# Determination

Application for revocation of authorisations A91506 and A91507 and the substitution of authorisation AA1000534
lodged by
Infant Nutrition Council Limited
in respect of
the *Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement,* and associated guidelines.

27 July 2021

Commissioners: Sims
Keogh
Rickard
Brakey
Crone
Ridgeway

# Summary

**The ACCC has decided to grant re-authorisation in relation to the Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement (MAIF Agreement) until 31 August 2024. The MAIF Agreement restricts the advertising and promotion of infant formula by signatory manufacturers and importers directly to the public.**

**The ACCC accepts that restricting the promotion of breastmilk substitutes is likely to result in public benefit by protecting rates of breastfeeding, with significant consequent health benefits. The ACCC considers that in the absence of the MAIF Agreement, there is likely to be some increase in marketing of infant formula, both directly and indirectly through greater references to infants in toddler milk marketing. As a result, the MAIF Agreement is likely to result in some public benefit by protecting breastfeeding rates.**

**However, the ACCC is concerned that the effectiveness of the MAIF Agreement is being substantially undermined by a number of factors:**

- **the ability for signatories to advertise toddler milk products, which often has almost identical packaging to infant formula and can have the effect of promoting infant formula**
- **the MAIF Agreement is voluntary and carries no sanctions for a breach, other than the publication of a breach finding on the Department of Health website, and**
- **significant concerns have also been raised about the independence and transparency of the complaints handling process.**

**The combined effect of these factors significantly reduces the effectiveness of the MAIF Agreement in protecting breastfeeding rates, and therefore the magnitude of the likely public benefit from the MAIF Agreement.**

**The ACCC must weigh this (reduced) public benefit against the public detriment arising from the MAIF Agreement, which is primarily due to the reduction in competition resulting from competitors agreeing to limit promotional activity. While the extent of this public detriment is likely to be limited, this type of agreement between competitors is nevertheless likely to result in some reduction in rivalry, including reduced incentives to innovate and increased barriers to entry.**

**In weighing the likely public benefit and detriment, the ACCC is satisfied on balance in all the circumstances that the conduct is likely to result in some net benefit and so has decided to re-authorise the MAIF Agreement for 3 years. This duration is shorter than sought by the Applicants, reflecting the concerns held by the ACCC and the fine balance between likely public benefit and detriment.**

**Authorisation for 3 years provides sufficient time for the upcoming Commonwealth Department of Health (Department of Health) review of the MAIF Agreement to be completed and its recommendations implemented prior to any future application for re-authorisation (which typically would be lodged 6-12 months before an authorisation expires). The ACCC considers that authorisation for a 3-year period strikes an appropriate balance between the reduced certainty and additional burden for the Applicants of having to seek re-authorisation again earlier, against the growing risk that the public benefit may no longer outweigh the public detriment if the concerns raised above are not addressed (and potentially worsen).**

**The ACCC notes that many of the issues raised by submissions in response to this application go well beyond the scope of competition law. The application involves significant health policy issues and the ACCC recognises that Australia's response to health policy issues is a matter for the Australian Government, largely through the Department of Health.**

**These issues highlight the importance of the upcoming comprehensive review of the MAIF Agreement by the Department of Health. The ACCC understands the review will consider strengthening the regulatory arrangements for the marketing of breastmilk substitutes, the scope of the MAIF Agreement (including the age range of products captured), how products are defined, and whether a voluntary agreement remains an appropriate mechanism for managing this issue.**

**The ACCC notes that this comprehensive review by the Department of Health is imminent. Further, the ACCC has concluded that a net public benefit is likely, and decided to grant authorisation for a short duration. In these circumstances, the ACCC has decided not to impose a condition of authorisation that would require signatories to the MAIF Agreement to also not promote toddler milk, as requested by most interested parties and discussed in the ACCC's draft determination.**

**The ACCC notes that this authorisation should not be taken as endorsement of the adequacy of the MAIF Agreement by the ACCC. Further, nothing in this authorisation should be considered to restrict in any way the Department of Health reviewing the MAIF Agreement and recommending changes to it or replacement of it by an alternate regulatory approach, if it considers appropriate to do so.**

**The existing authorisation of the MAIF Agreement expires on 8 August 2021. The ACCC has granted interim authorisation to take effect immediately and to continue until this determination comes into effect.**

# 1. The application for revocation and substitution

1.1. On 26 October 2020, the Infant Nutrition Council Limited (the **Council**) lodged an application to revoke authorisations A91506 and A91507 and substitute authorisation AA1000534 for the ones revoked (referred to as re-authorisation) with the Australian Competition and Consumer Commission (the **ACCC**). The Council sought re-authorisation for the *Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement* (**MAIF Agreement**), and associated guidelines (together, the **Conduct**), for 10 years. This application for re-authorisation AA1000534 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).

1.2. The Council sought that authorisation apply to current and future manufacturers in, and importers into, Australia of infant formula that are or become parties to the MAIF Agreement (**signatories**).

1.3. The MAIF Agreement is a voluntary self-regulatory code which governs the marketing of formula for infants up to 12 months. In summary, the MAIF Agreement and supplementary guidelines include provisions which:

- restricts the advertising and promotion of infant formula by infant formula manufacturers to the general public, including posting on social media and funding advertisements by third parties on social media
- require specified information regarding the importance of breastfeeding to be contained in the educational material provided by manufacturers and importers

which is intended for pregnant women or parents of young children and which relates to the feeding of infants

- prohibit signatories from offering any financial or material inducement to health care professionals or members of their families to promote infant formula
- prohibit health care professionals and persons employed by manufacturers and importers from accepting or offering incentives to promote or sell infant formula
- prohibit the distribution of samples of infant formula to health care professionals except when necessary for the purpose of professional evaluation or research at the institutional level
- prohibit the use of any facility of the health care system for the purpose of promoting infant formula. However, the MAIF Agreement allows for the donation or low-priced sale of infant formula to institutions or organisations for the use of infants who have to be fed on breastmilk substitutes, and
- restrict the information provided to health care professionals by manufacturers and importers regarding infant formula to scientific and factual matters.

1.4. The MAIF Agreement applies only to starter infant formula (for infants aged 1 to 6 months) and follow-on formula (for infants 6 – 12 months). It does not apply to 'toddler milks' formulated for children older than 12 months or infant foods. The MAIF Agreement also does not apply to retailers (such as supermarkets and pharmacies) of infant formula.

1.5. Although the MAIF Agreement does not refer directly to social media and other forms of electronic marketing, the MAIF Agreement's complaint handing body (the **Committee**) developed guidelines on the application of the agreement in these contexts which are intended to indicate to signatories the ways in which the Committee will consider such complaints.

1.6. The MAIF Agreement was first authorised (in more or less its current form) in 1992.[1] The agreement was considered by the Commission in a variation in August 2007 (which extended authorisation to cover new parties, and to introduce an expiry date to the agreement), and conducted a full re-assessment of the authorisation in 2015/16. The current application sought re-authorisation of the MAIF Agreement on the same terms as it was most recently re-authorised in 2016. The 2016 authorisations are due to expire on 8 August 2021.

1.7. In addition to the MAIF Agreement, the conduct for which authorisation is sought includes guidelines and policies developed and endorsed by the Committee relating to:

- general interpretation
- electronic media marketing
- scientific and factual information
- the meaning of 'the general public and parents and/or carers', and
- information on appropriate age range on infant formula labels)

[1] See A30146, A90539 and A90540 granted to Abbott Australasia Pty Limited and Nestlé Australia Limited on 23 September 1992; variation of A90539 and A90540 granted to Nestlé Australia Limited on 30 August 2007; and A91506 and A91507 granted to the Infant Nutrition Council on 15 July 2016.

as well as policy and guideline documents developed by the Council relating to:

- marketing of toddler milk drinks
- promotion of breastfeeding
- interactions with health care professionals, and
- distribution of samples.

1.8. The Council sought authorisation for these guidelines and the MAIF Agreement as they may involve agreements between competitors in breach of the competition provisions of the Act. Authorisation of these guidelines does not in itself make them binding on signatories or the Committee. The Committee remains free to develop its own interpretation and application of the MAIF Agreement.

1.9. The ACCC may grant authorisation – which provides businesses with legal protection from legal action under the competition provisions in Part IV of the Act specified in the authorisation for arrangements that may otherwise risk breaching those provisions, but are not harmful to competition and/or are likely to result in overall public benefit.

1.10. On 1 March 2021, the ACCC issued a draft determination proposing to re-authorise the arrangements for five years, noting that it considered the assessment was finely balanced and outlining that it was considering imposing a condition restricting the advertising of toddler milk products. Following the draft determination, a pre-decision conference was requested and it was held on 13 April 2021.

