Australian Competition & Consumer Commission

Determination

Application for Minor Variation of Authorisations A90539 and A90540

Lodged by

Nestlé Australia Ltd

in respect of

Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement

Date: **30 August 2007**

Authorisation no. A90539
A90540

Public Register no. C2007/1426

Commissioners: Samuel
Sylvan
King
Martin
Smith
Willett

The ACCC varies authorisations A90539 and A90540 lodged by Nestlé Australia Ltd so that:

- Authorisation applies to current and future manufacturers in, and importers into, Australia of infant formula that are or become parties to the *Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement*.
- Authorisations A90539 and A90540 will expire on 31 December 2015.

1 Introduction

1.1 The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the Trade *Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

1.2 The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'. Broadly, the ACCC may 'authorise' businesses to engage in such conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

1.3 A party to whom authorisation has been granted may also apply to the ACCC for a minor variation.

2 The Application

2.1 On 4 July 2007 Nestlé Australia Ltd lodged an application under section 91A of the Act for minor variation to authorisations A90539 and A90540 which were granted by the Trade Practices Commission (TPC) on 23 September 1992.

2.2 Authorisations A90539 and A90540 relate to the Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement (MAIF Agreement).

2.3 Nestlé has lodged this application for minor variation regarding proposed amendments to provide 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.

2.4 Nestlé proposes the addition of the following wording to paragraph 8.1 of the original authorisation:

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

3 Background to the application

3.1 The original authorisations relating to the MAIF Agreement were granted by the TPC on 23 September 1992. The MAIF Agreement is a voluntary self-regulatory code of conduct between manufacturers and importers to Australia of infant formula and sets out the obligations of manufacturers and importers of infant formulas in Australia.

3.2 The MAIF Agreement is based on the World Health Organisation's International Code of Marketing of Breast Milk Substitutes (WHO Code), although the MAIF Agreement is not as extensive in its coverage.

3.3 The aim of the WHO Code is 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 these are necessary, on the basis of adequate information and through appropriate marketing and distribution."

3.4 The WHO Code applies to all products marketed as partial or total substitutes for breast milk for infants, including infant formula, other milk products, foods and beverages, including bottle-fed complementary foods, when marketed or otherwise represented as suitable for use as a partial or total replacement of breast milk, as well as feeding bottles and teats. The scope of the WHO Code extends to the manufacturers and importers of infant formula, feeding bottle and teats and to the retailing of these products.

3.5 The MAIF Agreement covers the marketing in Australia of infant formulas when such products are marketed to be suitable for use as a partial or total replacement to breast milk. It also covers the quality and availability of such products and the provision of information concerning their use. Further it restricts the advertising and promotional activities that might ordinarily be undertaken by manufacturers and importers in the marketing of infant formula.

3.6 In particular, the arrangement:

- requires specified information to be contained in the educational material provided by manufacturers and importers which is intended for pregnant women or parents of young children and which relates to feeding of infants;
- prohibits the advertising and promotion of infant formula by manufacturers and importers directly to the general public, and the provision of samples of infant formula to the general public, pregnant women, parents or members of their families;
- restricts the information about infant formulas provided to health care professionals by manufacturers and importers to scientific and factual matters;

- prohibits health care professionals and persons employed by manufacturers and importers from accepting or offering incentives to promote or sell infant formulas.

3.7 The MAIF Agreement operated on an industry wide basis and was signed on 21 May 1992 by all industry participants at the time. The signatories to the MAIF Agreement were:

- Abbott Australasia Pty Limited
- Nestlé Australia Limited
- Douglas Pharmaceuticals Pty Ltd
- Mead Johnson Australia
- Sharpe Laboratories Pty Ltd; and
- Wyeth Pharmaceuticals Pty Ltd.

3.8 Since the granting of the authorisations in 1992, three of these parties, Douglas Pharmaceuticals Pty Ltd, Mead Johnson Australia and Sharpe Laboratories Pty Ltd, have left the industry in Australia. Nutricia Australia Pty Limited, H.J. Heinz Co. Australia Ltd and Bayer Australia Limited have since entered the industry in Australia and have become signatories to the MAIF Agreement.

4 Statutory provisions

4.1 Section 87ZD of the Act defines a minor variation as a single variation that does not involve a material change in the effect of the authorisation.

