps. Violation of article 4.3; violation of article 5.1.

- **Complaint 11-2020-02:** against NIG/Baby Steps use of phrase 'infant formula' or 'formula': The Panel considered the complaint in relation to Article 5.1. The Panel determined that there had been a violation of Article 5.1.
- **Complaint 03-2021-01:** against Zuru (Haven): This complaint contained 11 images and/or text from posts on Zuru's Haven Baby Facebook page. The Panel considered each example in relation to Articles 4 and 5.1. Article 5.1: Marketing to the general public; The Panel agreed that Zuru has breached Article 5.1 in examples 1, 6, and 11. And has breached Article 4 (Information and Education) in examples 1 and 11.
- **Complaint 03-2021-03:** against Zuru (Haven): The Panel found that Zuru breached Article 5.1 because the video refers to infant formula.
- **Complaint 05-2021-01:** against Zuru (Haven): The Panel agreed that Zuru breached Article 5.1 as the use of the phrase 'formula' is marketing formula to the general public. In considering the complaint and the remediation taken by Zuru, the Panel clicked through from the drop box and received the following message. The Panel considered that this statement "Sample boxes of our Stage 1, Stage 2 and etc" further constitutes a breach of Article 5.1 as this is marketing of Stage 1 and Stage 2 products.
- **Complaint 06-2021-05:** against Danone. The Panel considered the complaint in relation to Article 5.1. The Panel found that Danone had breached Article 5.1 because the video refers to infant formula.
- **Complaint 06-2021-07:** against Fonterra. Facebook content. Panel noted that it was unwise to refer to "formula" instead of "toddler milk". References to NeoPro1 and NeoPro2: the Panel agreed that Fonterra had breached Article 5.1 when listing these products. It acknowledged that Fonterra had removed the reference.
- **Complaint 06-2021-09:** The Panel found that Zuru breached Article 5.1 because the webpage is a Haven webpage, it makes reference to babies and in turn gives the impression that formula is referring to infant formula.

## **“Stretching the Rules”:**

The cross-marketing (using their toddler milks as a vehicle for marketing their infant formula products) that INC Members can do without it being deemed in breach of the INC Code, also is seen in the following marketing examples I put before the Compliance Panel, where no breach was upheld. Toddler milk is not a formula or infant formula (it instead comes under the same food standard as Milo, Food Standard 2.9.3 rather than the 2.9.1 of infant formula products), so on top of being wrong as it cross-promotes formula, it is misleading to consumers to label it a formula:

- **Complaint 06-2021-12:** About Nestle. Summary of the complaint 1. The complaint concerned Nestlé Facebook advertisement for a toddler milk product with background/hidden ad information showing the advertisement targeting those interested in baby bottles and baby food. The Compliance Panel decided this did not violate INC COP Article 5.5 (Marketers should not seek direct contact with pregnant women or mothers).
- **Complaint 09-2020-02:** About NIG Nutritionals (Baby Steps brand). Summary of the complaint 1. The complaint concerned an advertisement for the Baby Steps infant formula brand on the Baby Show website which contained the word ‘formula’ in the advertising alongside toddler milk. NIGN was found in violation of Article 5.1, but not 5.5, which is the Article about not seeking contact with pregnant women and mothers.
- **Complaint 06-2021-21:** About NIG Nutritionals (Baby Steps brand). Concerning unsolicited Baby Steps NZ Facebook advertisements with “Why am I seeing this ad” section targeting people interested in infant formula. The Compliance Panel decided this did not violate either Article 5.1 or 5.5 of the INC Code.
- **Complaint 06-2021-02:** About Nestle. “Summary of the complaint 1. The complaint concerned unsolicited Facebook advertisements using toddler milk which included a URL link “S26-original-range-update”. The complainant considered that this resulted in the promotion of the full range of S26 products, including infant formula products.” The Compliance Panel decided Nestlé had not breached Article 5.1 of the (INC COP). I’ll add now for clarity - the only other products in the S26 Original range, besides the toddler milk pictured in the ads, are the Stage 1 and Stage 2 infant formula products (there is no Stage 4 product).
- **Complaint 09-2020-01:** About Little Oak. A a complaint against Little Oak in relation to advertising containing ‘baby formula’ on the Baby Show Online- Auckland Show, noticed 22nd August 2020. The Compliance Panel found Little Oak in violation of Article 5.1, but not Article 5.5 (marketing personal seeking direct contact with pregnant women and mothers).
- **Complaint 06-2021-07:** against Fonterra. Panel noted that it was unwise to refer to “formula” instead of “toddler milk”. References to NeoPro1 and NeoPro2: the Panel agreed that Fonterra had breached Article 5.1 when listing these products. It acknowledged that Fonterra had removed the reference.

### **Here are details of the cross-promotion from Complaint 06-2021-07 that the Compliance Panel decided was not a violation:**

In relation to concerns raised about that a full range of formulas was referred to, which includes infant formula, the Panel:

- a. noted that Fonterra did not accept that this was a breach of the *INC Code of Practice*
- b. noted the wording “*from launching pregnancy milk in Asia to a full range of formulas today, the brand and its products continue to grow*” could be perceived as including infant formula, and that it was unwise to include this phrase/terminology;



- c. accepted that Fonterra had modified the information to remove any ambiguity as to which product was being promoted;
- d. did not find a breach of article 5.1.

In relation to referring to Annum as a "paediatric brand" which was developed by "paediatric nutrition experts, the Panel:

- a. noted that Fonterra did not accept that this was a breach of the *INC Code of Practice*;
- b. noted that 'paediatric' is not defined in the INC Code of Practice but it is defined in the Oxford dictionary as "the branch of medicine that deals with children and their diseases";
- c. agreed that describing Annum as a "paediatric brand" may be mis-interpreted as full brand promotion;
- d. noted that Fonterra had therefore removed the reference to this;
- e. did not find a breach of article 5.1.

In relation to using language such as "your little one" and "early development", the Panel:

- a. noted that Fonterra did not accept that this was a breach of the *INC Code of Practice*;
- b. noted Fonterra's use of "your little one" or "toddlers" as opposed to "babies" or "infants" so as not to confuse with a product for use by those under 12 months of age;
- c. noted that Fonterra had amended the information to remove any uncertainty as to which age group being referred to;
- d. did not find a breach of article 5.1

- **Complaint 06-2021-08:** About Danone (Aptamil brand). Summary of the complaint 1. The complaint concerned images from Aptamil Toddler sponsored Facebook advertisements. The complainant alleged that Danone breached Article 5.1 of the *Infant Nutrition Council Code of Practice for the Marketing of Infant Formula in New Zealand (INC Code of Practice) 2018* because referring to "our Aptamil range" included both infant formula and toddler milk products. The Panel determined Danone did not breach Article 5.1 of the *INC Code of Practice* for the use of unsolicited Facebook advertisements referring to "our Aptamil range".
- **Complaint 05-2016-18.** About Fonterra (Annum brand).

The complaint (referenced complaint 05-2016-18), received by the Ministry of Health on 2 May 2016, concerned Annum website ads that appear in Google's search results when unrelated terms such as "infant nutrition" and "unicef uk infant feeding" are used. The complaint alleged the ads were marketing Annum infant formula and that Fonterra Brands had breached articles 4.2, 4.3, 5.1 and 5.2 of the INC Code of Practice in relation to the Google ads.

#### Decision of the Panel

##### Articles 4.2 and 4.3

The Panel did not determine a breach of articles 4.2 and 4.3 because it did not consider the Google ads were providing information or educational material about the use of infant formula. The Google ads provide a link to the Annum website where information on Annum infant formula can be found. However, the website has a pop-up breastfeeding disclaimer that must be accepted before you can proceed to the website and access information about Annum infant formula. The website disclaimer meets the information requirements specified in articles 4.2 and 4.3 of the INC Code of Practice.

##### Articles 5.1 and 5.5

Article 5 of the INC Code of Practice is about marketing infant formula to the general public. The Panel did not consider the Google ads are advertising infant formula per se. The Google ads only go as far as directing consumers to the Annum website which is Code compliant. Once a consumer arrives at the website they are presented with a website disclaimer that recommends seeking advice from a health practitioner if considering using infant formula.

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##### Google search terms for Annum formula website ads

The Panel noted that Fonterra Brands has addressed the issue, raised by the complainant, of Annum website ads appearing in Google's search results for unrelated terms, such as "infant nutrition".

In summary, the Panel did not find Fonterra Brands in breach of the INC Code of Practice for Annum website ads that appear in Google's search results.

By the way, this (below) was the 2016 Fonterra advertising that the compliance Panel said was not "advertising infant formula per se." A factor in why I then stepped away from bothering with interacting with that compliance process for a while after 2016.

← → ↻ <https://www.google.co.nz/#q=unicef+uk+infant+feeding>

Google unicef uk infant feeding

All Images News Videos Maps More ▾ Search tools


About 96,700 results (0.44 seconds)

**Annum Infant Formula - annum.com**  
[www.annum.com/NZ](http://www.annum.com/NZ) ▾  
Made with care for your little one. Proudly caring for our little Kiwis

**The UNICEF UK Baby Friendly Initiative**  
[www.unicef.org.uk/babyfriendly](http://www.unicef.org.uk/babyfriendly) ▾  
It was established in 1992 to encourage maternity hospitals to implement the Ten Steps to Successful **Breastfeeding** and to practise in accordance with the ...

**The Baby Friendly Initiative: UK Breastfeeding - Unicef UK**  
[www.unicef.org.uk](http://www.unicef.org.uk) > Home > About Baby Friendly ▾  
**UK Breastfeeding** rates The Office for National Statistics performs its **Infant Feeding** Survey every five years. The figures from the 2010 survey were published in ...

**Sample infant feeding policies - Unicef UK**  
[www.unicef.org.uk](http://www.unicef.org.uk) > ... > Writing policies and guidelines ▾  
The **Baby** Friendly Initiative has produced sample maternity, community and **neonatal infant feeding** policies for facilities to use as references when writing their ...



## Current examples of INC COP violations today (dated 20/10/2023):

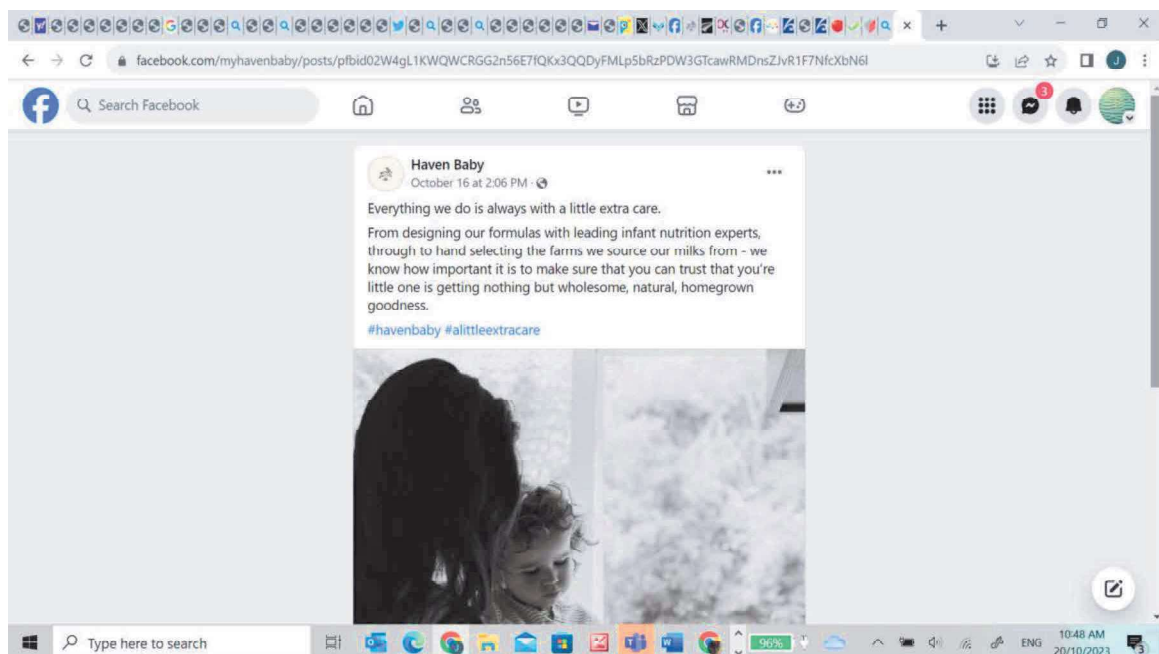
Screenshots dated 20/10/2023. Violations sent to the INC COP Compliance panel 20/10/2023.

<https://www.facebook.com/myhavenbaby/posts/pfbid02WCKqygY8gussrTVgkqmNaJtFEqWzdnMF8R6Pk cUcQtje8h5U7naUuq1CFVyPnNoEI>

INC Member Haven is breaching INC COP Article 5.

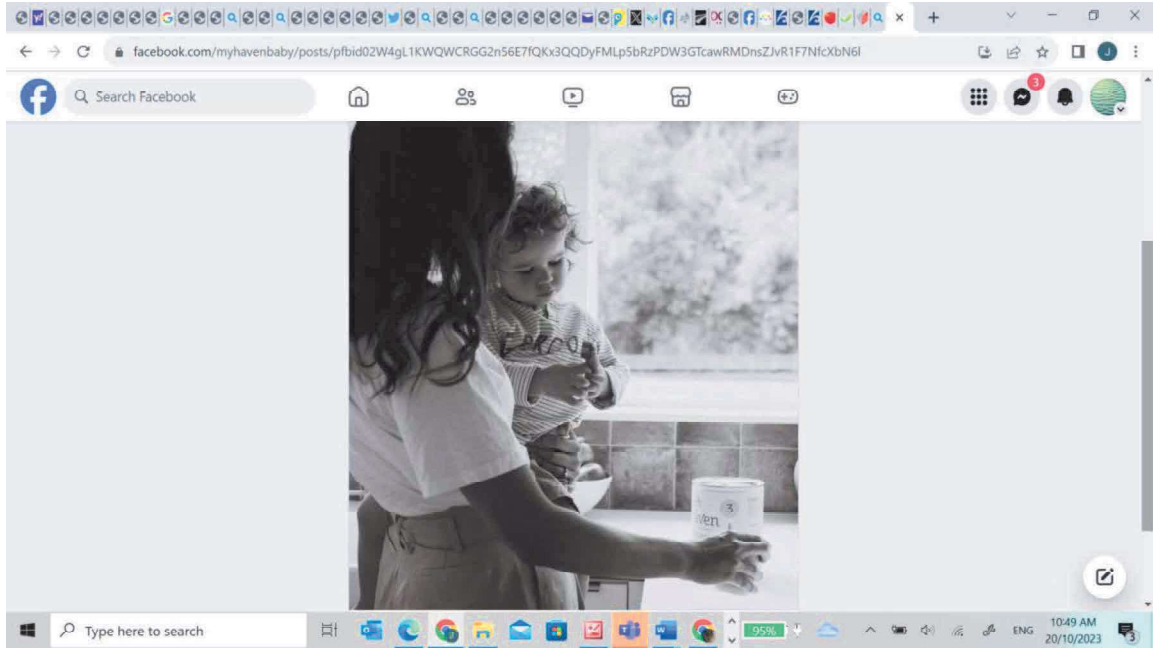
I sent complaints about these to the INC COP Compliance Panel on 20<sup>th</sup> October and as at 5<sup>th</sup> November have not had even a confirmation of receipt email.

Advertising infant formula directly to the public. Language: “infant nutrition”, “formula”. Stage 3 is no formula by Food Standards classifications:

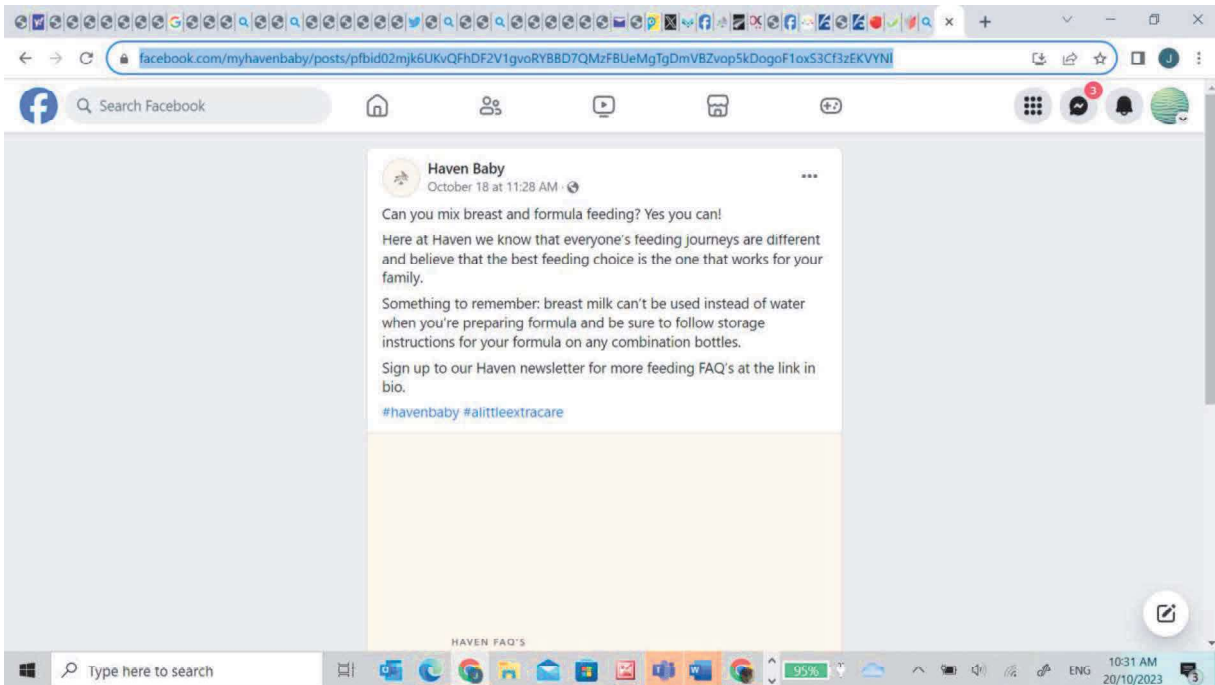


<https://www.facebook.com/myhavenbaby/posts/pfbid02WCKqygY8gussrTVgkqmNaJtFEqWzdnMF8R6Pk cUcQtje8h5U7naUuq1CFVyPnNoEI> INC Member Haven is breaching INC COP Article 5

Advertising infant formula directly to the public. Standard cynical use of “Stage 3” tin in the photo, when the post is “infant” and “formula”. Note the marketing page is called Haven “Baby”; the term Baby readily including both infants and toddlers in peoples’ minds.



<https://www.facebook.com/myhavenbaby/posts/pfbid02mjk6UKvQFhDF2V1gvoRYBBD7QMzFBUEmGtDmVBZvop5kDogoF1oxS3Cf3zEKVYNI> INC Member Haven breaching INC COP Article 4, and further framing the marketing page as relevant for babies in their infancy (first year).



## **2. I challenge the INC claim that INC Member are incentivised to avoid violations of the INC COP because it brings reputational damage.**

As far as I am aware, not one single instance of the above twenty-two upheld complaints found over the past decade has been picked up by the media and reported on to the public. **Not one instance.**

The meeting summaries, for this obscure self-regulatory code compliance matter that very few people know about, sit on a MoH website named after this obscure compliance process. And that is if the company has done the code-violating advertising in a time when I, the main member of the public to engage with this process in the last decade, saw the advertising and was willing and able to engage with the complaints process. And then, with the further hoop for me to jump through - if I can, usually months later, get the time to analyse the company response and write up my justification for why I still want the complaint to proceed to the compliance panel.