# 2. Background

**Implementation of the WHO Code**

2.1. The World Health Organization (**WHO**) established an *International Code of Marketing of Breast-Milk Substitutes* (**WHO Code**) in 1981 in response to the realisation that poor infant feeding practices were negatively affecting the growth, health and development of children.[2] The WHO Code aims to protect and promote breastfeeding and to ensure that marketing of breastmilk substitutes, feeding bottles and teats is appropriate, intending to provide a 'minimum acceptable requirement' for such marketing. Australia was one of the early signatories to the WHO Code.

2.2. Since the establishment of the WHO Code, there have been a number of World Health Assembly (**WHA**) resolutions that refer to the marketing and distribution of breastmilk substitutes and clarify or extend issues covered in the WHO Code. The WHO advises that the WHO Code and subsequent relevant WHA resolutions must be considered together in the interpretation and translation into national measures.[3]

2.3. Member States that are signatories to the WHO Code agree that products which function as breastmilk substitutes should not be promoted. In 2016 the WHO published guidance to clarify that it considered that breastmilk substitutes 'should be understood to include any milks (or products that could be used to replace milk, such as fortified soy milk), in either liquid or powdered form, that are specifically marketed for feeding

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2 https://www.who.int/elena/titles/regulation_breast-milk_substitutes/en/

3 World Health Organization (2017), "The International Code of Marketing of Breast-milk Substitutes: Frequently Asked Questions (2017 Update)", at https://apps.who.int/iris/bitstream/handle/10665/254911/WHO-NMH-NHD-17.1-eng.pdf

infants and young children up to the age of 3 years'. This includes infant formula and toddler milk products.[4]

2.4. The WHO has stated that "implementation of [the Code] and subsequent relevant WHA resolutions through enactment and enforcement of robust national legal measures is essential to ensuring that parents and other caregivers are protected from inappropriate and misleading information."[5]

2.5. Australia currently implements the WHO Code and related WHA resolutions in a number of ways, the primary mechanism being the MAIF Agreement.[6] Other mechanisms include the food standards of Food Standards Australia New Zealand (**FSANZ**), and the National Health & Medical Research Council's *Dietary Guidelines for Children and Adolescents in Australia* (2003), which includes guidance for health workers on interpreting the WHO Code.

2.6. The MAIF Agreement is narrower in scope than the WHO Code. While the MAIF Agreement relates only to marketing of infant formula by manufacturers and importers (**infant formula companies**), the WHO Code and WHA resolutions are broader in scope as they recommend that restrictions be placed on the marketing of complementary foods for infants, feed bottles and teats, and on the promotion and price discounting by retailers of all these products.

**Infant formula**

2.7. Infant formula is a milk product designed for infant consumption (an infant being a child aged up to 12 months) when this is necessary because an infant is not breastfed. Compared to cow's milk, formula has added vitamins and enzymes and different fats that infants need. It is intended to provide all of the nutritional needs of the infant.

2.8. The Australia New Zealand Food Standards Code – Standard 2.9.1. (**FSANZ Formula Standard**) contains comprehensive, mandatory compositional and labelling requirements for infant formula products in Australia. Only products which comply with this standard are permitted to be represented as an infant formula product. In addition, Standard 1.2.7 prohibits health and nutrition claims being made about infant formula, on product labels and in advertisements.

2.9. FSANZ is currently reviewing the standards applying to infant formula. The aim of the review is to ensure regulation of infant formula is clear and reflects the latest scientific evidence, and to consider harmonising the FSANZ Formula Standard with international regulations. Toddler milk products are not intended to be included in the review.[7]

*Toddler milk*

2.10. Toddler milk products (or "growing up milks") are marketed for children aged 1 – 3 years. Toddler milks are classified by FSANZ as supplementary foods and are not intended to provide all of the nutritional needs of a child. Compositional and labelling requirements for toddler milks (and all formulated supplementary foods for young children in Australia) are specified in the FSANZ Standard 2.9.3 (**FSANZ Supplementary Standard**). The requirements for toddler milks are not nearly as

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4 WHO/UNICEF (2019) "Information Note: Cross-promotion of infant formula and toddler milks".

5 WHO/UNICEF/IBFAN, "Marketing of Breast-Milk Substitutes: National Implementation of the International Code: Status Report 2020", p12.

6 Department of Health submission dated 3 December 2020.

7 https://www.foodstandards.gov.au/code/infant/Pages/default.aspx Accessed 15 December 2020.

comprehensive or prescriptive as the FSANZ Formula Standard, and the prohibition on health and nutrition claims does not apply to toddler milk products.

**Infant Nutrition Council**

2.11. The Council represents manufacturers and marketers of infant formula in Australia and New Zealand as well as local manufacturers producing for export. These companies also often produce other products such as toddler milks, and supplementary foods for young children. These other products are not currently covered by the MAIF Agreement and MAIF signatories remain free to market them.

2.12. The ACCC understands that the majority of sales of infant formula (more than 80%) are made by signatories to the MAIF Agreement.[8] The Council submits that signatories include all of Australia's major manufacturers and importers, and that signatories account for the majority of sales of infant formula in Australia.

2.13. At the time of lodging the application, the Council advised the current signatories were:

- Abbott Australasia Pty Ltd
- Australian Dairy Park Pty Ltd
- Bayer Australia Ltd
- Bellamy's Organic
- The Infant Food Co. Pty Ltd
- The LittleOak Company Pty Ltd
- Nature One Dairy Pty Ltd
- Nestlé Australia Ltd
- Nuchev Ltd
- Nutricia Australia Pty Ltd
- Reckitt Benckiser (Australia) Pty Limited
- Sanulac Nutritional's Australia Pty Ltd
- Spring Sheep Milk Company
- Sprout Organic
- Swisse Wellness Pty Ltd
- The a2 Milk Company Ltd
- Wattle Health Australia Limited.

2.14. The Council also sought authorisation to cover any future signatories.

[8] Euromonitor International, *Baby Food in Australia* (2020).

2.15. Infant formula brands not covered by the MAIF Agreement include those manufactured by Royal Australia New Zealand, Munchkins, Blackmores, and some supermarket brands.

**Complaints handling process**

2.16. The ACCC has previously noted that any public benefit associated with substantive provisions of a code of conduct will only arise to the extent that the code is effective in its operation. The MAIF Agreement does not include sanctions in the case of a breach. The only available mechanism to ensure effective operation of the MAIF Agreement is the adverse publicity likely to result from the publication of findings of breach by the complaints body. A number of bodies have operated at various times to consider complaints that signatories have breached the MAIF Agreement. These bodies have been responsible for interpreting the MAIF Agreement within the changing marketing landscape to determine what conduct is prohibited.

2.17. Prior to 2014, the MAIF complaints process was managed by the Commonwealth Department of Health's (**Department of Health**) Advisory Panel on the Marketing in Australia of Infant Formula (**APMAIF**). Following a decision of government not to continue its role in this regard, the MAIF complaints process was managed by an independent tribunal (the **Tribunal**), overseen by the Ethics Centre, from 2014 to 2017. An independent review of the MAIF complaints handling process was commissioned by the Department of Health and conducted in 2017. Following the review, the Department of Health resumed overarching responsibility for the handling of complaints received in relation to the MAIF Agreement, and in 2018 established the MAIF Complaints Committee (the **Committee**). The Committee consists of three members, appointed by the Department of Health: an independent representative; a public health representative; and a representative of the infant formula industry.

2.18. The MAIF Complaints Committee Secretariat (within the Department of Health) registers all complaints received and makes an initial assessment of whether complaints are in scope or out of scope of the MAIF Agreement. The Committee then makes a final determination of scope. Complaints which are determined to be in scope are then assessed for breaches of the MAIF Agreement. The ACCC understands that complaints regarding toddler milk advertising are in most cases ruled out of scope of the MAIF Agreement and therefore not considered in depth by the Committee.

**National Breastfeeding Strategy and upcoming review**

2.19. On 8 March 2019, all Australian health ministers endorsed the *Australian National Breastfeeding Strategy: 2019 and Beyond* (the **Breastfeeding Strategy**). The Breastfeeding Strategy provides an enduring policy framework for all Australian governments to provide a supportive and enabling environment for breastfeeding. An objective of the Breastfeeding Strategy is to strengthen the regulatory arrangements for marketing of infant formula and breastmilk substitutes to bring an end to inappropriate marketing and distribution of breastmilk substitutes.

2.20. The Breastfeeding Strategy sets out a range of stakeholder concerns, including that the MAIF Agreement only partially implements the WHO Code, that the governance, interpretation and monitoring of the MAIF Agreement lacks transparency and the absence of effective penalties for breaches.[9] The strategy made a number of recommendations, including an independent review to determine:

- the effectiveness of the MAIF Agreement in restricting inappropriate marketing of breastmilk substitutes
- the feasibility of including all manufacturers of infant formula and all retailers in the scope of the MAIF Agreement, and
- the transparency of the complaints process and outcomes of the Committee meetings.

2.21. The Breastfeeding Strategy also noted that research suggests that Australian consumers fail to distinguish between the advertising of infant formula and toddler milk, and that there has been an increase in toddler milk and other baby food advertising in Australia.

