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22 September 2015

Hannah Ransom
Senior Project Officer, Adjudication
Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

By Email

Dear Ms Ransom

Infant Nutrition Council - authorisation application

We refer to the Infant Nutrition Council's (**INC**) application for revocation and substitution for authorisation of the *Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement (MAIF Agreement)*. The INC wishes to take this opportunity to provide clarification in respect of some of the issues raised by third parties in their submissions in response to the INC's authorisation application.

1 The MAIF Agreement is an appropriate implementation of the WHO Code

The MAIF Agreement constitutes Australia's official application of the World Health Organization's International Code of Marketing of Breast Milk Substitutes (**WHO Code**). The Commonwealth Department of Health has previously commissioned a review into the effectiveness of the MAIF Agreement in implementing Australia's obligations under the WHO Code. That review concluded that the current scope and self-regulatory nature of the MAIF Agreement is appropriate. The Department of Health agreed with these findings.

One of the issues raised by the Australian Breastfeeding Association (as well as Julie Smith, Libby Salmon and Phillip Baker of the Regulatory Institutions Network at ANU) is that the MAIF Agreement does not give full effect to the WHO Code and subsequent World Health Assembly resolutions because:

- toddler milks, growing-up milks, baby cereals, infant meals and drinks are not within the scope of the MAIF Agreement; and
- distributors and retailers are not included, and nor is pricing conduct.

The MAIF Agreement applies to both starter infant formula (for infants aged 0 to 6 months of age) and follow-on formula (for infants aged 6 to 12 months). Consideration has already been given to whether the MAIF Agreement should apply to products for children over the age of 12 months: the 2012 *Nous Group Review of the effectiveness and validity of operations of the MAIF Agreement (the Nous Group Recommendations)* found that there was 'insufficient evidence to warrant the

Our Ref FVCS: 120507441:120507441

arrs A0134278570v4 120507441 22.9.2015

regulation of products beyond twelve months¹, and the Department of Health agreed in principle with the Nour Group's recommendation that the MAIF Agreement not be expanded.¹

The ACCC also considers it appropriate that the MAIF Agreement does not apply to products for children over the age of 12 months as, unlike infant formula, these products (including growing-up milks) are not sold as a breast milk substitute, rather they are a formulated food for young children under Standard 2.9.3 of the Australia New Zealand Food Standards Code.

As to the second point, to the extent the third party submissions urge that the MAIF Agreement should apply to distributors and retailers, and should include restrictions on price competition, the view of the ACCC is that this is not possible or appropriate because it will impermissibly restrict competition in contravention of the *Competition and Consumer Act 2010* (Cth).

2 Recommended changes to the WHO Code should not affect authorisation of the MAIF Agreement

The ACCC considers that a ten year authorisation period is appropriate for the reasons set out in section 2.1(a) of its submissions in support of the authorisation application. However, a few of the interested third parties took the view that the MAIF Agreement should be authorised for only a short term period (one or two years) because the WHO is currently considering and consulting on potential changes to the WHO Code. The ACCC sets out below its response to the submissions made by the third parties in this regard:

- (a) It is too early to know what, if any, changes will be made to the WHO Code as a result of the current consultation. At this stage a draft report has been released, however it has not yet been submitted to the WHO Executive Board or considered by the World Health Assembly.
- (b) Even assuming that significant changes were made to the WHO Code, the authorisation of the MAIF Agreement for a ten year period will not prevent Australia from adapting to those changes. Any authorisation by the ACCC does not set the MAIF Agreement in stone, nor render it unable to be modified over the ten year period. It is merely acknowledging that if this agreement were to continue in its current form for the medium term, the public benefits arising from the agreement outweigh any detriment arising from lessened competition. The submissions made by third parties to the ACCC do not suggest that there would be any competition concerns arising from a ten year authorisation, and they are in fact supportive of the public benefits which the MAIF agreement seeks to achieve.
- (c) Any changes made to the WHO Code are unlikely to result in a reduction of the existing restrictions on competition contemplated by the MAIF. It is therefore appropriate for the ACCC to authorise these restrictions for the ten year term.