4.2 Section 91A of the Act provides that the ACCC must, if it is satisfied that the proposed variation is a minor variation, invite submissions from interested parties. After consideration of the application and any submissions received, the ACCC may make a determination varying the authorisation or dismissing the application.

4.3 Section 91A(4) of the Act provides that the ACCC may grant a minor variation to an authorisation granted under section 88(1), where it is satisfied that the variation would not result, or would be likely not 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.

4.4 Section 91A(7) of the Act provides that if a person applies for 2 or more variations at the same time and the ACCC is satisfied that the combined effect of those variations, if all were granted, would not involve a material change in the effect of the authorisation, the ACCC may deal with all of those variations together as if they were a single minor variation.

5 Submissions

Supporting submission from Nestlé

5.1 Nestlé submits that the minor variations will have no impact on any detriment to the public resulting or likely to result from the original authorisation. Nestlé further submit that the variations will not result, or be likely to result, in any reduction in the benefit to the public that arose from the original authorisation.

5.2 Nestlé's application for minor variation also includes a letter of support from the Infant Formula Manufactures Association of Australia Inc.

The addition of future parties

5.3 Nestlé submits that 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 MAIF Agreement have been replaced in the industry by three more recent entrants.

5.4 Nestlé further submits that 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.

5.5 Nestlé submits that the minor variation reflects the fact that the industry participants have changed over time and could continue to change. Nestlé further submits that the public benefits resulting from the MAIF 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 MAIF Agreement.

5.6 Nestlé submits that 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.

5.7 Nestlé submits that in relation to public detriments the minor variation will have no impact as the minor variation reflects the changes to the identity of industry participants and does not impact on the conduct the subject of the original authorisations.

Introduction of a time limit

5.8 Nestlé has submitted that as the original authorisations were not time limited it is in the public interest that the authorisations be subject to more regular review.

5.9 Nestlé further submits that a period of 8-10 years from the date of this determination is an appropriate time frame for that review.

Submissions from interested parties

5.10 The ACCC invited comments from interested parties in relation to Nestlé's application for minor variation. The ACCC received submissions from the following parties:

- The Department of Health and Ageing
- Dietitians Association of Australia
- Royal College of Nursing
- Australian Nursing Federation
- The Pharmacy Guild of Australia
- The Royal Australasian College of Physicians
- National Health and Medical Research Council

5.11 Full copies of the submissions received are available on the ACCC website.

The addition of future parties

5.12 All submissions received by the ACCC support Nestlé's application for a minor variation to allow for the addition of future parties.

Introduction of a time limit for review

5.13 Generally the submissions have supported the introduction of an 8-10 year time limit for review of the authorisations.

5.14 The Pharmacy Guild of Australia has however submitted concerns that the 8-10 year time limit for review may be too long between reviews. The Pharmacy Guild suggested either a review time of 5 years instead of 8-10 years, or conducting a full review of the arrangement now, and then again in 8-10 years.

Other issues

5.15 The Dietitians Association of Australia would prefer to see the MAIF Agreement extended to include toddler milk formula and become mandatory for all manufacturers and importers and subject to stricter legislative controls.

5.16 The Australian Nursing Federation (ANF) has noted the importance of systematic monitoring for overt violations of the WHO Code. The ANF submits that this is necessary to evaluate trends, inform public opinion and deter overt promotional activities and provide information for health professional regarding the covert promotional methods that may be used to market breast milk substitutes.

5.17 Whilst not making a submission on the proposed minor variation, the National Health and Medical Research Council has noted the importance of healthy nutrition for infants, and indicated that it has produced guidelines and

information pamphlets, referring to the WHO Code, to assist health workers and Australian mothers.

6 ACCC evaluation

The addition of future parties

6.1 Nestlé proposes the addition of the following wording to paragraph 8.1 of the original authorisation:

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

6.2 The Department of Health and Ageing submits that the minor variation is consistent with the Australian Government aims to encourage, promote and support breastfeeding in the Australian community. The Department submits that to perform this work effectively it and the Advisory Panel on Marketing in Australia of Infant Formula need to be confident that all of the MAIF Agreement signatories are authorised to engage in the conduct set out in the MAIF Agreement and that the new entrants to the infant formula market can be unreservedly encouraged to sign up to the MAIF Agreement.

6.3 The Department indicated that the original intention of the authorisations was for industry-wide participation in the MAIF Agreement. The Department further submits that amending the authorisations will enable all manufacturers and importers of infant formula to participate in the MAIF Agreement and serve to maintain or enhance the benefit to the public by continuing to restrict the marketing to the public of infant formula by manufacturers and importers.