2.22. Relevantly, the Department of Health advises it is currently developing an implementation plan and governance arrangements for the Breastfeeding Strategy, and anticipates undertaking a comprehensive review of the MAIF Agreement in late 2021, which is to consider strengthening the regulatory arrangements for the marketing of breastmilk substitutes, the scope of the MAIF Agreement (including the age range of products captured), how products are defined, and whether a voluntary agreement remains an appropriate mechanism for managing this issue.[10]

# 3. Consultation

3.1. A public consultation process informs the ACCC's assessment of the likely public benefit and detriment from the Conduct.

3.2. The ACCC invited submissions from a range of potentially interested parties including government, industry and non-government organisations,[11] seeking comment on the application for re-authorisation.

3.3. In response to the application for authorisation (and prior to the release of ACCC's draft determination), the ACCC received 24 submissions from interested parties.

3.4. Submissions from signatories to the MAIF Agreement and from the Australian Food and Grocery Council expressed unconditional support for the application.

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9 *Australian National Breastfeeding Strategy: 2019 and beyond* (the **Breastfeeding Strategy**), page 35.

10 Department of Health submissions dated 3 December 2020, p3; and 8 April 2021, pp2 and 5.

11 A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

3.5. The remaining submissions – including from healthcare organisations, health advocacy groups, academics and individuals – raised a number of concerns in relation to matters subject to the application including:

- a range of marketing practices which interested parties submit undermine breastfeeding in Australia (and therefore the public benefit of the MAIF Agreement itself). In particular these concerns relate to:
    - widespread marketing of toddler milk as proxy advertising for infant formula
    - strong brand marketing by infant formula manufacturers
    - marketing by third parties not signatories to the MAIF Agreement, including manufacturers who have not signed the agreement, retailers, celebrities and social media influencers, and
    - influencing health professionals through gifts and sponsorship.
- concerns relating to the complaints handling process connected to the MAIF Agreement, including submissions that the Committee is not impartial, transparent or timely in decision making
- concerns that the periods of authorisation sought by the council (10 years) and proposed by the ACCC (5 years) are too long.

3.6. These interested parties have submitted that the MAIF Agreement no longer results in public benefit by protecting breastfeeding because it is not effective in restraining problematic marketing, and should be replaced with a more effective, compulsory legislative regime. Some submit that the agreement should no longer be authorised; others submit it should only be re-authorised for a period of two years and should include a condition restricting the marketing of toddler milk products.

3.7. On 1 March 2021, the ACCC issued a draft determination proposing to grant re-authorisation for five years, noting its assessment was finely balanced. The ACCC sought additional information on whether it was appropriate to impose a condition restricting the advertising of toddler milk products due to concerns this may, in effect, be advertising infant formula products and substantially reduces the benefit of the MAIF Agreement.

3.8. The ACCC received 19 unique additional submissions in response to the draft determination, as well as submissions prompted by two letter writing campaigns: one against the imposition of a condition (but not necessarily in favour of authorisation) and the other in favour of authorising for 2 years with the proposed condition while the government review takes place.

3.9. A pre-decision conference was requested by the Australian Breastfeeding Association and a group of academics with expertise in the area (**Dr Julie Smith and others**) and was held on 13 April 2021. A further 5 submissions were received following the pre-decision conference, including from the Council.

3.10. Issues raised in submissions after the draft determination as well as during and in response to the pre-decision conference include:

- the MAIF Agreement does not actually protect breastfeeding or implement the WHO resolutions

- there is no evidence the MAIF Agreement is effective in restraining marketing of infant formula or protecting breastfeeding
- the counterfactual should not be assumed to be unregulated marketing – these companies are incentivised to avoid a strict legislative replacement
- authorisation is seen as an endorsement of the public benefit of the agreement and acts as a 'fig leaf', reducing political motivation to enact legislation to effectively address the shortcomings that have been recognised repeatedly in reviews and reports
- anecdotal reports of confusion among mothers and families in relation to toddler milk advertising and infant formula, and transference of marketing claims to infant formula from toddler milk products
- the MAIF Agreement should not be authorised or only be authorised for 2 years with a condition restricting the advertising of toddler milk.

3.11. In summary, the Council submitted in response that:

- a five year term is the minimum term that is appropriate for authorisation. Granting authorisation for any shorter term would impose undue cost and resource burdens on the INC signatories
- there is no evidence that the marketing of toddler milks has had an adverse impact on breastfeeding rates in Australia. Rather, the evidence indicates that breastfeeding rates in Australia are increasing
- there is no evidence that toddler milk marketing is tantamount to the promotion of infant formula. The Council and signatories consider there are good reasons that toddler milk is marketed using stage numbers and similar packaging to infant formula
- statements and recommendations made by the WHO suggesting that restrictions should be imposed on the marketing of toddler milk must be considered in an Australian context
- toddler milk and infant formula are different products and should not be treated as identical or comparable for the purposes of the MAIF Agreement
- the current MAIF Agreement is already more restrictive than the regulations that apply in comparable overseas jurisdictions,[12] and
- the imposition of a condition that would extend the advertising restrictions in clause 5(a) of the MAIF Agreement to include toddler milk is beyond the scope of the ACCC's power, as it would in effect amount to the ACCC seeking to redraft the MAIF Agreement and implement legislative reform. Regulation of toddler milk is a matter of public health policy that should be addressed by the Federal Government and not through the ACCC authorisation process.[13]

3.12. These concerns, and the response to them by the Council, are addressed in further detail as relevant throughout this determination.

3.13. Public submissions by the Council and interested parties are on the Public Register[14] for this matter, as well as a record of the pre-decision conference.

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12 Infant Nutrition Council, Applicant – submission after pre-decision conference (11 May 2021).

13 Infant Nutrition Council, Applicant – submission after draft determination (7 April 2021).

14 https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/infant-nutrition-council-limited

# 4. ACCC assessment

4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test provided for in the Act.

4.2. The Council sought authorisation for Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act,[15] the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

4.3. The role of the ACCC in this process includes, as competition regulator, making an assessment about whether the likely public benefit resulting from the proposed conduct, which relate to the current MAIF Agreement and guidelines, for which the parties have sought authorisation, outweigh the likely public detriment such that authorisation should be granted.

4.4. As noted above, interested parties have raised a wide range of issues and concerns in relation to commercial conduct which, it is submitted, undermines breastfeeding, both in Australia and globally. While these issues are relevant to the ACCC's consideration of this application in relation to the likely benefit of the arrangements (discussed below), it is not within the scope of the ACCC's assessment of this authorisation application to:

- seek to create an ideal MAIF agreement
- require any parties to become signatories to the MAIF Agreement (including manufacturers/importers of breastmilk substitutes)
- impose obligations on third parties such as retailers or social media influencers (including extending the scope of the MAIF Agreement to cover these parties)
- enact a mandatory, "opt-out", or legislative regime
- enforce breaches of the law in relation to food standards legislation
- determine how Australia responds to its obligations under international law such as the WHO Code and WHA resolutions
- determine the way in which complaints are handled under the MAIF Agreement (as this is determined by the Department of Health and beyond the scope of the conduct for which authorisation is sought), or
- consider conduct which occurs outside of Australia.

4.5. The arrangements for which authorisation is sought relate to conduct within Australia, which is relevant for the assessment under the authorisation provisions. The ACCC also considers in its assessment the benefit to the Australian public[16].

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[15] See subsection 91C(7).

[16] *Re Howard Smith Industries Pty Ltd* (1977) ATPR 40-023

## Relevant areas of competition

4.6. To assess the likely effect of the Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.

4.7. The Council submits that the relevant market for the purpose of this authorisation is the Australian market for the supply of infant formula.

4.8. The ACCC does not consider it to be necessary to precisely define the relevant markets in this matter in order to examine the likely public benefit and detriment. However, for the purpose of assessing the Conduct the ACCC considers it appropriate to assess the effect of the Conduct on various areas of competition between manufacturers and importers of products including infant formula, follow-on formula and toddler milk.

## Future with and without the Conduct

4.9. In considering an application for authorisation, the ACCC compares the likely future with the Conduct that is the subject of the application to the likely future in which the Conduct does not occur.

4.10. The ACCC considers that, in the absence of the MAIF Agreement, the marketing of infant formula in Australia would not be subject to any regulatory restriction and members of the Council would be free to market infant formula as they see fit, subject to the requirements of food standards legislation (including prohibitions on health and nutrition claims on labels and in advertising) and the Australian Consumer Law.

4.11. The ACCC notes submissions from interested parties that a range of factors currently constrain the marketing of infant formula by manufacturers, including concerns about corporate reputation, and incentives to avoid a more rigorous form of regulation.

4.12. In the absence of the MAIF Agreement, any alternative regulatory response by the Australian Government following the upcoming review of the MAIF Agreement would likely take at least two years to develop and implement. Additionally, any conclusion regarding an alternative regulatory response is, at this stage, uncertain.

