

# ACCC PRE-DECISION CONFERENCE – INFANT NUTRITION COUNCIL A91506 & A91507

## SUMMARY

**ACCC OFFICE, MARCUS CLARKE ST, CANBERRA**

**VIDEO LINK UPS TO ACCC OFFICES IN MELBOURNE, SYDNEY  
AND BRISBANE**

**14 DECEMBER 2015, 11am**

### **Introduction**

**Commissioner Sarah Court** introduced herself and the ACCC staff present and welcomed everyone to the conference.

**Commissioner Court** then summarised a range of issues raised in submissions as she saw them:

- the duration for which authorisation should be granted, which many parties believe should be only 1 – 2 years to allow a review of the Marketing in Australia of Infant Formula Agreement (MAIF Agreement)
- the scope of the MAIF Agreement, which many interested parties argue should cover retailers and the marketing of toddler milks and/or associated products such as teats and bottles
- concerns that the current agreement does not extend to marketing via social and other electronic media
- the disbanding of the Advisory Panel (APMAIF) and its replacement with the Tribunal.

She also noted that:

- the ACCC's role is to weigh the likely benefits and detriments of the MAIF Agreement with the likely benefits and detriments without it. This involves trying to assess what would happen in the absence of the MAIF Agreement, which may be some form of government regulatory response but it is difficult to assess the likelihood of this given the current government's deregulatory agenda
- the MAIF Agreement is a voluntary code of conduct and therefore, while the ACCC can seek to influence its content, it cannot require parties to adopt or sign up to the agreement.

**Commissioner Court** then advised that she would invite each of the parties who requested the conference to provide a brief summary of their concerns and that each of the parties in attendance would have the opportunity to address the conference.

**Rachel Fuller** (President, Australian Breastfeeding Association (**ABA**)) said that:

- the MAIF Agreement has not and cannot achieve its aims, and has not protected breastfeeding in Australia
- the Infant Nutrition Council's (**INC**) Tribunal is unlikely to be adequate oversight to the agreement
- the MAIF is an inadequate response to Australia's obligations under the World Health Organisation's International Code of Marketing of Breastmilk Substitutes (**WHO Code**) and subsequent resolutions
- parents are especially vulnerable to exploitation (compared to consumers of other products), because formula fed infants are entirely dependent on infant formula as the sole source of nutrition
- as all infant formula is required to comply with content requirements set out in Australia New Zealand Food Standards Code Standard 2.9.1, there is no additional benefit provided by any one infant formula product over others. Marketing about the benefits or superiority of an infant formula product effectively implies the superiority of the product over breastfeeding

**Dr Nina Berry** (Australian Breastfeeding Association) said that:

- because infant formula manufacturers do not have incentive not to market their product, they should not be in charge of the agreement which regulates marketing
- there is no evidence that the MAIF Agreement has been effective in achieving its aim, and it has no effective sanctions or oversight
- Australia is not achieving optimal breastfeeding targets
- there is a large cost to the public health system as a result of formula feeding
- the growth in infant formula sales compared to the birth rate in Australia indicates that the MAIF Agreement has not been effective
- the scope of the agreement has failed to keep pace with marketing practices, for example consumers do not distinguish between the marketing of toddler milk and the marketing of infant formula. Marketing of toddler milks are effectively marketing for infant formula. Formula companies promote toddler milk which forms part of a "range" of products including starter and follow on formula and these are sequentially numbered and packaged very similarly
- parents believe the claims made by manufacturers in relation to toddler milk because they expect they would not be allowed to be made if they weren't true. This includes the quality claims such as "gold" and "platinum" and the benefit/health claims, made in store, on packaging and online
- the Nous Report recommended that solutions be considered in relation to marketing of toddler milks, but this was not accepted by the government. The WHO agrees that there is a problem with consumer confusion over marketing of toddler milks
- other recommendations from the Nous Report have not been adopted (including updating of health terminology, the need for APMAIF to provide rapid and transparent complaint resolution and high levels of industry coverage). Recommendations from

the earlier Knowles Report regarding baby clubs and retailers have also not been included

- it is expected that updates resulting from the current World Health Assembly process can be adopted within the next five years, but it is unlikely that the INC will make any move to vary the agreement if authorisation is granted for ten years, because they need to ensure a return to their shareholders
- the Nous Report anticipated that the content of the agreement would have to be reviewed
- the ABA agrees that having something in place is essential and that government regulation appears unlikely
- the ACCC should only grant authorisation for 2 years and consider imposing a condition requiring a full independent evaluation of the agreement, including consultation with stakeholders prior to any reauthorisation.

