

## Determination

### Infant Nutrition Council Limited [2023] NZCC 42

<b>The Commission:</b>	Sue Begg Joseph Liava'a Nathan Strong
<b>Summary of application:</b>	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.
<b>Determination:</b>	The Commerce Commission has decided to grant authorisation due to the public benefits that will result, or be likely to result, from the proposed arrangement.
<b>Date of determination:</b>	19 December 2023

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

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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. 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.<sup>1</sup>
4. The Application is seeking authorisation for restricting of advertising and marketing activities for infant formula products for infants up to 12 months old (Proposed Arrangements). The Proposed Arrangements would be embodied in the INC's Proposed Code of Practice for the Marketing of Infant Formula in Aotearoa New Zealand (Proposed 2023 INC Code).
5. On 8 November 2023, the Commission granted an interim authorisation to the INC for the Proposed Arrangements as part of its assessment of the Application.<sup>2</sup>

## Determination: grant authorisation

6. The Commission's determination is to grant authorisation under sections 58(1), (2), (6B), and (6D) of the Act to the Application due to the public benefits that will result, or be likely to result, from the Proposed Arrangements.
7. The granting of authorisation also means the interim authorisation granted to the INC on 8 November 2023 no longer remains in force.

## Assessment procedure

8. In making its determination, the Commission received submissions and obtained information from a wide range of sources. The Commission:
  - 8.1 reviewed the information and analysis in the Application;
  - 8.2 sought information from and considered submissions made by various parties on the Application;

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<sup>1</sup> 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).

<sup>2</sup> *Infant Nutrition Council Limited* [2023] NZCC 32 8 November 2023.

- 8.3 published a draft determination, which explained the Commission’s preliminary view that authorisation should be granted and called for submissions on our preliminary view (the Draft Determination);<sup>3</sup>
- 8.4 considered the submissions on the Draft Determination;
- 8.5 received and reviewed an amendment made to the Application by the INC. The INC amended clause 6.6 of the Proposed 2023 INC Code and this had the effect of amending the Application;
- 8.6 issued a short Addendum to the Draft Determination (Addendum) outlining our view that the amended clause does not materially impact our assessment of the relevant benefits and detriments of the Proposed Arrangements outlined in the Draft Determination;<sup>4</sup>
- 8.7 sought information from and considered submissions made by various parties on the amended clause and the Addendum;
- 8.8 granted interim authorisation on 8 November 2023; and
- 8.9 received and considered further submissions on the amended clause and the Addendum.

### **The proposed arrangement and key parties**

- 9. The Application concerns conduct relating to the supply of formula products for infants up to 12 months old in New Zealand. More information on this conduct is outlined below including:
  - 9.1 the Application and what the conduct relates to;
  - 9.2 who the INC represents and what it does;
  - 9.3 the role of Manatū Hauora - Ministry of Health in this industry and its relationship with the INC; and
  - 9.4 the submissions we received as part of our consultation process in assessing the Application.

### **The application**

- 10. The INC seeks authorisation to restrict advertising and marketing activities for formula products for infants up to 12 months old. The Proposed Arrangements

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<sup>3</sup> Commerce Commission Draft Determination - Infant Nutrition Council Limited (11 October 2023).

<sup>4</sup> Commerce Commission Addendum to Draft Determination Infant Nutrition Council Limited (1 November 2023).

involve INC members (current and future) agreeing to adhere, and give effect, to specific provisions of the Proposed 2023 INC Code.<sup>5</sup>

11. The Proposed 2023 INC Code would restrict INC members from engaging in the following activities:<sup>6</sup>
  - 11.1 advertising infant formula to the general public;
  - 11.2 distributing free samples to pregnant women, parents of infants, or the families and caregivers of infants;
  - 11.3 distributing free samples to healthcare professionals as a sales inducement;
  - 11.4 marketing personnel seeking direct or indirect contact with pregnant women or with parents of infants and young children;
  - 11.5 distributing bulk quantities of free infant formula product to the health system, as a sales inducement;
  - 11.6 distributing gifts of utensils or other articles that may discourage breastfeeding, whether to pregnant women, parents of infants, or caregivers of infants;
  - 11.7 offering inducements to healthcare professionals; and
  - 11.8 donating infant formula to food charities.

### **The applicant**

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.<sup>7</sup>
  - 12.1 Its members include Danone Nutricia NZ Limited, Nestlé New Zealand Limited, Fonterra Co-operative Group Limited and The A2 Milk Company Limited.
  - 12.2 Together, INC members account for approximately 99% of infant formula sales in New Zealand.<sup>8</sup>
13. The INC's constitution requires its members to comply with a code of conduct, which in turn requires INC's members to comply with any agreed code of practice.

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<sup>5</sup> Being, specifically, Articles 5.1, 5.3, 5.4, 5.5, 6.5, 6.6, 7.2 and 7.3. The Application at [70] and Letter from Buddle Findlay (on behalf of the INC) to the Commerce Commission (27 October 2023).

<sup>6</sup> The Application at [4], [63]-[73] and Appendix 1: Proposed INC Code of Practice.

<sup>7</sup> The Application does not request authorisation for toddler or junior milks (ie, formula for children aged over 1 year). Several industry parties expressed a desire for toddler and/or junior milks to be included as part of the Proposed Arrangements but, because they are not included as part of the Application, they fall outside of the scope of our consideration of the Application.

<sup>8</sup> The Application at [89].

14. Over time, the INC has updated, and sought authorisation to implement certain provisions in its code of practice, because these provisions place restrictions on the marketing of infant formula. In 2015 and 2018, the Commission authorised the INC members to give effect to a code of practice. The 2018 authorisation expired on 8 November 2023. These past authorisations are discussed further below.
15. The INC considers the Proposed Arrangements, as embodied by the Proposed 2023 INC Code, would be an important part of New Zealand fulfilling its obligations under the World Health Assembly's International Code of Marketing of Breast Milk Substitutes (the WHO Code).
  - 15.1 The WHO Code aims to protect and promote breastfeeding, and to restrict the marketing of breast milk substitutes in ways that could undermine this aim.
  - 15.2 The WHO Code was adopted on a voluntary basis by New Zealand in 1983 and the Manatū Hauora - Ministry of Health (the MoH) is committed to giving effect to the WHO Code in New Zealand.<sup>9</sup>

#### **Manatū Hauora - Ministry of Health**

16. After its adoption in 1983, the MoH was solely responsible for giving effect to the WHO Code in New Zealand. The MoH chose to do so through a voluntary self-regulatory approach, rather than through legislation.
17. Most recently, the MoH's Maternity and Early Years Unit has been the unit directly responsible for giving effect to the WHO Code although this unit is now part of Te Whatu Ora - Health New Zealand (Te Whatu Ora). Te Whatu Ora works alongside the MoH and Te Aka Whai Ora - Māori Health Authority (Te Aka Whai Ora) in giving effect to the WHO Code.<sup>10</sup>
18. While neither the MoH, Te Whatu Ora nor Te Aka Whai Ora are members of the INC, all work closely with the INC to give effect to the WHO Code, particularly when it comes to resolving public complaints about the marketing and advertising of infant formula. For example, the MoH and Te Whatu Ora are responsible for monitoring compliance with any INC code of practice, which they do through receiving complaints about alleged breaches of any INC code of practice.<sup>11</sup> Te Whatu Ora also provided input into the Proposed 2023 INC Code.

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<sup>9</sup> See MoH *Implementing and monitoring the International Code of Marketing of Breast-milk Substitutes in New Zealand: The Code in New Zealand*. The WHO Code is also given effect in the Advertising Standards Code, Australia New Zealand Food Standards Code, and in past INC code of practices.

<sup>10</sup> In this respect, feedback the Commission received on the Application from Te Whatu Ora also reflected the views of the MoH. See Email from Te Whatu Ora to Commerce Commission (1 November 2023).