4.13. The ACCC notes that the current arrangements are voluntary, such that signatories are choosing to restrict their marketing of infant formula. The only consequence under the MAIF Agreement of marketing infant formula is to be found to be in breach of the agreement, and the publication of this finding six to twelve months later. Further, non-signatories do not appear to engage in aggressive marketing of infant formula and some global or multinational companies have made commitments not to market infant formula.[17] This all suggests a desire by manufacturers to avoid damage to brand reputation and stricter regulatory restrictions, which would still provide some constraint on marketing of infant formula in the absence of the MAIF Agreement.

4.14. These factors would continue to exist without the MAIF Agreement, though the strength of the restraining effect would likely decrease over time. Any industry norms around acceptable marketing behaviour that may have been encouraged by the MAIF Agreement would likely fade, and manufacturers would have commercial incentive to

[17] Danone, Policy for the Marketing of Breast-Milk Substitutes, page 7. Available at: https://www.danone.com/content/dam/danone-corp/danone-com/about-us-impact/policies-and-commitments/en/2018/Danone%20Policy%20for%20the%20Marketing%20of%20Breast-Milk%20Substitutes%202018.pdf.

increase advertising and thus continually 'stretch the limits' of the kinds of advertising that are accepted by the public and government.

4.15. However, signatories are predominantly global or multinational companies (or part of such companies) and likely have incentive to restrict the inappropriate marketing of infant formula in Australia without the MAIF Agreement. Danone– which has the largest market share of the infant formula market in Australia (through Nutricia Australia Pty Ltd), estimated at 37%[18] – has a global Policy for the Marketing of Breast-Milk Substitutes which states Danone is committed to not advertising or promoting Infant Formula or delivery products (bottles and teats) in any country where it does business.[19] Further, Danone has publically signed up to the WHO's 2020 Breast-Milk Substitute Call to Action and committed to pursuing full, global compliance with the WHO Code by 2030.[20]

4.16. While difficult to quantify precisely, the ACCC considers that these factors would likely continue to provide a degree of restraint on marketing at least in the short to medium term even in the absence of the threat of reputational damage resulting from a breach finding by the MAIF Complaints Committee.

4.17. Overall, the ACCC considers that in the absence of the MAIF Agreement, over time it is likely that there would be some increase in the promotion of infant formula by direct marketing and/or indirect marketing through marketing of toddler milk – for example by using images of infants rather than toddlers.

## Public benefit

4.18. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal which has stated that the term should be given its widest possible meaning, and includes:

> *…anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements … the achievement of the economic goals of efficiency and progress.* [21]

4.19. The Council submits the MAIF Agreement has resulted, and will continue to result, in significant public benefit including public health benefits and low regulatory costs.

### Public health benefits

4.20. The ACCC has long recognised that there is likely to be a public benefit resulting from arrangements that promote and protect breastfeeding. The link between improved health outcomes and breastfeeding is undisputed, and scientific research indicates there is a relationship between breastfeeding and lower incidence of diseases including breast cancer, gastrointestinal infection, necrotising enterocolitis, lower

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18 Euromonitor International, *Baby Food in Australia* (2020).

19 Danone, Policy for the Marketing of Breast-Milk Substitutes, page 7. Available at: https://www.danone.com/content/dam/danone-corp/danone-com/about-us-impact/policies-and-commitments/en/2018/Danone%20Policy%20for%20the%20Marketing%20of%20Breast-Milk%20Substitutes%202018.pdf.

20 Danone, Working Together to Protect, Promote and Support Breastfeeding and Impact at Scale Infant Nutrition and Health: Danone's Response to the BMS Call to Action (4 December 2020). Available at: https://www.danone.com/content/dam/danone-corp/danone-com/about-us-impact/policies-and-commitments/en/2021/Danone-response-to-the-BreastMilk-Substitutes-call-to-action.pdf

21 *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

respiratory tract infection and acute otitis media.[22] Therefore increased rates of breastfeeding in infants will likely lead to improved health outcomes and lower public health costs.

4.21. The WHO considers that inappropriate marketing of products that compete with breastfeeding is an important factor that often negatively affects the choice of a mother to breastfeed her infant optimally. The WHO notes that given the special vulnerability of infants, usual marketing practices are unsuitable for these products.[23]

4.22. For this reason, the ACCC has previously accepted that the promotion of breastmilk substitutes in Australia is likely to negatively influence rates of breastfeeding in Australia, and therefore that the MAIF Agreement is likely to result in a public benefit to the extent it prevents or reduces promotion of breastmilk substitutes.

4.23. However, while the benefit of restricting the promotion of infant formula is beyond dispute, what *has* been highly disputed for some time, by a range of parties, is to what extent the MAIF Agreement is effective in restraining the problematic marketing of infant formula and achieving a public benefit given it does not restrict marketing of other breastmilk substitutes, such as toddler milk. It also does not restrict brand marketing, it does not cover all advertising of infant formula (as a voluntary agreement which applies to manufacturers but not retailers), and has no penalties for breaches beyond potential reputational damage.

4.24. The ACCC considers that relying on available data on breastfeeding rates is unlikely to be useful in its assessment of whether the arrangements are resulting in public benefit, because of the multifactorial influences on breastfeeding rates and individual decisions to start or cease breastfeeding, and the complexity of measuring these within a population. Many of these factors may be influenced by marketing of breastmilk substitutes, but as this may occur at the level of social norms, attitudes towards breastmilk substitutes and maternal confidence in breastfeeding,[24] it may not be evident from the data. For these reasons, based on the information available, it is not possible to make an assessment of what proportion of any increase or decrease in breastfeeding rates is due to the marketing, or absence of marketing, of breastmilk substitutes.

4.25. In any case, comprehensive data has not been collected in Australia on the proportion of infant formula versus breastmilk that has been fed to infants, and how this has changed over time. Partial or exclusive rates of breastfeeding give, at best, a partial picture of how much infant formula is being consumed by infants.

### *Extent to which MAIF Agreement restrains marketing*

4.26. The ACCC considers the restrictions in the MAIF Agreement are likely to protect and promote breastfeeding to the extent that they effectively limit the marketing of breastmilk substitutes.

4.27. The MAIF Agreement constrains the advertising behaviour of signatories directly, as findings of any breaches are published and publically available. The ACCC considers

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[22] Renfrew, M, Pokhrel, S, Quigley, M, McCormick, F, Fox-Rushby J, Dodds, R, Duffy, S, Trueman, P, and Williams A (2012), "Preventing disease and saving resources: the potential contribution of increasing breastfeeding rates in the UK" (report commissioned by UNICEF UK).

[23] World Health Organization (2017), "The International Code of Marketing of Breast-milk Substitutes: Frequently Asked Questions (2017 Update)".

[24] E. Piwoz and S. Huffman, 'The Impact of Marketing of Breast-Milk Substitutes on WHO-Recommended Breastfeeding Practices', *Food and Nutrition Bulletin* (2015), 36(4), 373-386.

that it is likely that direct advertising and broader promotion of infant formula, such as through direct contact with parents, medical facilities and social media influencers, would increase in the absence of the MAIF Agreement.

4.28. The ACCC also considers that the MAIF Agreement, given its long-standing operation, is likely to contribute to an industry norm of behaviour that infant formula is not marketed in Australia, which appears to constrain the advertising behaviour of both signatory and non-signatory infant formula manufacturers. The ACCC is concerned that indirect promotion of infant formula may increase in the absence of the MAIF Agreement, as toddler milk marketing is changed to increasingly have the effect of also marketing infant formula – for example by using images of infants rather than toddlers.

4.29. Although the MAIF Agreement is voluntary and signatories choose to restrict their marketing of infant formula, it is likely to provide some reassurance to infant formula manufacturers that their main competitors are unlikely to commence marketing infant formula. The ACCC considers that, in the absence of the MAIF Agreement, infant formula manufacturers are likely to increasingly push the boundaries on what is acceptable marketing of breastmilk substitutes.

4.30. The ACCC notes, as discussed at paragraphs 4.10 – 4.17 above, that there are factors which are likely to continue to restrain, to an extent, infant formula manufacturers from directly marketing infant formula in the absence of the MAIF Agreement, at least in the short to medium term. However, the ACCC considers that once some advertising of infant formula begins, there is likely to be an increase over time in the number of manufacturers that choose to market infant formula due to competitive pressure and commercial incentives.

4.31. Nevertheless, significant questions remain as to how effective the MAIF Agreement is in restricting problematic marketing of breastmilk substitutes.