**Michael Moore** (Public Health Association of Australia (**PHAA**)) said that:

- the PHAA considers that two years is an appropriate time period for re-authorisation because things are changing
- Australia's breastfeeding rates are well short of national and global recommendations
- re-authorising is effectively pre-empting WHA recommendations expected next year
- developing nations look to Australia as a model for breastfeeding policy. Breastfeeding in these nations is much more important than in first world countries and this should be included in the ACCC's consideration of the public benefits
- under the current agreement there is relatively free marketing especially via social media and indirect marketing, and this has consequences
- the PHAA strongly supports the issues raised by the ABA
- the PHAA issued a press release last week discussing toddler milk and identifying that there was no benefit from or need for toddler milk

**Lisa Amir** (PHAA) said that:

- there is an increasing discrepancy between breastfeeding rates in high and low income families
- practices in hospitals have improved but hospitals still hand out formula samples and breastfeeding rates drop off quickly after parents leave hospital

**Maureen Minchin** (infant feeding author) added that:

- mothers believe breastfeeding and formula are equivalent
- there are health risks to mothers as well as babies from formula feeding

**Commissioner Court:**

- said that the ACCC accepted that increased rates of breastfeeding were a public benefit for a range of reasons
- asked if there was evidence that the current MAIF Agreement, or marketing of toddler milks for example, were responsible for a decrease in breastfeeding rates
- asked if interested parties had considered what would happen in two years after the expiration of an authorisation, if the government at that time was not interested in introducing an alternative regulatory regime.

**Julie Smith** (Regulatory Institutions Network, Australian National University (**ANU**)) said that:

- she disagreed with the ACCC's view of the likely counterfactual (the future should authorisation not be granted)
- the correct counterfactual is one in which the ACCC required a review of the MAIF Agreement within two years and imposed conditions to broaden the scope and restrict the coordinated use of free formula samples.

**Rachel Fuller** said the ABA supports this view.

**Lisa Amir** said that:

- it is hard to point to evidence that the MAIF Agreement is responsible for declining breastfeeding rates, but that marketing had a role in normalising the use of infant formula
- other approaches (such as increased prenatal education on breastfeeding) had not been shown to be effective in increasing rates of breastfeeding.

**Dr Nina Berry** said that:

- while it is difficult to establish a link between infant formula marketing and breastfeeding rates, there is some evidence on the causal pathway of a link between the two
- there is evidence of the detrimental impact of free samples of formula, which she would supply to the ACCC.

**Maureen Minchin** said that:

- there are always a range of factors behind breastfeeding rates but each of these is important
- plain packaging of tobacco has been shown to be very effective in discouraging smoking
- a multi-faceted approach is required.

**Ingrid McKenzie** (representing the International Code Documentation Centre (**ICDC**)) said that:

- the ICDC is an international organisation which monitors compliance with the WHO Code
- the implementation of the MAIF Agreement in countries like Australia is mimicked in developing countries
- although the WHO Code is unenforceable under international law, the Convention on the Rights of the Child is. The MAIF Agreement representing a failure to protect the rights of the child under this convention.
- the ACCC has had regard to international instruments in past decisions
- the ICDC supports reauthorisation for a two year period to allow time for the WHA review
- the ACCC should impose conditions regarding oversight of the agreement, and the scope of the agreement

- the Tribunal's compliance mechanisms do not comply with the ACCC's recommendations for voluntary industry codes of conduct.

**Commissioner Court** noted that the International Board of Lactation Consultant Examiners (**IBLCE**) had requested a conference but as a US-based organisation was unable to attend. The IBLCE lodged a submission prior to the conference urging the ACCC to follow the recommendations of the ABA.

Commissioner Court invited Julie Smith of the Australian National University (as the final of the five parties to call the conference) to address the conference.

**Julie Smith** said that:

- a decision on the WHA guidelines would be made by the end of 2016. These plan to effectively expand the scope of the WHO Code to include complementary and toddler foods
- she had provided to the ACCC just prior to the conference a report from ANU research fellow Dr Ginny Sargent, which indicated that the Nous Report does not provide evidence that the MAIF Agreement is effective in protecting breastfeeding
- the disbanding of the APMAIF was widely disagreed with, including by industry participants who issued a press statement opposing it at the time
- many parties have not felt heard by the government on these issues
- breastfeeding participates in the economy as a substitute to infant formula and there are markets for goods and services associated with breastfeeding (such as lactation consultants) which compete with the Infant Formula industry and can be damaged by reauthorisation of the MAIF Agreement
- she supports reauthorisation for two years
- the ACCC should impose a condition requiring toddler milk to be included within the scope
- the MAIF Agreement has changed substantially since it was last considered due to the removal of APMAIF. This has also resulted in the removal of the guidance developed by APMAIF, which is no longer binding
- evidence indicates that, when the MAIF Agreement came into effect in 1992, there was an immediate reduction in infant formula marketing and a corresponding increase in toddler milk marketing
- breastfeeding rates are declining while formula sales are increasing
- the public benefits are overstated in the ACCC's draft determination as there is uncertainty as to whether these benefits will arise
- the New Zealand study cited in the ACCC's draft determination overstates the cost of government regulation
- the ACCC had not correctly characterised the market failure, suggesting that there are externalities in the health sector and principal/agent problems with the provision of samples