Then, if brand reputation damage does threaten, which is a situation that looks to have possibly happened to toy-makers Zuru (given the complaints upheld against them), the company can always create a new business to name the brand under. Because this appears to have happened with Haven Baby brand (the new company now listed as an INC Member for the Haven Baby brand looks to be under the name of a woman who, if I recall correctly, was on the marketing team during the 2021 INC COP violations anyway). The company Zuru was published by the Media Council as having doctored Facebook advertising to look like Newshub sponsored content – an article on healthy toddler eating - had a pack-shot of the Haven toddler milk under the heading, when the article never did (Zuru doctored their advertising imagery) – this would have been for a more likely to be behind removal of Zuru from association with the Haven infant formula brand, rather than the INC COP violations that never get any publicity but sit unseen on the Ministry of Health website.

See <https://www.mediacouncil.org.nz/rulings/julie-fogarty-against-newshub/> (I had commenced this complaint due to Newshub editorial content aligning a toddler milk with a healthy toddler diet, and not declaring their conflict of interest (a commercial relationship with Zuru).

“[17] Martin says the complainant’s claim that the article featured a Haven promotional shot as its lead photo is incorrect. Ms Fogarty and the Council initially relied on a Facebook post of the story by Haven, which showed the Newshub article with the Haven publicity shot as the lead image. But Martin says the story only ever featured a generic photo of a toddler. Investigations by Newshub as a result of this complaint showed that “Haven’s agency”, Zuru, had doctored the story and inserted its publicity shot into the article when posting it to Facebook. Zuru admitted their mistake and took down the post. But the story itself never included the advertising shot.

Further correspondence

[18] Subsequently Ms Fogarty advised she had found out that Zuru is actually the owner of Haven and that the Facebook post, with the mock-up of a Newshub story was still on the Haven Facebook page.”

### 3. I challenge the INC claim that continuing this self-regulatory process is of benefit to public health

#### Health detriments to infants and toddlers:

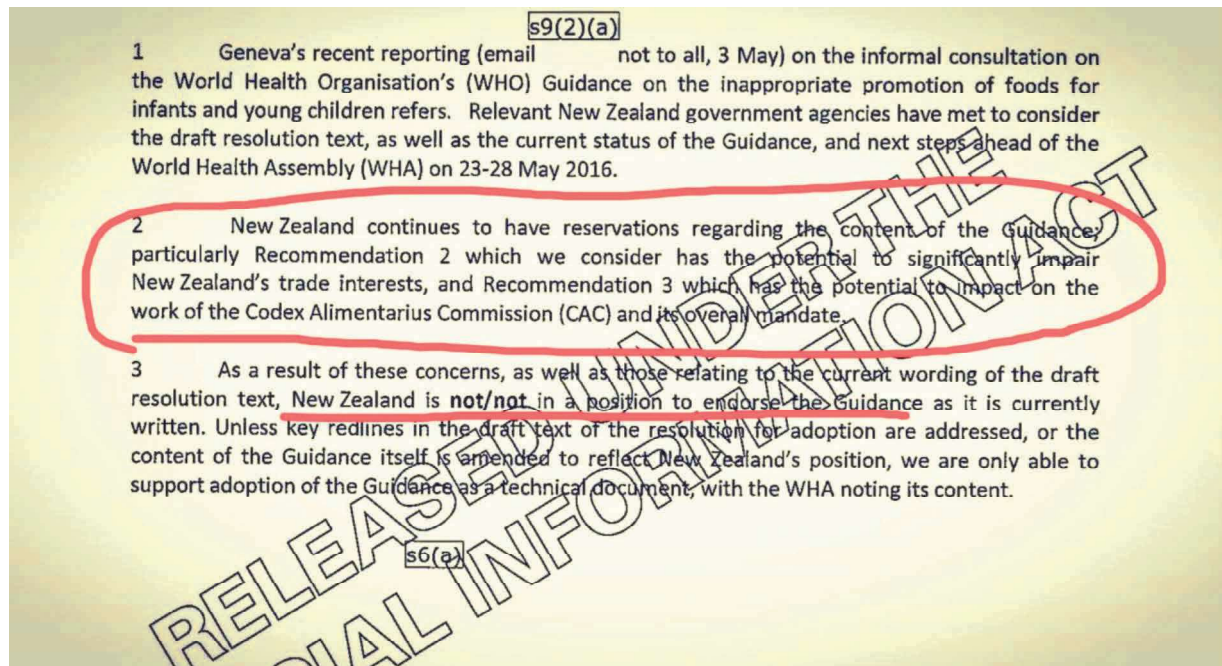
#### Toddler milk promotion acts as infant formula promotion, and undermines the World Health Organisation recommendation of breastfeeding into toddlerhood or beyond:

As I have shown above, under the headings of "Breaking the Rules" and "Stretching the Rules", the infant formula industry systematically uses toddler milk to promote their full range of baby milks, including infant formula products. The INC Code of Practice that is up for Commerce Commission determination on, continues this status quo that promotes infant formula products by proxy.

In the lead up to the 2016 World Health Assembly, moves to have toddler milks clarified as breastmilk substitutes (and thus products that should have restrictions about their promotion), the INC Members lobbied our NZ governments (and other similar-minded governments) to have the move halted so not to negatively effect trade. See the OIA documentation here: [REDACTED]

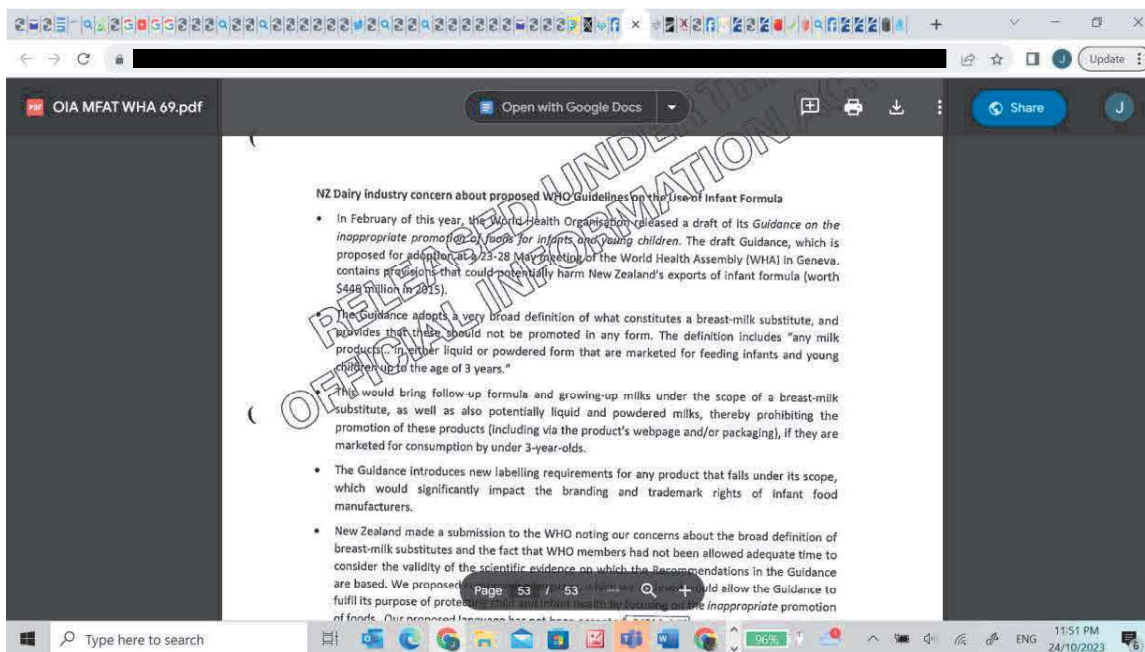
[REDACTED] See Appendix

This industry lobbying would not be necessary if ceasing to promote toddler milk (under a counterfactual of legislation that enacts current WHO Code expectations) would have no impact on sales of formula ranges, and thus also no impact on breastfeeding rates.

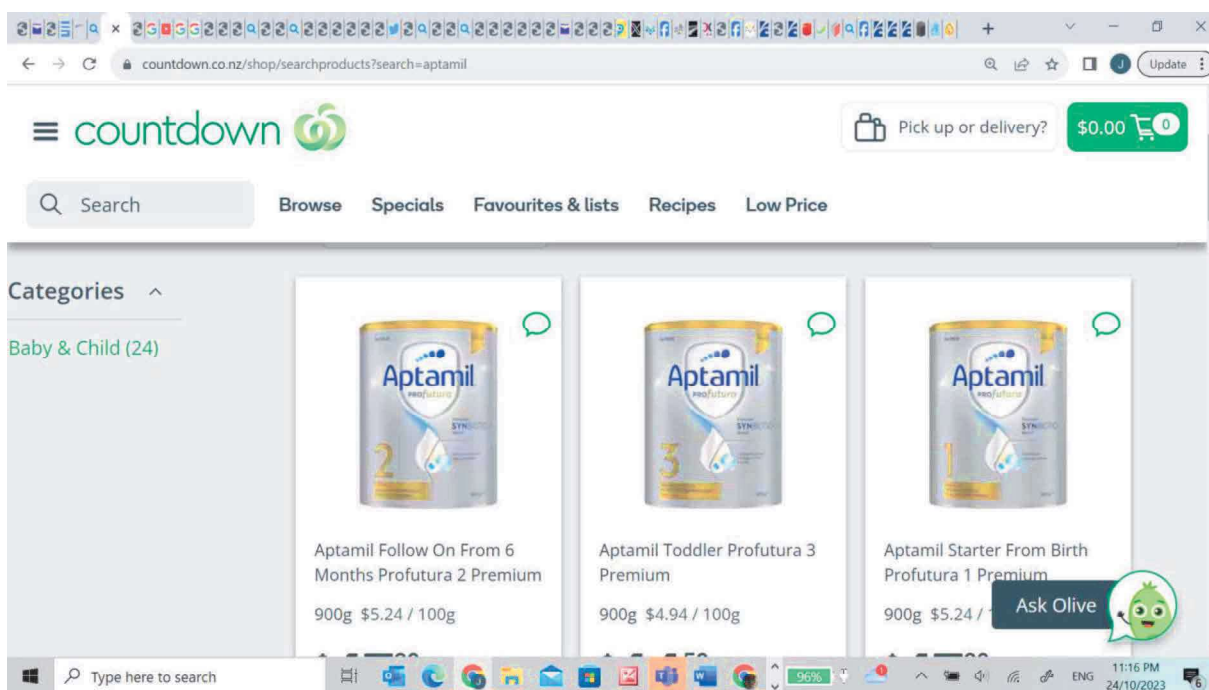


Details from NZ's communications about UN (World Health Assembly) attempts to end inappropriate marketing of baby milks:

See Appendix



BELOW: These companies make their toddler milk identical to their infant formula products – cross marketing.





While – when it comes to setting marketing restrictions – the formula industry doesn't seem to want toddler milk considered to not be a breastmilk substitute in line with infant formula products, here is the Infant Nutrition Council CEO in the press, saying about a government decision to keep oligosaccharides out of toddler milk: "If it's safe for infant formula then it is safe for toddler milk and the decision by the ministers about not including HMOs in toddler milk just completely ignores science and is simply wrong".

<https://www.rnz.co.nz/news/national/431999/confusion-over-decision-to-keep-additive-out-of-toddler-milk>

What the INC misleads the public on, is that the government decision to leave synthetic oligosaccharides (made to approximate one or two of the 200 or so in women's breastmilk) out of toddler milk is because it is the general food diet, and not breastmilk, that is the reference food for toddler milk nutrients, under the Food Standards Code. See

[https://foodregulation.gov.au/internet/fr/publishing.nsf/Content/forum-communique-2020-November27?fbclid=IwAR32wioxE\\_GrV7\\_2smmsJcliUK9dBbtHJrE-rhEO9EcGMBqy3emmO-Vbmb4](https://foodregulation.gov.au/internet/fr/publishing.nsf/Content/forum-communique-2020-November27?fbclid=IwAR32wioxE_GrV7_2smmsJcliUK9dBbtHJrE-rhEO9EcGMBqy3emmO-Vbmb4)

Screenshot of the relevant section:

The Forum agreed by majority (not supported by New Zealand) to an amendment to A1155 to review within five years from gazettal the permission to allow addition to infant formula products to determine whether there is sufficient evidence of a 'substantiated beneficial role in the normal growth and development of infants, or a technological role'. The Forum also agreed to not allow voluntary addition of 2'-FL and LNnT to formulated supplementary foods for young children (FSFYC). In considering this Ministers outlined concern that the compositional reference for foods for young children is not breast milk and that the application does not support the relevant Ministerial Policy Guideline for FSFYC.

How did the Infant Nutrition Council's apparent media attempt at promoting public distrust of government health decisions over infant formula and toddler milk, work to improve public health?

And how is the systemic alignment of toddler milks and infant formulas within their marketing, when they are not aligned within Food Standards compositional standards and classifications, compliant with laws under the Commerce Commission's remit, about not misleading consumers about the nature of a product? Toddler milk – "Stage 3" – IS marketed in a way that you'd guess it DID have the same reference food as the Stage 1 and Stage 2 breastmilk substitutes.



Aptamil Follow On From 6 Months Profutura 2 Premium

900g \$5.24 / 100g



Aptamil Toddler Profutura 3 Premium

900g \$4.94 / 100g



Aptamil Starter From Birth Profutura 1 Premium

900g \$5.24 / 100g

Ask Olive

## Toddler milk promotion undermines the health of non-breastfed toddlers:

Which in New Zealand currently, will be the majority of toddlers.

The Ministry of Health does not recommend that non-breastfed toddlers drink toddler milk; they recommend regular "blue top" (full fat) cows' milk.

I have already pointed out at the start, research showing "All toddler milks (*n* 32) were found to have higher energy, carbohydrate and total sugar levels than full-fat cow's milk per 100 ml"  
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10195549/>

### **In 2021 I found this out, for the NZ context, in an analysis I made of nutritional labels:**

Plain "blue top" cows milk for a non-breastfed toddler = 117mg calcium & 4.8g sugars per 100ml.  
The toddler milk I analysed at the time (a Nestle toddler milk, I'd say it was S26) = only 95mg calcium, sugars up at 7.2g per 100ml.

### **I did that out of curiosity in response to this media release from VicHealth in Australia:**

"MEDIA RELEASE

Toddler milks overpriced, high in sugar and potentially harmful to health

Health groups call for crackdown on aggressive marketing to families VicHealth is calling for an end to aggressive marketing of toddler milk formulas, as new research reveals some products are **up to four times more expensive than regular milk, but with more sugar and fewer key nutrients.**

The Deakin University and VicHealth study of 50 milks targeted at children aged 12 months and over found some cost up to \$1.02 per 200mL serve<sup>1</sup>, while regular cow's milk costs just 26 cents a serve – if drunk daily, toddler milk would cost a family as much as \$23.56 more per month than regular milk.

VicHealth CEO Dr Sandro Demaio said toddler milks are incredibly expensive and completely unnecessary.

"This research shows that toddler milk formulas are up to four times more expensive than their regular fresh milk counterparts. They're also less nutritious, containing more sugar and less protein than regular milk, while many also offer less calcium," Dr Demaio said.

"Despite this, manufacturers are using Instagram influencers, targeted digital advertising and on-pack claims to try and lure Australian families into believing these ridiculously priced products are 'essential' for their child's health.

"At a time when many families are finding it hard to afford healthy food, the last thing they need is to be guilted into thinking they should fork out excessive amounts of money on these unnecessary products."

Almost 1 in 6 Victorians were worried about being able to afford to put food on the table during the first coronavirus lockdown, a recent VicHealth survey found. More than a quarter of single-parent families and 1 in 10 families on low incomes ran out of food and couldn't afford to buy more<sup>2</sup>.

Some toddler milks contained up to 8g more sugar per 200mL serve than an equivalent fresh milk product. If drunk daily, a child would consume around 240g more sugar – or 60 teaspoons – over a month vs. the fresh milk option.

Dr Demaio said toddler milks fall into a regulatory loophole when it comes to marketing, and they may be harmful to a child’s health long-term.

“Unlike infant milk formulas, marketing claims about toddler milk products are under-regulated in Australia,” Dr Demaio said.

“This is potentially dangerous, as toddler milks could be harmful to the health of growing children. If children consume these toddler products instead of exploring regular foods and drinks, they won’t have a chance to develop healthy eating habits that are vital for a long, healthy and happy life.

“The Federal Government must urgently act to set higher standards for more honest labelling of added sugars and how these toddler products are marketed to families.”

<https://www.vichealth.vic.gov.au/sites/default/files/Toddler-milk-and-food-research-Media-Release.pdf#:~:text=%E2%80%9CThis%20research%20shows%20that%20toddler%20milk%20formulas%20are,many%20also%20offer%20less%20calcium%2C%E2%80%9D%20Dr%20Demaio%20said>

And this was Key finding 4 on the toddler milk problem, Indonesia. (via ARCH nutrition via Roger Nutritionist

[https://m.facebook.com/story.php?story\\_fbid=2530939280382843&id=100004003873896](https://m.facebook.com/story.php?story_fbid=2530939280382843&id=100004003873896)

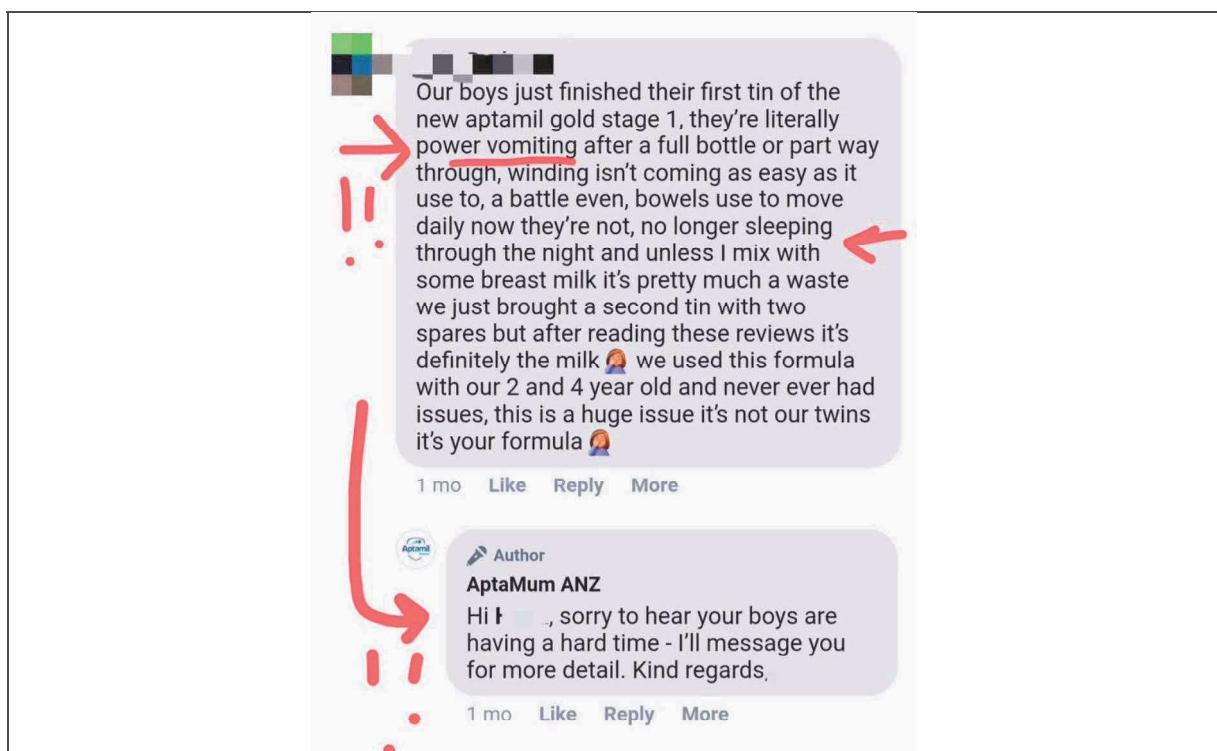
4. The average cost per 100ml of the growing-up milks was approximately 9 times that of the cost of whole cow’s milk, which is globally recommended for children older than 1 year who are no longer breastfed. Recognising the limitations of the price data used for the calculations, growing-up milks are very expensive compared to whole cow’s milk. Considering that the other aspects of this research showed most growing-up milks to be nutritionally inappropriate for this age group and they are globally not recommended, their high cost further adds to concerns on their use and relevance for feeding young children.

