

Determination

Infant Nutrition Council Limited [2023] NZCC 32

The Commission:	Sue Begg Joseph Liava'a Nathan Strong
Summary of application:	The Infant Nutrition Council on behalf of its members (current and future) has applied for authorisation of an arrangement allowing the Infant Nutrition Council's members to restrict their advertising and marketing activities for formula products for children up to 12 months of age.
Determination:	The Commerce Commission has decided to grant an interim authorisation under section 65AAA of the Commerce Act 1986 as it is satisfied that it is appropriate to do so. The interim authorisation will likely remain in force until the Infant Nutrition Council's application for authorisation has been granted or declined.
Date of determination:	8 November 2023

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Introduction

1. On 22 August 2023, the Commerce Commission (Commission) registered an application from the Infant Nutrition Council Limited (INC) under sections 58(1) and (2) of the Commerce Act 1986 (the Act) seeking authorisation on behalf of its current and future members for them to enter into and give effect to an arrangement to which section 27 of the Act may apply (the Application).
2. The INC submitted that the proposed arrangement does not constitute cartel conduct under section 30 of the Act. However, in the event that the Commission considers that the proposed arrangement might contain a cartel provision, the INC also seeks authorisation under sections 58(6B) and (6D) of the Act.
3. On 11 October 2023, we issued a Draft Determination outlining our preliminary determination on the Application.¹ The Application was amended on 27 October 2023 after the INC advised it wished to revise a particular clause forming part of the arrangements to be authorised.²
4. The Application is seeking authorisation for restrictions on advertising and marketing activities for formula products for infants up to 12 months old (Proposed Arrangements). The Proposed Arrangements would be embodied in the INC's Code of Practice for the Marketing of Infant Formula in Aotearoa New Zealand (Proposed INC Code). The Commission previously authorised similar arrangements in 2018 although this authorisation expires on 8 November 2023.³

Determination: grant interim authorisation

5. As part of its continuing assessment of the Application, the Commission considers it is appropriate to grant interim authorisation for the Proposed Arrangements under sections 58(1), (2), (6B), and (6D) of the Act (the Interim Authorisation).⁴ The Interim Authorisation will likely remain in force until the INC's application for authorisation has been granted or declined.⁵
6. Given the authorisation granted to the INC in 2018 expires on 8 November 2023, the Interim Authorisation allows for the Proposed Arrangements while the Commission consults on the amendment the INC made to its Application, which occurred after the Commission published its Draft Determination. The statutory deadline for the Commission to make a decision on the Application is 1 March 2024.

¹ Commerce Commission Draft Determination - Infant Nutrition Council Limited (11 October 2023).

² The amended clause related to clause 6.6 of the INC's Proposed Code of Practice for the Marketing of Infant Formula in Aotearoa New Zealand. Letter from Buddle Findlay (on behalf of the INC) to the Commerce Commission (27 October 2023).

³ Commerce Commission Infant Nutrition Council Limited [2018] NZCC 20.

⁴ In this respect, the Interim Authorisation relates to conduct under section 27 and section 30 of the Act.

⁵ The Interim Authorisation is granted until the date determined by the operation of section 65AAA of the Act. Under section 65AAA(4) of the Act, an interim authorisation remains in force until the applicant withdraws its application for an authorisation; or (b) the Commission revokes the interim authorisation under section 65 of the Act; or (c) the Commission declines or grants the application for an authorisation under section 58 of the Act.

7. The Commission considers that the Interim Authorisation is appropriate, based on our assessment of the evidence available at this time, because:
 - 7.1 the Commission authorised similar arrangements in 2018;
 - 7.2 there are reasonable grounds for believing that the Proposed Arrangements contain one or more cartel provisions (and that the Proposed Arrangements, as a whole, would restrict output);
 - 7.3 on balance we consider the potential benefits under the Proposed Arrangements are more likely than not to outweigh the potential detriments of Interim Authorisation; and
 - 7.4 the Interim Authorisation is unlikely to materially alter competitive dynamics of the relevant markets in a permanent way.
8. The Commission's decision to grant the Interim Authorisation should not be taken as an indication of what the Commission might decide in its final determination in respect of the Application.