<sup>11</sup> We do not consider, in resolving public complaints about the marketing and advertising of infant formula and monitoring compliance with any INC code of practice, that MoH, Te Whatu Ora or Te Aka Whai Ora are liable under section 80(1)(e) of the Act (by being directly or indirectly knowingly concerned in the contravention of the Act by the INC). This is because in their complaint resolution and monitoring functions, we do not consider those agencies 'in trade' (for the purposes of section 44(1)(h) of the Act) with the INC.

19. Since 2020, the MoH, and now Te Whatu Ora, have been developing The National Breastfeeding Strategy for New Zealand Aotearoa Rautaki Whakamana Whāngote (the National Breastfeeding Strategy).<sup>12</sup> The National Breastfeeding Strategy is to continue past programmes supporting the exclusivity and duration of breastfeeding to improve the health and wellbeing of infants, young children, breastfeeding parents and whānau, and benefit society as a whole. The National Breastfeeding Strategy has nine outcomes to recognise a holistic, whole-of-system approach to the protection, promotion, and support of breastfeeding. Aspects of the National Breastfeeding Strategy most relevant to the Application are:
- 19.1 considering breastfeeding in developing relevant policies, guidelines, regulations, and frameworks across government;
  - 19.2 establishing a regular process to review New Zealand’s interpretation of the WHO Code;
  - 19.3 reviewing the complaints process for breaches of any INC code of practice; and
  - 19.4 working with Foods Standards Australia New Zealand (FSANZ) to review evidence relating to the marketing, labelling, and preparation of breast milk substitutes.<sup>13</sup>

#### **Submissions received by the Commission**

20. The Commission received a range of submissions from individuals and organisations on the Application, the Draft Determination and Addendum, and the other material published on the Commission’s website.<sup>14</sup> The Commission took into account all submissions it received.
21. The submissions we received were generally supportive of restrictions on the advertising and marketing of any type of formula for infants, although there are conflicting views on the level of restrictions that are appropriate. The individuals and parties that provided submissions were:
- 21.1 WellSouth Primary Health Network (WellSouth);
  - 21.2 Advertising Standards Authority (ASA);
  - 21.3 New Zealand Food & Grocery Council (NZFGC);

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<sup>12</sup> See Te Whatu Ora website for further information: <https://www.tewhatauora.govt.nz/for-the-health-sector/specific-life-stage-health-information/maternal-health/breastfeeding/national-breastfeeding-strategy/>

<sup>13</sup> See Priority 2 of the National Breastfeeding Strategy. We understand that the New Zealand Breastfeeding Alliance has recommended that formula labels include warnings about contamination risks, which falls into the work the National Breastfeeding Strategy and FSANZ are conducting. See Submission from New Zealand Breastfeeding Alliance on Draft Determination (24 October 2023).

<sup>14</sup> Public versions of all submissions we received are available on the Commission’s website.

- 21.4 New Zealand College of Midwives (College of Midwives);
  - 21.5 New Zealand Breastfeeding Alliance (NZBA);
  - 21.6 Canterbury Breastfeeding Advocacy Service, Te Puawaitanga ki Ōtautahi Trust (CBAS); and
  - 21.7 Ms Julie Fogarty.
22. Some parties expressed reluctant support for the Proposed Arrangements because they do not consider the arrangements sufficiently restrict the advertising and marketing of formula for infants. For example, several parties expressed concerns with the amendment the INC made to the Application, which revised the circumstances in which health organisations would be able to donate formula.<sup>15</sup> However, other parties supported the amendment because the proposed clause is intended to make the Proposed Arrangements more consistent with relevant arrangements in Australia and the WHO Code.<sup>16</sup>

### **Past authorisations by the Commission**

23. In 2015 and 2018, the Commission authorised the INC members to give effect to an INC code of practice. These two authorisations are:<sup>17</sup>
- 23.1 Infant Nutrition Council Limited [2015] NZCC 11 (the 2015 Authorisation); and
  - 23.2 Infant Nutrition Council Limited [2018] NZCC 20 (the 2018 Authorisation).
24. In the 2015 Authorisation, the Commission authorised INC members to enter into, and to give effect to, a code of practice which restricted advertising and marketing of infant formula for children under six months of age. This was primarily because, while the code of practice was likely to lessen competition, the Commission considered that there would be public benefits from giving effect to the code of practice including:
- 24.1 avoided regulatory costs; and
  - 24.2 improved public health outcomes.
25. In the 2018 Authorisation, the INC sought authorisation to amend its code of practice to extend advertising and marketing restrictions to formula for infants aged 6 to 12 months. For very similar reasons to the 2015 Authorisation, the Commission authorised an update of the INC's code of practice. However, unlike the 2015

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<sup>15</sup> See Submissions from NZBA on Revised Clause 6.6 and Addendum (1 and 8 November 2023), Submission from CBAS (1 November 2023) and Submissions from College of Midwives on Revised Clause 6.6 and Addendum (1 and 8 November 2023).

<sup>16</sup> See Email from Te Whatu Ora (7 November 2023) and the INC's Submission on Addendum to Draft Determination (6 November 2023).

<sup>17</sup> Further details of these authorisations can be found on the Commission's website at: <https://comcom.govt.nz/case-register>.

Authorisation, the 2018 Authorisation was time bound with the Commission granting authorisation for a period of five years.

### **Interim authorisation**

26. As noted above, on 8 November 2023, the Commission granted an interim authorisation to the INC until it declines or grants the application for an authorisation under section 58 by the operation of section 65AAA of the Act (Interim Authorisation). The granting of the Interim Authorisation allowed the INC to give effect to the Proposed Arrangements embodied by the Proposed 2023 INC Code.
27. The Commission considered that the Interim Authorisation was appropriate, based on our assessment of the evidence available at the time, because:
  - 27.1 the Commission authorised similar arrangements in 2018;
  - 27.2 there were 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);
  - 27.3 on balance we considered the potential benefits under the Proposed Arrangements were more likely than not to outweigh the potential detriments of Interim Authorisation; and
  - 27.4 the Interim Authorisation was unlikely to materially alter competitive dynamics of the relevant markets in a permanent way.

### **How the Commission assesses restrictive trade practice and cartel authorisations**

28. The INC seeks authorisation under sections 58(1) and (2) of the Act, on the basis that section 27 of the Act might apply to specific provisions of the Proposed Arrangements.
29. Although the INC does not consider that the Proposed Arrangements constitute any cartel arrangement, the INC also seeks authorisation under sections 58(6B) and (6D) of the Act, on the basis that section 30 of the Act may apply to the Proposed Arrangements if there are reasonable grounds for the Commission to believe that the restrictions in the Proposed Arrangements may include cartel provisions.
30. Based on the restrictions in the Proposed Arrangements, we consider it is appropriate to assess the Application under section 30 of the Act as well as section 27. This is because section 30A(3)(a) of the Act defines “restricting output” in relation to the supply of goods to mean preventing, restricting or limiting, or providing for the prevention, restriction or limitation of the production or likely production by any party to a contract, arrangement, understanding, or covenant of goods that any two or more of the parties to that contract, arrangement, understanding, or covenant supply or acquire in competition with each other.

- 30.1 The restrictions in the Proposed Arrangements are likely to meet the threshold for “restricting output” on the basis that they would likely result in a restriction on the production and output of formula that INC members supply to downstream retail markets in competition with one another (due to the likelihood of reduced demand for formula as a result of the restrictions in the Proposed Arrangements).
- 30.2 In addition, the restrictions in the Proposed Arrangements are likely to result in a reduction in the acquisition of advertising services that would otherwise be acquired by INC members in competition with one another (section 30A(3)(d)).<sup>18</sup>

### Statutory framework

31. The Commission can authorise conduct that may otherwise breach section 27 and/or section 30 of the Act. A two-stage assessment is undertaken to determine any authorisation application submitted under sections 58(1) and (2) (in relation to section 27), and/or (6B) and (6D) (in relation to section 30) of the Act:
- 31.1 first, assessing whether the Commission has jurisdiction to authorise (the ‘jurisdictional threshold’); and
- 31.2 second, assessing whether the associated benefits mean that authorisation should be granted (the ‘public benefit test’).

