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Adjudication Branch  
Australian Competition & Consumer Commission  
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**A91506 & A91507 - Infant Nutrition Council  
Submission by the Australian Breastfeeding**

The Australian Breastfeeding Association (ABA) makes the following submission in response to the ACCC's Draft Determination regarding authorisations lodged by the Infant Nutrition Council for the Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement (MAIF Agreement).

In addition, given the short timeframe for response to the Draft Determination, ABA requests the opportunity to meet with the ACCC at a pre-decision conference to enable further discussion regarding the importance of an effective regulatory system.

The Australian Breastfeeding Association strongly objects to a further 10 year authorisation of the MAIF Agreement, and urges the ACCC to re-consider authorisation for a shorter period – 1-2 years.

This voluntary agreement has remained virtually the same since its inception in 1992. A re-authorisation in its current form would represent a significant missed opportunity for Australia to review the current evidence regarding marketing and promotion of infant foods and develop an effective regulatory system that not only provides full protection for breastfeeding but ensures all infant feeding decisions can be made free from the influence of inappropriate or unethical marketing.

Of particular concern in this submission process was the ability of industry (INC) to make further submission (after the closing date) refuting and clouding commentary in other parties' submissions.

This document examines the Infant Nutrition Council's response to these submissions and reiterates the position of the Australian Breastfeeding Association that:

1. Australia should not be committed to the MAIF Agreement for a period of a further 10 years
2. The scope of the MAIF Agreement as described by the Infant Nutrition Council (INC) for this reauthorisation does not protect optimal breastfeeding effectively in Australia
3. The MAIF Agreement and MAIF Complaints Tribunal are inadequate as Australia's official application of the World Health Organization's (WHO) International Code of Marketing of Breast Milk Substitutes and subsequent World Health Assembly (WHA) resolutions.

We look forward to an opportunity to meet with ACCC representatives to further discuss our concerns to ensure the safety and well being of Australia's most vulnerable consumers – infants.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Rebecca Naylor".

**Rebecca Naylor**  
Chief Executive Officer

# **Response to the ACCC Draft Determination on the Infant Nutrition Council Limited application for authorisation A91506 and A91507, *Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement (MAIF Agreement)***

## **1. Australia should not be committed to the MAIF Agreement, as described in the application by the Infant Nutrition Council, for a period of a further 10 years.**

The ACCC draft determination states “an amended form of the MAIF Agreement is proposed to come into force ...”, giving the illusion that the content has been updated in line with current market place conditions, independent reviews and health authorities’ recommendations. It has not.

The INC submission (dated 22 September 2015) makes reference to the Nous Report (2012), saying the review concluded that the current scope and self-regulatory nature of the MAIF Agreement is appropriate.

In fact the Nous Report states that the Department of Health and Ageing “*should revise the content and coverage of the Marketing in Australia of Infant Formulas: Manufacturers and Importers Agreement(MAIF Agreement)*. The report goes on to say “*Improvements should also be made to the efficiency, transparency and timeliness of the operations and governance arrangements of the Advisory Panel on the Marketing in Australia of Infant Formula (APMAIF) to ensure effective monitoring of industry compliance*”

The Nous report made a number of recommendations, however noted that there were three key recommendations that stood out for particular consideration:

- *Firstly, the voluntary, self-regulatory nature of the MAIF Agreement should remain in operation **provided** it continues to promote the aim of the MAIF Agreement and industry coverage remains high*
- *Secondly, the wording of the MAIF Agreement needs to be updated to reflect modern health terminology and developments in the marketing environment*
- *Thirdly, all APMAIF decisions and appointments should be timely, transparent and clearly communicated to the public.*

The report stated that adoption of these recommendations would support the MAIF Agreement to achieve its stated aim and that the recommendations provide an opportunity to address **valid** stakeholder concerns regarding the appropriateness of the MAIF Agreement for the modern marketing and regulatory environments.

ABA is particularly concerned that the updates proposed to the MAIF Agreement are limited and do not address the recommendations of the Nous Report. Further, oversight by the MAIF Tribunal Council and associated processes are not transparent, rendering the application of the MAIF Agreement weaker now than ever before. The INC submission dismisses the validity of the recommendation for better transparency saying concerns regarding the operation of the MAIF Agreement are no longer valid, since the abolition of APMAIF.

The INC contend that these recommendations have been addressed through guidelines and principles and regularly reviewed by Industry. Given the role of Nous was to assess the effectiveness of the MAIF Agreement and make impartial recommendation, surely their suggestion to include these items within the MAIF suggests they should not be a guideline or separate, rather be part of the instrument that binds industry.

ABA's submission (17 August 2015) reasoned that interim approval be given to the MAIF Agreement in order that Australian Health authorities and Government could give consideration to the following reviews in determining the appropriate regulatory system for the infant formula:

- a. The World Health Organization (WHO) *Consultation on the public draft of the Clarification and guidance on inappropriate promotion of foods for infants and young children* 20 July-10 August 2015.
- b. Renegotiation of Australia's National Breastfeeding Strategy, which expires in 2015.
- c. Ongoing FSANZ review of Food Standard 2.9.1 which includes labelling requirements for infant foods that fall within the scope of the WHO Code.

INC and ACCC contend that it is too early to know what, if any, changes will be made to the WHO Code as a result of the current consultation. Conversely, ABA proposes that WHO is aiming to strengthen marketing guidelines so it is reasonable to expect that there will be some changes.

