INC submissions following pre-decision conference

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Authorisation should be for more than 2 years notwithstanding ongoing consideration of recommendations from current WHO/WHA deliberations.	• The Department of Health has responsibility for determining how Australia complies with the WHO code. Parties, including those represented at the conference, are of course free to lobby government in respect of how the WHO Code is implemented in Australia. As noted in the ACCC's draft determination, ACCC authorisation will not prevent the Department of Health reviewing or amending the MAIF Agreement if it considers it appropriate to do so, in the light of any changes to the relevant WHO guidelines and a new National Breastfeeding Strategy. • It would be inefficient for the ACCC and the INC to review the MAIF Agreement again in two years. If significant changes are made to the WHO Code, the INC considers it would be more appropriate to implement those recommendations through the Department of Health rather than through the ACCC's authorisation process. Further, it is far from best regulatory practice to have the ACCC and Department of Health simultaneously review an industry agreement, which may be the case if authorisation is granted for only a two year period. • The INC expects that the Department of Health will initiate consultation with industry in the event that there are changes to the WHO Code. The submission made by the Department of Health states "despite the uncertainty around the potential changes to the WHO Code and subsequent WHA resolutions in mid-2016 and any implications this may have to the MAIF Agreement, any re-authorisation granted by the ACCC would not prevent the Infant Nutrition Council from seeking to vary the authorisation at any time, should it be considered appropriate."
The MAIF Agreement is fulfilling its purpose of preventing direct marketing of infant formula to consumers. There is no evidence to suggest that the MAIF Agreement is failing to protect breastfeeding rates in Australia.	• The MAIF Agreement seeks to prevent the direct marketing of infant formula by manufacturers to consumers. Contrary to suggestions made at the conference, the MAIF Agreement has been successful at achieving this. Although stakeholders present at the conference would prefer that restrictions on marketing be broader than they are, this does not detract from the fact that the MAIF Agreement is effective in its stated aim of ensuring signatories do not directly market infant formula to consumers. • Many stakeholders argue that breastfeeding rates in Australia are declining. This proposition is at odds with the view of the Department of Health which has clearly stated that there is no reliable data concerning current breast feeding rates in Australia. • It seems that stakeholders could be extrapolating from data about increased sales of infant formula. A recent article in the SMH states that there has been no significant fall in breastfeeding rates for Australian mothers since 2012. Although sales of infant formula have almost doubled during that period, the article suggests that increases in sales of infant formula in

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	Australia is due to grey market sales to China and is not representative of demand in Australia: http://www.smh.com.au/business/half-baby-formula-bought-from-aussie-supermarkets-being-sent-overseas-20151214-glnmd2.html. It is widely known that there has been, in recent years, an increase in the 'unofficial export' trade of infant formula purchased through Australian retailers and subsequently exported to China.
Marketing of toddler milk products does not equate to marketing infant formula.	• There is absolutely no evidence that sales of infant formula have increased as a result of the promotion of toddler milks. • As required by the INC's guidelines on 'Marketing of Infant Formulas via Electronic Media', when a person seeks to access information about infant formula on a manufacturer's website, a pop-up appears which sets out the benefits and superiority of breastfeeding. The person must acknowledge that they understand this before proceeding to the website. This pop-up is designed to appear regardless of how the viewer accesses the page (that is, including when they click through from a toddler-milk-product page; or whether they click through from an advertisement on social media). • The difference between toddler milks and infant formula is that the former are not sold as breast milk substitutes. If the MAIF Agreement were expanded to apply to these products it would be a significant departure from the current agreement. The ACCC would need to consider whether such a change would have an adverse impact on signatories' incentives to continue to be bound by the MAIF Agreement. • It would be inappropriate to pre-empt the WHO's decision by imposing a condition on authorisation which concerns the marketing of toddler milks. • There were some suggestions made at the conference that manufacturers of infant formula were advertising toddler milks in order to circumvent restrictions on marketing infant formula. This is not the case. No evidence was put forward to support this contention. Indeed, the INC Code of Conduct requires members to abide by both the letter and intent of the MAIF Agreement which principally concerns protecting breastfeeding and not marketing infant formula to consumers.
The MAIF Tribunal processes and decisions are effective and largely comply with the ACCC's guidelines for developing effective voluntary industry codes of conduct	• The INC was content with the operation of the APMAIF. The Department of Health made the decision to dismantle the APMAIF in line with the Federal Government's agenda of reducing red tape. The INC was not involved in this decision and, had it been, it would likely have opposed the decision. In the absence of an independent review body, the INC of its own volition approached St James Ethics Centre to develop and oversee an independent complaints body. • Many of the stakeholders present at the conference (including the Public Health Association of Australia, the Dietitians Association of Australia and the Australian Breastfeeding Association) were approached by the St James Ethics Centre and invited to provide comments on the Terms of Reference for the MAIF Tribunal.