### *Jurisdictional threshold*

32. When authorising conduct that would otherwise breach section 27 of the Act, under sections 58(1) and (2) of the Act, the Commission must be satisfied that such conduct would be likely to result in benefits to the public of such a degree as to outweigh any likely lessening of competition (ie, the detriments arising from the loss of competition caused by the conduct). As such, the Commission must first determine whether the conduct is likely to lessen competition. The lessening of competition need not be substantial,<sup>19</sup> although in the authorisation context, the Commission must also determine the extent of the lessening of competition that would result from the proposed arrangement.<sup>20</sup> If the Commission does not consider that a lessening of competition is likely, it does not have jurisdiction to further consider the Application and, consequently, will not go on to consider the public benefits of the conduct. However, if the Commission is satisfied that a lessening of competition is likely, it will go on to conducting the public benefits test.
33. When authorising conduct that would otherwise breach section 30 of the Act under sections 58(6B) and (6D) of the Act, the Commission first needs to have reasonable

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<sup>18</sup> We believe there are reasonable grounds for considering the Proposed Arrangements include a cartel provision although we have not formally concluded on this point for the purposes of this determination. Under section 61(9) of the Act, it is not necessary for the Commission to determine whether a particular provision is in fact a cartel provision, providing there are reasonable grounds for believing that it might be.

<sup>19</sup> Section 61(6A) of the Act.

<sup>20</sup> *New Zealand Vegetable Growers Federation (Inc) v Commerce Commission (No.3)* (1988) 2 TCLR 582.

grounds to believe that the contract, arrangement, understanding, or covenant contains a cartel provision. We set out our assessment of our jurisdiction under sections 58(6B) and (6D) of the Act above; however, we note that it is not necessary for the Commission to determine whether a provision is in fact a cartel provision.<sup>21</sup> If the jurisdictional threshold under sections 58(6B) and (6D) is met, for the Commission to authorise conduct that would otherwise breach section 30 of the Act, the Commission must be satisfied that the contract, arrangement, understanding, or covenant to which the application relates will in all the circumstances result or be likely to result in such a benefit to the public that it should be permitted.<sup>22</sup>

### *Public benefit test*

34. Although the jurisdictional thresholds differ under sections 58(1) and (2), and sections 58(6B) and (6D) of the Act, we consider that the public benefit test is materially the same.<sup>23</sup>
35. Where the courts have previously considered various types of authorisation decisions allowed for in the Act, there has been overall consistency in the approach taken to assessments of public benefit (ie, a facts-based assessment of the benefits and detriments, adopting a quantitative approach where possible).<sup>24</sup>
36. If the public benefits either outweigh the detriments or are likely to do so, the Commission may grant the authorisation. Otherwise, the Commission will decline to grant the authorisation.

### **Market definition**

37. When the Commission considers an application for authorisation of potentially restrictive trade practices, it assesses the competitive effects of those practices in respect of the relevant market(s) in New Zealand.
38. Determining the relevant market requires a judgement as to whether, for example, two products are sufficiently close substitutes (as a matter of fact and commercial common sense) to provide significant competitive constraints on each other. Markets are defined in a way that best isolates the key competition issues that arise from the application.
39. There are two types of formula relevant to the Proposed Arrangements:
  - 39.1 formula for children aged up to 6 months; and
  - 39.2 follow-on formula for children aged 6 to 12 months.

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<sup>21</sup> Section 61(9) of the Act

<sup>22</sup> Section 61(8) of the Act.

<sup>23</sup> See *News Publishers' Association of New Zealand Incorporated* [2022] NZCC 35, at [37]. We note that section 65AA of the Act referred to in the *News Publishers' Association Authorisation* has since been repealed, and that section 58(6) of the Act substantively replaced section 65AA.

<sup>24</sup> *News Publishers' Association of New Zealand Incorporated* [2022] NZCC 35 at [38].

40. There is likely to be limited demand-side substitution between these formulas. However, as noted below, we consider that it is appropriate to assess the Application on the basis of a single national market for the supply of infant formula via retail channels because of supply-side substitution.

### Relevant markets for formula

41. In the 2018 Authorisation, the Commission identified three main types (or stages) of formula, namely:<sup>25</sup>
- 41.1 stage one formula (starter formula), which is designed for infants from birth to the age of approximately 6 months as a substitute for breastmilk as the sole source of an infant's nutrition;
  - 41.2 stage two formula (follow-on formula), which is designed for infants from approximately 6 months to 12 months old. Follow-on formula is considered inappropriate for infants below 6 months old (however starter formula can be used up to 12 months); and
  - 41.3 stage three formula (toddler milk), is designed to be used from 12 months onwards. Toddler milk differs significantly from stage one and two formula, as it is designed to supplement the diet rather than be a sole source of nutrition.
42. All three products are likely supply-side substitutes, and the competitive constraints for all three are similar, if not the same, as they are all produced by formula manufacturers and distributed through the same channels.<sup>26</sup> However, from a demand-side perspective, the degree of substitutability differs between the three product types. In particular, the composition of stage three formula differs significantly from stage one and two formula such that stage three products are not substitutes for the other two products.<sup>27</sup>
43. Further, the Proposed Arrangements relate to starter formula and follow-on formula but not toddler milk. Consequently, we have defined a single product market for 'Infant Formula' which consists of both starter formula and follow-on formula. This is consistent with the INC's definition of infant formula.<sup>28</sup>
44. The INC and other industry participants advised there have been no substantial changes in the production, supply, and distribution of Infant Formula since the

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<sup>25</sup> As in the past, we also note that there is a degree of overlap between breastfeeding and each type of formula.

<sup>26</sup> For example, see 2018 Authorisation at [48].

<sup>27</sup> For example, most stage three formula is casein-dominant, while most stage one and stage two formula is whey-dominant. See 2018 Authorisation at [43]–[45] for more detail on the differences between the stages of formula.

<sup>28</sup> Specifically, the INC defines infant formula to be "Any food described or sold as an alternative for human milk for the feeding of infants up to the age of twelve months and formulated in accordance with all relevant clauses of the Australia New Zealand Food Standards Code."

Commission last considered this industry in 2018.<sup>29</sup> The vast majority of infant formula (of all stages) is distributed to end-customers via retailers, such as the major grocery retailers<sup>30</sup> and, to a lesser extent (albeit growing), retail pharmacies.<sup>31</sup> All manufacturers supply on a national basis.

45. As a result, similar to our 2018 Authorisation, we have defined a market for the supply of Infant Formula via retail channels, which is nationwide in scope.

### **With and without the arrangement**

46. When assessing the likelihood of a lessening of competition arising from an arrangement, the Commission compares the likely state of competition with the arrangement, and the most competitive likely state of competition without the arrangement. By assessing the relative state of competition in each of these scenarios, the Commission can determine whether the restrictive trade practice is likely to result in a lessening of competition.

#### **With the arrangement**

47. With the Proposed Arrangements, the current marketing restrictions under the 2018 Authorisation would continue. The Proposed Arrangements, which the Commission authorised for an interim period, are similar to the previous INC code of practice with regards to marketing restrictions on Infant Formula.<sup>32</sup>

#### **Without the arrangement**

48. We understand that without the Proposed Arrangements:<sup>33</sup>

48.1 the INC would amend the existing INC Code of Practice to omit the relevant restrictions or take steps to ensure that it is clear that the relevant restrictions are not binding;

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<sup>29</sup> The Application at [67]; Commerce Commission interview with Te Whatu Ora (18 September 2023); email from [ ] to Commerce Commission (21 September 2023); and email from [ ] to Commerce Commission (19 September 2023). However, the Commission notes that FSANZ is currently undertaking a review relating to the regulatory framework, composition, labelling, category definitions and representation of infant formulation products to reflect the latest scientific evidence and make sure it aligns with international regulations where possible (see here: [www.foodstandards.govt.nz/code/proposals/Pages/P1028.aspx](http://www.foodstandards.govt.nz/code/proposals/Pages/P1028.aspx)). Any potential changes would likely impact all industry participants equally. Also see [ ]

<sup>30</sup> The major grocery retailers in New Zealand are Woolworths New Zealand Limited, Foodstuffs North Island Limited, and Foodstuffs South Island Limited.

