

Nestlé Australia Ltd.

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4 July 2007

Mr Scott Gregson
General Manager, Adjudication
Australian Competition & Consumer Commission
470 Northbourne Avenue
Dickson ACT 2062

Dear Mr Gregson

Application for Minor Variation of Authorisation

Please find enclosed Form FA: Application for Minor Variation of a Non-Merger Authorisation relating to the Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement (MAIF Agreement).

I have also enclosed a letter from the Infant Formula Manufacturers Association of Australia, Inc (IFMAA) in support of the application.

Nestlé is seeking **interim authorisation** of the subject matter of the proposed minor variation. In this regard, Nestlé submits that the MAIF Agreement has traditionally operated on an industry-wide basis and the application for minor variation seeks to preserve the opportunity for that to occur. Interim authorisation will therefore have little, if any, effect on the competitive dynamics of the market considered in the original authorisation. Conversely, if interim authorisation is not granted there will be a period of uncertainty as to the operation of parts of the MAIF Agreement. In Nestlé's submission any such period of uncertainty, even if only temporary, is highly undesirable for all market participants, including consumers for the reasons described in the enclosed application.

Please contact Peter Lloyd or myself if you have any questions in relation to the application.

Yours sincerely


Peter Kelly
Director, Corporate & External Relations

Form FA

Commonwealth of Australia

Trade Practices Act 1974 – subsection 91A (1)

APPLICATION FOR MINOR VARIATION OF A NON-MERGER AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 91A (1) of the *Trade Practices Act 1974* for the minor variation of an authorisation.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

(a) Name of applicant:

Nestlé Australia Ltd

A30146
A90539
A90540

(b) Description of business carried on by applicant:

Marketing and sale of infant formula

(c) Address in Australia for service of documents on the applicant:

1 Homebush Bay Drive, Rhodes, NSW 2138

2. Minor variation of authorisation

(a) Description of the contract, arrangement or understanding, or the relevant conduct, for which authorisation was granted, including, but not limited to, the registration number assigned to that authorisation (the original authorisation):

Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement (MAIF Agreement): TPC Determination dated 23 September 1992, file numbers CA92/8, 92/13 and 92/14

(b) Provide a description of the goods or services that relate to the authorisation for which variation is sought:

Infant formula

(c) Provide details of the variation for which authorisation is sought, including but not limited to identification of differences between the contract, arrangement or understanding, or the relevant conduct, that was originally authorised and the

contract, arrangement or understanding, or the relevant conduct, for which a minor variation of authorisation is sought:

Nestlé seeks a variation to the original authorisation which provides for:

- the addition of future parties to the MAIF Agreement; and
- the introduction of an 8-10 year time limit on the authorisation to allow for more regular review.

In relation to the addition of future parties, Nestlé proposes the addition of the following wording to paragraph 8.1 of the original authorisation:

This authorisation will also apply to manufacturers in, and importers into, Australia of infant formula that are parties to the Australian arrangement after [date of varied authorisation].

(d) Facts and evidence relied upon in support of the claim that the variation is a minor variation:

The variation proposed is an extension of the existing authorisation to expressly cover future signatories to the MAIF Agreement, in addition to the original applicants for authorisation. This would ensure that the authorisation is clearly expressed to apply to all members of the industry who sign on to the MAIF Agreement, and better reflect the status of the MAIF Agreement as an accepted mechanism for industry self-regulation.

In Nestlé's view, the variation sought is in the nature of a technical amendment. The MAIF Agreement has operated since 1992. It has remained unchanged since that time, and three original signatories to the Agreement have been replaced in the industry by three more recent entrants. So far as Nestlé is aware, the industry has no current plans to seek any amendment to the Agreement or the manner of its operation.

As the MAIF Agreement remains unchanged, the conduct on which immunity has been conferred will not change under the proposed variation. Given that the original authorisation applied to all of the industry participants at that time, the nature of the immunity that has been conferred (ie with potential industry-wide application) will therefore also not change. Accordingly, Nestlé submits that there is no material change in the effect of the authorisation arising from the proposed variation, and the variation falls within the meaning of a minor variation under section 87ZD of the Trade Practices Act. For want of a better description, the identity of some of the parties delivering the conduct may change but the conduct itself, and its effect, remains the same.