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	• There was some suggestion at the conference that the MAIF Tribunal was inadequate due to the fact that its membership does not include any person from the Australian Breastfeeding Association. Consistent with the ACCC guidelines for developing effective voluntary industry codes of conduct, the members of the MAIF Tribunal are required to be 'disinterested', that is, have no preconceived ideas about the industry.
	• The MAIF Tribunal is more independent of the INC's members than the APMAIF was (for instance, there is no industry representation on the MAIF Tribunal as there was on the APMAIF). The MAIF Tribunal is also independent of St James Ethics Centre. The 'background' to the Terms of Reference provides that the deliberations of the MAIF Tribunal will be 'free from influence by any other organisation, including St James Ethics Centre'.
	• The MAIF Tribunal is a newly developed body. It is in its development stage. Because the MAIF Tribunal is independent of the INC, the INC cannot give any assurances as to when the annual report will be released or what the content of the report will be. However the INC has been advised by the MAIF Tribunal that the next annual report will be released in early 2016. Pursuant to the MAIF Tribunal Terms of Reference, the annual report will contain records of any breaches found by the MAIF Tribunal.
	• The MAIF Tribunal Terms of Reference are largely consistent with the ACCC's guidelines. In particular, the INC notes the following features of the MAIF Tribunal which accord with the requirements of the ACCC's guidance:
	  • The MAIF Tribunal Terms of Reference provide for independent review of complaints. The three members of the MAIF Tribunal are recruited from outside industry and include a person with legal qualifications, a public health and nutrition expert and a community representative. As mentioned above, the members of the MAIF Tribunal are required to be 'disinterested' consistent with the ACCC guidelines which require the independent review body to have 'no preconceived ideas about the industry'.
	  • The MAIF Tribunal Terms of Reference provide that the members will have tenure for a fixed period of three years (and may be eligible for appointment for one further term of three years). This is consistent with the ACCC guidelines which require that the independent review body should have tenure for a fixed period.
	  • The ACCC guidelines specify there should be commercially significant sanctions for breaches of an industry code. Breaches of the MAIF Agreement are made public and can be published by the media. The subsequent reputational damage that could arise from a finding of a breach is very significant for these companies. For multinational companies, this can have ramifications for their brand image in overseas markets as well as in Australia. The significance of reputational damage in the infant formula market should not be understated.

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	Consumers in this industry can be particularly sensitive to any suggestion of wrong doing. The INC members have a high focus on corporate governance guidelines and corporate social responsibility activities. Breaches of the MAIF Agreement are taken seriously and with implications for anyone responsible. • The MAIF Tribunal can make recommendations on how a breach might be remedied following a finding that a signatory breached the MAIF Agreement. On making a decision in respect of a complaint, the MAIF Tribunal is required to provide to both the complainant and the company alleged to have breached the MAIF Agreement the reasons for the decision and any recommendations made. The MAIF Tribunal is also required to report any findings of breaches, along with any recommendations to the Department of Health. • The Department of Health is required to record all complaints received in a complaints register and forward all relevant information concerning these to the Secretariat for incorporation in the annual report. Any MAIF Tribunal findings of a breach, and any recommendations made, are also recorded in the annual report, consistent with the 'data collection' and 'accountability' requirements in the ACCC's guidelines.
Infant formula is supplied to the health system at competitive prices. There is no evidence that this precludes the development of alternatives such as pumping or human milk banking.	• Infant formula is supplied to hospitals predominantly through competitive tender processes at above-cost prices. The ACCC cannot address stakeholders' concerns regarding the supply of infant formula at competitive prices other than by the ACCC setting a price floor for infant formula supplied to hospitals. Putting aside competition concerns, in circumstances where not all manufacturers of infant formula are signatories to the MAIF Agreement, it would disadvantage the signatories to the MAIF Agreement if the ACCC were to take such a course. • It is essential that hospitals have access to infant formula at competitive prices. In circumstances when infants are not breastfed, infant formula is the only suitable and safe alternative. Accordingly, manufacturers are competing with each other to be the product of choice for hospitals for use in these limited permissible circumstances. • The supply of infant formula to the health system at competitive prices does not create a disincentive for health systems to develop or focus on alternatives. Nor does it encourage early infant formula use and hinder the establishment of breastfeeding. Health care professionals exercise considerable care in providing infant formula to women in a hospital setting. Indeed the circumstances in which they do so are limited. The 'Infant Feeding Guidelines: Information for health workers' provide that health workers have a responsibility to promote breastfeeding first, and to assist mothers to address common problems with breastfeeding. In this context, the supply of infant formula at low prices is unlikely to result in the lack of promotion of breastfeeding by the health system, or the development of alternatives. The INC considers that the 'harm' attributed by the stakeholders to the supply of infant formula at competitive prices is significantly overstated at best, and largely speculative.