<sup>31</sup> For example, see the Application at [34] and Commerce Commission interview with [ ] (22 September 2023).

<sup>32</sup> With the exception of clause 6.6, the Proposed 2023 INC Code is similar to the INC code of practice authorised in 2018 although it would also prohibit the advertising of Infant Formula on social media. See the Application at Appendix 1: Proposed INC Code of Practice.

<sup>33</sup> The Application at [77]-[81] and [ ]

- 48.2 the marketing of Infant Formula in Aotearoa New Zealand would not be subject to any regulatory restriction and members of the INC would be free to market Infant Formula as they see fit subject to other legislation; and
- 48.3 formula manufacturers would have the ability to increase the promotion of Infant Formula by direct marketing, and the level of marketing would likely increase, which may, in turn, increase the level of formula consumed.
49. Following the above, the INC submits that, given New Zealand's commitment to the WHO Code, the Government would likely impose marketing restrictions similar to the current INC Code of Practice. The INC submits this would either be through legislation or, the less likely route of, bilateral contracting with Infant Formula manufacturers.<sup>34</sup> The INC submits that two or more years is a realistic timeframe for such Government action to come into effect.<sup>35</sup>
50. We agree that these outcomes reflect the likely without-the-arrangement scenario.

### **How the arrangement could lessen competition**

51. The Proposed Arrangements would restrict INC members from employing common promotional (including marketing and advertising) activities to promote their Infant Formula products. For the reasons set out below, and consistent with our past determinations, we consider the Proposed Arrangements are likely to lessen competition:
- 51.1 by limiting the price information consumers receive about rival products. Restrictions on advertising can lead to higher prices if they prevent suppliers from publicising price reductions and can soften price competition more generally. Higher prices can lead to fewer purchases, resulting in reduced economic activity (ie, a loss in allocative efficiency);
- 51.2 by limiting the provision of product information about certain products generally or products produced by certain manufacturers in relation to rival products. Incomplete information can lead to consumers making fewer purchases or making purchasing decisions that do not provide them with the best possible outcome. As a result, consumers may miss out on benefits they would otherwise obtain from these products (ie, a loss of allocative efficiency).
- 51.3 by restricting firms from publicising new products that could be beneficial for consumers. Restrictions on advertising can reduce the incentive of firms to undertake product innovation, to the long-term detriment of consumers (ie, a loss in dynamic efficiency); and

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<sup>34</sup> The Application at [77]-[81]. [ ].

<sup>35</sup> The Application at [77]-[81]. [ ].

- 51.4 by restricting the provision of free (donated) products. Restrictions on the provision of free products can reduce the ability of consumers to sample or trial products, reducing their ability to compare products, and reducing the incentive for firms to undertake product innovation.
52. In the without-the-arrangement scenario, the INC members would be free to advertise and market their Infant Formula to consumers, as well as offer sales inducements.
53. Accordingly, we consider that some lessening of competition is likely to result from the Proposed Arrangements. Below we assess whether the Proposed Arrangements would result, or be likely to result, in such benefit to the public as to outweigh any detriments.

## Assessment of the benefits and detriments

### General approach to assessing authorisation applications

54. In considering whether to grant an authorisation under section 58 of the Act, the Commission will consider the public benefits and detriments arising from the conduct.
55. The Commission will grant authorisation if it is satisfied, on the evidence before it, that the Proposed Arrangements will result, or be likely to result, in a benefit to the public that outweighs the detriments resulting from Proposed Arrangements.
56. In making this assessment, we have regard to the quality of the evidence available and make judgements as to the weight to be given to the evidence. We may also adjust the weight of evidence to reflect the distribution of benefits and detriments within the community.<sup>36</sup> This is known as the “modified total welfare approach.”<sup>37</sup>
57. The Court of Appeal in *NZME* confirmed that the Act permits us to apply the modified total welfare approach (ie, adjust the weight of evidence we give to the benefits and detriments of an arrangement depending on distribution of such benefits and detriments within broader society), however the Act does not require it.<sup>38</sup> For example, the Commission may give less weight to benefits flowing from an arrangement to a limited number of shareholders,<sup>39</sup> but may give more weight to a benefit that is realised by the wider community and sustained for a period of time.<sup>40</sup>
58. In *Godfrey Hirst*, the Court of Appeal noted that in determining whether to grant authorisation the Commission must consider a broad range of benefits and detriments. This includes any efficiencies and may include non-market factors in

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<sup>36</sup> *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 (CA) (NZME), at [66]-[67], citing *Re Howard Smith Industries Ltd* at 17,334; [75].

<sup>37</sup> *NZME* at [67].

<sup>38</sup> *NZME* at [75].

<sup>39</sup> *NZME* at [67] citing *Re Howard Smith Industries Ltd* at 17,334.

<sup>40</sup> This approach is reflected in the Australian Competition Tribunal’s decision *Qantas Airways Ltd* [2005] ACompT 9, (2005) ATPR 42-065 at [185]-[189] cited in *NZME* at [66]; also see *NZME* at [64]-[68].

appropriate cases.<sup>41</sup> In particular, the Court of Appeal indicated that in making an authorisation decision the Commission is to have regard to efficiencies when weighed together with long-term benefits to consumers, the promotion of competition, and any economic and non-economic public benefits at stake in the relevant market. In assessing these various factors, the Court stated that “[w]here possible these elements should be quantified; but the Commission and the courts cannot be compelled to perform quantitative analysis of qualitative variables.”<sup>42</sup>

59. The Commission’s approach is to quantify benefits and detriments to the extent that it is practicable to do so;<sup>43</sup> however, as the Court of Appeal in *Godfrey Hirst* noted, this must not be allowed to obscure the Commission’s primary function of exercising a qualitative judgment in reaching its final determination and “...making what is an essentially evaluative judgment on any application”.<sup>44</sup> The Court re-emphasised the guidance given in *New Zealand Bus Ltd v Commerce Commission*, where it was stated:

It is true that some data will be weighed or considered in deciding whether the law is violated and some will not. Yet all the suggestions about more systematic ways to inform that judgment are merely techniques, or hand tools. In short, this Court should not allow a kind of false scientism to overtake what is in the end a fundamental judgment which is required by the Act itself.<sup>45</sup>

### **Key assumptions in assessing benefits and detriments arising from the Application**

60. The likely benefits or detriments from the Proposed Arrangements primarily relate to the relationship between the marketing of Infant Formula and the effect this marketing would likely have on breastfeeding rates, as well as the likely regulatory response if the Proposed Arrangements were not authorised. However, there is considerable uncertainty regarding these factors.<sup>46</sup> As such, in assessing the likely benefits and detriments arising from the Application, the Commission has made the following assumptions:

- 60.1 the most likely timeframe in which the Government would implement a regulatory response in the absence of the Proposed Arrangements would be two to three years, although there is a smaller likelihood that it would take longer;<sup>47</sup> and

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<sup>41</sup> *Godfrey Hirst NZ v Commerce Commission* [2016] NZCA 560(CA) at [24] and [31].

<sup>42</sup> *Godfrey Hirst* (CA) at [36].

<sup>43</sup> *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) (AMPS-A CA) at 447; *Air New Zealand and Qantas Airways Limited v Commerce Commission* (2004) 11 TCLR 347 (Air NZ No 6) at [319]; and *Ravensdown Corporation Ltd v Commerce Commission* High Court, Wellington (16 December 1996) AP168/96.

<sup>44</sup> *Godfrey Hirst* (CA) at [35].

<sup>45</sup> *New Zealand Bus Limited and Infratil Limited v Commerce Commission* [2007] NZCA 502 at [104].

<sup>46</sup> See 2015 Authorisation at [57] and 2018 Authorisation at [95].

<sup>47</sup> Commerce Commission interview with Te Whatu Ora (18 September 2023). Te Whatu Ora considered [ ].