Citation - Helen Keller International (HKI). (2021). Nutritional Composition and Labelling Practices of Growing-up Milks (GUMs) Launched in Indonesia between January 2017 and May 2019. Helen Keller International, Washington, DC.

## Health detriments of infant formula companies positioning themselves as health-advice providers, as accommodated within this INC COP self-regulation status quo:

Then there are the infant and toddler health detriments of this situation where the infant formula companies are all over social media, setting themselves up as the quickest and most convenient point of contact for parents infant-health concerns about their babies consumption of their product:

This is a parent commenting on Danone's Aptamil's Australia/New Zealand Facebook page "Aptamum" (maybe a word play on Optimum?).



The parent is directed by the company to seek further contact with the company, rather than seek medical help quickly for her power-vomiting babies.

Ministry of Health advice from 2021: BELOW – is to seek medical help quickly if your child vomits often (Well Child Tamariki Ora advice).

How is this lack of 1981 WHO Code boundaries helping infants like these twins?

A child has diarrhoea if they have watery, dirty nappies more often than usual.

## Signs your child needs medical help quickly !

You should get medical help quickly if your child:

- will not drink or eat normally
- has several runny, dirty nappies in 1 or 2 hours
- vomits often
- has a fever
- is very thirsty
- has blood in their nappy
- is unusually irritable
- has sunken eyes and a dry mouth
- has diarrhoea that lasts longer than 24 hours.

**IMPORTANT** – as soon as diarrhoea starts

## Summary of the infant and toddler health-detriments matter, in relation to Commerce Commission decision on this matter:

In summary, the Commerce Commission needs to not just question the matter of likely infant health benefits. The NZ Government is obliged to implement the 1981 WHO Code and subsequent relevant WHA Resolutions, and under those subsequent relevant WHA Resolutions (namely the WHA Resolution of 2016), toddler milk would be expected to be placed under the marketing restrictions of WHO Code regulation by legislation. So the health benefits to toddlers need to be added to the counterfactual scenario of regulation by legislation. Marketing restrictions on toddler milk are not proposed by the INC for their proposed continued self-regulation scenario, and from their lobbying history I showed earlier, I'd wager they are unlikely to make such a proposal if pressed. Toddler milk marketing clearly serves a function of advertising infant formula products, as I have shown in this submission.

The status of toddler milk marketing, given it's impact and relevance, is something the Commerce Commission absolutely needs to consider for this decision.

Health Organisation material indicates 112 out of 143 countries protect babies up to 35 months of age, regarding inappropriate marketing of breastmilk substitutes. New Zealand needs to catch up. See page 16 of "Marketing of breast-milk substitutes National implementation of the International Code Status report 2022"

<https://www.unicef.org/media/120071/file/Marketing%20of%20Breast%E2%80%91milk%20Substitutes%20Status%20Report%202022.pdf>

Marketing of breast-milk substitutes: national implementation of the International Code | Status report 2022

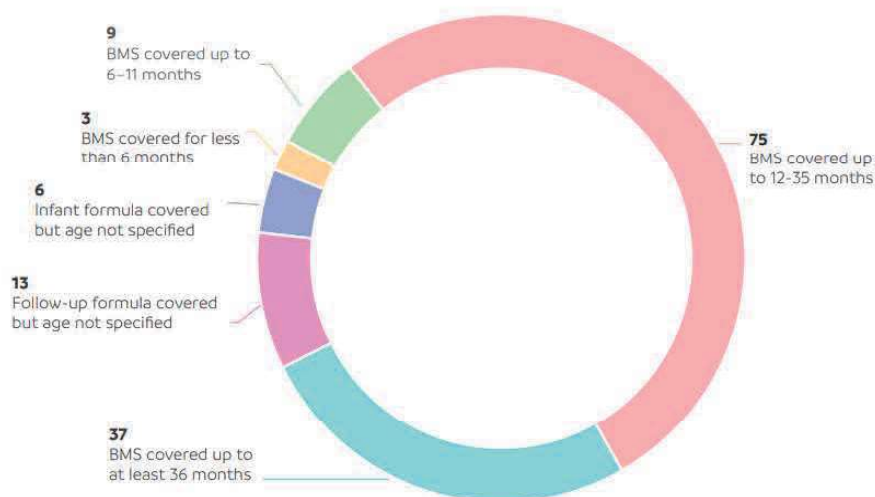


Figure 4. BMS products covered in scope of legal measures (n=143)

Above: as at 2022, 112 out of 143 countries include infants up to 35 months of age, regarding the 1981 WHO Code.

**Below:** Market research firm Coriolis concedes, in “UNDERSTANDING THE INFANT FORMULA VALUE CHAIN (2014) that infant formula is “renamed” Stage 2, Stage 3, etc. “primarily to avoid regulation and restrictions on advertising”. Page 9.

[https://static1.squarespace.com/static/62b234e5b82e3f577d752b01/t/631eadb7569c7802a2a621ca/1662954941538/coriolis\\_dairy\\_infant\\_formula\\_value\\_chain.pdf](https://static1.squarespace.com/static/62b234e5b82e3f577d752b01/t/631eadb7569c7802a2a621ca/1662954941538/coriolis_dairy_infant_formula_value_chain.pdf)

### HOW IS IT SEGMENTED?

CORIOLIS

Infant formula is typically defined as “birth to six months”; the product is then renamed for a range of reasons (primarily to avoid regulation and restrictions on advertising)



#### Five stage segmentation of infant/child nutrition products

Model; 2013

	STAGE 1/STEP 1	STAGE 2/STEP 2	STAGE 3/STEP 3	STAGE 4/STEP 4	STAGE 5/STEP 5	PREGNANT MOTHERS
Common name	Infant formula	Infant formula Follow on formula Follow up formula		Children's nutrition Toddler formula "Growing up milk"		
Regulatory environment	<ul style="list-style-type: none"> <li>- Highly regulated</li> <li>- Advertising banned (by law or voluntarily)</li> <li>- Manufacturers focus on selling through doctors &amp; nurses</li> </ul>	<ul style="list-style-type: none"> <li>- Less regulated as it is not the only source of food (baby is eating solids)</li> <li>- Advertising allowed</li> <li>- Traditional FMCG sales &amp; marketing</li> <li>- "take advantage of brand loyalty developed in Stages 1 and 2 to retain consumers as they grow older"</li> </ul>				<ul style="list-style-type: none"> <li>- Regulated as dairy</li> <li>- Advertising allowed</li> </ul>
Defined target age range	Birth to 6mo.	6mo. to 1 year	1 to 3 years	3 to 6 years	6 years +	Pregnant & lactating women
EXAMPLE range:						

Scientific Literature showing toddler milk markets infant formula products by proxy:

(Australia; relevant to the key/multinational INC Members)

<https://www.foodstandards.gov.au/code/proposals/Documents/Attachment%201%20to%20SD3%20-%20Consumer%20research%20on%20infant%20formula%20labelling.pdf>



“Berry, Jones, and Iverson (2010)<sup>9</sup> used semi-structured interviews with pregnant women to examine how they understood print advertisements for toddler milk products. Interviewees were 15 women pregnant with their first child who were recruited through antenatal classes. When they first looked at the advertisements, most of interviewees reported they were for ‘formula’, ‘baby formula’ or ‘infant formula’. Eight of the participants indicated the image of the packaging in the advertisement<sup>10</sup> showed the product was formula...

“Berry, Jones, and Iverson (2011) carried out a second study with a similar design, but including health professionals as well as mothers and grandmothers. Semi-structured interviews were carried out with a general practitioner, a community dietitian, mothers/expectant mothers (n=4), grandmothers/expectant grandmothers (n=4) and Child and Family Health nurses (n=7). As with the 2010 study, interviewees shown toddler milk advertisements tended to say they were for ‘formula’...

“A third study by Berry, Jones, and Iverson (2012) investigated whether parents recalled seeing advertisements for infant formula products. Berry and colleagues surveyed 439 expectant parents or parents with one or more children under five years at a parenting exposition in Sydney. The majority (92%) of respondents believed they had seen an advertisement for ‘formula’. Those respondents who had seen an advertisement were then shown pictures of five infant formula products and asked which, if any, they had seen advertised. Ninety one percent reported they had seen one or more of the products advertised.

“Respondents were asked further questions to ascertain whether they recalled seeing a type of advertisement that would be prohibited under the MAIF Agreement. Of the respondents who had reported seeing an advertisement for ‘formula’, 93% reported seeing an advertisement that did not originate from a retailer. Two thirds (67%) believed they had seen formula suitable from birth advertised and 45% believed they had seen formula suitable from 4-6 months advertised. Among respondents who had only seen a non-retail advertisement, 67% believed they had seen an advertisement for an infant formula product (i.e. believed they had seen a type of advertisement that was prohibited). The authors note that around the time of the study there were no breaches of the MAIF Agreement. They conclude that these respondents had actually seen advertisements for toddler milks but were incorrectly recalling these as infant formula advertisements. Another possibility is that they had actually seen advertisements for infant formula or follow-on formula from a retailer (not prohibited) but were mistaken about the source.

“Respondents in the study also recalled seeing claims for the products advertised. As part of 15 the survey, they were shown seven advertising messages based on mothers’ responses to actual toddler milk advertisements in the 2010 study. Over 90% reported seeing one or more of the seven messages advertised. The most common message they reported seeing was about omega 3, iron or probiotics in the formula. Other claims they reported seeing were that the product: ensures proper growth and development (53%), improves babies’ brain development (33%), could make babies happy/healthy (31%), was like breastmilk (27%), or strengthens immunity (25%).

“As the study relied on respondents’ recall of the advertisements they had seen, it is possible that some of these respondents had encountered these claims elsewhere (e.g. friends or family may have made these comments about particular brands of formula or toddler milks) but conflated them with advertisements. However, as the authors note, these types of claims were common in toddler milk advertising at the time of the survey. They concluded that respondents had seen advertisements for toddler milk containing these (or similar) claims and recalled these as infant formula advertisements. This could occur in one of two ways. The first is that respondents exposed to toddler milk advertisements believed they were for infant formula when they saw them. The second is that respondents understood when they saw the advertisements that they were for toddler milk, but then misremembered them as infant formula advertisements.”

## **Health detriments of health worker efforts diverted from delivering public health:**

This self-regulatory process relies on either health workers or members of the public making complaints. The Ministry of Health cannot instigate a complaint. Putting an onus on health workers (because, outside the formula marketers' industry (who would never report their own marketing), it is really only health workers who might get taught about the INC COP's existence), rather than people in the government who have that as their specific paid job, to monitor and report infant formula marketing violations is not in the interest of public health. It takes the health workers in an already stretched health system away from the work of improving public health.

As you can see from the two INC COP violations found in recent years that were not the twenty violations put forward by me, they were both about advertising in medical publications. So it would have been health professional time and effort that was diverted from their public health work, to submit and follow up on those complaints. That is detrimental to public health, compared to regulation by legislation, where staff dedicated to WHO Code monitoring do that work of dealing with WHO Code violations.

And with the INC now changing their INC COP Article 6.6 to channel infant formula donations through any (undefined) "health organisation", rather than the current scenario of donations via one health authority, then the onus on stretched health workers to whistleblow about Code violations will increase

## **Health detriments to people engaging in the INC COP complaints process:**

Members of the public who engage in the INC COP complaints process, who are not health workers themselves, will have a high likelihood of having neurodiversity, and being new mothers, in order to both become aware of and then engaged with this very niche and complex code. [REDACTED]

[REDACTED] New mothers and the neurodiverse are statistically more prone to mental health issues such as depression. Engaging with the INC COP complaints process has many aspects that could challenge mental health, such as:

- Having to take on the identity/label of "complainant", when "complaining" carries cultural stigma
- Having set timeframes to respond, even when life events like a death in the family, relocation, career changes may happen, and having complaints lapse while you have previously seen companies get extra time for their responses
- The tension felt dealing with incoming company responses
- The physically sedentary, and isolated, nature of sitting focused on a device for the hours you engage with the complaints process
- The lost time away from paid tasks, while working on this unpaid task.
- "burn-out" and energies diverted away from voluntary work in breastfeeding support

#### **4. I challenge the claim that the INC COP Article 6.6 change has no potential to significantly impact breastfeeding:**

**The change in the word of Article 6.6, from saying:**

“If in circumstances of emergency relief or poverty there are donated supplies, these need to meet the following conditions: • they are given to a single designated health agency to control, and are not provided directly from industry to consumer;....”

**To saying:**

“Donations of infant formula may be made to support safe and adequate nutrition for infants. Donated supplies need to meet the following conditions: • they are given to a health organisation to control and distribute appropriately, including to food charities, and are not provided directly from industry to consumer;...”

**And removing the final bullet point:**

“in the case of emergency relief, the donations are in accordance with national emergency preparedness plans and supporting documents.”

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This literature review from 2015 shows:

**“Clear evidence of a negative impact is found when breast-milk substitutes are provided for free in maternity facilities”**

**“The medical profession can also provide a means of circumventing regulation, as another prize-winning campaign explains: “Mead Johnson communicated the benefits of its Enfa A+Gentlease baby formula directly to doctors, to work around advertising regulations in the Philippines ... The approach resulted in 40% sales growth after three months” [32].**

<https://globalizationandhealth.biomedcentral.com/articles/10.1186/s12992-020-00597-w>

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The national emergency preparedness plans and supporting documents in New Zealand were created IN RESPONSE TO problematic infant formula donation practices after the Christchurch Earthquake. This evidently took the Ministry of Health YEARS to set up. And now compliance with it is written out of the INC COP? Watering down NZ's WHO Code Compliance yet again?:

<https://www.health.govt.nz/our-work/who-code-new-zealand/compliance-panel/meeting-summaries>

WHO Compliance Panel – Summary for Implementing and Monitoring the International Code of Marketing of Breast-milk Substitutes in New Zealand: The Code in New Zealand (Ministry of Health 2007) 1 July 2011 – 30 June 2012

There were a number of enquiries relating to The Code in New Zealand, which the Ministry responded to (in consultation), as appropriate with the INC. Themes included: • new non-INC members' marketing campaigns • **unintended consequences of donated formula in Christchurch, following the February 2011 earthquake** • how the Ministry monitors the Code of Marketing in New Zealand.

**WHO Compliance Panel – Summary for Implementing and Monitoring the International Code of Marketing of Breast-milk Substitutes in New Zealand: The Code in New Zealand (Ministry of Health 2007)**  
**1 July 2013 – 30 June 2014**

### **Infant feeding in emergencies**

In response to issues arising from the response to the Christchurch earthquake and to align with the World Health Assembly's 2010 resolution on infant and young child feeding in emergencies (WHA63.23)<sup>1</sup> the Ministry initiated work on infant feeding as part of national emergency preparedness plans. The work includes the Ministry's undertaking to revise its position statement and to provide advice on infant feeding in emergencies for parents/caregivers, health practitioners, and emergency responders.

As I pointed out on page 6, in bold red text – a loop-hole exists where health workers employed by INC Members as public relations workers get to avoid the Conflict-of-Interest rules in place for Health Workers, because employees of INC Members don't come under the Health Workers Code. In the absence of any INC COP definition of "health organisation", to accompany the alterations to Article 6.6, there is no evidence that a loophole hasn't been created where an INC Member may themselves establish/fund a "health organisation" for free infant formula distribution. Health-care provider, in the INC COP definitions essentially means an outfit/charity/etc. directly or indirectly involved with health care, and it is arguable that an outfit established to give free formula is involved in a health matter. Nursies and child-care providers also are named in the definition of "health care providers". Health workers, in the INC COP definitions, include "volunteers". There is a lot of scope for unethical marketing. The Commerce Commission has to take this 11<sup>th</sup>-hour INC COP change much more seriously.

Health workers/professionals are not immune to exposure to and/or participation in unethical formula brand marketing. See these details from past INC COP Compliance meeting summaries:

<https://www.health.govt.nz/our-work/who-code-new-zealand/compliance-panel/meeting-summaries>

### **"Summary for 9<sup>th</sup> meeting (8 February 2011)**

The Compliance Panel (CP) determined a Complaint against **a health worker giving free infant formula samples, from one infant formula manufacturer, to a mother of an exclusively breastfed infant aged six weeks** (Ministry of Health Complaint #09-2010-02). The CP found the health worker's employer Westgate Medical Centre (WMC) to be in breach of the Ministry's Code of Practice for Health Workers Articles 4.4, 7.1 and 7.2, in relation to inappropriate sample distribution and use. The CP has made

<sup>1</sup> World Health Assembly Resolution 63.23 (2010)

recommendations to WMC as to how they can improve their practice in relation to infant feeding advice including the distribution of infant formula samples.

The CP also finalised the drafting for the decision about the related complaint against an infant formula marketer (Ministry of Health #09-2010-01). The CP did not find the infant formula marketer to be in breach of the INC Code of Practice for the Marketing of Infant Formula, but did suggest recommendations to reduce the risk of such a complaint being made in the future.

#### **Summary for 10<sup>th</sup> meeting (10 May 2011)**

The Compliance Panel (CP) determined a Complaint against an infant formula company's mail-out to health workers which included a 32g sample (Ministry of Health Complaint #12-2010-05). The CP was unable to reach a majority decision in relation to whether there had been a breach of the INC's Code of Practice for the Marketing of Infant Formula Samples in relation to Article 7.3. The CP has made recommendations to the company as to how they can improve their practice. These were:

- that the company should not include samples in mail-outs to health workers
- that the purpose of distributing any samples should always be stated
- that the company's database should be updated to ensure the right health workers are getting the right information.

And I will remind you again, of these confirmed INC COP violations by INC Members, in relation to unethical engagement with the health sector:

- **Complaint 04-2019-02:** which concerned Plunket receiving ongoing funding, funding for education or indirect funding from several producers/distributors of breast milk substitutes was upheld by the Panel in relation to its sponsorship/acceptance of payment for conference attendance. (My own note here; Heinz, owner of Nurture formulas, is a company involved. The Plunket / Heinz relationship seems to have continued regardless.)
- **Complaint 10-2018-02:** concerned a Nutricia Aptamil advertisement for infant formula in the New Zealand Doctor magazine which the complainant alleged was aimed at the 0-12 month age group and **did not provide factual and educational information for medical professionals.** The complaint was upheld by the Panel.