- MAIF facilitates coordinated marketing of infant formula to hospitals and damages breastfeeding related markets because there are no real limits within the MAIF Agreement on marketing to health professionals
- the introduction of formula in hospital can be compared to forming an addition to a product because the introduction of formula affects the acceptance of breast milk by an infant and affects supply of breastmilk. Infants effectively become dependent upon a single product
- infant formula is provided to hospitals at very low wholesale prices, and/or invoices to hospitals for its supply are not chased up. The aggressive provisions of samples to hospitals is detrimental because it discourages the development of innovative models by health systems such as use of breast pumps or human milk banks
- pharmacists provide free formula samples to parents as they are not covered by the MAIF Agreement
- the ACCC should require a stronger agreement.

**Commissioner Court** said that, while she did not accept that the imposition of a stronger agreement by the ACCC could be considered the relevant counterfactual, she acknowledged that the imposition of a condition by the ACCC may amount to much the same thing.

Commissioner Court invited the INC to respond to issues raised by the parties who called the conference.

**Stephen Voordouw** (Chair, Infant Nutrition Council and General Manager of Aspen Nutritionals) said that:

- the INC supported the goal of protecting breastfeeding and continued to support its application
- the growth in sales of infant formula products in recent years could not be said to be entirely reflective in a growth in the use of infant formula in Australia, as the 2008 melamine contamination scare in China has distorted the market due to large volumes of formula being bought in Australia and then exported
- granting reauthorisation for a 10 year term does not lock in the agreement as revision remains possible in that period.

**Commissioner Court** invited representatives of the Department of Health to address the conference.

**Elizabeth Flynn** (Assistant Secretary, Department of Health) said that:

- the National Breastfeeding Strategy expires this year. The Department is going through a process to determine what the next iteration of the strategy should be. The process will include a lot of consultation and may take 12 months to complete
- the current National Breastfeeding Strategy does not include any performance indicators and there do not appear to be any appropriate data sources such that it is hard to be definitive as to whether breast feeding rates are going up, down or remaining static. The Department will look into these issues as part of its review.

**Annette Byron** (Dieticians Association of Australia) said that:

- the Dieticians Association is sympathetic to the other interested parties who had spoken and
- the Association supports a two year reauthorisation given the review of the National Breastfeeding Strategy and the WHA deliberations.

**Maureen Minchin** said that:

- she believed the ACCC would be better off taking a misleading conduct case against infant formula manufacturers as this would be more effective than the MAIF Agreement
- implied health claims (about optimum brain development etc) have been found to have been misleading in jurisdictions such as Canada and the UK
- infant formula manufacturers used staged formula and language which implied progress (such as “advance”). This can encourage mothers to switch to the next stage of formula too early to feel that their child is progressing (also there is a lower price associated with later stages of infant formula)
- manufacturers should have to call everything produced for children up to 12 months “formula” and not refer to “toddler formula”. Toddler milk products should be packaged so as to make them very distinctly different from infant formula products
- toddler milk is often overused and discourages the establishment of a proper diet
- there is ignorance amongst parents as to how to use formula properly. The effects of formula are intergenerational
- hospitals are risking a class action by the parents of children who have been given formula in hospital due to the health effects
- the ACCC should do more and has become a shield for the infant formula industry. Complaints made to the ACCC would often be referred to APMAIF instead of being actioned through the ACCC’s usual processes
- there should not be a loophole of retailers marketing on behalf of manufacturers and importers
- restrictions should also be placed on products to be exported.

**Commissioner Court** said that the existence of an authorisation in relation to an industry code does not give a free pass to the industry. The ACCC would assess complaints as it would in any other industry.

**Elizabeth Foley** (Federal Professional Officer, Australian Nursing and Midwifery Federation) said that:

- what had already been said at the conference by interested parties would resonate with ANMF members, particularly in relation to the provision of samples, and
- authorisation should not be granted for 10 years.

**Lisa Amir** said that:

- she is aware of examples where samples have been given to the public by practice nurses. These have the weight of the advice of a health professional and parents put weight on this
- there appears to have been a frenzy of marketing and samples in the last 12 months
- marketing of formula (including through samples) occurs to professionals also at health conferences.