60.2 an increase in the marketing and promotion of Infant Formula during a period within which there was no direct regulation would lead to a small to moderate decrease in the rate of breastfeeding and commensurate increase in consumption of Infant Formula. As outlined in our previous Authorisations, there is a high degree of uncertainty around the likely magnitude of any changes in breastfeeding rates that would arise in the counterfactual.<sup>48</sup> Similar to our previous Authorisations, we have assumed a 1% change in breastfeeding as a 'base case' but note that if the actual change were larger, then the various benefits and detriments would scale accordingly.<sup>49</sup>

### **What the applicant submitted**

61. The INC submits that it is not aware of any information to suggest that the public benefits and detriments that the Commission has previously assessed would have changed in the last five years.<sup>50</sup> Overall, the INC submits that, consistent with the Commission's previous authorisations:

61.1 there would be detriments associated with the Proposed Arrangements from reduced consumer and producer surpluses compared to the scenario without the Proposed Arrangements; but

61.2 there are clear public benefits that will, or will be likely to, result from restricting the marketing of Infant Formula as a result of the Proposed Arrangements compared to the scenario without the Proposed Arrangements. These benefits include the avoidance of regulatory costs that would otherwise be incurred.

### **Benefits**

62. We consider that there are likely to be two main benefits from the Proposed Arrangements being:

62.1 avoided regulatory costs; and

62.2 improved public health outcomes.

#### *Benefits from avoided regulatory costs*

63. We consider there are likely benefits from the Proposed Arrangements from the avoidance of regulatory costs primarily because self-regulation (via the Proposed 2023 INC Code) is likely to be less expensive than the cost of introducing legislation.

64. Without the Proposed Arrangements, we consider it likely that the Government would institute a regulatory response, in which the MoH would sponsor legislation to ensure New Zealand is fulfilling its obligations under the WHO Code.

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<sup>48</sup> See 2015 Authorisation at [57] and 2018 Authorisation at [95].

<sup>49</sup> To clarify, a 1% change in breastfeeding is not a prediction of the likely actual change.

<sup>50</sup> The Application at [98].

65. As noted above, several submitters consider the Proposed Arrangements provide a diluted set of regulatory ‘principles’ and the Government should be fulfilling its regulatory obligations by imposing greater restrictions on the marketing of Infant Formula.<sup>51</sup> We consider that the implementation of such regulations would impose societal costs, through both time and resourcing on Parliament and the related policy agencies. We expect that this process would likely take approximately two to three years and estimate it would cost approximately \$4.0 million to \$5.0 million.<sup>52</sup> Avoiding this cost generates a public benefit, as these resources could be productively deployed on other activities.
66. However, offsetting this to some degree is the fact that the INC would be incurring some costs in administering the Proposed Arrangements. These costs would not be incurred if the Proposed Arrangements are not authorised because there would be no relevant industry code to administer. Based on a two to three year period for which these administrative costs would be avoided, we estimate this value to be approximately \$0.1 million.<sup>53</sup> This amount is therefore netted off against the ‘gross’ benefit of avoided regulatory costs above.
67. Aside from this initial two to three year period, we consider the difference in ongoing administrative costs between the two scenarios is unlikely to be significant.<sup>54</sup> We also consider the difference in compliance costs for Infant Formula suppliers in the two scenarios to also be relatively insignificant.<sup>55</sup>
68. Consequently, our estimate for the overall benefit of the Proposed Arrangements from avoided regulatory costs is in the vicinity of \$4.0 million to \$5.0 million.

*Benefits from improved public health outcomes*

69. We consider there are likely benefits from the continuation of the existing marketing restrictions under the Proposed Arrangements rather than let these restrictions lapse for the two to three years it would likely take for legislation to be passed and regulatory restrictions to be implemented. These benefits would take the form of improved health outcomes. Such outcomes would also result in a reduction in associated healthcare costs.

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<sup>51</sup> For example, see Submission from College of Midwives (25 October 2023) and Submission from Julie Fogarty on Authorisation (6 November 2023).

<sup>52</sup> See the Attachment for more detail on how we have estimated this amount.

<sup>53</sup> This estimate is based on information from [ ]).

<sup>54</sup> To the extent that there is a difference in ongoing administrative costs, we expect these to be lower with the Proposed 2023 INC Code, given the strong incentives for cost efficiency under a self-regulatory approach. See Application at [126].

<sup>55</sup> One submission also raised the issue of increased costs to private individuals making complaints about the Proposed 2023 INC Code, see Submission from Julie Fogarty on Authorisation (6 November 2023). While costs to individuals wishing to undertake this activity may be greater under the Proposed Arrangements, we consider that any reduction in such costs under a legislative intervention would be more or less offset by increased costs incurred by the public body that would otherwise be tasked with enforcing regulation.

70. If the Proposed Arrangements are not authorised, there would be a period during which there would be no direct restrictions on the marketing of Infant Formula. We consider that there is a real chance that there would be a corresponding increase in marketing activity for these products.<sup>56</sup> This increase would in turn be likely to lead to a reduction in the rate of breastfeeding and an associated worsening in public health outcomes.<sup>57</sup>
71. These public health impacts include:
- 71.1 infant health: when compared to infants that are not breastfed, breastfed infants aged 0 to 12 months have a decreased risk of ‘all-cause’ infant mortality, a decrease in prevalence and mortality from diseases, and an increase in IQ.<sup>58</sup> Breastmilk also provides optimum nutrition and assists the physical and emotional development of infants;<sup>59</sup> and
- 71.2 maternal health: breastfeeding can help mothers return to their pre-pregnancy weight and reduce the risk of ovarian and breast cancer.<sup>60</sup>
72. The Commission has previously generated quantitative estimates for some of these public health impacts, in particular reduced public health costs from fewer treatments. In the 2015 Authorisation we estimated that a two year reduction in the breastfeeding rate by 1% would be likely to increase public healthcare costs related to breast cancer, gastrointestinal infections, lower respiratory tract infections, necrotising enterocolitis, and acute otitis media by approximately \$300,000.<sup>61</sup>
73. However, this quantitative estimate does not include other aspects of these public health outcomes, including the pain and distress that would accrue to the infants and/or their caregivers from contracting these illnesses. These impacts are difficult to quantify.

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<sup>56</sup> For example, see Commerce Commission interview with Te Whatu Ora (18 September 2023). In addition, certain INC members are unable to predict their response to marketing and advertising restrictions in absence of the authorisation which could depend on the response of their competitors. See 2015 Authorisation and 2018 Authorisation.

<sup>57</sup> For example, see Baker, Smith et al “The political economy of infant and young child feeding: confronting corporate power, overcoming structural barriers, and accelerating progress,” *The Lancet* breastfeeding series at p. 508: <https://pubmed.ncbi.nlm.nih.gov/36764315/>. This outlined the lack of commitment from global companies to the Breastmilk Substitutes Call to Action from WHO, UNICEF, and leading non-governmental organisations (June 2020) as an example of limited meaningful change.

<sup>58</sup> See the Attachment for more detail of how we have estimated this amount.

<sup>59</sup> For example, see Healthy Eating Guidelines for New Zealand Babies and Toddlers (0-2 years old) at p. 11 and World Health Organisation Fact Sheet: <https://www.who.int/news-room/fact-sheets/detail/infant-and-young-child-feeding>.

<sup>60</sup> For example, see Ranadip Chowdhury and others “Breastfeeding and maternal health outcomes: a systematic review and meta-analysis”, *National Library of Medicine* (Online ed, 4 November 2015): <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4670483/>.

<sup>61</sup> This estimate has been adjusted from the original 2015 figure to account for inflation.