Whilst re-authorisation of the MAIF Agreement for a further 10 years does not in principle prevent changes, ABA feels it is likely to impact on governments urgency to respond to any changes, given a usual process for re-authorisation is a review and update of the Agreement.

The Nous Report stated it expected the content and operation of the MAIF Agreement to require review prior to application for re-authorisation. Recommendation 7 of this report states that the currency of the agreement be regularly reviewed. There has not been a robust review of the MAIF agreement, the content of which remains largely the same since 1992. This review will only be possible, as stated above, in 6 – 12 months.

ABA urges the ACCC to issue an interim re-authorisation.

## **2. The scope of the MAIF Agreement as described by the Infant Nutrition Council (INC) for this reauthorisation does not protect optimal breastfeeding effectively in Australia.**

One of the significant omissions to the MAIF agreement is that toddler formulas (12 months plus) are out of scope, enabling industry to market toddler milks directly to consumers. Manufacturers and importers advertise toddler milks on television, social media, company websites, industry-funded blogs, parent information and advice services, and baby clubs. Australian research shows that mothers do not differentiate between infant formula, follow-on formula and toddler milk, understanding that the product is "baby formula"<sup>1</sup>.

Whilst the Nous report found that there was "*insufficient evidence to warrant the regulations of products beyond 12 months*", citing the risk that including food described or sold as an

alternative for human milk for the feeding of infants beyond the age of twelve months would make it inconsistent with the WHO Code. We refer again to the The World Health Organization (WHO) *Consultation on the public draft of the Clarification and guidance on inappropriate promotion of foods for infants and young children 20 July-10 August 2015* to be considered by the World Health Assembly in 2016.

The Nous Report notes an alternative mechanism to prevent toddler milk drinks being used as de-facto advertising for infant formula is placing restrictions on the ability of industry to market and label both infant formula and toddler milk drinks in a similar manner.

The marketing of toddler milks contradicts the NHMRC Australian Infant Feeding Guidelines (2012) that state that children don't need toddler milk<sup>2</sup>. The confusion is in the marketing of toddler milks / growing up milks.

Retailers (supermarkets and pharmacies) are not covered by MAIF so are free to advertise infant formula and toddler milks on line and in-store, especially through pricing and discounts. The Knowles report (2003)<sup>3</sup> concluded that there was a need for Australian retail sector to reach an agreement regarding code of practice, particularly noting that pharmacies and supermarket chains needed to be included as part of public health strategy as *"there is no doubt that some practice in the retail sector can undermine promotion of breast-feeding"*.

The current retail environment includes regular in-store promotions, price discounting. The internet is now also a major mechanism for sales and promotion. These practices, intensified by the growth of electronic media, highlight the gaps and inadequacy of the MAIF agreement to protect consumers from inaccurate, misleading and potentially harmful advertising of breastmilk substitutes.

An interim re – authorisation would allow these facts to be considered in a full and robust review.

### **3. The MAIF Agreement and MAIF Complaints Tribunal are inadequate as Australia's official application of the World Health Organization's (WHO) International Code of Marketing of Breast Milk Substitutes and subsequent World Health Assembly (WHA) resolutions.**

ABA re-iterates that the MAIF Agreement and MAIF Complaints Tribunal is not an effective regulatory instrument for marketing of breast milk substitutes, for the following reasons:

- a. The MAIF Agreement is voluntary and not all industry members are signatories
- b. Oversight of the MAIF Agreement by the Advisory Panel on the Marketing in Australia of Infant Formula ceased in 2013<sup>1</sup> without public consultation. It was replaced by a MAIF Complaints Tribunal administered by the St James Ethics Centre.
- c. The MAIF Agreement is not enforceable and the Tribunal has no power to impose penalties.
- d. There is a lack of clarity about processes for bringing a complaint about a breach of the MAIF Agreement via the Department of Health and then to the MAIF Complaints Tribunal reporting of decisions and outcomes to the public.

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<sup>1</sup> Department of Health <http://www.health.gov.au/internet/main/publishing.nsf/Content/health-pubhlth-publicat-document-brfeed-complaints.htm>, accessed 8 August 2015

- e. The lack of transparency and appropriateness of industry funding arrangements of the MAIF Complaints Tribunal and the make up of the Tribunal. It is imperative that any regulatory body has transparent processes, is truly independent of industry and absolutely free of conflict or perceived conflict of interest.
- f. Any regulatory authority must table public reports annually, and those reports include outcomes and consequences of significance. Prior to 2013, reports were made tabled in Parliament, however there no reports have been available to the public since APMAIF was abolished.
- g. The definition of the 'infant formula market' adopted in MAIF does not capture substitutable products, including toddler and follow-up formulas (consumers cannot differentiate these products)<sup>10</sup>
- h. The MAIF Agreement applies only to companies that are signatories to the Agreement.

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<sup>1</sup> Berry, N.J., S.C. Jones, and D. Iverson, Toddler milk advertising in Australia: infant formula advertising in disguise? *Australasian Marketing Journal (AMJ)*, 2012. 20(1): p. 24-27

<sup>2</sup> National Health and Medical Research Council (2012) *Infant Feeding Guidelines*. Canberra: National Health and Medical Research Council

<sup>3</sup> Knowles, R., *Independent advice on the composition and modus operandi of APMAIF and the scope of the MAIF Agreement*. 2003: Canberra.