4.32. A large number of interested parties (including a new entrant infant formula manufacturer in Australia) have submitted that the MAIF Agreement no longer results in public benefit by protecting breastfeeding because it is not effective in restraining problematic marketing, and submit that the agreement should either no longer be authorised,[25] or should only be re-authorised for a period of two years and should include a condition restricting the marketing of toddler milk products.[26] Many of the submissions calling for authorisation to be denied came following the draft determination, and this issue was also discussed at the pre-decision conference. In general terms, these interested parties submit that:

- the MAIF Agreement is not fit for purpose, as a 30-year-old agreement which has largely not been revised despite significant changes in marketing behaviours (in particular, online marketing via social media, email and web searches which allows companies to directly access and target potential customers through ‘mum’s clubs’ etc)

[25] Including the submission by Dr Julie Smith and others, Dieticians Australia, Public Health Association of Australia, Breastfeeding Advocacy Australia, Maternity Choices Australia, VicHealth, CareA2+, World Public Health Nutrition Association, Baby Milk Action Network, and Obesity Policy Coalition.

[26] Such as the Australian Breastfeeding Association, Australian Nursing and Midwifery Association, Breastfeeding Coalition Tasmania, Royal Australian College of Physicians, International Board of Lactation Consultants, Scaling Up Nutrition Civil Society Alliance Cambodia, Australian College of Midwives, Australasian Association of Parenting and Child Health, International Baby Food Action Network, Rosemary Stanton OAM, and Lactation Consultants of Australia and New Zealand.

- the voluntary form of the MAIF Agreement is unsuitable and inadequate, and should be replaced with a mandatory legislative regime with penalties for breaches, and covering all parties who promote breastmilk substitutes

- the scope of the MAIF Agreement does not reflect community standards and expectations, as evidenced by the large proportion of complaints deemed to be 'out of scope', because they involve retailers, products not within scope, or activity which has been interpreted as being permitted under the agreement.

4.33. In response, the Council submits that:

- its signatories are committed to supporting breastfeeding

- several state-based studies suggest an increase in prolonged breastfeeding in Australia

- the Council considers the current voluntary framework, with the risk of reputational consequences for a breach finding, to be effective

- the promotion of infant formula on social media is covered by the MAIF Agreement's general prohibition on promoting infant formula to the general public, and

- it considers questions of the appropriate scope of the MAIF Agreement are matters of government policy.

4.34. Specific issues raised by interested parties, and the Council's response to these, are discussed in further detail below.

## Factors which reduce the effectiveness of MAIF Agreement

*It does not prevent marketing of toddler milk*

4.35. Infant formula and toddler milk products are generally labelled as part of the same line of products sold in 'stages' – that is, they are packaged very similarly, shelved together in retail stores, marketed as a range on manufacturer websites, and labelled in stages (typically stages 1 (0-6 months) , 2 (6-12 months) and 3 (12 months plus)). They typically use the same or similar brand names, labels, colours, and logos. However, toddler milk is not suitable for infants. It has a different formulation under FSANZ standards to that required of infant formula, and different limitations as to what claims can be made about the product under FSANZ standards.

4.36. Concerns have been raised that marketing infant formula and toddler milk as part of the same 'product line' creates confusion about the different products, and that toddler milk marketing is having the effect of marketing infant formula. In addition, toddler milk may displace breastfeeding for children over the age of 12 months.

4.37. Numerous interested parties have raised strong concerns regarding marketing of toddler milk, including VicHealth, Rosemary Stanton OAM, the Australian Breastfeeding Association and Breastfeeding Advocacy Australia, and called for the MAIF Agreement to apply to (and hence restrict the marketing of) toddler milk products.

4.38. The WHO has clearly stated that "toddler milks are breast-milk substitutes" and therefore should not be marketed. It has also stated it is clear that in many countries,

including Australia, the marketing of toddler milks is a response to the agreement restricting marketing of formulas for infants. [27]

4.39. In addition, the WHO has identified that manufacturers of infant formula commonly use marketing of toddler milk products to cross-promote infant formula products. Cross-promotion is a form of marketing promotion where customers of one product or service are targeted through promotion of a related product. This can include packaging, branding and labelling of a product to closely resemble that of another. It can also refer to the use of particular promotional activities for one product and/or promotion of that product in particular settings to promote another product.[28] The WHO notes that brand and product line features (such as logos, graphics, package type, shape and product names) are much more prominent on toddler milk and infant formula packaging than any text clarifying the appropriate age at which these milks should be offered, and considers that this suggests that the labelling is more focussed on promoting the entire line of products including infant formula.

4.40. The WHO has expressed increasingly strong concerns over time about the indirect promotion of infant formula through the cross-promotion of toddler milk products, including in a 2019 information note stating:

> *The now common cross-promotion practice by which breast-milk substitutes for Infants are promoted through labelling and advertisements of toddler formulas is a threat to breastfeeding and infant health. This marketing tactic has become highly prevalent in an apparent attempt to circumvent national regulation of the marketing of products for infants. Mothers are confused by this strategy and often believe that there is little difference among the different products in a line. As a result, young infants are being fed with toddler milk, which cannot meet their nutritional needs. The practice of cross-promotion of breast-milk substitutes must be curbed*.[29]

4.41. The WHO points to numerous studies (including Australian studies) which, in its view, demonstrate how advertising only one product in a line effectively promotes other products in the range, and that specifically demonstrate that toddler milk advertising and products are often confused for infant formula.

4.42. Since the draft determination, a number of health professionals have provided a range of anecdotal reports of confusion among mothers and families in relation to toddler milk advertising and infant formula, and transference of marketing claims to infant formula from toddler milk products.

4.43. The ACCC accepts there is growing evidence from a range of sources globally and locally to support this WHO position, including evidence from studies that parents frequently misunderstand toddler milk marketing to be advertising for infant formula, and that infants have inadvertently and inappropriately been fed toddler milk due to confusion relating to product packaging and placement.[30]

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27 WHO/UNICEF (2019), "Cross-promotion of infant formula and toddler milks: information note".

28 World Health Assembly Resolution WHA69.9, "Ending inappropriate promotion of foods for infants and young children", May 2016.

29 WHO/UNICEF (2019), "Cross-promotion of infant formula and toddler milks: information note".

30 See for example: Berry, N, Jones, S, & Iverson, D (2010), "It's all formula to me: Women's understandings of toddler milk ads", *Breastfeeding Review*, 18(1), 21–30; Berry, N, Jones, S, & Iverson, D (2012), "Toddler milk advertising in Australia: Infant formula advertising in disguise?" *Australasian Marketing Journal*, 20(1), 24–27; Cattaneo, A, Pani, P, Carletti, C, Guidetti, M, Mutti, V, Guidetti, C, & Knowles, A (2014), "Advertisements of follow-on formula and their perception by pregnant women and mothers in Italy." *Archives of Disease in Childhood*, 100(4), 323– 328; Harris, J. L., Fleming-Milici, F., Frazier, W., Haraghey, K., Kalnova, S., Romo-Palafox, M., Seymour, N., Rodriguez-Arauz, G., & Schwartz, M. B. (2016). *Baby Food Facts 2016 Nutrition*

4.44. In response to these concerns the Council submits that issues relating to the marketing of toddler milk have been addressed by a number of developments since the ACCC's 2016 determination, which have improved industry practice. In this regard the Council points to: guidance it has developed and disseminated to its members, which provides practical suggestions to ensure there is no inadvertent promotion of infant formula through the marketing of toddler milk; guidelines developed by the Committee relating to staging information on packaging of infant formula; and a number of determinations issued by the Committee (and formerly the Tribunal) in relation to marketing of toddler milk, which may have had the effect of promoting infant formula. The Council submits that the Federal Government has not given any indication that it considers the MAIF Agreement should be extended to include marketing of toddler milk, and that the inclusion of toddler milk in the MAIF Agreement may deter companies from signing and the withdrawal of existing signatories.

4.45. The Council also submits that toddler milk is not a substitute for breastmilk and should therefore not be regulated within the same framework as infant formula because:

- toddler milk is intended as an alternative to cow, sheep, goat and other non-human milks in young children over 12 months of age
- the nutritional composition of toddler milk is different to that of infant formula, and
- toddler milk and infant formula are regulated under separate FSANZ standards.

4.46. The Council has prepared (and sought authorisation for) non-binding guidance for its members for the marketing of toddler milk drinks to consumers. The guidance suggests that members consider:

- using images of children clearly identifiable as aged over 1 year, and drinking from a cup
- avoiding direct comparisons of toddler milk drinks to breastmilk
- clearly specifying the intended age group, and
- avoiding featuring images of infant formula products on toddler milk drinks.