74. For instance, increased breastfeeding would reduce other negative public health outcomes for infants, such as:<sup>62</sup>
- 74.1 reduce the incidence of Sudden Infant Death Syndrome;<sup>63</sup>
  - 74.2 improve cognitive outcomes;<sup>64</sup> and
  - 74.3 reduce childhood obesity.<sup>65</sup>
75. Further, the loss of productivity from caregivers who would otherwise take time off work to care for individuals affected by the above health outcomes would also be avoided.
76. We note that, although there are numerous public health benefits from higher rates of breastfeeding, breastfeeding itself can give rise to some negative health impacts for mothers, including mastitis and abscesses, which can in turn also give rise to public health costs.<sup>66</sup>
77. Nevertheless, we consider the \$300,000 estimate figure above is a substantial underestimate of the likely magnitude of actual total public health impacts, where total impacts include not only avoided public health costs but also the avoided pain and distress from avoided negative public health outcomes and other beneficial outcomes.<sup>67</sup> The view that this quantified estimate is likely a material underestimate of the likely value of the actual benefit was supported by several submitters.<sup>68</sup>
78. However, several submitters considered that any government imposed legislative response would be likely to result in more restrictive or effective regulation, which would be more successful in increasing breastfeeding rates, ultimately leading to better public health outcomes.<sup>69</sup>

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<sup>62</sup> Other illnesses which may correlate with reduced breastfeeding but for which the evidence is less robust include asthma; diabetes; leukaemia; coeliac disease; cardiovascular disease, sepsis; ovarian cancer (in mother); and type 2 diabetes (in mother). See 2015 Authorisation and 2018 Authorisation.

<sup>63</sup> See 2015 Authorisation at [74]–[75].

<sup>64</sup> See 2015 Authorisation at [76] and 2018 Authorisation at [113]–[114].

<sup>65</sup> See 2015 Authorisation at [77].

<sup>66</sup> As noted by College of Midwives, treatments are available to reduce these ailments; however the occurrence and prevalence of these ailments cannot be completely eliminated. Submission from College of Midwives (25 October 2023) at [15].

<sup>67</sup> For example, our previous estimates of value of reducing the risk of Sudden Infant Death Syndrome and improving cognitive outcomes suggest these impacts could be significant. See our 2015 Authorisation at [74]–[75] and our 2018 Authorisation at [113]–[114].

<sup>68</sup> For example, see Submission from College of Midwives (25 October 2023) at [14] and Submission from Julie Fogarty on Authorisation (6 November 2023) at p.4;

<sup>69</sup> For example, see Submission from Julie Fogarty on Authorisation (6 November 2023); Submission from College of Midwives (25 October 2023) and Submission from CBAS (1 November 2023).

- 78.1 This possibility was also considered by the Australian Competition and Consumer Commission in its recent authorisation determination regarding the same issue.<sup>70</sup>
- 78.2 Similarly, the NZBA highlighted a WHO online public consultation on draft guidance on regulatory measures aimed at restricting digital marketing of breastmilk substitutes and suggested that this might indicate potential future legislative action from the New Zealand Government.<sup>71</sup>
79. We consider that stricter regulation from a government imposed legislative response is possible. However, we consider other outcomes are also possible in the absence of the Proposed Arrangements, such as any legislative response being equivalent, or potentially less restrictive, to the Proposed 2023 INC Code. On the evidence before us, it is difficult to predict the precise form of any potential legislative response, although we consider that regulatory requirements that would arise from legislation would be similar in nature. Given that the Proposed Arrangements are also based on the WHO Code, we consider that any legislative response would be at least broadly similar to the Proposed Arrangements.
80. For this reason, we consider that the ultimate annual public health benefits of regulation via legislation would be similar in magnitude to those that would arise from the Proposed Arrangements, albeit legislation would take materially longer to develop and implement.
81. We consider that our view that annual public health outcomes would be broadly similar under these two approaches is consistent with submissions that were supportive of the Proposed Arrangements,<sup>72</sup> despite some of them expressing a preference for legislative intervention.<sup>73</sup>

*Other potential breastfeeding benefits*

82. Some submitters put forward estimates of the value of breastfeeding that were larger than our quantified estimates of public health benefits, which we acknowledge are underestimates.<sup>74</sup> We considered whether the estimates of the

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<sup>70</sup> See Australian Competition and Consumer Commission Determination on application lodged by Infant Nutrition Council Limited Decision AA1000534-1 (27 July 2021) at [4.136].

<sup>71</sup> Submission from NZBA on Draft Determination (24 October 2023) at p.3. Also noted in Submission from College of Midwives (25 October 2023) at [16]. See: <https://www.who.int/news-room/articles-detail/who-open-online-public-consultation-draft-guidance-on-regulatory-measures-aimed-at-restricting-digital-marketing-of-breast-milk-substitutes>

<sup>72</sup> For example, see Commerce Commission interview with Te Whatu Ora (18 September 2023); Submission from WellSouth on Infant Nutrition Council Authorisation 2023 (7 September 2023); Submission from ASA on Infant Nutrition Council Authorisation 2023 (26 September 2023); and Submission from NZFGC on Infant Nutrition Council Authorisation 2023 (4 October 2023).

<sup>73</sup> See Submission from NZBA on Draft Determination (24 October 2023) under Recommendations and Addendum to Draft Determination (8 November 2023); Submissions from College of Midwives (25 October 2023); and Submission from CBAS (1 November 2023).

<sup>74</sup> Some submitters pointed to estimates of the total value of breastmilk produced nationally using the Mothers' Milk Tool, see Submission from Julie Fogarty on Authorisation (6 November 2023 at p.4 and

total value of breastmilk produced nationally implies that there may be some inherent value to mothers of breastfeeding over and above the health benefits to themselves and their children that derive directly from feeding. In particular, we considered whether there may be some form of ‘producer surplus’ that accrues to breastfeeding mothers.

83. In our view, it is unclear that there are any additional or intrinsic benefits from breastfeeding outside of the direct health and nutrition impacts on mother and infant.<sup>75</sup> However, given our evaluation of other impacts was sufficient to determine a net public benefit was likely, we have not reached a final view on the likelihood on any potential additional ‘producer surplus’ benefits.

### **Detriments**

84. As in our previous Authorisations, we consider there are likely detriments from the Proposed 2023 INC Code primarily arising from a reduction in consumer surplus (ie, benefits to formula consumers) flowing from a lessening in competition and the associated reduction in Infant Formula use.<sup>76</sup> There is potentially also an associated reduction in producer surplus.<sup>77</sup>

### *Reduced consumer surplus*

85. The lower sales of Infant Formula that would arise with the Proposed Arrangements would lead to a lower overall level of consumer surplus. This is because, in comparison to a scenario without the Proposed Arrangement, the continued restriction on advertising and marketing would likely mean a subset of potential consumers would be unaware of the benefits they might obtain from formula feeding. The benefits this group of consumers could miss out on include reduced discomfort for those mothers who find it difficult to undertake and/or maintain. Some mothers might also benefit from formula feeding if it is more convenient for them than breastfeeding such that it enables them to engage in greater levels of paid employment than would otherwise be the case.<sup>78</sup> If these benefits were to exceed the cost of purchasing formula, these outcomes could generate a ‘consumer surplus’ for this subset of mothers.
86. Consequently, the restrictions on the marketing and promotion arising from the Proposed Arrangements could necessarily reduce some proportion of any such consumer surplus that might otherwise arise from Infant Formula use. As outlined in

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Submission from College of Midwives (25 October 2023) at [14]. This tool values each litre of breastmilk produced at US\$100, based on the costs of sourcing breast milk from milk banks, primarily in Norway, see <https://www.frontiersin.org/articles/10.3389/fpubh.2023.1152659/full#supplementary-material>.

<sup>75</sup> We note that producing breastmilk other than for the feeding of infants does not typically occur.

<sup>76</sup> See 2015 Authorisation at [82]–[84].

<sup>77</sup> As in the past, we consider there are unlikely to be detriments from higher prices given the Proposed Arrangements would not prevent price discounting from supplier or retailers. In addition, the Proposed Arrangements are unlikely to result in any material reduction in the level of product innovation given such innovation is typically undertaken in a global context.