We therefore submit that the variation will not result, or would not be likely to result, in a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation. Further, the variation will not result, or be likely to result, in any reduction in the benefit to the public that arose from the original authorisation.

In relation to the introduction of a time limit on the authorisation, Nestlé submits that this is in the nature of a technical amendment to reflect current practice of the Commission and also has no material change in the effect of the authorisation.

3. Parties to the contract, arrangement or understanding (whether proposed or actual), or conduct, for which variation of authorisation is sought

(a) Names, addresses and description of business carried on by those other parties to the contract, arrangement or understanding, or the relevant conduct:

Current and future signatories of the MAIF Agreement, including:

Abbott Australasia Pty Limited
Sir Joseph Banks Corporate Park
32-34 Lord Street
Botany NSW 2019

Wyeth Australia Pty Limited
17-19 Solent Circuit
Norwest Business Park
Baulkham Hills NSW 2153

Nutricia Australia Pty Limited
Talavera Corporate Centre
Level 4, Building D
12-24 Talavera Road
Macquarie Park NSW 2113

Bayer Australia Limited
875 Pacific Highway
Pymble NSW 2073

H.J. Heinz Co. Australia Ltd
2 Southbank Boulevard
Southbank VIC 3006

The relevant business carried on by each of the above parties is the marketing and sale of infant formula.

(b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:

Nestlé makes this application on its own behalf, with the support of the Infant Formula Manufacturers Association of Australia, Inc (IFMAA). IFMAA represents Nestlé, Wyeth, Nutricia, Bayer and Heinz in matters relating to the infant formula industry. A statement from IFMAA supporting this application is attached. IFMAA address details are:

Infant Formula Manufacturers Association of Australia, Inc
PO Box 7190
Yarralumla ACT 2600

- (c) **Where those parties on whose behalf the application is made are not known – description of the class of business carried on by those possible parties to the contract or proposed contract, arrangement or understanding:**

Not applicable

4. Public benefit claims

- (a) **Provide submissions regarding the effect of the minor variation upon the public benefits resulting or likely to result from the original authorisation:**

In Nestlé's submission, the proposed variation does not diminish in any way the public benefits resulting from the original authorisation. To the extent the variation better allows the MAIF Agreement to function as an accepted mechanism for industry self-regulation, Nestlé submits that those public benefits are enhanced.

The public benefits resulting from the MAIF Agreement are described in the original authorisation. In summary, ensuring infants receive the best available nutrition is a major public health concern. The MAIF Agreement represents a benefit to the public through its contribution to the provision of safe and adequate nutrition for infants, which is a necessary condition for their long-term development. It does this by protecting and promoting breast-feeding and by encouraging mothers to obtain the information of the nutritional needs of their children from health care professionals. Further, the MAIF Agreement gives effect in Australia to the principles of the World Health Organisation's International Code of Marketing of Breast Milk Substitutes and therefore assists in meeting Australia's international obligations.

The proposal to vary the authorisation to provide for the addition of future parties does not change the MAIF Agreement itself, and the public benefits resulting from the Agreement continue to apply. The minor variation reflects the fact that the industry participants have changed over time and could continue to change. Nestlé submits that the public benefits resulting from the Agreement are maximised, and potentially only achievable, if all industry participants are parties to, or are capable of being parties to, the restrictions contained in the Agreement. If that is not practicable, parties are discouraged from joining the MAIF Agreement and could more readily elect to operate outside its terms. If that were to occur and the MAIF Agreement does not have application across the industry, the public benefits resulting from the Agreement are potentially seriously eroded. By clearly providing in the authorisation for the addition of future parties, the accepted public benefit of using the MAIF Agreement as a mechanism for industry self-regulation is more readily preserved.

