

Allens

Deutsche Bank Place
Corner Hunter and Phillip Streets
Sydney NSW 2000 Australia

T +61 2 9230 4000

F +61 2 9230 5333

www.allens.com.au

GPO Box 50
Sydney NSW 2001 Australia
DX 105 Sydney

ABN 47 702 595 758

Allens > < Linklaters

20 May 2016

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**). We set out below further and final submissions from the INC.

1 Executive summary

The view held by the INC (and each of its members) is that breastfeeding is the best form of nutrition for the healthy growth and development of infants. The benefits of breastfeeding are unsurpassed by any product, including infant formula. In recognition of this, the purpose of the MAIF Agreement is to protect and promote breastfeeding and give effect to the principles of the *World Health Organization's International Code of Marketing of Breast Milk Substitutes* (**WHO Code**) in Australia by imposing restrictions on the marketing activities of manufacturers of infant formula.

The INC submits that the ACCC should authorise the MAIF Agreement as, on a counterfactual analysis, the public benefits of authorising the MAIF Agreement significantly outweigh any public detriments and this is likely to remain the position throughout the proposed authorisation period.

Submissions recently made by senators representing the Australian Greens, and shadow ministers representing the ALP, raise concerns with the ACCC authorising the MAIF Agreement for the proposed authorisation period. The basis of their concerns is that the important public health issues relevant to the MAIF Agreement and Australia's application of the WHO Code ought properly to be addressed by the Australian Government.

The INC agrees that these issues are the prerogative of government. Any re-authorisation of the MAIF Agreement by the ACCC does not prevent the Australian Government considering these issues and making changes in consultation with industry, stakeholders and the community more generally.

The INC sets out below a proposal which ensures that in the event the Australian government and the Department of Health considers that the MAIF Agreement is no longer aligned with community values or is no longer the most appropriate application of the WHO Code for Australia, the ACCC's authorisation will expire. The merit of the INC's proposal is that it accommodates the possibility that

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community values may change over the proposed authorisation period, but it does not impose a short authorisation period which would require industry and the ACCC to repeat this protracted authorisation process in a short period of time.

2 Counterfactual analysis

The INC considers that on a counterfactual analysis, the public benefits of the MAIF Agreement significantly outweigh any public detriment.

If the MAIF Agreement is not authorised, there is a risk Australia will fall behind the international community in the implementation of the WHO Code. This could have implications for Australia's international reputation, and the competitiveness of Australian exports of infant formula.

As of April 2011, the WHO Code was implemented (in its entirety or in substantial part) in 95 countries, either through law or voluntary codes.¹ Another 27 countries have some legal or voluntary provisions in place. If the MAIF Agreement is not authorised, the INC considers it unlikely the Federal government will introduce legislation in its place. This means Australia will fall into the group of six countries which have no existing implementation of the WHO Code. As at April 2011 these countries were: Central African Republic, Chad, Somalia, the United States, Iceland and Kazakhstan.

Further, in the absence of any authorised industry agreement or legislation which restricts the promotion of breast-milk substitutes, there is a risk that fewer companies will comply with the WHO Code in Australia.

If the MAIF Agreement is authorised, Australia will continue to meet its obligations with respect to implementing the current WHO Code. In the event that the WHO Code changes, the INC considers it likely that both industry and the Australian Government (through the Department of Health) will monitor those changes and assess the appropriateness of implementing them in Australia. The INC's proposal below accommodates a situation where the Department of Health deems it necessary to amend the MAIF Agreement during the authorisation period.

3 Proposed solution

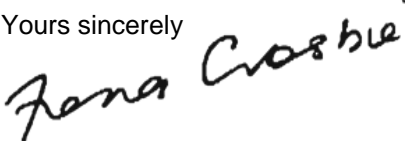
The INC would be willing to accept a condition on authorisation that the ACCC can withdraw its authorisation of the MAIF Agreement (with reasonable notice), if the Department of Health, determines at any point during the authorisation period that the MAIF Agreement no longer meets community expectations or is no longer the most appropriate application of the WHO Code for Australia.

The INC considers this proposal should give comfort to the ACCC that authorisation of the MAIF Agreement will not continue in circumstances where community expectations change. The INC's proposal is preferable to a short authorisation period as the INC's proposal avoids a scenario where industry and the ACCC bear the costs of another (potentially unnecessary) review of the MAIF Agreement soon after this protracted authorisation process. It also avoids a scenario where both the ACCC and the Department of Health are simultaneously reviewing the MAIF Agreement.

¹ http://www.unicef.org/nutrition/files/State_of_the_Code_by_Country_April2011.pdf.

The INC is keen to continue to assist the ACCC, and is happy to respond to any questions raised by the ACCC, including in relation to the proposed provisional authorisation term.

Yours sincerely



Fiona Crosbie

Partner

Allens

Fiona.Crosbie@allens.com.au

T +61 2 9230 4383