<sup>78</sup> For example, see Mahoney SE, Taylor SN, Forman HP “No such thing as a free lunch: The direct marginal costs of breastfeeding.” *Journal of Perinatology* (2023) May; 43(5):678-682. These benefits are disputed by Julie Fogarty in her Submission on Authorisation (6 November 2023) at p. 4.

our previous authorisations, it is difficult to quantify any potential reduction in consumer surplus.<sup>79</sup>

87. The INC submits that, in line with the Commission's previous authorisations, it cannot quantify any such reduction in consumer surplus, but the INC expects it to be insignificant.<sup>80</sup> We also consider that this impact is unlikely to be relatively large. Those mothers that stand to gain the most from formula feeding are more likely to be already using it, given that information regarding formula feeding would continue to be available via other channels. Consequently, the incremental formula uptake that would arise from increased promotional and marketing activity may be more likely to arise amongst those consumers for whom the advantages of formula are relatively small.
88. The continuation of the restrictions on marketing and promotional activity if the Proposed Arrangements are authorised would also make it more difficult for other formula suppliers with superior or innovative products to expand or enter, and could reduce incentives for suppliers to innovate.<sup>81</sup> This may effectively deny consumers the advantages of higher quality products (for example, the development of products that could potentially reduce the associated health impacts of formula feeding), also reducing total consumer surplus.
89. However, given that we expect that any relaxation of marketing restrictions if authorisation were not granted would likely be temporary, before a legislative response by the Government, we consider that the benefits of new entry or expansion by higher quality formula suppliers would likely be limited. Similarly, we expect that reductions in longer term dynamic efficiency from a reduced incentive to improve product quality would also be limited.
90. Further, relaxation of marketing restrictions could also enable greater promotional activity by lower quality formula suppliers which, if successful, could reduce the gains otherwise obtained from new entry or expansion. This could arise to the extent that some consumers may not be able to accurately judge the relative quality of rival Infant Formula products based on marketing and promotional activity.<sup>82</sup>

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<sup>79</sup> See 2015 Authorisation and 2018 Authorisation.

<sup>80</sup> The Application at [106].

<sup>81</sup> For example, see Commerce Commission interview with [ ] (18 September 2023). In this respect, we acknowledge, as part of our consideration of reduced consumer surplus, the possibility that better substitutes to Infant Formula could potentially be developed. However, we also note that all industry parties consider that, regardless of the extent to any technical innovation, Infant Formula is unlikely to ever replicate the biodynamics of breastmilk. For example, see Commerce Commission interview with Te Whatu Ora (18 September 2023) and Submission from College of Midwives (25 October 2023).

<sup>82</sup> For example, the College of Midwives advised that 'added ingredients' can mislead parents into purchasing unnecessary and expensive commercial milk formulas (Submission from College of Midwives (25 October 2023) at [10]. [ ] also noted that not all product characteristics of formula are relevant to and/or make a significant difference to health and wellness of consumers. Interview with [ ] (18 September 2023). In addition, FSANZ advises that some caregivers may not be able to differentiate between 'marketing' tactics and understanding what a nutritive substance does, and generally consult healthcare providers after formula use has begun. However, this can be curbed by stronger public health

### *Reduced producer surplus*

91. Lower sales of Infant Formula arising from authorisation of the Proposed Arrangements would reduce the returns (producer surpluses) that would otherwise accrue to formula manufacturers. This lower level of returns would constitute a detriment.
92. The INC submitted that this detriment would be relatively insignificant.<sup>83</sup> We estimate the reduction in producer surplus from a reduction in sales of Infant Formula that equates to a 1% increase in the breastfeeding rate to be approximately \$200,000.<sup>84</sup>

### **Balancing the benefits and detriments**

93. In Table 1 below, we compare the benefits and detriments outlined above. As indicated, there are both quantifiable and unquantifiable benefits and detriments. Note that all quantified estimates are approximate only and are intended to provide a sense of likely magnitude, not precise value.

**Table 1: Summary of benefits and detriments**

Benefits	Approximate estimates
Avoided regulatory costs	\$4.0 million - \$5.0 million
Improved public health outcomes	Likely greater than \$300,000*
Detriments	Approximate estimates
Lost consumer surplus	Unquantified but likely insignificant
Lost producer surplus	\$200,000

Source: Commission estimates. \*Likely to be an underestimate.

94. Weighing the estimated magnitude of the benefits against the estimated magnitude of detriments indicates that the likely benefits would significantly outweigh the likely detriments.<sup>85</sup>
95. Further, similar to our past determinations, the Proposed Arrangements are supported by the relevant public health authorities and industry bodies.<sup>86</sup> This indicates to the Commission that we should continue to place weight on the unquantified benefits that can be attributed to the Proposed Arrangements.

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messaging from health organisations and health providers. See FSANZ Attachment 1 on Consumer research on infant formula labelling (4 April 2022)

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

<sup>83</sup> The Application at [104].

<sup>84</sup> This estimate is based on the same methodology as our 2015 and 2018 Authorisations. See the Attachment for more detail of how we have estimated this amount.

<sup>85</sup> See the Attachment for more detail of how we have estimated this amount.

<sup>86</sup> See Commerce Commission interview with Te Whatu Ora (18 September 2023); Submission from WellSouth on Infant Nutrition Council Authorisation 2023 (7 September 2023); Submission from ASA on Infant Nutrition Council Authorisation 2023 (26 September 2023); and Submission from NZFGC on Infant Nutrition Council Authorisation 2023 (4 October 2023). As noted above, several parties expressed reluctant support for the Proposed Arrangements.

96. By considering together both the quantified and unquantified benefits and detriments that will result, or be likely to result, from the Proposed Arrangements, our view is that the Proposed 2023 INC Code would result in public benefits that are likely to significantly exceed the detriments arising from the lessening of competition.

## **Determination**

97. The Commission's determination is to grant authorisation under sections 58(1), (2), (6B), and (6D) of the Act to the Application due to the public benefits that will result, or be likely to result, from the Proposed Arrangements.

Dated this 19<sup>th</sup> day of December 2023

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Sue Begg  
Division Chair

## Attachment: Assessment of benefits and detriments

- A1. This attachment outlines the assumptions and analysis underpinning our assessment of various benefits and detriments. All future impacts have been discounted using a 5% discount rate.

### Public health benefits

- A2. The public health benefits of breastfeeding are well established.<sup>87</sup> Many of these effects were discussed in the 2018 Authorisation, which included Table A1 below.<sup>88</sup>
- A3. The 'Effect' columns of the table show either the odds ratio (OR) or the risk ratio (RR) of a given public health outcome based on whether infants have been breastfed compared to not breastfed. Risk ratio is the ratio of the probability of an event occurring among people exposed to a particular treatment and the probability of an event occurring among people not exposed. Odds ratio is the ratio of the odds of an event occurring among people exposed to a treatment and the odds of an event occurring amongst people not exposed.
- A4. Although odds ratios and risk ratios are slightly different, both measure the association between breastfeeding and a specific health outcome.<sup>89</sup> An odds ratio of 0.5 means that the odds of a public health outcome are 50% less for the group that breastfed compared to the group that did not breastfeed.<sup>90</sup>
- A5. As shown in Table A1 the relative risk of these illnesses significantly decreases with breastfeeding. In general, the marginal effect is larger when breastfeeding occurs from 0 to 6 months compared to 6 to 12 months. Overall health benefits are strongest when breastfeeding continues for 12 months.

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<sup>87</sup> Victora et al *"Breastfeeding in the 21<sup>st</sup> century: epidemiology, mechanisms, and lifelong effect"*, The Lancet, 2016: <https://pubmed.ncbi.nlm.nih.gov/26869575/>. See also The Lancet, *"Breastfeeding 2023"*, 7 February 2023: <https://www.thelancet.com/series/Breastfeeding-2023>.

<sup>88</sup> See 2015 Authorisation at Table 1.

<sup>89</sup> Because the illnesses considered in this report are relatively rare, the odds ratio and risk ratio tend to be approximately the same, therefore we can compare both. See: Bonita et al *"Basic epidemiology 2<sup>nd</sup> ed"*, WHO, 2006.