The Commission's power to grant interim authorisation

9. Our approach to granting interim authorisations is set out in our Authorisation Guidelines.⁶ The Commission may grant an interim authorisation under section 65AAA of the Act in respect of an application for authorisation made under section 58 of the Act if it considers it appropriate to do so:
 - 9.1 for the purpose of enabling due consideration to be given to an application; or
 - 9.2 for any other reason.⁷
10. The Commission does not need to be satisfied that any proposed arrangement would meet the 'public benefit test' like it would for an authorisation.⁸ Nevertheless given the purpose of the Act and the authorisation regime, the Commission is unlikely to grant interim authorisation in respect of an agreement that has the potential to substantially lessen competition unless there are compelling reasons in the public interest to do so.⁹
11. Without limiting the Commission's discretion when considering whether to grant interim authorisation, factors the Commission will consider include:¹⁰

⁶ Commerce Commission Authorisation Guidelines (June 2023).

⁷ Commerce Commission Authorisation Guidelines (June 2023) at [176]. An interim authorisation can be granted by the Commission of its own motion or following a request from an applicant.

⁸ Section 65AAA(2) of the Act.

⁹ Commerce Commission Authorisation Guidelines (June 2023) at [177].

¹⁰ Commerce Commission Authorisation Guidelines (June 2023) at [178].

- 11.1 the purpose of the Act, to promote competition in markets for the long-term benefit of consumers within New Zealand;
- 11.2 the urgency of the application for authorisation, including whether:
 - 11.2.1 the risk that some or all of the benefits of the authorisation may not materialise if interim authorisation is not granted; or
 - 11.2.2 an emergency exists and interim authorisation is needed to allow parties to respond;
- 11.3 the potential benefits and detriments based on all information available to the Commission at the time the application for interim authorisation is considered;
- 11.4 the extent to which any relevant market may change if an interim authorisation is or is not granted – interim authorisation is more likely to be granted when:
 - 11.4.1 it will maintain the market status quo; or
 - 11.4.2 it is unlikely to materially alter the competitive dynamics of the market;
- 11.5 the possible harm, if any, to the applicant if an interim authorisation is not granted;
- 11.6 the possible harm to other parties (such as customers and competitors) or the public if a request for interim authorisation is granted or not; and
- 11.7 the likely scope and duration of the interim authorisation, and any conditions that might be imposed within it.

Background to the granting of the interim authorisation

- 12. The INC is a limited company incorporated in Australia, owned by its members, which consist of manufacturers and marketers of infant formula and toddler milk products in Australia and New Zealand.
- 13. The Application is the third from the INC. The second authorisation granted by the Commission expires on 8 November 2023. Further background on the INC, its past authorisation applications, and the Proposed Arrangements it is seeking authorisation for are detailed in the Draft Determination.
- 14. After the Commission issued its Draft Determination on 11 October 2023, the INC advised on 27 October 2023 that it wanted to make an amendment to the Proposed INC Code by revising Article 6.6 (the Revised Clause 6.6), which had the subsequent effect of changing some of the conduct for which Authorisation was sought.¹¹ The

¹¹ Letter from Buddle Findlay (on behalf of the INC) to the Commerce Commission (27 October 2023).