The INC's addition of medical reasons for infant formula donations raises concerns too. Infant formula for medical reasons like cows' milk allergy is already free for families who need it, via Pharmac funding. See <https://bpac.org.nz/BPJ/2011/May/formula.aspx>. So what other reason is there for the addition of this phrasing to INC COP Article 6.6?

Here is information on specialty formula marketing, from an overseas research paper in the Lancet, 2023:

[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(22\)01931-6/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(22)01931-6/fulltext)

#### **... "The misuse of infant behaviour and development in commercial milk formula (CMF) marketing**

"Worldwide, parents want their children to be healthy and to have a good life. The CMF industry exploits these desires in their marketing efforts. A common approach is to suggest that CMF is a solution to parents' concerns about infant behaviour that is part of normal development. For instance, labels and advertisements highlight that use of a specific brand of CMF can alleviate fussiness, flatulence, and crying.<sup>50 51. 52</sup>

We have recreated artwork that illustrate the messages commonly found on CMF packaging ([figure 3A–C](#)). One real-life label on CMF packaging indicates that relief from these infant behaviours can be accomplished within 24 h and brain development will be enhanced at the same time. <sup>50</sup>

The words gentle, sensitive, soothe, and comfort appear frequently to reassure parents and terms such as premium appeal to emotional values, strengthening these associations. <sup>50, 52</sup>

Comfort milks can have additives or special composition, such as prebiotics, hydrolysed proteins, xanthan gum, or low lactose. However, claims that these additives provide relief for infant discomfort are not supported by trials that meet evidence standards expected of health recommendations. <sup>53</sup>

Claims to alleviate infant discomfort also provide the foundation for specialty formulas that aim to address various sensitivities and allergies. The specialty milk market has been one of the most profitable areas of expansion: an effect probably aided by industry's active role in supporting guideline development for diagnosing cow's milk allergy. Their marketing links normal baby behaviours, such as crying, to cow's milk allergy, undermining confidence in breastfeeding. <sup>54 55</sup>

Another marketing target is sleep—or the lack of sleep for both parents and infants. In the first few months, infant sleep duration is short during day and night, and increasingly follows diurnal patterns. As part of normal human development, sleep patterns consolidate over the course of several months in concert with ongoing night-time breastfeeding. Yet, health-care providers and parents predominantly in high-income settings often have unrealistic expectations that their infants will sleep in a pattern that is synchronous with adult sleep. <sup>56</sup>

This misconception is further compounded by structural conditions that oblige mothers to return to work shortly after birth. CMF marketing exploits this notion by claiming CMF improves or consolidates sleep so that infants sleep at night for longer periods of time. This claim is neither accurate, given that sleep consolidation is a product of human development, nor desirable, given that formula feeding is associated with adverse health outcomes, including in high-income settings. <sup>1, 57, 58</sup>

Industry discussions are open about how they use parental fatigue and uncertainty to sell their product. <sup>59</sup>

The published business report of an international trade event, 2017 Vitafoods, <sup>59</sup> described how the chief executive officer (CEO) of an Irish nutrition company tried “to define the sector's characteristics” and how “...infant nutrition wasn't necessarily about the ingredients or innovation”. The CEO was quoted as saying, “What we are selling is actually sleep...If the baby doesn't sleep for three nights and the mother is exhausted, the mother will change the infant formula. So that's what we're selling.” The report went on to describe how a fellow panellist, managing partner of another company, echoed these comments, adding that they were “selling peace of mind”.

However, one of the most pervasive suggestions is that CMF will encourage superior intelligence ([figure 4A–C](#)) compared with other products through advertisements that use terms such as brain, neuro, and intelligence quotient written in large font, and images that suggest achievement and early development. For instance, in one real-life advertisement a formula product is called Neuro Pro and claims to be “brain building” with additional text reading “for a life full of wonder”. <sup>60</sup> With another product, “Nurture Intelligence” is the dominant text on the packaging. <sup>61</sup>

Images show infants with glasses or holding a pencil to signal a precocious ability to read or write. In another, a baby boy is depicted using an abacus while an image behind shows an adult male solving mathematical equations, implying future intelligence as a result of CMF. <sup>62</sup>

<https://www.bmj.com/content/363/bmj.k5056#:~:text=Between%202006%20and%202016%2C%20prescriptions%20of%20specialist%20formula,have%20raised%20the%20question%20of%20industry%20driven%20overdiagnosis.>

## Overdiagnosis and industry influence: how cow's milk protein allergy is extending the reach of infant formula manufacturers

*BMJ* 2018; 363 doi: <https://doi.org/10.1136/bmj.k5056> (Published 05 December 2018) Cite this as: *BMJ* 2018;363:k5056

Allergy to cow's milk protein may be acting as a Trojan horse for the \$50bn (£40bn; €44bn) global formula industry to forge relationships with healthcare professionals in the UK and around the world.<sup>1</sup> Experts believe these relationships are harmful to the health of mothers and their children, creating a network of conflicted individuals and institutions that has wide ranging effects on research, policy, and guidelines. **Potential overdiagnosis of the allergy can also have negative effects on breast feeding.**

Between 2006 and 2016, **prescriptions of specialist formula milks for infants with cow's milk protein allergy (CMPA) increased by nearly 500% from 105 029 to over 600 000 a year,**<sup>2</sup> while NHS spending on these products increased by nearly 700% from £8.1m to over £60m annually.<sup>3</sup> Epidemiological data give no indication of such a large increase in true prevalence<sup>4,5</sup>—and the extensive links between the formula industry and the research, guidelines, medical education, and public awareness efforts around CMPA have raised the question of industry driven overdiagnosis.

Nigel Rollins from the World Health Organization's department of maternal, newborn, child, and adolescent health tells *The BMJ*, "It's reasonable to question whether these [prescription and spending] increases reflect a true increase in prevalence."

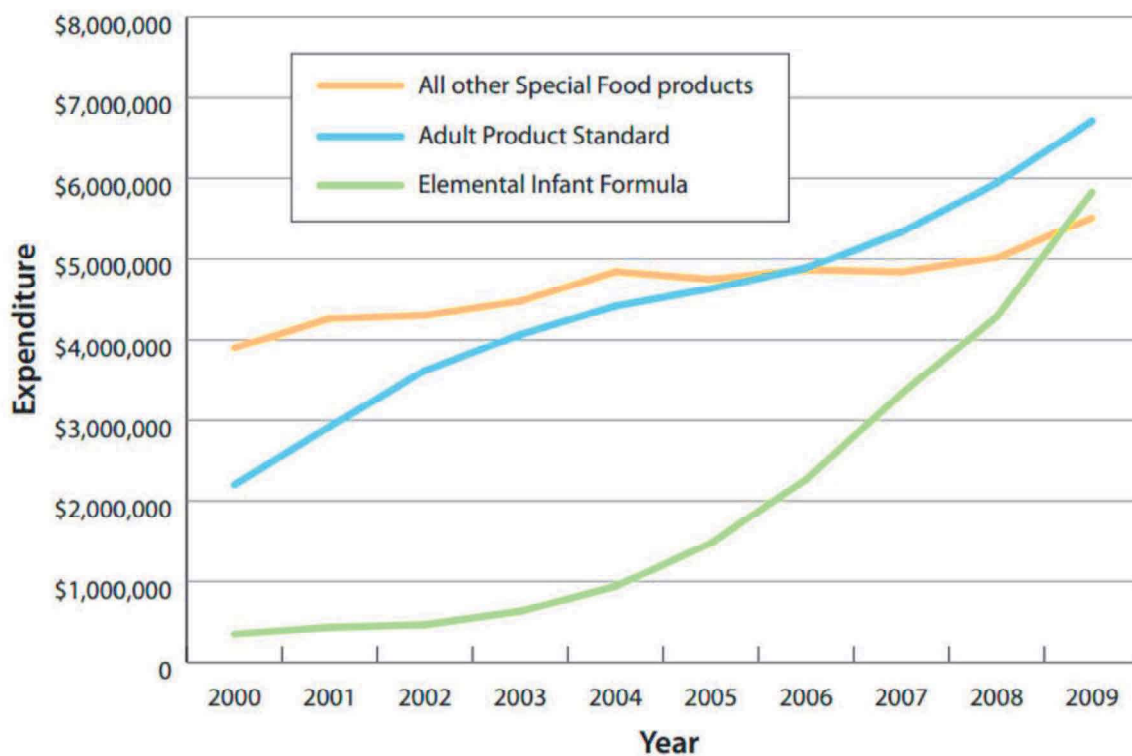
...

**You can see the trend that has occurred in increasing expenditure on just one type of special infant formula in New Zealand here (green line on the graph) :**

(see <https://bpac.org.nz/BPJ/2011/May/formula.aspx> )

be funded (and be a private cost).

Figure 1: Special Foods expenditure in the Pharmaceutical Budget (main categories)



**THE CHANGE TO INC COP ARTICLE DOES NOT DO WHAT THE CURRENT WHO CODE REQUIREMENTS ASK, REGARDING INFANT FORMULA DONATIONS:**

**P11 (emphasis mine), from the World Health Organisation GUIDANCE ON ENDING THE INAPPROPRIATE PROMOTION OF FOODS FOR INFANTS AND YOUNG CHILDREN IMPLEMENTATION MANUAL**

“Supply distribution through **officially sanctioned health programmes**

**Some governments** do distribute foods, particularly to low-income families, as a means to improve nutritional status. It is important that such programmes make a meaningful contribution to the diets of children and do not simply induce the families to buy more of the product.

“**Government approval and operation of such programmes can ensure governance over the distribution of foods for infants and young children.** However, circumstances exist where government infrastructure is weak and government approval is not always possible. Under such circumstances, other organizations that have high-level oversight on child health, such as UN organizations or large non-governmental organizations, must determine which products are appropriate for distribution. **Individual clinicians or health clinics should not have the authority to determine whether a**



particular case is “exceptional”. Thus, “officially sanctioned health programmes” implies that an official or higher entity needs to review a proposed programme that may or may not be governmental.

“When such programmes exist, it is important that unbranded packaging (or a brand created just for the programme) is used. This is to prevent the use of the programme as means of brand promotion, and/or product introduction onto the new market.”

<https://iris.who.int/bitstream/handle/10665/260137/9789241513470-eng.pdf?sequence=1>  
GUIDANCE ON ENDING THE INAPPROPRIATE PROMOTION OF FOODS FOR INFANTS AND YOUNG CHILDREN IMPLEMENTATION MANUAL

## SUMMARY OF POINTS ON THIS MATTER OF ARTICLE 6.6 CHANGING:

- At least one major INC Member, Danone, has a recorded history of at least once not providing factual information it is material for an NZ medical publication; this could continue and worsen.
- Plunket has a recorded history of association with several breastmilk-substitute companies, so we know health organisations in NZ are vulnerable to relying on commercial influences.
- NZ’s current infant-feeding-relevant emergency response materials were created in response to problematic infant formula donations in the Christchurch Earthquake emergency, and now the INC ditches responsibility to that and further dilutes the breastfeeding protection infrastructure of our country
- Formula brand promotion by health professionals led to a 40% increase in sales within three months, in the Philippines; the halo effect of association with medical professionals promotes the product in the community. Even if INC COP says the free formula will go to that family for the entire time that infant needs the formula, the brand association with the health sector, and word of mouth, etc., will promote the product.
- Regarding specialty infant formulas, research indicates the formula industry uses these as a growth area. With medical reasons specified in the new INC COP Article 6.6 as a reason for infant formula company relationships being with health workers via free donations, there is every indication that infant formula products will be promoted via INC COP article 6.6’s allowances.
- Pharmac spending on elemental infant formula for Cows Milk Protein Allergy (CMPA), judging by the above (p 32) graph, increased over ten-fold, from below \$500,000 to nearing \$6 million dollars, from the year 2000 to 2009. NZ is a country with only approximately 60, 000 babies born a year. Exclusively breastfed babies are less likely to develop CMPA, and develop less severe symptoms if they do develop CMPA. A climate of infant formula donations via an under-pressure health systemic could have the iatrogenic effect of increasing CMPA prevalence.
- The current WHO Code requirements (2016 update), regarding infant formula donations, are that they are via a government-approved organization, and that they are donations on unbranded product (so not a sales promotion act). The INC COP change enacts NEITHER of those two key requirements. Before, it at least enacted one of them (the approved organization/authority for managing donations). The INC COP change is not enacting WHO Code expectations.

## 5. INC Membership does not guarantee the consumer anything more than non-INC Membership, in terms of Food Standards Compliance:

The Commerce Commission draft decision talks of the possible detriment of lesser quality infant formula from non-INC Members being promoted more than INC Members' infant formulas. The Ministry of Health will be able to confirm with the Commerce Commission that there is no evidence that one formula is better than another. They used to say exactly that in the former background paper for our nation's infant and toddler eating guidelines (if not also in the current relevant publications). The strict requirements of Food Standards legislation means formula must meet a standardized quality level to be sold for consumption. Any formula from small companies will be produced on a big company's canning line with different labels on the cans, not produced in someone's garage.

The Commerce Commission has previously, in 2021, been informed by me of apparent Food Standards labelling breaches, by an INC Member. The apparent breaches indicate INC Membership does not guarantee the consumer anything more than non-INC Membership, in terms of Food Standards Compliance. Another formula brand Bluebell (not sure if they have ever been INC Members) was also similarly found to be in violation of the Food Standards Code.

Below is a cut-and-paste of the 2021 email CCed to the Commerce Commission:

**To:** info@mpi.govt.nz

**Cc:** info@health.govt.nz, contact@comcom.govt.nz

Sat, 1 May 2021 at 8:54 am

Kia ora,

Please forward to Food Standards Compliance for MPI, Infant Nutrition/Health for MoH, and Fair Trade Act Compliance for Commerce Commission.

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.  
.

I am concerned that Zuru's Haven infant formula is violating labelling and health claims law. Please see photos attached. Their infant formula labelling reads (emphasis mine):

"... an A2 infant formula for precious TUMMIES... carefully combined with vital ingredients... "our formula as contain everything you need to support growing bodies and inquisitive MINDS... "

Surely that language must violate the law on no health claims (claims of effect on the body and/or particular parts of the body, in this case tummies and minds).

FSANZ Standard 2.9.1 defines:

"infant formula product means a product based on milk or other edible food constituents of animal or plant origin which is nutritionally adequate to serve by itself either as the sole or principal liquid source of nourishment for infants, depending on the age of the infant."

How has the idealising, promotional product definition on Zuru's labelling been able to happen?

"Adequate"... compared to Zuru's "vital", "everything you need", etc?

Further, their labelling reads "the infant formula product may be used by infants from birth to 6 months".

The labelling law is "the required statements are ones indicating that: (a) for infant formula - the infant formula product may be used from birth"

..."( then the recommendation to indicate that foods are introduced from mid-infancy).

That labelling in indicating the product can only be used until age 6 months (then usage must stop), is obscuring the true nature of the product, which becomes a Fair Trade Act issue too. And it is a health concern, as the Ministry of Health Food and Nutrition Guidelines advise staying on the Stage 1 formula in the second half of infancy, for formula fed babies. And not putting an infant through that formula change (to Stage 2) if they are doing well on Stage 1.

See photos attached. Photos are from Zuru's website <https://www.havenbaby.co.nz/products/stage-1>

Thank you

Ngā mihi,

Julie Fogarty”

**The responses from the MPI were:**

[Redacted]@mpi.govt.nz>

To: [Redacted]

Thu, 24 Feb 2022 at 3:11 pm

Hello Julie,

I am sending you this email following the completion of the investigation into the concerns you have raised about Zuru New Zealand Limited Haven brand infant formula. My apologies for the time elapsed since you contacted MPI.

It was found that there were health claims made in on-line advertising and on product labels that do not comply with the requirements of the Australia New Zealand Food Standards Code. The business has undertaken to remove the non-compliant health claims from all media. Please note that New Zealand Food Safety can only action concerns that are a breach of the Food Act 2014.

If you have any questions about the investigation please feel free to contact me.

Ngā mihi

| Senior Food Compliance Officer, Food Compliance Services  
Food Compliance and Response | New Zealand Food Safety – Haumaru Kai Aotearoa  
Ministry for Primary Industries - Manatū Ahu Matua | 21 Domett Street, Ahuriri | PO Box 12034 |  
Napier 4110 | New Zealand  
Telephone: [Redacted] | Mobile: [Redacted] | Web: [www.foodsafety.govt.nz](http://www.foodsafety.govt.nz)

To: [REDACTED]

Wed, 2 Mar 2022 at 11:57 am

Good morning Julie

I would like to use this opportunity to update you with an outcome following the completion of the investigation into the concerns you have raised about Aotearoa Nutrients Ltd – Bluebell brand infant formula. My sincere apologies for the time taken since you have contacted MPI.

A review of the Bluebell Facebook page and website was done and non-compliant (health claims) and prohibited statements were identified in breach with the requirements of the Australia New Zealand Food Standards Code (the Code). The business was contacted and has undertaken to remove the non-compliant health claims and prohibited statements from all social media and their website. The “reviews” section of the Facebook page was removed in their entirety. Other corrective actions were implemented by the business to ensure that their social media accounts and website contents do not breach the Code going forward.

Thank you again for your patience awaiting this outcome.

Kind Regards

Liaison & Coordination, Food Compliance Services  
Food Compliance & Response | New Zealand Food Safety - Haumaru Kai Aotearoa  
Ministry for Primary Industries - Manatū Ahu Matua || 11 Nikau Crescent, Mount Maunganui 3116  
| Private Bag 12031, Tauranga Mail Centre 3143| New Zealand  
Telephone: [REDACTED] | Web: [www.foodsafety.govt.nz](http://www.foodsafety.govt.nz)

## Key questions the Commerce Commission needs to ask:

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As the 1981 WHO Code, and its subsequent relevant resolutions, state that WHO Code compliance should be free from commercial influence, how appropriate is it for a signatory State like New Zealand to have industry self-regulation of the WHO Code in place? How appropriate is it for the industry to be able to submit to a government department, and have a conclusion reached that continued industry self-regulation – over regulation by legislation - is the option of most benefit to the public?

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If the INC COP keeps breastfeeding rates at (a conservative estimate of) 1% better than they would otherwise be, then how does the tracking of INC Member product sales on the NZ domestic market over the years since 2015 (when the Commerce Commission first authorized the INC COP) stack up in support of this theory? These numbers aren't given to us members of the public in this Commerce Commission process, so the Commerce Commission needs to do this. I would hazard a guess that revenue from sales of infant formula product ranges (toddler and junior milks included) have increased rather than decreased.

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Why does the potential of this industry to act as public health advisory services to families need to yet again, in Commerce Commission work, be referred to as a source of possible benefit to consumers? Why were the Ministry of Health 2018 submissions on this matter ignored for the 2023 draft decision? We don't blink twice at general food sellers, or medicine manufacturers, not being set up as our health advisors. We don't have day-care centers advertising that day-care is great because you can ditch your baby and go back to work (as the Commerce Commission has proposed would be one beneficial advice area from INC Members). Why should the Commerce Commission view the infant formula industry differently?