**Margaret Grove** (former APMAIF member) said that:

- the latest submission by the Department of Health refers extensively to the Nous Report but this was very limited in scope with a high ratio of industry stakeholders consulted as part of the process. Major stakeholders such as the ABA were consulted only perfunctorily. For this reason recommendations of the Nous Report are questionable
- breastfeeding rates are not what they should be, and formula has been normalized. MAIF is supposed to counteract this
- the ACCC should reauthorise for only a short period and the agreement should include toddler milks, retailers, bottles and teats etc, and digital technologies. It should cover all industry participants rather than being voluntary
- APMAIF had been working closely with signatories on issues around social media and electronic marketing, but the panel has been disbanded. There should be some developments in this direction
- the whole WHO Code should be adopted eventually but in the meantime the above should be implemented immediately.

**Commissioner Court** said that:

- it was not within the power of the ACCC to make the agreement compulsory
- if the ACCC were to impose conditions on the INC, the INC did not have to accept them
- while some interested parties had raised concerns that the current MAIF Agreement did not cover electronic marketing, the understanding of the ACCC was that all forms of marketing – including electronic – were covered by the agreement even though they were not specifically referred to. She sought clarification from the INC.

**Stephen Voordouw** said that:

- there is no distinction between social media and other forms of marketing under the agreement. All forms are captured
- marketing of infant formula does not occur via social media. However, toddler milk is promoted via this channel
- the industry does not promote toddler milk as “toddler formula”. The term “formula” is not used in connection with toddler milk



- the work of INC signatories with APMAIF regarding social media demonstrates that they are responsible and committed.

**Dr Nina Berry** said that:

- regardless of whether or not industry uses the term “formula”, consumers understand them to be the same product
- while only toddler milk ads appear online, they are often highly targeted to mothers of very young babies. The ads encourage mothers to click through to websites which encourage them to join baby clubs etc where their conversations are monitored and relationships are developed with consumers by health professionals employed by formula manufacturers.

**Janelle Maree** (mother) said that:

- breastfeeding is learned through observation, imitation and practice
- infant formula manufacturers use subliminal advertising for their products
- MAIF Agreement doesn't sufficiently give effect to the WHO Code
- the confidence of mothers to breastfeed is undermined by formula marketing
- infant formula should only be sold under guidance like tobacco. Formula use requires supervision
- formula should be sold with plain packaging with risk messaging
- consumers are confused by toddler milk marketing as they understand it to be marketing for infant formula
- measures taken by Australia in this space have an impact internationally
- breastfeeding policy in Australia is not keeping pace with research
- Australia needs to provide a culture of observation, imitation and practice for breastfeeding.

**Rachel McDonald** (PhD candidate) said that:

- she supports most of what had been said so far
- there is a question as to whether it is a human right to be breastfed, or to breastfeed. Many scholars accept that there is a human right to breastfeed. If this is the case there may also be a right against other forces which impede this right. On this basis some scholars argue that anything less than full WHO Code implementation may amount to a breach of human rights as contained within the Convention on the Rights of the Child and this is a relevant factor for the ACCC to take into account
- the WHO Code is a minimum standard and the MAIF Agreement falls well short of this

- there are indications that companies are not abiding by the MAIF Agreement as some retailers have marketing materials which would appear to have been provided by manufacturers
- there should also be restrictions placed on breast pump manufacturers who claim their product “mimic” natural action
- the WHO Code should be implemented in full.

**Kay Whitby** (registered nurse) said that:

- infant formula manufacturers conduct free seminars to health professionals which may not be an appropriate way to educate health professionals
- toddler formula is being overused by parents
- the MAIF Agreement is not effective and should be reauthorised for only two years

**Maureen Minchin** said that in the 1990s a company was advertising its teats as being “natural”. The ACCC took action and the company pulled its advertising before it got to court. The threat of prosecution was enough. But these claims are now being made again.

**Rachel Fuller** said that the Nous Review recommended a regular review of the effectiveness of the MAIF Agreement.

**Libby Salmon** (Regulatory Institutions Network, Australian National University) said that:

- while the aim of the MAIF Agreement was to prevent direct marketing to consumers, this was definitely still occurring through toddler milk advertising and through retailers
- electronic marketing in Australia for formula products becomes a source of marketing internationally because it operates across national borders
- the ACCC should ensure that the Head of the St James Ethics Centre is fully independent of INC members, since he has the sole power to appoint members to the Tribunal
- innovation in milk banks etc is held back by the MAIF Agreement, because low prices for formula provided to hospitals erodes options presented to mothers by the health sector
- it is not possible to discover the current full list of signatories to the MAIF Agreement. This means it is not possible to establish the market share of signatories and non-signatories. Commercial market share data is also not publicly available. The ACCC should require this information to be made public.

## Conclusion

**Commissioner Court** brought the forum to an end. She thanked everyone for attending and advised that:

- the ACCC will prepare a high level summary of the issues raised, a copy of which will be provided to all participants
- the ACCC will consider the issues raised today, as well as the written submissions provided, in making a decision
- participants should feel free to provide any further information if they so wished within by 15 January 2016

- she would convey views raised during the conference to the other ACCC Commissioners.

The forum concluded at approximately 1:20pm.