INC advised that it made the revision to the Proposed INC Code after consulting with Te Whatu Ora – Health New Zealand. It further advised that the amendment is to ensure the Proposed INC Code is consistent with other international arrangements.¹²

15. On 1 November 2023, we issued an Addendum to the Draft Determination (Addendum) outlining our view that the Revised Clause 6.6 does not materially impact our assessment of the relevant benefits and detriments of the Proposed Arrangements in the Draft Determination.¹³ The Addendum sought feedback on Revised Clause 6.6 from industry parties by 6 November 2023.
16. Several industry parties advised the Commission that they would like to provide a submission on Revised Clause 6.6, including the Commission’s assessment of Revised Clause 6.6 outlined in the Addendum, but that they would be unable to do so by 6 November 2023. At the date of this determination for Interim Authorisation, the Commission had not received all of these submissions.
17. On 7 November 2023, the INC requested that the Commission grant interim authorisation.¹⁴
18. In granting the Interim Authorisation, the Commission took into consideration that the INC’s current authorisation expires on 8 November 2023. In addition, the Commission considered information from a range of industry parties including:
 - 18.1 members of the INC;
 - 18.2 government agencies and health organisations including Māori and Pacific interest groups;
 - 18.3 breastfeeding advocates; and
 - 18.4 retailers who purchase and sell infant formula.

Reasons for granting interim authorisation to the INC

19. The Commission grants Interim Authorisation under section 65AAA of the Act because the Commission is satisfied that it is appropriate to do so.
20. The Interim Authorisation allows the INC to give effect to the Proposed Arrangements; specifically, allowing the INC’s members to restrict their advertising and marketing activities for formula products for children up to 12 months of age. the Proposed Arrangements will be given effect via the INC’s members complying with Articles 5.1, 5.3, 5.4, 5.5, 6.5, 6.6, 7.2 and 7.3 of the Proposed INC Code. The Proposed Arrangements are particularised:

¹² Letter from Buddle Findlay (on behalf of the INC) to the Commerce Commission (27 October 2023). The consultation with Te Whatu Ora – Health New Zealand also involved consultation with the Ministry of Health.

¹³ Commerce Commission Addendum to Draft Determination Infant Nutrition Council Limited (1 November 2023).

¹⁴ Email from Buddle Findlay (on behalf of the INC) to the Commerce Commission (7 November 2023).

- 20.1 with regards to Articles 5.1, 5.3, 5.4, 5.5, 6.5, 7.2 and 7.3, in the Proposed INC Code;¹⁵ and
- 20.2 with regards to Article 6.6, in Appendix 1 of the INC's letter to the Commission on 27 October 2023.¹⁶
21. Under section 65AAA(4) of the Act, the Interim Authorisation will remain in force until the INC withdraws the Application; or the Commission revokes the Interim authorisation under section 65 of the Act; or the Commission declines or grants the INC's application for authorisation.
22. The Commission is continuing to assess the Application and the statutory deadline for the Commission to make a decision on the Application is 1 March 2024. In this respect, the Interim Authorisation will likely remain in force until the Application has been granted or declined.
23. In applying the factors in the Commission's Authorisation Guidelines,¹⁷ the Commission considers it appropriate to grant an interim authorisation to enable us to complete our consultation on the Revised Clause 6.6 and because:¹⁸
- 23.1 on balance we consider the potential benefits under the Proposed Arrangements are more likely than not to outweigh the potential detriments from the Interim Authorisation based on all the information available to the Commission at the time interim authorisation was considered; and
- 23.2 the Interim Authorisation is unlikely to materially alter the market in a permanent way.

Potential benefits from the Interim Authorisation likely to outweigh the potential detriments

24. When considering whether to grant an interim authorisation, the Commission will consider the potential benefits and detriments based on all information available to the Commission at the time.¹⁹
25. Consistent with the Draft Determination, we consider that it is more likely than not that the benefits of the Interim Authorisation will outweigh the detriments.
26. To date the Commission has not obtained any information that indicates the Revised Clause 6.6 would materially impact its assessment of the likely benefits and

¹⁵ See the Application at Appendix 1: Proposed INC Code of Practice.

¹⁶ Letter from Buddle Findlay (on behalf of the INC) to the Commerce Commission (27 October 2023).

¹⁷ As noted at Commerce Commission Authorisation Guidelines (June 2023) at [178], the Commission is not limited in its discretion on the factors it needs to consider in granting an interim authorisation.

¹⁸ Commerce Commission Authorisation Guidelines (June 2023) at [178].