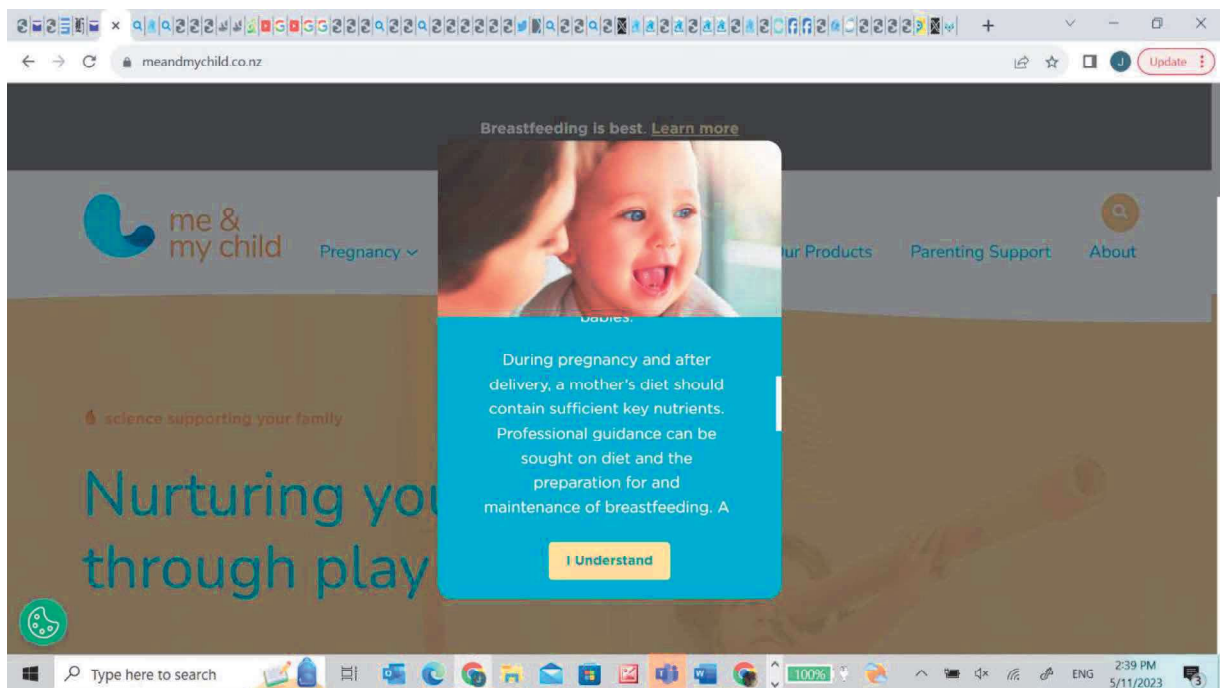
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What can the commerce commission do to stop the INC using it as a forum to publish health claims about optional extra components of infant formula? When those components are optional because they are not proven as beneficial; why do we have the government organisation who is in charge of compliance with the Fair Trade Act, functioning as the medium for an industry to publish such health claims?

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Why, when I previously submitted to the Commerce Commission a range of examples of how the infant formula industry was providing misleading material (about breastfeeding) to pregnant women and mothers in New Zealand, was that matter referred back to the Ministry of Health as under their remit – when in this scenario of the infant formula industry submitting to the Commerce Commission that they act in a manner that benefits breastfeeding, we see no involvement/submission from the Ministry of Health apparent?

Example of INC Member Nestle misleading pregnant women and mothers about their breastfeeding:



It reads:

During pregnancy and after delivery, a mother's diet should contain sufficient key nutrients. Professional guidance can be sought on diet and the preparation for and maintenance of breastfeeding

So fear-mongering about the quality of maternal diet, making it sound like special, complicated professional help is needed. While the Ministry of Health's reassuring advice, in contrast, is:

"Healthy eating while breastfeeding is important, but if you are worried about the quality of your diet, don't let that stop you from breastfeeding. Breastfeeding is still the best option for your baby"

---

I will close with the details from this research paper showing that in Australia, which has INC Member self-regulation just like here in New Zealand, infant formula company marketing adapted and became more, not less, prolific. The paper concludes that strong regulation is needed:

<https://onlinelibrary.wiley.com/doi/ft/10.1111/1753-6405.12081>

# Infant food marketing strategies undermine effective regulation of breast-milk substitutes: trends in print advertising in Australia, 1950–2010

[Julie Smith](#), [Miranda Blake](#)

First published: 30 July 2013

## Abstract

**Objective** : This study addresses the issue of whether voluntary industry regulation has altered companies' marketing of breast-milk substitutes in Australia since the adoption of the World Health Organization (WHO) International Code on the Marketing of Breast-milk Substitutes 1981.

**Methods** : Print advertisements marketing breast-milk substitutes were systematically sampled from the Australian Women's Weekly (AWW) magazine and the Medical Journal of Australia (MJA) for the 61 years from 1950 to 2010.

**Results** : Breast-milk substitute advertising in both the MJA and the AWW peaked and began declining before the introduction of the WHO Code in 1981. Although there was almost no infant formula advertising in AWW after 1975–79, other breast-milk substitute advertising has been increasing since 1992, in particular for baby food, toddler formula and food and brand promotion.

**Conclusions** : Companies have adopted strategies to minimise the effects of the Code on sales and profit in Australia, including increasing toddler formula and food advertisements, increasing brand promotion to the public, and complying with more limited voluntary regulatory arrangements.

**Implications** : Comprehensive regulation is urgently required to address changed marketing practices if it is to protect breastfeeding in Australia.

## APPENDIX: OIA documentation

**From:** TND

**Sent:** Monday, 16 May 2016 7:20 p.m.

**To:** GENEVA; [s6(a)] [s6(a)]

**Cc:** ...WLN TRADE DIVISIONS; FM.P/S MFA; FM.P/S Trade; FM.P/S Health; FM.P/S Food Safety; FM.P/S Agriculture; FM.Health Ministry (Seemail); FM.MPI (Seemail); CEO; FM.DPMC (FPA); ...TRADE POSTS

**Subject:** RE: Formal Message: Tasking for Posts ahead of the World Health Assembly (23-28 May 2016)

### Distribution

MOH: [s9(2)(a)]

MPI: [s9(2)(a)]

[s9(2)(a)]

### Summary

- Attached is New Zealand's marked up version of the draft resolution text to be shared with the WHO Secretariat and Ecuador as chair of the consultation process.
- Also attached is New Zealand's negotiating position, a para by para breakdown of the draft resolution, and proposed revisions to the WHO Guidance itself – which reflects the content of previous submissions to the WHO by New Zealand. These documents can be used to inform discussions with like-mindeds and deliberations at the informal consultation on 20 May.

### Action

- Geneva to share draft resolution text with the WHO Secretariat and Ecuador. (Para 1)
- [s6(a)] [s6(a)] to share draft resolution text with host government agencies and with likeminded delegations, using New Zealand's negotiation position to inform their discussions, and to explore whether like-mindeds see value in continuing to push to have the Guidance reopened for drafting.

### Report

1 As indicated our FM of 13 May, we attach New Zealand's marked up version of the draft resolution text to be shared with the WHO Secretariat and Ecuador, as chair of the informal consultation process. Grateful if posts could share our draft resolution text with host government agencies and raise New Zealand's concerns around the resolution as currently drafted.

2 Also attached is New Zealand's negotiating position, a para by para breakdown of the draft resolution, and proposed revisions to the WHO Guidance itself as contained in previous submissions to the WHO by New Zealand. These two documents, which provide drafting instructions and key redlines, can be used to inform discussions with like-mindeds, and be used to find common ground between all parties.

3 Grateful if posts could also explore whether like-mindeds see value in continuing to seek redrafting of the Guidance, drawing on previous reporting and the attached "WHO guidance revisions" to support this conversation.



		<p>appropriate and safe use, and that the promotion of such products for infants under 6 months of age has been associated with earlier cessation of exclusive breastfeeding</p>
<p>§6(a)</p>		<p>§6(b)</p>
	<p>§6(a)</p>	<p>§6(b)</p>
		<p>PP6 Convinced that guidance on ending the inappropriate promotion of foods for infants and young children is needed for Member States, the private sector, health systems, civil society and international organizations,</p>
	<p>§6(a)</p>	<p>§6(b)</p>
	<p>§6(a)</p>	<p>§6(b)</p>

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<p>56(b) guidance on ending the inappropriate promotion of foods for infants and young children;</p>	<p>56(a)</p>
<p>OP2 URGES Member States [(FOOTNOTE: And, where applicable, regional economic integration organizations)] [(FOOTNOTE: taking into account the context of federated states)]</p>	<p>56(a)</p>
<p>OP2.a, OP2.b, OP2.c, OP2.d, OP2.e</p>	<p>56(a)</p>
<p>OP2.b, OP2.c, OP2.d</p>	<p>56(a)</p>
<p>OP2.a to take all necessary measures to implement the guidance on ending the inappropriate promotion of foods for infants and young children, while taking into account existing legislation and policies, 56(a)</p>	<p>56(a)</p>

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<p>s6(b)</p>	<p>as</p>	<p>appropriate;</p>
<p>s6(a)</p>	<p>s6(a)</p>	<p>OP2.b to establish a system for monitoring, evaluating and enforcing the implementation of the guidance on ending the inappropriate promotion of foods for infants and young children, <u>AND</u></p>
<p>s6(a)</p>	<p>s6(a)</p>	<p>s6(b)</p>
<p>s6(a)</p>	<p>s6(a)</p>	<p>OP2.c to s6(b) of the International Code of Marketing of Breast-milk s6(b) and relevant subsequent Health Assembly resolutions, <u>AND</u> <u>OR</u> s6(b)</p>

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56(b)		
OP2.d	to implement,	56(a)
56(b)	the Codex Guidelines on Formulated Complementary Foods for Older Infants and Young Children and other relevant Codex standards and guidelines, <u>AND</u>	56(b)
OP2.e	to implement the WHO set of recommendations on the marketing of foods and non-alcoholic beverages to children, and to adopt a comprehensive approach to implementation of those recommendations, including through legislation,	56(b)
	paying particular attention to ensuring that settings where infants and young children gather are free from all forms of marketing of foods that are high in saturated fats, trans-fatty acids, free	

<p>sugars, or salt;</p> <p>OP3 CALLS UPON manufacturers and distributors of foods for infants and young children to end all forms of inappropriate promotion by fully implementing the recommendations set forth in the guidance on ending the inappropriate promotion of foods for infants and young children, irrespective of whether the recommendations have been transposed into national legislation;</p> <p>56(b)</p>	<p>56(a)</p>
<p>OP4 CALLS UPON health care professionals to fulfil their essential role in providing parents and other caregivers with information and support on optimal infant and young child</p> <p>56(b)</p> <p>and to implement the recommendations set forth in the guidance on ending the inappropriate promotion of foods for infants and young children, irrespective of whether the recommendations have been transposed into national legislation;</p>	
<p>OP5 CALLS UPON the media and creative</p>	

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<sup>1</sup> WHO, UNICEF, Acceptable medical reasons for use of breast-milk substitutes, WHO, 2009, (USA) GOVE-14-10242

<p>industries to ensure that their activities across all communication channels and media outlets, in all settings and using all marketing techniques comply with the recommendations set forth in the guidance on ending the inappropriate promotion of foods for infants and young children</p>	
<p>OP6 CALLS UPON civil society to engage in advocacy work for and activities to monitor the implementation of the guidance on ending the inappropriate promotion of foods for infants and young children;</p>	
<p>OP7 REQUESTS the Director-General</p>	
<p>OP7.a to provide technical support to Member States in implementing the guidance on ending the inappropriate promotion of foods for infants and young children and in monitoring and evaluating its implementation</p>	
<p>56(b)</p>	<p>56(A)</p>

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<p>OP7.b to strengthen international cooperation with United Nations organizations, most notably FAO, UNICEF and WFP, in promoting national implementation of the guidance on ending the inappropriate promotion of foods for infants and young children</p>	
<p>OP7.c to report on implementation of the guidance on ending the inappropriate promotion of foods for infants and young children as part of the report on progress in implementing the comprehensive implementation plan on maternal, infant and young child nutrition to the Seventy-first and Seventy-third World Health Assemblies in 2018 and 2020.</p>	

**Proposed revised recommendations for the WHO Guidance on ending the inappropriate promotion of foods for infants and young children – key changes which will allow New Zealand endorsement of the Guidance**

**Recommendation 2.**

*Products that function as breast-milk substitutes should not be promoted. A breast-milk substitute should be understood to include any milks (or products that could be used to replace milk, such as fortified soy milk), in either liquid or powdered form, that are specifically marketed for feeding infants and young children up to the age of 3 years (including follow-up formula and growing-up milks). It should be clear that the implementation of the International Code of Marketing of Breast-milk Substitutes and subsequent relevant Health Assembly resolutions covers all these products.*

The inclusion of all milk products within the definition of 'breast-milk substitutes' could be interpreted as including products, such as fresh milk, dried cows' milk powder, and fermented milk; yet the WHO Guiding Principles<sup>3</sup> recommend consumption of these products for complementary feeding. The New Zealand government does not support the breadth of this prohibition if it applies to the promotion of any milk products for young children up to the age of 3 years and considers that the appropriate promotion of cows' milk as a suitable, if not recommended, food for young children should be permitted.

As New Zealand has already noted, the Codex Alimentarius Commission is currently reviewing the Standard for Follow-up Formula and has yet to reach a decision on whether follow-up formula products targeted to older infants (6-12 months) and young children (12-36 months) are considered breast milk substitutes, and, importantly, the labelling requirements of the standard. Through the Codex review of the Standard for Follow-up Formula, global data has been collected on the role of these products in the diets of older infants and young children. The conclusions of this review is that follow-up formula type products consumed from 12 to 36 months of age can have a variable role in the diets of young children globally, but will mostly function as a replacement for cows' milk, rather than breast milk<sup>4</sup>.

We consider that this recommendation should focus on inappropriate promotion of products for use as a partial or total replacement for breast-milk, consistent with the WHO 2013 document<sup>3</sup> which states:

If follow up formula is marketed or otherwise represented to be suitable, with or without modification, for use as a partial or total replacement for breast-milk, it is covered by the Code. In addition, where follow-up formula is otherwise represented in a manner which results in such product being perceived or used as a partial or total replacement for breast-milk, such product also falls within the scope of the WHO Code. [Emphasis added]

New Zealand is of the view that the International Code of Marketing of Breast-milk Substitutes, subsequent WHA resolutions and the WHO 2013 Guidance are sufficiently clear that products that are marketed or presented as a partial or total replacement of breast-milk are covered by the Code, and can be interpreted by Member States to include follow-up formula products based on their national context.

We consider it important to ensure there is consistency between definitions used in WHO Guidance and Codex. To ensure this consistency is maintained, we propose the following amendment to the text:

<sup>3</sup> Guiding principles for feeding non-breastfed children 6-24 months of age, 2005.

<sup>4</sup> CX/NFSDU 14/36/7. Review of the Standard for Follow-up Formula (Section 4)



**Proposed Recommendation 2:** "Products that function as a breast-milk substitute should not be promoted. A breast-milk substitute should be understood to include any food, in either liquid or powdered form, that is presented or promoted as a partial or total replacement of breast-milk. If a food is promoted or otherwise represented to be suitable, with or without modification, for use as a partial or total replacement for breast-milk it should be clear that the implementation of the International Code of Marketing of Breast-milk Substitutes and subsequent relevant Health Assembly Resolutions covers all these products."<sup>5</sup>

### **Recommendation 3**

*Foods for infants and young children that are not products that function as breast-milk substitutes should be promoted only if they meet all the relevant national, regional and global standards for composition, safety, quality and nutrient levels and are in line with national dietary guidelines. Nutrient profile models should be developed and utilized to guide decisions on which foods are inappropriate for promotion. Relevant Codex standards and guidelines should be updated and additional guidelines developed in line with WHO's guidance to ensure that products are appropriate for infants and young children, with a particular focus on avoiding the addition of free sugars and salt.*

New Zealand is concerned with the text contained within this recommendation and the directive to include nutrient profiling and reviews of Codex Standards and Guidelines without any assessment of the necessity to do so. Recommendation 3 undermines the work of the Codex Alimentarius Commission which is guided by its overall mandate of protecting the health of consumers and ensuring fair practices in trade. Nor does it acknowledge that the current provisions within the Codex Guidelines for use of Nutrition and Health Claims are aligned with the Guidance, clearly stating "Nutrition and health claims shall not be permitted for foods for infants and young children except where specifically provided for in relevant Codex standards or national legislation." The directive contained within Recommendation 3 is one which New Zealand could not support, especially in light of our concerns relating to the current drafting of Recommendation 2.

### **Proposed Recommendation 3**

*Foods for infants and young children that are not products that function as breast-milk substitutes should be promoted only if they meet all the relevant national, regional and global standards for composition, safety, quality and nutrient levels and are in line with national dietary guidelines. Reviews of relevant Codex Standards and Guidelines should be aligned with the WHO Guidance concerning ending the inappropriate promotion of foods for infants and young children.*

### **Recommendation 5**

*There should be no cross-promotion to promote breast-milk substitutes indirectly via the promotion of foods for infants and young children.*

- *The packaging design, labelling and materials used for the promotion of complementary foods must be different from those used for breast-milk substitutes so that they cannot be used in a way that also promotes breast-milk substitutes (for example, different colour schemes, designs, names, slogans and mascots other than company name and logo should be used).*

The broad wording of this recommendation, stating simply that the "packaging design, labelling and materials used for the promotion of complementary foods must be different from those used for breast-

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<sup>5</sup> Ibid.

*milk substitutes so that they cannot be used in a way that also promotes breast-milk substitutes*” does not provide adequate guidance as to what constitutes different. In this context, the broad language could impact on the branding and trademark rights of global manufacturers of infant foods. Such an outcome may affect obligations existing under international trade agreements and other legally binding agreements. The directive contained within Recommendation 5, first dot point, is one which New Zealand could not support, especially in light of our concerns relating to the current drafting of Recommendation 2.

To prevent these unintended outcomes, we propose the following amendments to the text of the first dot point:

**Proposed Recommendation 5** There should be no cross-promotion to promote breast-milk substitutes indirectly via the promotion of foods for infants and young children.

- The packaging design, labelling and materials used for the promotion of complementary foods must be able to be clearly differentiated by consumers from those used for breast-milk substitutes so that they cannot be used in a way that also promotes breast-milk substitutes (for example, different colour schemes, designs, names, slogans and mascots other than company name and logo should be used).

RELEASED UNDER THE  
OFFICIAL INFORMATION ACT

**From:** GENEVA

**Sent:** Monday, 23 May 2016 3:07 a.m.

**To:** TND; UNHC

**Cc:** s6(a) s6(a) ...WLN TRADE DIVISIONS; FM.P/S MFA; FM.P/S Trade; FM.P/S Food Safety; FM.P/S Agriculture; FM.MPI (Seemail); CEO; FM.DPMC (FPA); ...TRADE POSTS; FM.P/S Health; EUR; FM.Health Ministry (Seemail); GENEVA

**Subject:** FORMAL MESSAGE: WHO GUIDANCE: PROPOSED COMMENTS ON THE DRAFT RESOLUTION ADOPTING

#### Distribution

MOH: s9(2)(a)

MPI: s9(2)(a)

#### Summary

We provide the latest draft of the resolution that would adopt the Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children. The Chair has requested comments on the draft resolution "before Monday" Geneva time. We attach a marked up draft of the resolution featuring possible New Zealand amendments, and set out below a draft of our submission to the Chair.

#### Action

TND/UNHC Grateful for your comments on our draft submission about the draft resolution by 1600 on 23 May (NZ time)

Others For information.