4.47. In addition, the Committee has prepared a document outlining its interpretation of the MAIF Agreement relating to information on appropriate age range on infant formula. The interpretation applies to packaging of infant formula but not toddler milk. The Committee's interpretation of the MAIF Agreement is that:

- infant formula product labels must include information relating to the range of ages appropriate for that infant formula product

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*and marketing of baby and toddler food and drinks.* UConn Rudd Center for Food Policy & Obesity; NOP World (2005), "Attitudes to feeding: report of survey findings"; Pereira, C., Ford, R., Feeley, A. B., Sweet, L., Badham, J., & Zehner, E. (2016), "Cross-sectional survey shows that follow-up formula and growing-up milks are labelled similarly to infant formula in four low and middle income countries: Survey reveals similarities between IYC commercial milk labels," M*aternal & Child Nutrition*, 12, 91– 105; Pomeranz, J. L., Romo Palafox, M. J., & Harris, J. L. (2018), "Toddler drinks, formulas, and milks: Labeling practices and policy implications", *Preventive Medicine*, 109, 11– 16; Romo-Palafox, M, Pomeranz, J, and Harris, J. (2020), "Infant formula and toddler milk marketing and caregiver's provision to young children", *Maternal and Child Nutrition*, 16(3); Smith, J & Blake, M. (2013), "Infant food marketing strategies undermine effective regulation of breastmilk substitutes: trends in print advertising in Australia, 1950-2010", *Australian and New Zealand Journal of Public Health*, 37, 337-344.

- infant formula product labels may include additional information relating to the range of ages appropriate for the product, but should be factual and not promotional, and

- the use of symbols and/or infographics showing all numbers and/or stages of the product range, including highlighting where the product being purchased is in the range, and the use of arrows, triangles or flow chart-like symbols, is not appropriate.

4.48. The ACCC understands that a relatively small number of complaints regarding toddler milk advertising have been considered by the Committee and its precursors since the establishment of the MAIF Agreement in 1992, and that all other complaints regarding toddler milk have been deemed to be out of scope of the agreement prior to being considered. Of the complaints considered, those found to be in breach of the agreement have:

- made reference to, and/or featured a pack shot of, infant formula, and

- featured images of babies who were clearly under 12 months of age.

4.49. The ACCC understands that issues of cross-promotion through product line marketing have not been found to have been in breach of the MAIF Agreement.

4.50. The ACCC considers that, based on the Committee's interpretation guidelines relating to staging information and complaints considered by the Committee, the Tribunal and APMAIF, the MAIF Agreement, as currently drafted, is unlikely to effectively address concerns that the promotion of toddler milk as part of a product line including infant formula may result in the proxy promotion of infant formula.

4.51. The Department of Health acknowledges that significant progress has been made on the issue of marketing of toddler milks, but considers that the issue requires further consideration which should be explored in detail as part of the Department's planned review of the MAIF Agreement in 2021. Consistent with its view in its 2016 determination, the ACCC considers that the scope of products and parties covered by marketing restrictions is ultimately a matter for Government policy. However, these issues also remain relevant to the ACCC's assessment of the benefit and detriment of the proposed arrangements.

4.52. While marketing practices in relation to toddler milks have been occurring in Australia for some time, recent WHO statements on toddler milk advertising, together with increasing academic studies, lend increased weight to the conclusion that toddler milk marketing is effectively a proxy for the marketing of infant formula. The ACCC considers that advertising of a number of toddler milk products in Australia exhibits characteristics consistent with those over which concerns have been raised by the WHO and studies, such as an emphasis on elements which are common to the entire 'range' of breastmilk substitute products including packaging and branding.

4.53. Given the extent of the marketing and promotion of toddler milk in Australia, and the clear similarities between toddler milk packaging and infant formula packaging across many product ranges (for examples, see **Annexure A**), the ACCC considers the marketing of toddler milk products frequently communicates indirectly with consumers about infant formula products, and is likely to some extent to have the same effect as the direct marketing of infant formula in that product range. The WHO material referred to above supports this conclusion, as do a number of submissions from interested parties. The ACCC considers that the impact on consumers of the marketing and promotion of toddler milks is likely to undermine the purpose of the MAIF Agreement

and the public benefit (of protecting breastfeeding) resulting, or likely to result, from the Conduct.

*Branding and product ranges beyond toddler milk*

4.54. A number of interested parties have raised concerns that brand marketing by infant formula companies undermines the effectiveness of the MAIF Agreement in prohibiting marketing of infant formula, by building brand loyalty and awareness, and providing a mechanism by which manufacturers can connect directly with consumers through the collection of data online.

4.55. Interested parties argue this brand marketing takes a number of forms including:

- marketing of product ranges which share a brand with breastmilk substitutes such as infant formula and toddler milk, and including products such as dietary supplements (for young children or expectant mothers), probiotics for infants and complementary foods for young children
- sponsorship or hosting of events for health professionals and parents
- through branded parents' and expectant mothers' clubs (online, via social media, or via email lists)
- maintaining information sites relating to pregnancy, infant development, or offering support for infant feeding problems – many of which come up in results in internet searches for information on breastfeeding, infant feeding, or pregnancy
- links to manufacturers' websites on social media and in web searches (permitted under the MAIF Agreement), which in turn sell infant formula.

4.56. WHO guidance is that "there should be no cross-promotion to promote breast-milk substitutes indirectly via the promotion of foods for infants and young children. The packaging design, labelling and materials used for the promotion of complementary foods must be different from those used for breast-milk substitutes (for example, different colour schemes, designs, names, slogans and mascots other than company name and logo should be used). Companies that market breast-milk substitutes should refrain from engaging in the direct or indirect promotion of their other food products for infants and young children by establishing relationships with parents and other caregivers (for example through baby clubs, social media groups, childcare classes and contests)."[31]

4.57. Brand marketing by infant formula companies is not subject to marketing restrictions under the MAIF Agreement and can include, for example, images of infants under 12 months of age. The ACCC understands that most, if not all, infant formula companies market product lines (for products such as supplements, complementary foods, and pregnancy formulas) and brands heavily, but that this is not captured within the scope of complaints that can be considered by the Committee as potential breaches of the current MAIF Agreement.

4.58. The ACCC considers that marketing of brands and product lines which include infant formula products may have the effect of increasing awareness of infant formula products and influence attitudes toward infant feeding generally, thereby potentially increasing sales of infant formula and undermining the public benefit of the MAIF

[31] World Health Assembly, 69 (2016), "Maternal, infant and young child nutrition: guidance on ending the inappropriate promotion of foods for infants and young children: report by the Secretariat".

Agreement. While this is a similar issue to the marketing of toddler milk products as discussed above, the ACCC considers that brand and product line marketing are less likely to function as proxy marketing for infant formula than the marketing of toddler milk (or at least that there is currently less evidence that this is the case).

*Oversight and complaints*

4.59. The ACCC has previously noted that any public benefit associated with substantive provisions of a code of conduct will only arise to the extent that the code is effective in its operation. The ACCC considers it is important that complaint handling is robust and transparent and that decisions of the Committee are adhered to by industry participants. The ACCC is not aware of concerns that signatories continue with conduct after it is found to be in breach by the Committee.

4.60. Some interested parties, including the Australian Breastfeeding Association, Breastfeeding Advocacy Australia and the head of the former Tribunal, have raised concerns about the effectiveness of the Committee in resolving complaints regarding potential breaches of the MAIF Agreement, including the composition of the Committee (which includes an industry representative on its three-member panel), a lack of transparency in decision making and breach findings, and difficulties in lodging complaints.

Independence in decision making

4.61. The ACCC has previously noted, in relation to the effectiveness of voluntary industry codes of conduct, the importance of a review process which is independent of industry interests.[32]

4.62. In the case of the MAIF Agreement, one of the three-member Committee is an industry representative – currently the Chair of the Infant Nutrition Council.

4.63. The outgoing Chair of the Tribunal remarked in 2018 that the industry had not been involved in hearing complaints against its members under the Tribunal's scheme developed by the Ethics Centre, and that the Ethics Centre as a general principle believed complaints were best heard by a disinterested body.[33] Breastfeeding Advocacy Australia provided data which indicates during the period when there was no industry representative on the complaints panel (that is, while the Tribunal was operated by the Ethics Centre 2014–2017) there was a significantly higher percentage of complaints found to be breaches compared to the years before and immediately after that period.[34]

4.64. The Council submits the industry plays an important role on the Committee, because of their in-depth understanding of the industry, and, in any event, the industry representative is outnumbered by other members of the Committee. The Council advises that the Department of Health follows an established conflict of interest process whereby conflicts of interest are declared prior to member appointment, and regularly discussed by the Committee throughout the year.

4.65. The ACCC is also aware that the Council has (outside of the authorisation process) reported that signatories lodge complaints about one another's alleged breaches of the MAIF Agreement through an internal complaints process managed by the Council,

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[32] https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf

[33] Annual Report: Marketing in Australia of Infant Formula Independent Tribunal 2017-2018.

[34] Breastfeeding Advocacy Australia submission dated 4 December 2020, p28

which mediates and resolves these complaints internally, or with the assistance of external facilitation.[35]

4.66. The ACCC notes that interested party criticisms of industry influence over decision making regarding complaints appear to have been resolved in part, due to recent changes in the composition of the Committee.