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Infant formula samples are provided to health care professionals in limited circumstances	• Under the MAIF Agreement, and the policy on the provision of samples to health care professionals, manufacturers can only distribute infant formula samples to health care professionals in very limited circumstances. The stakeholders appear to confound the supply of low price infant formula with the supply of samples. Samples cannot be provided to health care professionals unless:
	  ◦ it is for the purpose of professional evaluation or research; and
	  ◦ where a health care professional has requested it by submitting a request form. The form requires the healthcare professional to acknowledge that the samples will only be used for professional evaluation or research.
	• The term health care professional is defined broadly in both documents, it includes 'a professional or other appropriately trained person working in a component of the health care system, including pharmacists and voluntary workers'.
	• Both the policy and the form were accepted by the Department of Health in 2010. By way of example, we attach the request form used by Danone Nutricia, Nestlé Australia and Aspen Pharmacare.
	• There is no evidence that the provision of samples of infant formula to healthcare professionals in these limited circumstances discourages breastfeeding.

A list of signatories to the MAIF Agreement has been made publicly available	• At the conference, the stakeholders raised concern that the current list of signatories to the MAIF Agreement is not publically available. The Department of Health manages the process of industry members becoming signatories to the MAIF Agreement. A list of signatories to the MAIF Agreement is publicly available on the Department of Health's website however this list may not always be current. The INC is unaware of a request for an updated list having been made to the Department of Health before. • In response to the concern raised by stakeholders, the INC has made available on its own website a current list of signatories to the MAIF Agreement. The list is available here: http://www.infantnutritioncouncil.com/marketing-codes/maif/.
General explanation of the MAIF complaints handling process	• A person wishing to make a complaint arising under the MAIF Agreement must first lodge their complaint with the Department of Health. The Department of Health determines whether a complaint is in or out of scope. The MAIF Tribunal Terms of Reference provide examples of types of complaints which may be out of scope. These examples include complaints concerning: ◦ an infant formula manufacturer or importer that is not current signatory to the MAIF Agreement or was not a signatory at the time the complaint was made

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	• retailer activity where there is no involvement by the manufacture/importer (e.g. price promotions in retail catalogues); • infant merchandise (e.g. infant feeding bottles, teats, dummies, etc.); and • foods, including milk products formulated for children over 12 months of age (sometimes referred to as "toddler Milks"). • The Department of Health may seek further information if required to make a determination in relation to scope. If a complaint is deemed out of scope, the Department of Health will notify the complainant. • If a complaint is within scope, the Department of Health will forward the complaint (together with any supporting material) to the Secretariat of the St James Ethics Centre. The Secretariat then sends this to the MAIF Tribunal for consideration at its next meeting, and also advises the manufacturer concerned of the complaint. The manufacturer is able to respond with any evidence or other information it wishes the MAIF Tribunal to consider. • In considering the complaint, the MAIF Tribunal can do one of two things. It can determine that further consideration is required before a determination can be made. If further consideration is required, the manufacturer is notified and invited to respond with any additional relevant information. Alternatively, it may decide that the complaint does not represent a breach of the MAIF Agreement. • At its next available meeting, the MAIF Tribunal is required to consider all relevant information provided and make a decision as to whether or not the matter complained of constitutes a breach. If a breach is found, the MAIF Tribunal may make recommendations as to how the breach might best be remedied. • Both the complainant and manufacturer are advised of the outcome, including the MAIF Tribunal's reasons for the decision and any recommendations that the Tribunal may have made. • With respect to the number and details of complaints made since the MAIF Tribunal was established, this information will be included in the MAIF Tribunal's annual report, which the INC understands will be released in February 2016. The INC will provide the ACCC a copy of the annual report when it is released.