3 Any changes to the Australia New Zealand Food Standard is unlikely to require amendment to the MAIF Agreement

Another issue raised by some of the interested third parties is that in determining the authorisation period, the ACCC should take into account the ongoing Food Standards Australia New Zealand's review of Standard 2.9.1 relating to labelling requirements for infant foods. The MAIF Agreement is

¹ Nour Group Recommendations, available here: <http://www.health.gov.au/internet/main/publishing.nsf/Content/review-effective-infant-formula> at p4 in relation to recommendation 3. The Nour Group did however find that consideration should be given as to how best restrict manufacturers' labelling of toddler milk drinks with product identifiers resembling those of infant formula labels (Recommendation 4). However the Department of Health disagreed with this recommendation, see: <http://www.health.gov.au/internet/main/publishing.nsf/Content/review-effective-infant-formula>.

complementary to Standard 2.9.1 and it is therefore unlikely that any changes to that standard will require any modification to the MAIF Agreement.

4 Recommendations by the Nous Group have already been addressed

The Nous Group Recommendations were considered by the Advisory Panel on the Marketing in Australia of Infant Formula (**APMAIF**) before the panel was disbanded by the Department of Health. Of the 16 recommendations that were made by the Nous Group, only one concerned the content of the MAIF Agreement. As set out below, to the extent this recommendation involved any changes of substance to the agreement, these were addressed. For this reason, the INC does not agree with the submission made by the Dietitians Association of Australia that the MAIF Agreement has not been updated in response to the Nous Group Recommendations.

Only Recommendation 1 of the Nous Group Recommendations concerned the content of the MAIF Agreement. In addition to some minor changes to the language of the MAIF Agreement, this recommendation included two substantive changes to the MAIF Agreement. These were that electronic media and social marketing should be explicitly covered by the MAIF Agreement, and that the MAIF Agreement should include clearer guidance relating to manufactures' dealings with healthcare professionals (specifically concerning the provision of inducements and samples).

Following the Nous Group Recommendations, the guideline on *Marketing of Infant Formulas via Electronic Media* was adopted by the INC and endorsed by APMAIF and the Department of Health, and the Department of Health published *Principles for the consideration of interactions with health care professionals for the purpose of interpreting the MAIF Agreement*. In addition, the INC had already developed *Guidance on Interactions with Healthcare Professionals* and a policy on *Distribution of Infant Formula Samples to Health Care Professionals*, neither of which were considered by the Nous Group in its final report.

The MAIF Agreement operates as a high level instrument that is supplemented by more specific guidelines, principles and policies. These documents are reviewed regularly by the signatories to the MAIF Agreement to ensure currency of the operation of the MAIF Agreement. The INC therefore considers that the two substantive changes to the MAIF Agreement included in the Nous Group Recommendations were more properly addressed through the guidelines and principles, rather than through amendment to the text of the MAIF Agreement itself.

The Nous Group Recommendations also included three recommendations concerning the coverage of the MAIF Agreement. Two of these merely confirmed the effectiveness of the existing coverage of the MAIF Agreement, and one was not supported by the Department of Health. The remaining 11 recommendations concerned the operation of the MAIF Agreement. There have been significant changes made to the operation of the MAIF Agreement since the Nous Group Recommendations were published, in particular as a result of the abolition of the APMAIF and the establishment of the MAIF Complaints Tribunal. As a result of these changes, the recommendations by the Nous Group concerning the operation of the MAIF Agreement are no longer applicable.

5 Updated MAIF Agreement

As set out in section 4.3 of the submissions in support of the authorisation application, the MAIF Agreement has been amended to remove references to the APMAIF, and to update references to Australian Food Standards to references to the Australia New Zealand Food Standards Code. In the original submissions we mentioned that updating references to Australian Food Standards impacts clause 3. It also impacts clause 9. The amended agreement will come into force on the date that the ACCC provides authorisation for the MAIF Agreement. We enclose for your convenience a copy of the updated MAIF Agreement.

The INC is keen to continue to assist the ACCC, and will be happy to respond to any additional questions or concerns raised by the ACCC in relation to the authorisation application.

Yours sincerely

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