6.4 The Department submits that if some of the major participants in the market were excluded from the authorisation, this could undermine the objective of protecting and promoting breastfeeding in the interests of infant and maternal health. The Department is keen to see a prompt resolution to the current uncertainty about the authorisation of signatories to the Agreement.

6.5 The Royal College of Nursing supports the principle of all industry players being a signatory to the MAIF Agreement as a means of ensuring public safety through self-regulation of the entire industry.

6.6 The ACCC considers it important to maintain the level of certainty afforded by the authorisations by ensuring that new parties who sign up to the MAIF Agreement are covered by the authorisations. This will ensure that the industry-wide participation in the MAIF Agreement is maintained and therefore the benefits from the authorisations continue to be realised. In this regard the ACCC considers that the proposed variation does not change the intended industry-wide coverage of the original authorisations, but rather ensures that this coverage can be maintained as industry participants change over time.

6.7 The ACCC is satisfied that the proposed variation would be unlikely to result in a reduction in the net benefit to the public caused by authorisations A90539 and A90540.

The introduction of a time limit

6.8 Authorisations A90539 and A90540 were granted in 1992 without a time limit. Nestlé has sought a minor variation to introduce a time limit of 8-10 years to the authorisations.

6.9 In this regard, the ACCC considers that the benefit to the public is likely to increase as the introduction of a time limit will enable the authorisation to be reviewed more regularly in light of possible changing circumstances.

6.10 The ACCC notes the submission by the Pharmacy Guild of Australia which is concerned about the length of the proposed time limit and in particular that 8-10 years may be too long. The Pharmacy Guild submits that a review time of 5 years instead of 8-10 years, or conducting a full review of the agreement now and then again in 8-10 years may be more appropriate. The ACCC notes that as Nestlé has applied for a minor variation, the ACCC is limited in this context to considering the issues the subject of the minor variation application. Such an application does not open up the entire arrangement for review.

6.11 The ACCC is satisfied that the introduction of a time limit to the authorisations is likely to result in an increase to the net benefit to the public caused by authorisations A90539 and A90540, by allowing more regular reviews in the future. The ACCC proposes a time limit allowing the authorisations to expire on 31 December 2015.

6.12 The ACCC considers, however, that the Pharmacy Guild's concerns may be addressed to some extent by the discussion below.

Parliamentary inquiry into breastfeeding

6.13 The ACCC notes the recent House of Representatives Standing Committee on Health and Ageing inquiry into breastfeeding, whose report was tabled in Parliament on 9 August 2007.[1] The report recommends, among other things, implementing the full WHO Code and subsequent World Health Assembly resolutions.

6.14 The ACCC notes that depending on the nature of the Government or industry response to the report the arrangements covered by the authorisations may be affected, which may require the authorisations to be reviewed. Similarly, upon any other material change in circumstances the authorisations can be reviewed should concerns arise.

[1] *The Best Start: Report on the inquiry of the health benefits of breastfeeding*, August 2007.

7 Determination

7.1 On 4 July 2007 Nestlé Australia Ltd lodged an application under s91A of the Act for minor variation to authorisations A90539 and A90540. Authorisations A90539 and A90540 were granted by the TPC on 23 September 1992.

7.2 The ACCC is satisfied that the proposed variations are minor.

7.3 The ACCC is satisfied that the public benefit test in section 91A(4) of the Act is met – that is, the variations which are the subject of this application are unlikely to result in a reduction in the net benefit to the public that arose from the original authorisations.

7.4 Pursuant to section 91A(3) of the Act, the ACCC makes this determination varying authorisations A90539 and A90540 so that:

- Authorisation applies to current and future manufacturers in, and importers into, Australia of infant formula that are or become parties to the *Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement*.
- Authorisations A90539 and A90540 will expire on 31 December 2015.

7.5 This determination is made on 30 August 2007. If no application for a review of the determination is made to the Australian Competition Tribunal in accordance with section 101 of the Act, it will come into effect on 21 September 2007.

Interim authorisation

7.6 Nestlé also sought interim authorisation for the proposed arrangements.

7.7 The ACCC granted interim authorisation on 11 July 2007 to Nestlé in order to maintain the status quo while the ACCC considered the merits of the application.

7.8 Interim authorisation will remain in place until such time as this determination takes effect.