4.67. Industry involvement in the process of determining breaches of the MAIF Agreement has potential to influence the interpretation of the agreement, and to lessen the effectiveness of the complaints process itself (for example, to influence the extent to which complaints are investigated, or the timing of their publication). While the presence of two independent members lessens this risk to a certain extent, the risk would be lower if all three panel members were independent.

4.68. The ACCC considers there is a risk that industry involvement in these decision making processes reduces the robustness of the complaints process. To the extent the Committee would benefit from information or explanation of issues by industry, it could seek it as required. It is not necessary for one of the decision makers on the Committee to be an industry representative.

Transparency of decision making and breach findings

4.69. The Council submits that the new mechanism for resolving complaints alleging breaches of the MAIF Agreement is stronger and more transparent than under the former Tribunal. The Council advises that, in its experience, where the Committee finds that there has been a breach of the MAIF Agreement, the associated reputational consequences are sufficient to ensure that the breach is promptly rectified.

4.70. The Department of Health considers that the development of the MAIF Complaints Committee has made for a more transparent mechanism for resolving complaints alleging breaches of the MAIF Agreement.

4.71. The complaints process relies on reports from members of the public and the only consequence for a breach finding is the possibility of reputational damage. In this context, it is important that breach findings are publicised in a timely and effective manner, that the process of the Committee in assessing complaints is robust, impartial, and transparent, and that the public is aware of and easily able to access and contribute to the complaints process.

4.72. In its 2016 Determination, the ACCC considered it was important to ensure public confidence in the MAIF Agreement and that the then-Tribunal publish its decisions shortly after they are finalised in order to provide greater transparency and help ensure effective oversight of the MAIF Agreement. While there has been some improvement in transparency this year in that the outcomes of complaints are now published on the Department of Health website, in addition to the annual report, there remains a concern about timeliness, in that publication does not appear to happen shortly after decisions are finalised but rather some months afterwards. The result is that some decisions are not published until more than 12 months after the initial complaint is lodged.

4.73. In addition, the Council's internal complaints process lacks transparency as the complaints or outcomes are never reported.

[35] Nous Group, 'Independent Review of the MAIF Complaints Handling Process – Review Report', 15 August 2017, p25.

Conclusion

4.74. The ACCC considers the effectiveness of the complaints process – and the MAIF Agreement itself – is likely to be reduced by a lack of transparency and independence in the handling of complaints.

4.75. The ACCC considers that greater independence in and transparency of decision making would improve the effectiveness of the complaints process, including through:

- having the complaints committee independent from the industry
- more frequent and timely reporting of outcomes
- more fulsome reporting on complaints received (including those found to be out of scope) and the Committee's consideration of these
- increased publicity of breach findings to disincentivise marketing which may test the boundaries of the agreement – for example, via media release or social media
- increasing accessibility and awareness of processes in lodging complaints, and
- increased willingness and ability to consider complaints about toddler milk advertisements as potentially within the scope of the complaints process, particularly in cases where the toddler milk advertisement is alleged to be cross-promoting infant formula.

*Industry coverage*

4.76. Many interested parties argue that the voluntary nature of the MAIF Agreement undermines its effectiveness as a regulatory instrument, because it does not extend to major industry players that would otherwise be required to comply with its obligations, if a legislative solution was adopted. Some interested parties have raised concerns that the MAIF Agreement no longer covers all significant players in the infant formula market.

4.77. The Council submits that the MAIF Agreement covers the majority of the infant formula market in Australia and considers that only a small number of manufacturers and importers are not signatories, including Royal Australia New Zealand, Munchkins and Blackmores.

4.78. The ACCC notes that (in addition to the companies named by the Council) some major supermarket brands (which act as both manufacturer/importer and retailer due to vertical integration) are not signatories.

4.79. While the ACCC recognises the concerns of some parties in relation to industry coverage of the MAIF Agreement, the ACCC understands that the majority of infant formula manufacturers and importers in Australia are signatories.

4.80. To the extent that non-signatories are engaging in aggressive marketing of infant formula the effectiveness of the MAIF Agreement may be undermined; however, the ACCC is not aware of this occurring.

*Marketing by third parties*

4.81. Interested parties have raised concerns that the benefit of the MAIF Agreement is undermined by marketing and promotion (inadvertent or otherwise) of infant formula by third parties not covered by the agreement, including:

- retailers
- endorsements by celebrities and social media influencers
- reviews on online consumer sites, and
- social media users who comment on or post content related to infant formula.

4.82. The Council submits that:

- to the extent that manufacturers and importers indirectly market infant formula to the public through retail channels (for example by providing funding and/or content directly for retailer advertisement), this conduct will be captured by the MAIF Agreement
- promotion of infant formula on social media is clearly covered by the MAIF Agreement, as it covers all forms of advertising or promotion by manufacturers and importers
- it understands that signatories routinely monitor their social media sites with a view to ensuring that infant formula is not promoted through their social media accounts, and
- it considers that the scope of coverage of the MAIF Agreement is a matter of government policy.

4.83. The ACCC recognises that the MAIF Agreement already prohibits manufacturers and importers who are signatories to the MAIF Agreement from providing funding or material for others to promote infant formula, including on social media. The MAIF Agreement (and subsequent Committee guidance on electronic marketing) also prohibits advertising of infant formula products by signatories via online forums such as consumer review sites, although current Committee guidance does not appear to require signatories to monitor or control what third parties post on social media forums they control.

4.84. The MAIF Agreement does not prohibit promotion (inadvertently or otherwise) of infant formula by retailers, social media influencers, celebrities, online consumer reviewers, or users of social media, because these parties are not signatories to the agreement.

4.85. Retailers currently feature price promotions for infant formula in their marketing, and support the promotion of a “staged” product line and brand awareness by grouping products such as infant formula and toddler milk together, at times under “infant formula” signage and with shelf labels that refer to toddler milk as “formula”.

4.86. Users of social media (other than signatory formula manufacturers) and online consumer reviewers are not subject to restrictions as to what they can say in relation to breastmilk substitutes, and the ACCC is aware that comments are made which may have the effect of promoting infant formula (for example, comparing an infant formula product favourably to breastmilk).

4.87. The ACCC is not currently aware of widespread issues from endorsements of infant formula products by social media influencers and celebrities. A large majority of examples brought to the ACCC's attention involve promotion of toddler milk products, apparently by celebrities and influencers on behalf of companies which also produce infant formula.

4.88. As noted above, it is not within the scope of the ACCC's assessment of this application to impose obligations on any parties not signatories to the MAIF Agreement. The scope of parties covered by marketing restrictions on promotion of breastmilk substitutes is ultimately a matter for government policy and the industry.

4.89. However, promotion of infant formula by third parties such as retailers, celebrities, social media influencers, and social media users is likely to limit the effectiveness of the arrangement sought to be authorised.

4.90. The ACCC notes that the Committee operates on the basis of information provided voluntarily by signatories to the MAIF Agreement, and does not have powers to investigate whether funding or marketing material has been provided by signatories to third parties for the purpose of promoting infant formula. In recent years a number of complaints regarding infant formula marketing by third parties have been determined by the Committee not to involve breaches of the MAIF Agreement, citing a lack of evidence providing a connection between the third party marketing and a signatory infant formula manufacturer. While third parties remain free to promote breastmilk substitutes and the Committee lacks the ability to obtain this information, this lack of transparency provides an avenue that may undermine the effectiveness of the MAIF Agreement and reduce the likely public benefit.

*Marketing to health professionals*

4.91. Some interested parties have raised concerns that gifts, donations and sponsorships by infant formula companies to health professionals undermine the effectiveness of the MAIF Agreement, pointing to WHO guidance that no gifts or donations by infant formula companies should be accepted by health professionals, and that industry involvement in health worker education or training should not be permitted.

4.92. The MAIF Agreement prohibits signatories from offering "any financial or material inducement to health care professionals or members of their families to promote infant formula, nor should such inducements be accepted by health care professionals or members of their families."

4.93. The current Committee has developed and refers to a document when considering complaints on this issue, which provides an update to that developed by the previous APMAIF on this issue.

4.94. The ACCC acknowledges that the MAIF Agreement, in prohibiting "inducements" to health care professionals, does not go as far as the WHO recommendations, which extend to prohibiting all gifts or donations. Further, the use of the term "inducement" within the MAIF Agreement potentially allows a broad interpretation of permitted gift giving and donations.

4.95. The ACCC understands that the WHO recommends gifts and donations not be given to health care professionals because this may influence the medical advice they provide to pregnant or breastfeeding mothers, and potentially the level of support they provide for breastfeeding. However the ACCC does not consider there is currently evidence that health care professionals are being significantly influenced by gifts or donations of infant formula companies in a manner that would undermine the aims of

the MAIF Agreement for the purpose of this assessment. The ACCC also notes that health care professionals are subject to a number of obligations under their own professional ethics and standards.

### Reduced Regulatory Costs

4.96. In the absence of the MAIF Agreement, some form of regulatory response by Government may be implemented to give effect to its obligations under the WHO Code. While the nature and scope of such a response cannot be known, the ACCC accepts that any regulatory response would impose regulatory costs.