#### Report

1 Further to our FM of 21 May, and our various emails over the weekend, we circulate the **latest draft of the resolution** that would adopt the Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children. The Chair has sought comments from interested delegations "before Monday", Geneva time. Given its use of "endorses", and its omission of various New Zealand concerns, **we would propose to submit a marked up resolution featuring our preferred language, and the attached accompanying submission to the Chair.**

2 With apologies for the tight turn around, grateful for your advice on this approach by 1600 on 23 May (NZ time). This will enable us to submit the material to the Chair at 0830 tomorrow in Geneva. Subject to your views, we would propose sharing our submission with likeminded delegations (i.e. s6(a))

Ends

**From:** GENEVA

**Sent:** Saturday, 21 May 2016 2:16 a.m.

**To:** TND; UNHC

**Cc:** [s6(a)] [s6(a)] ...WLN TRADE DIVISIONS; FM.P/S MFA; FM.P/S Trade; FM.P/S Food Safety; FM.P/S Agriculture; FM.MPI (Seemail); CEO; FM.DPMC (FPA); GENEVA; ...TRADE POSTS; FM.P/S Health; EUR; FM.Health Ministry (Seemail); [s6(a)]

**Subject:** FORMAL MESSAGE: WHO GUIDANCE: FURTHER INFORMAL CONSULTATIONS ON DRAFT RESOLUTION

#### Distribution

MOH: [s9(2)(a)]

MPI: [s9(2)(a)]

#### Summary

We report on the informal consultations on the draft World Health Organisation Infant Formula Guidelines held in Geneva today. The consultations were well-attended, and involved a paragraph by paragraph round of interventions from Member States. The result was that a small number of paragraphs were agreed, while new language was proposed and existing bracketed language was left unresolved. [s6(a)] spoke in favour of their preferred language, while we intervened in support of retaining a reference to Codex Alimentarius in PP6bis, and to suggest deferring the question of whether the Guidance could be noted or endorsed until after the other outstanding issues were dealt with.

The next step will be for the Chair to circulate a revised, and shortened, draft resolution. The intention is to circulate that draft later this evening, and to allow Member States until sometime on Monday (GVA time) to provide their reactions to the Chair. The Chair will then assess whether the resolution can be agreed, or whether it will need to be referred to a drafting group. There was no suggestion of the Guidance being re-opened, nor of the issue being deferred for further consultation. It is also clear that the Chair wishes the Guidance to be adopted through a resolution, rather than a decision point. We expect that the revised resolution will be referred to a drafting group on Monday.

#### Action

TND/UNHC To note that we will circulate the draft resolution by email when it arrives, for your consideration.

Others For information.

#### Report

1 We report on the WHO Informal consultation on the draft resolution concerning the WHO Infant Formula Guidelines held at WHO headquarters today. [s6(a)]  
[s6(a)]

s6(a)

s6(a)

Our unedited notes of the consultations are attached.

2 The Ecuadorian Chair commenced the consultations by advising that she would go through the draft resolution on a paragraph by paragraph basis.

#### *Agreed paragraphs*

3 The following paragraphs of the Guidance were, as we interpreted the discussions, agreed: PPs 1-5, OP2, OP2e, OP4, OP5 and OP7a.

#### *Outstanding issues*

4 All of the remaining paragraphs were contested, to varying degrees. The most contentious issue is whether or not Member States will endorse the Guidance or merely take note of the recommendations in the Guidance. There was no consideration of alternative language, such as "welcomes". Other disputed issues included whether there should be references to Codex Alimentarius whether to refer to "trade obligations" or "legal obligations", whether OP2c and d should be retained (which refer to the International Code of Marketing of Breast Milk Substitutes, and relevant Codex standards), and the extent to which the preferred language of s6(a) should be retained or omitted.

#### *New issues*

5 s6(a) proposed to insert a new paragraph on the marketing and promotion of vitamin and mineral products. This issue is very unlikely to feature in this resolution.

#### *Next steps*

6 Having been through the entire draft, the Chair said that she would work with the Secretariat to prepare a revised draft resolution, that is focused on the agreed paragraphs. She indicated that the revised draft would be short, and would remove most of the preambular paragraphs, and minimise the number of operative paragraphs. She said that this revised draft would be circulated later this evening, and that the Secretariat would seek comments on it by Monday at the latest. If it looks likely that the resolution can be agreed, it would be dealt with at the Assembly on Thursday. If agreement is unlikely, the Chair would (on Monday) s6(b) convene a drafting group. s6(a)

s9(2)(g)(i)

#### *Comment*

7 Today's consultations were well-attended, with additional voices in support of the Chair's process coming from delegations that have not taken the floor before. s6(a) having missed the last consultations, was also very active. Unlike in previous consultations, there were no voices other than s6(a) that sought to re-calibrate the resolution in a more balanced way.

8 For its part, s6(a) was clear in its priorities and advocated for the retention of its preferred wording in various paragraphs. s6(a) similarly intervened from time to time to support the and s6(a)

to defend its own amendments. We took the floor in order to retain a reference to the Codex Alimentarius Commission in PP6bis and to encourage the chair to consider OP1 ("encourages" v "notes") at the end, after the other OPs have been settled.

9 We strongly doubt that the Chair will be able to prepare a revised draft resolution that can reconcile the divergent views on the fundamental question of whether the WHA can endorse the Guidance. The idea of a short resolution, that focuses on what is largely agreed, is attractive but is unlikely to be achievable given s6(a)

Nonetheless, we will circulate the revised draft resolution once it is issued, and seek your guidance. While nothing is guaranteed, we think it more likely than not that the resolution will go to a drafting group. If that eventuates, we would expect the negotiation process to be an extensive one. We think it is very unlikely that the Guidance itself would be opened up, and there has been no suggestion that there should be further consultations on it.

10 s6(a)

Ends

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Attachment – Informal Consultation notes of meeting

Informal Consultation – Salle A WHO Headquarters, Geneva, 20 May 2016

Guidance on ending the inappropriate prom

Chair

Remainder of document withheld in full under s6(b)

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**From:** [s6(a)]

**Sent:** Thursday, 10 March 2016 8:20 p.m.

**To:** TND; GENEVA; [s6(a)]

**Cc:** FM.P/S MFA; FM.P/S Trade; FM.P/S Health; FM.P/S Food Safety; FM.P/S Agriculture; FM.Health Ministry (Seemail); FM.MPI (Seemail); CEO; [s6(a)]

**Subject:** RE: FORMAL MESSAGE: New Zealand Submission to WHO Infant Formula Guidelines

## Summary

We have conveyed New Zealand's submission on the WHO Draft Guidance to DFAT and [s6(a)] as instructed.

## Action

For information.

## Report

As requested in TND's FM below.

2 In handing over the submission we had a brief exchange with [s6(a)] initial reaction to the Draft Guidance.

[s6(a)]

[s6(a)]

[s6(a)]

## Comment

5 We have agreed to keep in touch with both agencies as the issue develops.

[s6(a)]



s6(a)

We would be happy to follow these up at more senior levels if needed – we await your advice.

ENDS

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**From:** s6(a)  
**Sent:** Friday, 20 May 2016 6:56 a.m.  
**To:** GENEVA; TND  
**Cc:** ...WLN TRADE DIVISIONS; s6(a); s6(a) CEO; DCE; s6(a); FM.P/S MFA;  
FM.P/S Trade; FM.Health Ministry (Seemail); FM.P/S Health; FM.MPI (Seemail)  
**Subject:** RE: FORMAL MESSAGE: WHO GUIDANCE, FURTHER UPDATE  
s6(a)

**Distribution**

MOH: s9(2)(a)  
MPI: s9(2)(a)

**Action**

For information

**Report**

2 Further to our formal message yesterday (18 May s6(a)), we spoke this morning  
with

s6(b)

s6(b)

s6(b)

s6(b)

ENDS

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**From:** GENEVA

**Sent:** Thursday, 19 May 2016 5:50 a.m.

**To:** TND

**Cc:** ...WLN TRADE DIVISIONS; [s6(a)]; [s6(a)]; [s6(a)]; FM.P/S MFA; FM.P/S Trade; FM.Health Ministry (Seemail); FM.P/S Health; FM.MPI (Seemail)

**Subject:** FORMAL MESSAGE: WHO GUIDANCE ON INFANT FORMULA: GENEVA UPDATE

**Distribution**

MOH: [s9(2)(a)]

MPI: [s9(2)(a)]

**Summary**

The [s6(b)]

They anticipate that the draft resolution adopting the Guidance will be referred to a drafting group on Monday or Tuesday next week, whereupon any Interested Member States can participate in negotiations on the resolution. Depending on how those negotiations progress, the resolution could be re-cast as a decision point. There is also a possibility that consideration of the Guidance could be deferred for further consultations.

[s9(2)(g)(i)] We circulated New Zealand's proposed changes to the resolution to [s6(a)] [s6(a)] both indicated that they could support our proposed changes. We will provide them to the Chair and the WHO Secretariat today.

**Action**

For information

**Report**

We [s9(2)(a)] met with [s6(a)] colleagues yesterday afternoon, 18 May, to exchange views and to discuss New Zealand's version of the draft resolution text, before we shared it with the WHO Secretariat and Ecuador. We briefly outlined our proposed approach to the informal consultations on the draft resolution, to be held tomorrow, and our proposed approach to the issue in the World Health Assembly in accordance with your FMs. They are consistent with how [s6(a)] intend to proceed.

[s6(a)]

[s6(b)]

s6(b)

4 s6(b)

and noted that New Zealand's proposed changes are broadly consistent with a number of s6(b) points.

s6(a)

s6(b)

s6(b), s6(a)

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s6(b)

could support the New Zealand amendments to the resolution also.

s6(b)

*Next steps*

9 We will today circulate our proposed changes to the resolution to the Chair and Secretariat, in advance of the informals tomorrow.

10 It is unclear exactly when the Guidance resolution will come before the WHA next week. [s6(a)] anticipate that it may come up on Monday afternoon or Tuesday morning, at which time there would probably be a single round of interventions in the plenary. The resolution would then be referred to a drafting group, with the current Ecuadorean chair, with a view to the resolution returning to the plenary at the end of the week.

Comment

[s6(a)]

[s6(a)]

[s6(a)]

ENDS

From: [s6(a)]  
Sent: Thursday, 19 May 2016 9:01 a.m.  
To: TND, GENEVA  
Cc: WLN TRADE DIVISIONS; [s6(a)]; [s6(a)] FM.P/S MFA; FM.P/S Trade; FM.P/S Health; FM.P/S Food Safety; FM.Health Ministry (Seemail); FM.MPI (Seemail); CEO; DCE: [s6(a)]  
Subject: FORMAL MESSAGE: WHO GUIDANCE ON INFANT FORMULA: UPDATE ON [s6(a)]  
VIEWS

FORMAL MESSAGE: WHO GUIDANCE ON INFANT FORMULA: UPDATE ON [s6(a)] VIEWS

#### Summary

The [s6(a)]  
infant formula promotion.

WHO Guidance on

[s6(a)]

[s6(a)]

**Action**

For information.

**Report**

As requested, we met with s6(a) contacts to hand over copies of New Zealand's response to the draft Resolution text (TND's FM of 16/05 refers); to express New Zealand's ongoing concern about the draft Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children; s6(a) s6(a) prior to informal consultations in Geneva on 20 May; s6(a)

s6(a)

s6(a)

s6(a)

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## Comment

[s6(a)]

ENDS

**From:** TND

**Sent:** Monday, 16 May 2016 7:20 p.m.

**To:** GENEVA; [s6(a)] [s6(a)]

**Cc:** ...WLN TRADE DIVISIONS; FM.P/S MFA; FM.P/S Trade; FM.P/S Health; FM.P/S Food Safety; FM.P/S Agriculture; FM.Health Ministry (Seemail); FM.MPI (Seemail); GEO; FM.DPMC (FPA); ...TRADE POSTS

**Subject:** RE: Formal Message: Tasking for Posts ahead of the World Health Assembly (23-28 May 2016)

### Distribution

MOH: [s9(2)(a)]

MPI: [s9(2)(a)]

[s9(2)(a)]

### Summary

- Attached is New Zealand's marked up version of the draft resolution text to be shared with the WHO Secretariat and Ecuador as chair of the consultation process.
- Also attached is New Zealand's negotiating position, a para by para breakdown of the draft resolution, and proposed revisions to the WHO Guidance itself – which reflects the content of previous submissions to the WHO by New Zealand. These documents can be used to inform discussions with like-mindeds and deliberations at the informal consultation on 20 May.

### Action

- Geneva to share draft resolution text with the WHO Secretariat and Ecuador. (Para 1)
- [s6(a)], [s6(a)] [s6(a)] to share draft resolution text with host government agencies and with likeminded delegations, using New Zealand's negotiation position to inform their discussions, and to explore whether like-mindeds see value in continuing to push to have the Guidance reopened for drafting.

### Report

1 As indicated our FM of 13 May, we attach New Zealand's marked up version of the draft resolution text to be shared with the WHO Secretariat and Ecuador, as chair of the informal consultation process. Grateful if posts could share our draft resolution text with host government agencies and raise New Zealand's concerns around the resolution as currently drafted.

2 Also attached is New Zealand's negotiating position, a para by para breakdown of the draft resolution, and proposed revisions to the WHO Guidance itself as contained in previous submissions to the WHO by New Zealand. These two documents, which provide drafting instructions and key redlines, can be used to inform discussions with like-mindeds, and be used to find common ground between all parties.

3 Grateful if posts could also explore whether like-mindeds see value in continuing to seek redrafting of the Guidance, drawing on previous reporting and the attached "WHO guidance revisions" to support this conversation.

ENDS

**From:** TND

**Sent:** Friday, 13 May 2016 9:02 p.m.

**To:** GENEVA; [s6(a)] [s6(a)]

**Cc:** ...WLN TRADE DIVISIONS; FM.P/S MFA; FM.P/S Trade; FM.P/S Health; FM.P/S Food Safety; FM.P/S Agriculture; FM.Health Ministry (Seemail); FM.MPI (Seemail); CEO; FM.DPMC (FPA); ...TRADE POSTS

**Subject:** Formal Message: Tasking for Posts ahead of the World Health Assembly (23-28 May 2016)

**Distribution**

MOH: [s9(2)(a)]

MPJ: [s9(2)(a)]

[s9(2)(a)]

**Summary**

- New Zealand continues to have reservations regarding the content of the WHO Guidance on ending the inappropriate promotion of foods for infants and young children. As a result

[s6(a)]

•

- Ahead of an informal consultation on the draft resolution chaired by Ecuador on 20 May, we would like to arrange meetings with like-mindeds [s6(a)] to discuss the draft resolution and how we can all best approach it.

**Action**

**Geneva**

- To organise meetings with like-mindeds [s6(a)] and any others you deem appropriate) to discuss the draft resolution on the WHO guidance and assess their willingness to reopen the content of the guidance for redrafting. (para 5 refers)

[s6(a)] , [s6(a)] , [s6(a)]



- To make contact with the relevant host government officials and update them on New Zealand's approach and suggest that there would be value in taking a common approach to discussion of the draft resolution, as well as the guidance itself (para 5 refers), in meetings in the lead up to and during the forthcoming WHA meeting.

## Report

1 Geneva's recent reporting (email [s9(2)(a)] not to all, 3 May) on the informal consultation on the World Health Organisation's (WHO) Guidance on the inappropriate promotion of foods for infants and young children refers. Relevant New Zealand government agencies have met to consider the draft resolution text, as well as the current status of the Guidance, and next steps ahead of the World Health Assembly (WHA) on 23-28 May 2016.

2 New Zealand continues to have reservations regarding the content of the Guidance, particularly Recommendation 2 which we consider has the potential to significantly impair New Zealand's trade interests, and Recommendation 3 which has the potential to impact on the work of the Codex Alimentarius Commission (CAC) and its overall mandate.

3 As a result of these concerns, as well as those relating to the current wording of the draft resolution text, New Zealand is **not/not** in a position to endorse the Guidance as it is currently written. Unless key redlines in the draft text of the resolution for adoption are addressed, or the content of the Guidance itself is amended to reflect New Zealand's position, we are only able to support adoption of the Guidance as a technical document, with the WHA noting its content.

5 [s6(a)] In the meantime, grateful if Geneva could contact like-mindeds to arrange meetings for the week of 16 May in order to discuss our respective positions, with a view to seeking alignment. Noting that counterparts will likely need to discuss with capitals, we suggest a flexible approach to how we engage with the like-mindeds, and suggest that more than one meeting is likely to be required. Components of the MoH-led delegation [s9(2)(a)] will be arriving in GVA on the evening of 17 May. We propose that [s9(2)(a)] and an appropriate person from Post serve as contact points – should any likeminded want to make direct contact with the New Zealand delegation on the ground.

6 Over the same period we request that [s6(a)], [s6(a)] and [s6(a)] also contact relevant host government agencies to discuss this matter further, emphasising the desirability of as an aligned approach as possible in the forthcoming discussions in Geneva.

7 To aid in these discussion, on Monday 16 May we will be able to provide Posts, via FM, with a paragraph by paragraph summary of the resolution text reflecting New Zealand's redlines and preferred language, as well as possible revisions of the guidance itself. These two documents, which providing drafting instructions and talking points, can be used to inform discussions with like-mindeds, and be used to find common ground between all parties.

**From:** s6(a)

**Sent:** Saturday, 30 April 2016 9:56 a.m.

**To:** s6(a) TND; ...WLN TRADE DIVISIONS; FM.P/S MFA; FM.P/S Trade; FM.P/S Food Safety; FM.P/S Agriculture; FM.MPI (Seemail); CEO; FM.DPMC (FPA); s6(a); GENEVA; ...TRADE POSTS; FM.P/S Health; EUR; UNHC; FM.Health Ministry (Seemail)

**Subject:** Formal Message: World Health Organisation Infant Formula Guidelines - Update on discussions with s6(a)

**Handling instructions**

MOH: s9(2)(a)

MPI: s9(2)(a)

**Summary**

s6(a)

**Action**

TND/s6(a) grateful for an update on activities in s6(a)

**Report**

As requested (refer email 21/04/2016 s9(2)(a) not to all) we report on discussions with s9(2)(a) s6(a) on the WHO Infant Formula Guidelines and the WHA resolution.

We noted the intention of our Mission in Geneva to convene an informal group, but our challenge with resources on the ground meant that we were unable to take the lead.

s6(a)

s6(b)

s6(b)

5 [s6(a)] was interested in remaining connected on the issue and specifically wanted to understand New Zealand's current position. We have updated him based on existing messages, but see value in keeping in touch with [s6(a)] as this progresses. As such any updates that we could share on proposed approaches would be most welcome.

ENDS

**From:** BRUSSELS

**Sent:** Tuesday, 26 April 2016 12:53 p.m.

**To:** TND; ...WLN TRADE DIVISIONS; FM.P/S MFA; FM.P/S Trade; FM.P/S Food Safety; FM.P/S Agriculture; FM.MPI (Seemail); CEO; FM.DPMC (FPA); [s6(a)]; GENEVA; ...TRADE POSTS; FM.P/S Health; EUR; UNHC; FM.Health Ministry (Seemail)

**Subject:** Formal Message: World Health Organisation Infant Formula Guidelines - Update on discussions with [s6(a)] re approach

#### Handling instructions

MOH: [s9(2)(a)]

MPI: [s9(2)(a)]

#### Summary

[s9(2)(a)]  
[s6(a)]  
[s9(2)(a)]

[s9(2)(a)]

#### Action

[s6(a)]  
TND, GVA [s6(a)] We would appreciate being kept in the loop about New Zealand's intentions, [s6(a)] [s9(2)(a)]

#### Report

As requested (refer email 21/04/2016 [s9(2)(a)] not to all) we report on discussions between [s6(a)] [s9(2)(a)]

[s9(2)(a)]

[s6(b)]

[s9(2)(a)]

[s9(2)(a)]

[s6(b)]

[s9(2)(a)] [s9(2)(a)]

[s9(2)(a)]

[s6(a)]

[s9(2)(a)]

[s6(a)]

[s9(2)(a)]

[s9(2)(a)]

[s9(2)(a)]

[s6(a)]

7 [s9(2)(a)] emphasised that to some extent this document was just another phase in a long running tension between Codex and WHO with respect to nutritional guidance with both organisations wanting to drive the agenda. [s6(a)]

8 [s6(a)] [s9(2)(a)] gave an undertaking to keep [s9(2)(a)] informed of [s6(a)] She gave a likewise assurance regarding New Zealand.