<sup>90</sup> The exception to this is for all-cause mortality (Sankar, 2015). This paper estimates a risk ratio greater than 1.0 because it is measuring the effect of breastfeeding on *not* contracting the disease ie on the infant not dying. Therefore, the risk ratio of not contracting all-cause infant mortality when not breastfeeding is 1.0, whilst the risk ratio of not contracting all-cause infant mortality will be greater than 1.0 when breastfeeding.

Table A1: Assessment of risks

Health outcome	Effect of breastfeeding between 0-6 months	Effect of breastfeeding between 6-11 months	Effect of breastfeeding over other infant age ranges	Conclusion
Prevalence of and hospitalisation from diarrhoea (Horta & Victora, 2013)#	RR 0.10-0.75	RR 0.12-1.18†	RR 0.12-1.26‡ (0-12 months)	Strong evidence of major protection against diarrhoea morbidity and admissions to hospitals, based on a larger number of studies
Mortality from diarrhoea (Horta & Victora, 2013)	RR 0.11-0.16	RR 0.53	RR 0.05-0.25 (0-12 months)	See above
Prevalence and hospitalisation from respiratory illness (Horta & Victora, 2013)	RR 0.22-0.95	RR 0.72	RR 0.06-0.96 (0-12 months)	Strong evidence of a reduction in severe respiratory infections in breastfed children
Mortality from respiratory illness (Horta & Victora, 2013)	RR 0.42	RR 0.40	RR 0.35 (0-12 months)	See above
Decrease in acute otitis media (Bowatte, 2015)	OR 0.57		OR 0.85 (> 3-4 months)	Consistent evidence of reduction in acute otitis media during the first 2 years of life.
Decrease in dental cavities (Tham, 2015)			OR 0.50 (0-12 months)	Breastfeeding in infants may protect against dental caries.
Increase in IQ (Horta, 2015)		0.97 IQ points~	3.44 IQ points (Lifetime*)	Consistent effects of about 3 IQ points across observational studies
Breast cancer (Chowdhury, 2015)	OR 0.93	OR 0.91^	OR 0.74 (> 12 months)	Consistent protective effect of breastfeeding against breast cancer
Ovarian cancer (Chowdhury, 2015)	OR 0.83	OR 0.72	OR 0.63 (> 12 months)	Suggestive evidence of a protective effect of breastfeeding against ovarian cancer
Mortality due to infectious diseases (Sankar, 2015)	OR 0.12		OR 0.48 (6-23 months)	See above
All-cause mortality (Sankar, 2015)	RR 14.4*	RR 1.8*		Consistent evidence of major protection

Notes: # Only studies comparing predominant/partial versus not breastfeeding were used in this study. † One study (Wray, 1978) found an increase in the mortality from diarrhoea, all other studies used in the meta-analysis found a decrease. ‡ One study (Cunningham, 1979) found an increase in the incidence of diarrhoea, all other studies used in the meta-analysis found a decrease; ~ Less than 6 months versus greater than 6 months; \* Lifetime effect from any breastfeeding versus no breastfeeding; ^ Age range 6 to 12 months; \* Compared to 1.0 relative risk for breastfeeding.

- A6. The MoH summarises some of the benefits of breastfeeding for the baby as follows:<sup>91</sup>
- A6.1 helps build a strong emotional bond between the mother and baby, and this bond supports healthy brain development in the baby and reduces the risk of mental health conditions later in life (Horta and Victora 2013);
  - A6.2 boosts the baby’s immune system and helps protect the baby against common childhood illnesses, particularly diarrhoeal infections and pneumonia, and hospitalisation (Sankar et al 2015; SACN 2018);
  - A6.3 protects against sudden unexplained death in infancy (SUDI) (Hauck et al 2011; Sankar et al 2015);
  - A6.4 decreases the chance of health problems later in life, such as type 2 diabetes (Horta and Victora 2013; Horta et al 2015; Koletzko et al 2019);
  - A6.5 may reduce the chance of obesity in childhood, adolescence, and early adulthood (Horta et al 2015); and
  - A6.6 exposes the baby to flavours originating from the maternal diet through their mother’s milk, which helps them accept new foods better once they are eating solid foods (Spahn et al 2019; Stoody et al 2019).

#### *Avoided healthcare costs*

- A7. In our 2015 Authorisation, we estimated the healthcare costs that would be avoided from a 1% reduction in the breastfeeding rate over a two year period.<sup>92</sup> The 2015 estimate was \$225,646.
- A8. Adjusting for inflation we estimate an equivalent 2023 figure to be \$284,976.<sup>93</sup> This total is broken down by different treatments in Table A2.

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<sup>91</sup> See <https://www.health.govt.nz/system/files/documents/publications/healthy-eating-guidelines-for-new-zealand-babies-and-toddlers-nov21-v3.pdf>.

<sup>92</sup> Based on Renfrew et al “Preventing disease and saving resources: the potential contribution of increasing breastfeeding rates in the UK” (report commissioned by UNICEF UK, October 2012). See 2015 Authorisation at [67]–[70].

<sup>93</sup> Inflation adjustment based on a 26% increase in CPI since the first quarter of 2015, see <https://www.rbnz.govt.nz/monetary-policy/about-monetary-policy/inflation-calculator>. Both estimates are based on 61,548 births per year. Actual births between 2015 and 2023 have fluctuated around 60,000, see <https://www.stats.govt.nz/information-releases/births-and-deaths-year-ended-december-2022-including-abridged-period-life-table/>.

**Table A2: Incremental healthcare costs**

<b>Illness</b>	<b>Incremental cost</b>
Breast cancer	\$143,733
Gastrointestinal infection	\$38,061
Necrotising enterocolitis	\$31,520
Lower respiratory tract infection	\$71,581
Acute otitis media <sup>94</sup>	\$80
<b>Total</b>	<b>\$284,976</b>

Source: Commission estimates

- A9. Higher rates of breastfeeding are likely to also reduce healthcare costs of numerous other illnesses as outlined above but given the difficulty of estimating these other impacts, we have not been able to generate quantified estimates for these other impacts.

### **Producer surplus impacts**

- A10. In our 2015 Authorisation, we estimated that the average revenue per infant from formula feeding was \$885.<sup>95</sup> Adjusting for inflation we estimate an equivalent 2023 figure to be \$1,113,<sup>96</sup> which is similar in magnitude to other estimates.<sup>97</sup>
- A11. In our 2015 Authorisation, we assumed a 20% gross margin to estimate producer surplus.<sup>98</sup> We have continued to use this gross margin percentage given it is similar to more recent financial figures.<sup>99</sup>
- A12. Assuming a 1% higher rate of breastfeeding, this equates to approximately 575 fewer infants being formula fed per year.<sup>100</sup> As a result, we estimate that the reduced producer surplus stemming from lower formula sales over two years would be approximately \$238,145.<sup>101</sup>

<sup>94</sup> Unlike the other illnesses listed here, infants are only uncommonly admitted to hospital following a clinical diagnosis of otitis media. Consequently, this cost figure for acute otitis media only incorporates visits to general practitioners (see UNICEF Study at 49).

<sup>95</sup> See 2015 Authorisation at [81].

<sup>96</sup> Inflation adjustment based on a 26% increase in CPI since the first quarter of 2015, see <https://www.rbnz.govt.nz/monetary-policy/about-monetary-policy/inflation-calculator>.

<sup>97</sup> For example, a US study estimated a minimum spend on formula in one year of \$1,257, see <https://plutusfoundation.org/2020/costs-breastfeeding-formula/>. US\$ values converted to NZ\$ at US\$1:NZ\$1.68.

<sup>98</sup> See 2015 Authorisation at [81].

<sup>99</sup> For example Nestlé's Underlying Trading Operating Profit Margin is listed as 19.1%, see <https://www.nestle.com/media/pressreleases/allpressreleases/full-year-results-2022>.

<sup>100</sup> This figure is based on 57,534 births per year, see <https://www.stats.govt.nz/information-releases/births-and-deaths-year-ended-june-2023/>.

<sup>101</sup> This assumes that the reduction in formula feeding is driven by a switch to exclusive breastfeeding. This may overestimate the actual reduction in formula sales if some of the reduction results in partial breastfeeding.