In relation to the proposal to include a time limit on the authorisation, Nestlé notes that the original authorisation was not limited in time and considers it appropriate

and in the public interest that the authorisation be subject to more regular review. Given the nature of the original authorisation and the fact that the MAIF Agreement has not been amended since its inception, Nestlé submits that a period of 8-10 years from the date of this application being determined is an appropriate time frame for that review.

(b) Facts and evidence relied upon in support of these claims:

Please see paragraph 5(a) above.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (b) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

Nestlé submits that the relevant market is the Australian market for the supply and distribution of infant formula. Infant formula is product that meets the applicable requirements of the Australia and New Zealand Food Standards Code for Infant Formula Products.

The 4 largest suppliers of infant formula in Australia are Wyeth, Nutricia, Nestlé and Heinz. Significant acquirers of infant formula include grocery, pharmacies and healthcare providers. Goods are supplied to these channels either directly via the supplier or through wholesale distributors. Based on volume, sales of infant formula to grocery and pharmacy are split approximately 70:30. Figures are not available for healthcare providers. The major suppliers compete for supply through each of these channels. Other suppliers also provide product with a more specialised focus, for example through the healthcare channel to meet particular paediatric needs.

6. Public detriments

(a) Provide submissions regarding the effects of the minor variations upon the detriments to the public resulting or likely to result from the original authorisation, in particular the likely effect of the conduct on the prices of the goods or services described at 2 (b) above and the prices of goods or services in other affected markets:

In line with the statements regarding public benefit above, Nestlé submits that the minor variation will have no impact on any detriment to the public resulting or likely to result from the original authorisation. At the time the original authorisation was determined it applied to all infant formula manufacturers and importers in Australia, and the proposed variation facilitates that position continuing. The minor variation simply reflects changes to the identity of industry participants and does not impact on the conduct the subject of the original authorisation.

(b) Facts and evidence relied upon in support of these claims:

Please see paragraph 6(a) above.

7. Further information

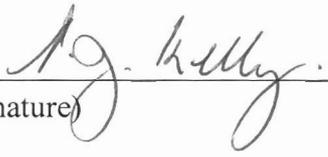
(a) Name, postal address and telephone contact details of the person authorised by the applicant to provide additional information in relation to this application:

Peter Kelly
Nestlé Australia Ltd
GPO Box 4320
Sydney NSW 2001
(02) 8756 2462

Peter Lloyd
Nestlé Australia Ltd
GPO Box 4320
Sydney NSW 2001
(02) 8756 2734

Dated: 4 July 2007

Signed by/on behalf of the applicant



(Signature)

Peter Kelly
Director, Corporate & External Relations
Nestlé Australia Ltd



**INFANT FORMULA MANUFACTURERS
ASSOCIATION OF AUSTRALIA, INC**

4 July 2007

Mr Scott Gregson
General Manager, Adjudication
Australian Competition & Consumer Commission
470 Northbourne Avenue
Dickson ACT 2062

Dear Mr Gregson

Application for Minor Variation of Authorisation – MAIF Agreement

I am writing on behalf of the Infant Formula Manufacturers Association of Australia (IFMAA).

IFMAA represents the five major companies: Nestlé, Wyeth, Heinz, Nutricia, and Bayer: manufacturing, importing and marketing their own brands of infant formulas in Australia.

IFMAA has been shown a copy of Nestlé's proposed application for minor variation of an authorisation relating to the MAIF (Marketing in Australia of Infant Formulas) Agreement. The proposed minor variation will not change the MAIF Agreement itself, and we consider that it will assist in maintaining the public benefits resulting from the Agreement as reflected in the Agreement's stated aim:

“...to contribute to the provision of safe and adequate nutrition for infants, by the protection and promotion of breast feeding and by ensuring the proper use of breast milk substitutes, when they are necessary, on the basis of adequate information and through appropriate marketing and distribution.”

On behalf of its members, IFMAA confirms that it supports Nestlé's application for minor variation, and Nestlé's request for interim authorisation.

Yours sincerely,

A handwritten signature in black ink that reads 'J.M. Carey'.

Janet Carey
Executive Director