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**From:** GENEVA

**Sent:** Tuesday, 12 April 2016 8:09 a.m.

**To:** TND

**Cc:** ...WLN TRADE DIVISIONS; FM.P/S MFA; FM.P/S Trade; FM.P/S Health; FM.P/S Food Safety; FM.P/S Agriculture; FM.Health Ministry (Seemail); FM.MPI (Seemail); CEO; FM.DPMC (FPA); [s6(a)]; ...TRADE POSTS; ...PACIFIC POSTS; [s6(a)]; UNHC; GENEVA

**Subject:** Formal Message: WHO informal consultation on the inappropriate promotion of foods for infants and young children

## HANDLING INSTRUCTIONS

MOH: [s9(2)(a)]

MPI: [s9(2)(a)]

### Summary

We report on the informal consultations on the draft World Health Organisation Infant Formula Guidelines held on 8 April. The WHO Secretariat declined to allow a further round of consultation on the Guidance, on the basis that there is insufficient time to do so before the World Health Assembly next month. In the course of the consultations, the Secretariat agreed to make seven changes to the draft Guidance, which included adding a section on 'goals', inserting a definitions section, and various minor changes to recommendations 2, 3 and 4. While the Secretariat accepted our request to add a definition section, [s6(a)]

[s6(a)] significantly, [s6(a)]

the  
We

were not alone in making these points, with the [s6(a)] intervening at different times on them.

The next steps will be for the WHO to finalise the Guidance and circulate it to Member States, which they intend to do on 22 April. There is no further opportunity to propose changes to the Guidance. There will be further consultations in early May about how to progress the Guidance at the World Health Assembly. Those consultations will include consideration of whether the Guidance should be endorsed by a resolution at the World Health Assembly, or merely referred to the Assembly as a technical document. Ecuador will lead those consultations, [s6(a)]

### Action

For information

### Report

1 We report on the WHO Informal consultation on the draft WHO Infant Formula Guidelines held on 8 April. [s6(a)]

s6(a)

Our notes of the meeting are attached, as is the Secretariat's presentation.

*WHO presentation and initial comments*

2 The WHO s9(2)(a) commenced the consultations with a history of the process to date, and a summary of the various changes made to the revised Guidance circulated in March. The WHO then sought responses to the revised Guidance.

s6(a)

*Comments on recommendations*

4 The Secretariat sought comments on each of the six recommendations in the Guidance. We engaged on those recommendations on the basis of your talking points, your amended draft of the Guidance, and the Ministry of Health's earlier comments on the draft Guidance. In particular, we expressed serious concern about the scope of the recommendations and their broader implications for Member States in terms of TBT and TRIPS issues.

s6(a)

5 The Secretariat then took two hours over lunch to consider the morning's interventions, and returned in the afternoon to announce that it would make seven changes to the Guidance. Most significantly, the Secretariat accepted our request to insert a definition section

s6(a)

*Next steps*

6 The Secretariat advised that it would finalise and circulate the Guidance on 22 April. Ecuador volunteered to hold further informals on how to progress the Guidance through to the World Health Assembly. Those informals are likely to be scheduled for early May. The main issue for consideration will be whether the Guidance will be endorsed by the Assembly through a resolution, or merely noted at the Assembly as being a WHO technical document. Endorsement through a resolution would significantly elevate the status of the Guidance, as it would have been adopted by all Member States. [s6(a)]

[s6(a)]  
Member States were invited to provide their comments on the existing draft resolution (circulated during the Executive Board meeting in January) to Ecuador.

**Comment**

7 This was a frustrating meeting,

[s6(a)]  
We will continue to follow this process closely, and will revert with any additional information.

8 Finally, while we were not alone in alluding to the broader trade implications of the Guidance, our assertiveness was clearly noticed by delegations that we are often broadly aligned with on both trade and health issues [s6(a)]

[s6(a)]  
Finally, [s6(a)] intervention also claimed some Member States are bringing in "private sector" arguments, with some delegates effectively reading from a script provided to them by big producers. While that criticism was not directed primarily at New Zealand, we suggest that we should continue to be conscious of such perceptions as these issues unfold.

Ends

**From:** TND

**Sent:** Friday, 8 April 2016 6:35 a.m.

**To:** GENEVA; TND

**Cc:** ...WLN TRADE DIVISIONS; FM.P/S MFA; FM.P/S Trade; FM.P/S Health; FM.P/S Food Safety; FM.P/S Agriculture; FM.Health Ministry (Seemail); FM.MPI (Seemail); CEO; FM.DPMC (FPA); [s6(a)]; ...TRADE POSTS; ...PACIFIC POSTS; [s6(a)]; UNHC

**Subject:** Formal Message: Talking Points for New Zealand's Intervention at the 8 April WHO informal consultation on the inappropriate promotion of foods for infants and young children

HANDLING INSTRUCTIONS

MOH: s9(2)(a)  
MPI: s9(2)(a)

## Summary

We provide you with guidance in advance of the 8 April WHO "Informal consultation" on the draft WHO Infant Formula Guidelines.

## Action

Geneva to draw on the Talking Points below in speaking at the 8 April "Informal Consultation" meeting.

## Report

Para 10 of your FM of 7 April refers.

Attached is a further version of the text with further comments from us for your background information in participating in the Informal Consultation, and for you to provide excerpts from to the Secretariat as appropriate if suggestions for revised text are requested.

2 We would expect the WHO Secretariat to produce a further draft of the text after the Informal Consultation based on comments made during it. Once we have seen that further revised text, we will determine whether we need to provide further textual comment – s6(a)

3 We provide the revised Talking Points below for you to draw on in speaking at the Informal Consultation:

### TALKING POINTS

- New Zealand supports the intent of the draft Guidance, aimed at strengthening optimal nutrition for infants and young children to improve health by limiting the inappropriate promotion and use of breast-milk substitutes and complementary foods in a way that undermines breastfeeding. We want the Guidance to be effective, properly targeted, and readily accessible.
- New Zealand has a long history as a strong supporter of the WHO. We have also consistently supported the provision of high quality guidance to member states and other stakeholders. New Zealand's work on these issues includes leading the regular resolution on maternal mortality and morbidity in the Human Rights Council, our work on Non-Communicable Diseases in Geneva and elsewhere, and our active membership of the WHO Executive Board.
- However we continue to have concerns that some of the current wording of the recommendations may have unintended consequences beyond safeguarding and promoting the health of infants and young children.



- A key concern for New Zealand remains the process through which the Guidance was drafted, with Member States not receiving adequate time, or access to the evidence base, in order to fully evaluate the Guidance and any potential impact it may have on Member States' domestic regulations and their broader trade and economic relationships.
- Even with the evidence base now released, we consider the six weeks remaining until the WHA meeting on 23-26 May is limited time to fully consider that evidence, the potential impact of the Guidance as currently drafted, and to consult with affected parties. We do not think that this process should be rushed, given the significance of the issues.
- While the revised draft released by the WHO on 24 March does address some of the concerns raised by New Zealand, some other key concerns remain unaddressed.
- In particular, New Zealand remains concerned by the lack of definitions in the guidance document for certain key components of the Guidance, including what constitutes promotion, cross-promotion, and inappropriate promotion, as well as the broad definition of "breast milk substitute," as set forth in recommendation two.
- Regarding the lack of definitions, New Zealand proposes including an Annex to the Guidance which contains the definitions as set out by the Scientific and Technical Advisory Group (STAG), which we believe will ensure clarity of interpretation.
- Regarding recommendation two, New Zealand continues to have serious reservations regarding the expansive definition of breast-milk substitute used in the draft Guidance, particularly the inclusion of all "milks... in liquid or powdered form" a breast milk substitute.
- We are also concerned that there is insufficient focus on what constitutes "inappropriate promotion". We are concerned that some aspects of the revised Guidance are excessively vague, and may have unintended consequences far beyond infant and child nutrition. It is essential that the Guidance support optimal nutrition for infant and child health – including for those who rely on safe, high quality milk and milk products for complementary feeding, as recommended by the WHO Guiding Principles. For example, recommendation two of the revised Guidance is unnecessarily and excessively broad. It also risks inadvertently permitting technical barriers to trade for dairy and dairy-related products.
- We look forward to engaging with the secretariat and Member States as we work to develop a Guidance that will achieve the goal of improving child health by limiting the inappropriate promotion and use of breast-milk substitutes and complementary foods.

From: GENEVA

Sent: Friday, 8 April 2016 5:01 a.m.

To: TND

Cc: ...WLN TRADE DIVISIONS; FM.P/S MFA; FM.P/S Trade; FM.P/S Health; FM.P/S Food Safety; FM.P/S Agriculture; FM.Health Ministry (Seemail); FM.MPI (Seemail); CEO; FM.DPMC (FPA); [s6(a)] ; ...TRADE POSTS; ...PACIFIC POSTS; [s6(a)]

**Subject:** FW: Formal Message: Tasking ahead of the WHO informal consultation on the inappropriate promotion of foods for infant and young children

#### Distribution

MOH: s9(2)(a)

MPI: s9(2)(a)

#### Summary

We report on our meeting with the s6(a) today, in advance of tomorrow's WHO informal consultation on the draft Guidance on the inappropriate promotion of foods for infants and young children. The s6(a) agreed with our approach, s6(a), s6(b)

meeting in May. s6(a) and s6(a) indicated that they are broadly happy with the Guidelines, and would be content for them to be adopted. s6(a) delegate was in listening mode throughout the meeting.

#### Action

TND: Grateful for your consideration of our proposed approach in paras 9 and 10

Others: For information

#### Report

1 We report on our meeting with the s6(a) today, in advance of tomorrow's WHO informal consultation on the draft Guidance on the inappropriate promotion of foods for infants and young children. The meeting was attended by health attachés from the s6(a)

s6(a) We invited the Australian health attaché, and counterparts from the s6(a) who were unable to attend. Our s6(a) counterparts declined the invitation to participate.

2 We spoke to your talking points (for which thanks). We added that New Zealand has a long history of being a strong supporter of the WHO, and is actively involved in health issues in Geneva (including through our running the regular Human Rights Council resolution on maternal health, and having chaired the WHO's dialogue on non-communicable diseases in December).

s6(a)

s6(b)

s6(b)

s9(2)(a) also expressed concern that there is ongoing work in the Codex Alimentarius Commission that has "great relevance" to the draft Guidelines, and that it may not be timely to try and finalise the Guidelines without that work still incomplete.

s6(b)

s6(b)

5 In contrast, s6(a) and wants to see it adopted at the WHA. s6(a)

#### *Procedural next steps*

6 None of the participants in our meeting had a clear understanding of how tomorrow's consultations' will proceed. s6(a) s6(a) anticipates that the Secretariat will speak to the current version of the Guidance, after which there may be a question and answer session. This may then result in the Secretariat asking a Member State to lead the process of running a resolution at the WHA to adopt the Guidance. s6(a)

Meeting with s9(2)(a)

s6(b)

#### **Comment**

8 It was clear from our separate discussions with the s6(a) today that, while they both have concerns about the draft Guidance, s6(a) It was therefore not possible to coordinate a clear position on deferral.

s6(a)

s6(a) We provided s6(a) with New Zealand's revised text of the draft Guidance, but did not discuss it during the meeting itself given the positions adopted by s6(a)

9 In light of the meeting this afternoon, we suggest slightly re-casting our talking points for the WHO consultations tomorrow (see below). In particular, we suggest

s9(2)(g)(i)

10 Finally, we have not yet provided your latest comments on the text to the Secretariat. We propose to do so first thing in the morning, before the Consultations, in case you receive further feedback on them from our like-mindeds overnight.

*Talking points for 8 April Meeting (with GVA's suggested changes underlined)*

- New Zealand supports the intent of the draft Guidance, aimed at strengthening optimal nutrition for infants and young children's health by limiting the inappropriate promotion and use of breast-milk substitutes and complementary foods in a way that undermines breastfeeding. We want the Guidance to be effective, properly targeted, and readily accessible.
- New Zealand has a long history as a strong supporter of the WHO. We have also consistently supported the provision of high quality guidance to member states and other stakeholders. New Zealand's work on these issues includes leading the regular resolution on maternal mortality and morbidity in the Human Rights Council, our work on Non-Communicable Diseases in Geneva and elsewhere, and our active membership of the WHO Executive Board.
- However we continue to have some concerns that current wording of the recommendations may have unintended consequences beyond safeguarding and promoting the health of infants and young children.
- A key concern for New Zealand remains the process through which the Guidance was drafted, with Member States not receiving adequate time, or access to the evidence base, in order to fully evaluate the Guidance and any potential impact it may have Member States' domestic regulations and their broader trade and economic relationships.

- Even with the evidence based now released, we consider the six weeks remaining until the WHA meeting on 23-26 May to be insufficient time to fully consider that evidence, the potential impact of the Guidance as currently drafted, and to consult with affected parties. We do not think that this process should be rushed, given the significance of the issues. Nor do we think it is realistic to finalise such important Guidance in the limited time remaining to us before the WHA.
- While the revised draft released by the WHO on 24 March does address some of the concerns raised by New Zealand, s6(a) of key concerns remain unaddressed.
- In particular, New Zealand remains concerned by the lack of definitions in the guidance document for certain key components of the Guidance, including what constitutes promotion, cross-promotion, and inappropriate promotion, as well as the broad definition of "breast milk substitute," as set forth in recommendation two.
- Regarding the lack of definitions, New Zealand proposes including an Annex to the Guidance which contains the definitions as set out by the Scientific and Technical Advisory Group (STAG), which we believe will ensure clarity of interpretation. We submitted a revised text, which includes such an Annex, to the Secretariat earlier today.
- Regarding recommendation two, New Zealand continues to have serious reservations regarding the expansive definition of breast-milk substitute used in the draft Guidance, particularly the inclusion of all "milks... in liquid or powdered form" a breast milk substitute

s9(2)(g)(i)

- We are also concerned that there is insufficient focus on what constitutes "inappropriate promotion". We are concerned that some aspects of the revised Guidance are excessively vague, and may have unintended consequences far beyond infant and child nutrition. It is essential that the Guidance support optimal nutrition for maternal and child health – including for those who rely on safe, high quality milk and milk products for complementary feeding, as recommended by the WHO Guiding Principles. For example, recommendation two of the revised Guidance is unnecessarily and excessively broad. It also risks inadvertently permitting technical barriers to trade for dairy and dairy-related products.

- Again, our preference would be for there to be further consultation on the draft Guidelines, in slower time, and without artificial deadlines. We look forward to engaging with the secretariat and Member States as we work to develop a Guidance that will achieve the goal of improving child health by limiting the inappropriate promotion and use of breast-milk substitutes.

ENDS

From: TND

Sent: Thursday, 7 April 2016 9:31 a.m.

To: GENEVA

Cc: ...WLN TRADE DIVISIONS; FM.P/S MFA; FM.P/S Trade; FM.P/S Health; FM.P/S Food Safety; FM.P/S Agriculture; FM.Health Ministry (Seemail); FM.MP (Seemail); CEO; FM.DPMC (FPA); s6(a); ...TRADE POSTS; ...PACIFIC POSTS; s6(a)

Subject: Formal Message: Tasking ahead of the WHO informal consultation on the inappropriate promotion of foods for infant and young children

#### Distribution

MOH: s9(2)(a)

MPI: s9(2)(a)

#### Summary

Following our FM dated 4 April, we provide further guidance for the meeting of like-minded on Thursday 7 April, and for the WHO informal consultation on the draft Guidance on the inappropriate promotion of foods for infants and young children on Friday 8 April.

#### Action

- s6(a) at the May 2016 World Health Assembly (WHA).
- To pass New Zealand's revised text of the draft Guidance to the WHO secretariat and socialise with like-minded.

#### Report

1. Having reviewed the WHO's revision of the Guidance on the inappropriate promotion of foods for infants and young children, it is clear that some of New Zealand's concerns with the draft Guidance remain unaddressed.
2. While the WHO has now released a technical document that contains the evidence based used to support the Guidance's recommendations, we consider the six weeks remaining until the WHA meeting on 23-26 May insufficient time to fully consider the Guidance in relation to the evidence and to review its impact on Members States' domestic regulations and broader trade and economic relationships.

3. Beyond our concerns with the process, we note that while the WHO has made changes to many of the individual recommendations, they have not addressed some of the concerns raised in our submission. In light of that, we remain unable to support the adoption of this Guidance as currently written, and have proposed revised text (attached) for consideration by the WHO.
4. Grateful if you could pass New Zealand's revised draft of the Guidance to the Secretariat after the meeting with like-mindeds, noting that depending on that meeting, the content of the revised text may be altered to reflect the consensus in the room.

#### April 7 Meeting with Like-mindeds

5. We refer you to the talking points below.
6. We are seeking the views of our counterparts on the revised text, and whether it meets any of their concerns. In particular, you should work to ensure that there is a coordinated approach taken to seek the deferral of the adoption of the draft Guidance by the WHA. This will allow Members States adequate time to review and consider the revised Guidance, and the recently released evidence-base.

#### Talking points for the 7 April Meeting

7. Reiterate the concerns of New Zealand, as contained in the talking point below and expressed in earlier FM. While we supportive of the WHO's aims, continue to be deeply concerned with the current draft of the Guidance.
8. In particular, we believe that like-mindeds should take a coordinated approach at the 8 April meeting. Our understanding is that we share similar concerns with the draft Guidance. By working in concert we may be able to influence the development of these guidelines so that they achieve their intent of improving infant and child nutrition, without the broader unintended consequences that have highlighted in our submissions.
9. We believe that if the s6(a)

#### April 8 WHO informal Consultations

10. We refer you to the talking points below.
11. If the like-mindeds have agreed to a coordinated approach, we encourage you to incorporate as much of the below as you feel is necessary. s6(a)

recognising the difficulties we face, we have provided you with a revised draft

Guidance, which we would be grateful if you could socialise at the informal consultation.

Talking points: for both 7 and 8 April Meetings

- New Zealand supports the intent of the draft Guidance, aimed at strengthening optimal nutrition for infants and young children's health by limiting the inappropriate promotion and use of breast-milk substitutes and complementary foods in a way that undermines breastfeeding.
- However we continue to have some concerns that current wording of the recommendations may have unintended consequences beyond safeguarding and promoting the health of infants and young children.
- A key concern for New Zealand remains the process through which the Guidance was drafted, with Member States not receiving adequate time, or access to the evidence base, in order to fully evaluate the Guidance and any potential impact it may have Member States' domestic regulations and their broader trade and economic relationships.
- Even with the evidence based now released, we consider the six weeks remaining until the WHA meeting on 23-26 May insufficient time to fully consider the Guidance's impact and consult with affected parties.
- While the revised draft released by the WHO on 24 March does address some of the concerns raised by New Zealand, the others remain unaddressed.
- In particular, New Zealand remains concerned by the lack of definitions in the guidance document for certain key components of the Guidance, including what constitutes promotion, cross-promotion, and inappropriate promotion, as well as the broad definition of "breast milk substitute," as set forth in recommendation two.
- Regarding the lack of definitions, New Zealand has proposed including an Annex to the Guidance which contains the definitions as set out by the Scientific and Technical Advisory Group (STAG), which we believe will ensure clarity of interpretation.