¹⁹ Commerce Commission Authorisation Guidelines (June 2023) at [178.3].

detriments arising from the Proposed Arrangements, as outlined in the Draft Determination.²⁰

27. In addition, we consider that the potential benefits from the Proposed Arrangements would outweigh any potential detriments, such that the with-the-Proposed Arrangements scenario results, on balance, is such a benefit to the public that it should be permitted.²¹
28. Further, the statutory deadline for the Commission to make a decision on the Application is 1 March 2024 and allowing the Proposed Arrangements under the Interim Authorisation would likely avoid disruption to the current status quo²² before the Commission makes a final determination on the Application. For example:
 - 28.1 if an interim authorisation is not granted but a full authorisation subsequently is granted, there is likely to be a period of time where there would be some lost benefits because there would be no authorisation in place. In this scenario, INC Members would not be protected by any authorisation and therefore they would likely incur legal and administrative costs to amend the INC Code authorised in 2018 to omit the relevant restrictions and/or otherwise take steps to ensure that the relevant restrictions are not binding;
 - 28.2 alternatively, if an interim authorisation is granted but a full authorisation is subsequently declined, there is likely to be a limited period of time where there would be the potential for significant harm.

Interim Authorisation unlikely to result in a permanent market change

29. We are more likely to grant an interim authorisation when it will maintain the market status quo, or it is unlikely to materially alter the competitive dynamics of the market permanently or for a substantial period, if the application for full authorisation is later declined.
30. We consider the Interim Authorisation would not result in any permanent structural changes to the relevant market(s) and would maintain the current status quo.²³ This is because, as outlined in the Draft Determination and the Addendum, the Proposed Arrangements are similar to the current restrictions on the advertising and marketing of infant formula that have been in place for some time as a result of the Commission's previous authorisation to the INC in 2018.
 - 30.1 As outlined in the Draft Determination, the relevant markets are mature and stable, and there have been minimal changes to the industry and infant formula manufacturing since 2018.

²⁰ See Commerce Commission Draft Determination - Infant Nutrition Council Limited (11 October 2023) and Commerce Commission Addendum to Draft Determination Infant Nutrition Council Limited (1 November 2023).

²¹ Draft Determination at: [54]-[69]; [80]-[83]; and [84].

²² Essentially, the arrangements authorised under the 2018 authorisation.

²³ The Commission is also required to make a decision on the Application by 1 March 2024.

- 30.2 As outlined in the Draft Determination and the Addendum, the revisions that are included in the Proposed INC Code do not materially impact our previously assessments that the potential benefits from INC Members restricting their advertising and marketing activities for formula products for infants up to 12 months would outweigh any potential detriments.
- 30.3 If the Application is later declined, the INC members (ie formula manufacturers and marketers) would continue to face their own individual incentives to not advertise or promote infant formula (subject to their own company policies).²⁴ As a result, any increase in the advertising and marketing activities of INC Members between Interim Authorisation and any later decline would more likely be incremental and unlikely to have a material impact on the relevant markets.

²⁴ Some formula manufacturers have individual policies to not advertise or market stage 1 infant formula (0 to 6 months) as opposed to the 0-12 months restriction in the current INC Code. See Danone [Policy for the Marketing of Breast-Milk Substitutes](#) and Nestlé [Policy For Implementing the WHO Code](#).

Determination

31. Under section 65AAA of the Act, the Commerce grants interim authorisation to the INC to allow the INC to give effect to the Proposed Arrangements, being the restricting of advertising and marketing activities for formula products for infants up to 12 months old. The Proposed Arrangements would be embodied in the INC Code of Practice for the Marketing of Infant Formula in Aotearoa New Zealand.
32. Under section 65AAA(4) of the Act, the interim authorisation will remain in force until the INC withdraws its Application; or the Commission revokes the Interim Authorisation under section 65 of the Act; or the Commission declines or grants authorisation to the Application.

Dated this 8th day of November 2023

Sue Begg
Division Chair