•  
s9(2)(g)(i)

•  
s9(2)(g)(i)

- We believe that the wording of recommendation two, as currently constructed, could be used to justify the imposition of new technical barriers to trade for dairy and dairy-related products, and would therefore do little to support optimal nutrition for maternal



and child health for those who rely on safe, high-quality milk and milk products for complementary feeding, as recommended by WHO Guiding Principles.

- New Zealand has proposed revised text, which we have provided to the Secretariat, and look forward to engaging with the secretariat and Member States as we work to develop a Guidance that will achieve the goal of improving child health by limiting the inappropriate promotion and use of breast-milk substitutes.

ENDS

From: TND

Sent: Monday, 4 April 2016 4:35 p.m.

To: GENEVA; [s6(a)]

Cc: ...WLN TRADE DIVISIONS; FM.P/S MFA; FM.P/S Trade; FM.P/S Health; FM.P/S Food Safety; FM.P/S Agriculture; FM.Health Ministry (Seemail); FM.MPI (Seemail); CEO; FM.DPMC (FPA); [s6(a)]; ...TRADE POSTS; ...PACIFIC POSTS; [s6(a)]

Subject: FORMAL MESSAGE: New Zealand Submission to WHO Infant Formula Guidelines: Tasking for Geneva

#### Distribution

MOH: [s9(2)(a)]

MPI: [s9(2)(a)]

#### Summary

- Reporting from Posts indicates that there is close alignment on this issue between New Zealand, [s6(a)], at both [s6(a)].
- Ahead of the 8 April WHO 'Informal Consultation,' Geneva should convene a meeting of likeminded Missions to discuss the Guidance and ways in which to coordinate our positions.

#### Action

##### Geneva:

- To convene a meeting of like-mindeds to share views and perspectives before the 8 April "informal consultation" by the WHO, and to develop a coordinated approach to the positions taken at the 8 April meeting. (para 3)
- To consider in the 8 April meeting how our submission has been addressed, to ensure infants and young children receive optimal nutrition, and reiterate our view regarding the need to defer the World Health Assembly's deliberation of the Guidelines in May 2016 in order to allow adequate time for full consideration of the evidence base used to inform the Guidelines, the impacts on Member States' domestic regulations and broader trade and economic relationships (paras 4-5).

[s6(a)]

- To approach [s6(a)] before the 8 April WHO informal consultation on the draft Guidance in order to see if they are willing to support the above proposal.

Others

For information

## Report

1. Thanks to Posts for reporting on this issue. We are encouraged to learn that there appears to be strong elements of alignment between ourselves and the [s6(a)] [s6(a)]

We are also encouraged to learn the WHO Secretariat is taking a proactive stance to enable concerned Member States to provide their views on the draft Guidelines, and has circulated a response to the various points (attached) ahead of an informal consultation, scheduled for 8 April.

2. We need to be mindful of the sensitivity apparently expressed by some

process. New Zealand's concerns with the Guidance include the lack of access to the evidence used to support the recommendations contained in the Guidance as well as the lack of sufficient time for consultation. New Zealand views transparency as a core principle that underpins the credibility and independence of technical and/or expert processes, such as that employed by the WHO. By seeking sufficient time to fully consider the recommendations in relation to the evidence, New Zealand is working to ensure this technical Guidance is robust and credible, and that the WHO operating in an open and transparent manner.

3. Noting the alignment between ourselves and the [s6(a)] in particular around the lack of access to the information base as well as the language of the Guidance, a coordinated approach that also includes [s6(a)]

[s6(a)]  
• Geneva approach their counterparts and arrange a meeting of like-minded following the Secretariat's release of the table and before the 8 April informal consultation. This meeting should be used to further share views and information, and with a view to developing a coordinated approach.

4. At the 8 April 'informal consultation' meeting, Geneva should consider how well (or otherwise) our submission has been addressed, to ensure infants and young children receive optimal nutrition. If necessary, they should firmly reiterate our view regarding the need to defer the World Health Assembly's deliberation of the Guidelines in May 2016 in order to ensure Member States have adequate time to evaluate the evidence base used to inform the Guidelines, as well as the impacts on Members States domestic regulations and broader trade and economic relationships.
5. As was noted in New Zealand's submission to the WHO, for Members States to be able to provide meaningful input to the Guidance, we require sufficient time to fully consider and consult on the implications of the evidence base supporting the Guidance.

ENDS

From: GENEVA

Sent: Thursday, 31 March 2016 8:30 p.m.

To: TND

Cc: ...WLN TRADE DIVISIONS; FM.P/S MFA; FM.P/S Trade; FM.P/S Health; FM.P/S Food Safety; FM.P/S Agriculture; FM.Health Ministry (Seemail); FM.MPI (Seemail); CEO; FM.DPMC (FPA); s6(a) ; ...TRADE POSTS; ...PACIFIC POSTS; s6(a)

Subject: RE: FORMAL MESSAGE: New Zealand Submission to WHO Infant Formula Guidelines

#### Distribution

MOH: s9(2)(a)

MPI: s9(2)(a)

#### Summary

We report on our engagement with counterpart Missions on the WHO's draft infant formula guidelines. Our counterparts were appreciative of New Zealand's approach, but were not yet in a position to elaborate on their positions.

#### Action

TND: Grateful about your advice on next steps (para 3)

Others: For information

For information

#### Report

1 In accordance with your FM of 2 March we have engaged with counterparts in both the UN and WTO Missions of s6(a) about the WHO's draft infant formula guidelines. In particular, we have raised it at DPR-level and at expert level with UN and WTO colleagues. We have shared your talking points (for which thanks), and the Ministry of Health's submission also.

2 Counterpart Missions appreciated New Zealand's outreach on this issue. In each case, their UN Missions are primarily responsible for carriage of these issues, although they are conscious of linkages to the WTO, and of implications for the trade in infant formula. While our contacts were primarily in listening mode, the following points arose from our discussions:

s6(a)

s6(a)

The anticipated next steps are that the WHO will circulate a 'table' responding to various points raised in parties' comments, together with

a paper summarising the evidence base. An informal consultation facilitated by WHO is scheduled for 8 April;

- We suggested the possibility of holding an informal exchange of views amongst like-minded following the release of the table/paper, before the informal on 8 April.

s6(a)

Having said that, there was agreement that it would be useful to have a good understanding of one another's likeminded perspectives before the 8 April informal. knowing what others' concerns are.

- There was considerable interest in New Zealand having made its submissions publicly available. So far as we are aware, we are the only member state yet to have done so.

s6(a)

### Comment

3 We are confident that our counterpart Missions have registered our concerns about the draft guidelines. Our sense is that they had not especially prioritised the guidelines at this stage, and so were not in a position to respond to engage about them in any detail. We hope that our outreach may have provided an opportunity for them to again flag the issue with their capitals. Grateful for your advice about how to approach the 8 April informal meeting at the WHO, and in particular, how forcefully you wish us to seek a delay in the consideration of the Guidelines.

Ends

From: TND

Sent: Wednesday, 2 March 2016 3:45 a.m.

To: TND; s6(a); ...TRADE POSTS; ...PACIFIC POSTS; s6(a)

Cc: ...WLN TRADE DIVISIONS; FM.P/S MFA; FM.P/S Trade; FM.P/S Health; FM.P/S Food Safety; FM.P/S Agriculture; FM.Health Ministry (Seemail); FM.MPI (Seemail); CEO; FM.DPMC (FPA)

Subject: RE: FORMAL MESSAGE: New Zealand Submission to WHO Infant Formula Guidelines

Resend with corrections.

From: TND

Sent: Wednesday, 2 March 2016 10:25 a.m.

To: TND; s6(a); ...TRADE POSTS; ...PACIFIC POSTS; s6(a)

Cc: ...WLN TRADE DIVISIONS; FM.P/S MFA; FM.P/S Trade; FM.P/S Health; FM.P/S Food Safety; FM.P/S Agriculture; FM.Health Ministry (Seemail); FM.MPI (Seemail); CEO; FM.DPMC (FPA)

Subject: RE: FORMAL MESSAGE: s6(a)

to WHO Infant Formula

Guidelines

### Distribution

MOH: s9(2)(a)

MPI: s9(2)(a)

### Summary

- New Zealand has made a submission to the WHO Secretariat raising concerns about the draft WHO Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children (EB138/8).
- We seek more time for WHO member states to consider the Guidance and provide meaningful input. This includes review of the underlying evidence used to inform the Guidance (which to date has not been released) and to consult adequately with relevant stakeholders.

### Action

- s6(a)
- s6(a) to pass a copy of New Zealand's submission to host government health agencies/officials and to ensure that they are aware of the timeframes in which this will be discussed at the WHA
- Geneva to touch base with both the WTO and UN Missions of s6(a) and to ensure that they are aware of this issue, and to suggest that a coordinated approach should be taken at the forthcoming WHA meeting in Geneva.

### Report

1. A range of New Zealand government agencies have received representations from New Zealand industry about the proposed WHO Guidance along the same lines as the views expressed by US industry.
2. New Zealand has provided the attached submission to the WHO Secretariat. Our key concerns relate to the lack of adequate time WHO has given member states to properly consider, and provide feedback, on the draft Guidance, as well as issues regarding the transparency of the process, particularly given that member states are still unable to review the technical data and research that underpins the Guidance.
3. Further areas of concern include lack of clarity around the Guidance's definitions, for example "breast milk substitutes" and frequent references in the body of the text to simply preventing *promotion* of products rather than the *inappropriate promotion*, as the title of the Guidance suggests.

4. We consider it is important that all WHO member states who share similar concerns take a coordinated approach to consideration of the issue at the forthcoming meeting of the WHO World Health Assembly, scheduled for 23-28 May 2016. Relevant posts are therefore requested to consult with contacts in host governments' trade and health agencies to confirm that they are aware of the draft WHO Guidance, and to pass over a copy of New Zealand's submission. We provide Talking Points below for Posts to draw on.

#### Talking points

- In May 2012, the World Health Assembly directed the WHO Director General "to provide clarification and guidance on the inappropriate promotion of foods for infants and young children." Accordingly, the WHO Secretariat established a Scientific and Technical Advisory Group on Inappropriate Promotion of Foods for Infants and Young Children, which, at the end of 2015, submitted draft Guidance on "ending the inappropriate promotion of foods for infants and young children."
- A major concern for New Zealand is that the underlying evidence informing the recommendations made by the Scientific and Technical Advisory Group has not been made available to WHO member states. Member states are, therefore, unable to determine whether the recommendations contained in the Guidance are supported by the science.
- In light of that, New Zealand strongly urges that member states have adequate time to consider the data and research, and consult with their stakeholders on potential impacts of the Guidance before it is considered by the World Health Assembly in the 23-28 May 2016 meeting of the Assembly.
- The Guidance needs to ensure that it is focussed on strengthening optimal nutrition for infant and child health by limiting the inappropriate promotion of breast-milk substitutes and complementary foods, where it undermines breastfeeding. The Guidance should therefore focus on preventing the *inappropriate* promotion of foods for infants and young children, rather than its current formulation where it could be viewed as preventing *any* promotion of foods for infants and young children.
- For example, the manner in which "breast milk substitute" has been defined could be interpreted broadly to encompass fresh milk, dried cows' milk powder, fermented milk and yoghurt. This would undermine WHO Guiding Principles which recommend the consumption of these products for complementary feeding.
- To that end, New Zealand has proposed changes to the text to remove or amend passages where the definitional uncertainties posed may potentially lead to confusion, and inconsistent implementation by member states. New Zealand has also proposed addition of a definitions section to the Guidance, to minimise potential misinterpretation.
- We believe that a coordinated response by likeminded member states can address these concerns and the draft Guidance can achieve its aim of improving nutrition for infant and

child health by limiting the inappropriate promotion and use of breast-milk substitutes and complementary foods in a manner that undermines breastfeeding. Such a response can also help consider and avoid unintended or adverse consequences for member states broader trade and economic relationships.

- The submission to the WHO regarding the Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children (EB138/8) can be found on the Ministry of Health website at the following link: <http://www.health.govt.nz/news-media/news-items/submission-who-draft-guidance-ending-inappropriate-promotion-foods-infants-and-young-children>

From: s6(a)  
Sent: Tuesday, 16 February 2016 4:10 p.m.  
To: TND; GENEVA  
Cc: FM.P/S Trade; FM.P/S Health; FM.P/S Food Safety; FM.P/S Agriculture; FM.Health Ministry (Seemail); FM.MPI (Seemail); ECO; AMER; DS TEG; CEO; s6(a)  
s6(a)  
Subject: FORMAL MESSAGE s6(a) to WHO Infant Formula Guidelines

#### Handling Instructions

MPI: s9(2)(a)  
MOH: s9(2)(a)

#### Summary

Three different s9(2)(b)(ii)

s6(a) approached the Embassy last week strongly opposing the World Health Organisation's "Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children". In their view the Guidelines prescribe, without evidence or any clear objective, unreasonably limiting the promotion of infant nutrition products, particularly infant formula.

s6(a)

s6(a)

this has been done without meaningful consultation with Members.

Each organisation has requested that New Zealand takes action as a WHO Member to seek details of any underpinning evidence supporting WHO's recommendations. They believe WHO members need more time to carefully develop these recommendations, based on strong scientific evidence and with careful consideration and input by key stakeholders. They are particularly concerned about the potential for the WHO Guidance to overtake a concurrent standards-setting review process under way at Codex, and therefore to set new international trading conditions.

We report on the meetings and forward documents received.

Action

For information. We welcome advance notice of New Zealand's intentions, for sharing as appropriate s6(a)

## Report

2 During the previous meeting of the World Health Organisation (WHO) Executive Board (in the final week of January), we were approached with urgency by senior contacts in s6(b) relaying concerns of the about a paper for consideration at the Executive Board meeting: "Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children" (hereafter "the Guidance"). We were urged to press for more time to consider the paper given its flaws and its potentially far-reaching implications for trade.

3 We understand that a decision was taken at that meeting to delay consideration of the paper, pending further comments from Members. [Comments on the substance of the paper itself, we are not qualified to comment, other than to note that the recommendation for nutrition products for infants under age 3 "not to be promoted" seems extraordinarily far-reaching – one of our contacts suggested to us s6(b) and it is not clear in the paper what problem this recommendation would address.]

4 Last week (8-12 February)

5 The decision by the WHO Executive Board in January to defer a recommendation for taking up the Guidance was gratefully noted s9(2)(a)

s9(2)(b)(ii)

s9(2)(b)(ii) understood, however, that comments on the Guidance from WHO Members were now due by the end of February (if not before) and that they would only be considered at one meeting in Geneva before the paper was put again to the WHO. The quick turnaround for comments was very concerning.

s6(b)

6 s9(2)(b)(ii)

(page 13 onwards in the attached). Their bottom line ask is that many Member States comment to the WHO to the effect that:

- There is s9(2)(b)(ii) told us that they had learned of conclusive evidence;

s9(2)(b)(ii)

- MJN

being cited as



- There is no sense of what the Guidance is intended to achieve; the “inappropriate” in the title, however. s9(2)(g)(i)
- The Guidance should be scrapped and started again with objectives/evidence having been agreed/endorsed by the entire WHO membership;
- If not scrapped, then certainly delayed – particularly to take into account the concurrent Codex process which is under way, and which will set guidelines for infant formula which are actually based on science.

7 They noted the process for development of the guidance was flawed, and could easily undermine Codex and the science and risk-based work the Committee on Nutrition and Foods for Special Dietary Needs is completing on “follow-on formulas”. There was concern expressed by all on the potential for this guidance to s9(2)(g)(i) whether intended or not, this may well become the reference standard for the WTO and could have the effect of legitimising discriminatory barriers to trade.

#### Comment

8

s9(2)(g)(i) the above – except where noted – represents the view of s9(2)(b)(ii) as relayed to us. If their description of the consultation process is correct, however, and if their description of the modest evidence base for the recommendations is accurate, then their call for at least a delay and reconsideration seems reasonable.

9

We would appreciate being kept in the loop about New Zealand’s intentions in responding to the paper s6(a)

We presume s6(a) and New Zealand delegations in Geneva will coordinate on this issue on the ground. We are of course happy to liaise with the s6(a) here in s6(a) on a way forward, as directed.

ENDS

**From:** s6(a)

**Sent:** Monday, 4 April 2016 8:08 p.m.

**To:** TND; GENEVA; s6(a)

**Cc:** ...WLN TRADE DIVISIONS; FM.P/S MFA; FM.P/S Trade; FM.P/S Health; FM.P/S Food Safety; FM.P/S Agriculture; FM.Health Ministry (Seemail); FM.MPI (Seemail); CEO; FM.DPMC (FPA); s6(a); ...TRADE POSTS; ...PACIFIC POSTS; s6(a)

**Subject:** FORMAL MESSAGE: WHO INFANT FORMULA GUIDELINES: s9(2)(b)(ii)

**Handling instructions:**

MOH: s9(2)(a)

MPI: s9(2)(a)

**Summary**

s9(2)(b)(ii)

**Action Require**

2 TND to advise on para 5.

**Report**

s9(2)(b)(ii)

s9(2)(b)(ii)

RELEASED UNDER THE  
OFFICIAL INFORMATION ACT

# Hon Todd McClay: Meeting with Fonterra

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Date/Time 1215-1500, 28 April

Location Fonterra Head Office, Auckland

Participants s9(2)(a) Fonterra s9(2)(a)  
s9(2)(a) Fonterra

*martin Harvey,* Trade Negotiations Division, MFAT

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Key Objectives:

OUT OF SCOPE

Fonterra Overview

OUT OF SCOPE

OUT OF SCOPE

#### NZ Dairy industry concern about proposed WHO Guidelines on the Use of Infant Formula

- In February of this year, the World Health Organisation released a draft of its *Guidance on the inappropriate promotion of foods for infants and young children*. The draft Guidance, which is proposed for adoption at a 23-28 May meeting of the World Health Assembly (WHA) in Geneva, contains provisions that could potentially harm New Zealand's exports of infant formula (worth \$440 million in 2015).
- The Guidance adopts a very broad definition of what constitutes a breast-milk substitute, and provides that these should not be promoted in any form. The definition includes "any milk products... in either liquid or powdered form that are marketed for feeding infants and young children up to the age of 3 years."
- This would bring follow-up formula and growing-up milks under the scope of a breast-milk substitute, as well as also potentially liquid and powdered milks, thereby prohibiting the promotion of these products (including via the product's webpage and/or packaging), if they are marketed for consumption by under 3-year-olds.
- The Guidance introduces new labelling requirements for any product that falls under its scope, which would significantly impact the branding and trademark rights of infant food manufacturers.
- New Zealand made a submission to the WHO noting our concerns about the broad definition of breast-milk substitutes and the fact that WHO members had not been allowed adequate time to consider the validity of the scientific evidence on which the Recommendations in the Guidance are based. We proposed compromise language, which we believed would allow the Guidance to fulfil its purpose of protecting child and infant health by focusing on the *inappropriate* promotion of foods. Our proposed language has not been accepted s9(2)(g)(i)

The remainder of this document is out of scope