4.97. The ACCC notes the submissions of interested parties that much of the cost of operating the MAIF Agreement falls to non-government organisations and members of the public in monitoring and attempting to enforce the agreement. The ACCC understands that the current process relies on concerned members of the public to monitor and report examples of marketing activity they consider to be problematic. The ACCC considers it appropriate that the costs to society of monitoring and reporting conduct by signatories should be included within the calculation of the costs of operating the MAIF Agreement.

4.98. The ACCC considers there is significant uncertainty as to any alternative regulatory regime which might be imposed in the absence of the MAIF Agreement. Consequently, the ACCC is not satisfied in the circumstances that the MAIF Agreement is likely to result in a public benefit in the form of reduced compliance costs.

### ACCC conclusion on public benefit

4.99. The ACCC considers that the Conduct has resulted, and has the potential to continue to result in, a public benefit in the form of protecting and promoting breastfeeding, leading to improved health outcomes.

4.100. The extent of this public benefit is unclear as manufacturers are likely to choose to restrain their marketing of infant formula in the absence of the MAIF Agreement, to some extent, due to reputational concerns and incentives to avoid more arduous regulation. However, without the MAIF Agreement, the strength of this restraining effect is likely to decrease over time as manufacturers will have commercial incentives to increase advertising and thus continually 'stretch the limits' of the kinds of advertising that are accepted by the public and government.

4.101. The ACCC considers that the potential public benefit of the MAIF Agreement is limited by a range of factors which substantially undermine the effectiveness of the agreement itself, namely:

- the marketing of toddler milk by infant formula companies
- the promotion by infant formula companies of brands and product ranges which include infant formula
- the way in which complaints are resolved and the MAIF Agreement is interpreted by the Committee due to a lack of independence and transparency, and difficulties in processes for lodging complaints
- incomplete industry coverage of the agreement, and
- marketing by third parties not covered by the MAIF Agreement, and a lack of transparency over the possible support of signatories for this marketing

4.102. Overall, the ACCC considers that the Conduct is likely to result in some public benefit.

## Public detriment

4.103. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

> *…any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*[36]

4.104. Signatories to the MAIF Agreement comprise several importers and distributors who account for a large majority of retail sales volumes of infant formula in Australia. The Applicants seek authorisation on behalf of current and future signatories for an arrangement to agree not to market their infant formula products. Any such arrangement between a large proportion of market participants raises potential competition concerns.

4.105. The Council submits the MAIF Agreement does not result in any anti-competitive or other public detriment, because:

- marketing restrictions are directed to meeting important public health goals
- a decision to use infant formula should not depend upon the effectiveness of commercial advertising
- the benefits normally attributed to direct advertising (ensuring best quality, lowest cost, and an informed public) do not appear to be applicable to advertising of infant formula. In any event, benefits relating to price, quality and information are still achievable under the MAIF Agreement, and
- price competition by retailers, and research and innovation, are not restricted under the MAIF Agreement.

4.106. The submission by Dr Julie Smith and others argues that the existence of the MAIF Agreement results in public detriment by favouring large, existing manufacturers, who have less need to market their brand and products than new entrants, and who have existing marketing access through health channels.

4.107. CareA2+ – a manufacturer of infant formula which began marketing its products in November 2020 – submits the MAIF Agreement should not be re-authorised, as it (among other things) results in detriment by:

- stifling product innovation, or discouraging innovative products being from sold in the Australian market, because manufacturers (including non-signatories) feel the agreement contributes to their inability to communicate with the Australian public regarding the features and benefits of their products, and
- reducing price competition, because the dominance of three large infant formula manufacturers in Australia results in the retail price of infant formula being predominantly determined by the manufacturer, rather than by competition at the retail level. CareA2+ submits that, as a result, Australians pay more for inferior products, when compared to overseas markets.

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[36] *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

4.108. In relation to the concerns raised by interested parties, the ACCC notes that the public detriment of the MAIF Agreement is likely to be substantially reduced by its voluntary nature (meaning manufacturers are free to choose not to sign the agreement to market their new brands or innovative products), and the limitations imposed by the FSANZ Standards (which restrict health claims regarding infant formula from being made on packaging or in advertising irrespective of the MAIF Agreement).

4.109. In the context of the current application, the ACCC acknowledges that most of the potential public detriment arises from the same restrictions on marketing which also deliver the potential public benefit.

4.110. Marketing is intended to increase demand for a firm's product and/or to differentiate a firm's products from those of its competitors and as such is a part of efficient competitive rivalry in most markets. Generally speaking, an agreement between manufacturers not to promote their products is likely to result in substantial public detriment in the form of reduced competition particularly because:

- manufacturers will have less incentive to invest to improve their products through innovation if they cannot capture the benefit of this by differentiating their product through advertising
- consumers will have less information available to them regarding the products, resulting in less informed purchasing decisions and a less efficient market
- an inability to advertise (including through pressure on non-signatories to also not advertise) infant formula is likely to increase barriers for potential new entrants, who may face difficulty in establishing their brand, and
- any agreement between competitors may increase the likelihood of coordination of matters beyond the scope of the agreement itself.

4.111. However, the ACCC considers that there are a range of factors which reduce the public detriment likely to result from the marketing restrictions in the MAIF Agreement including:

- retailers of infant formula are not prevented from engaging in inter- and intra-brand price competition
- without the MAIF Agreement, manufacturers would nonetheless have some restrictions on product innovation and their ability to market these because their products would still need to be compliant with requirements of composition, labelling, and advertising of health and nutrition claims under food standards legislation
- the agreement is voluntary, and
- there are likely to be other factors which would continue to restrain marketing of infant formula to some extent in the absence of the MAIF Agreement, at least in the short to medium term, such as corporate reputational concerns, global commitments by some companies not to advertise infant formula, and incentive to avoid regulation.

4.112. Nevertheless, the ACCC considers that the MAIF Agreement is likely to result in some detriment from the impact on competition.

4.113. While signatories to the MAIF Agreement do not compete by advertising infant formula, they can continue to compete on price, brand, ingredients and attributes as conveyed on in-store packaging (to the extent they are permitted to do so under food

labelling legislation), as well as indirectly through marketing other products, including toddler milk.

### ACCC conclusion on public detriment

4.114. The ACCC considers that the Conduct is likely to result in some public detriment in the form of reduced competition between manufacturers and importers of breastmilk substitutes.

## Balance of public benefit and detriment

4.115. The ACCC considers that the Conduct, to the extent it restricts the promotion of breastmilk substitutes to Australian consumers, is likely to result in a public benefit in the form of protecting and promoting breastfeeding, leading to improved health outcomes.

4.116. The extent of this public benefit depends on the effectiveness of the MAIF Agreement in preventing the promotion of infant formula, both directly and indirectly, to Australian consumers, when compared with the future without the Conduct.

4.117. The ACCC shares the concerns of many interested parties that the purpose of the MAIF Agreement is undermined by a number of factors, including marketing activity which falls outside the scope of the Agreement, as well as an ineffective sanctions/complaints process.

4.118. Nonetheless, the ACCC considers that these factors do not completely eliminate the benefit that is likely to arise, and the Conduct is likely to continue to constrain the marketing of infant formula in Australia, at least to some degree.

4.119. The ACCC considers that the Conduct is likely to result in some public detriment in the form of reduced competition between manufacturers and importers of breastmilk substitutes.

4.120. The ACCC acknowledges that most of the potential public detriment arises from the same restrictions on marketing which also deliver the potential public benefit. Those factors which reduce the public benefit of the Conduct also lessen the detriment.

4.121. Public detriment from the MAIF Agreement is also likely to be substantially reduced by its voluntary nature, the limitations imposed by the FSANZ Standards (which restrict health claims regarding infant formula from being made on packaging or in advertising), price competition between retailers, and factors which are likely to continue to restrain advertising of infant formula in the absence of the MAIF Agreement.

4.122. In the context of the current application, the ACCC considers that the assessment of the public benefit and detriment is finely balanced, but is satisfied that the Conduct is likely to result in a small but sufficient public benefit that would outweigh the likely public detriment from the Conduct.

### Potential condition regarding toddler milk marketing

4.123. Based on the information before it at this time, the ACCC is satisfied that the Conduct would be likely to result in a net public benefit and has decided in the circumstances (including a short period of authorisation) not to specify a condition

which extends the limitations on advertising set out in Clause 5(a) of the MAIF Agreement to apply to toddler milk.

4.124. The ACCC recognises the strong position put by a number of interested parties that if granting authorisation, the ACCC should impose a condition that extends the MAIF Agreement's restriction on infant formula advertising and promotion to the marketing of toddler milk generally.

4.125. Given the broader public health issues that are linked to the implementation of the WHO's commitments in Australia of which the MAIF Agreement is an aspect, the ACCC considers that deciding whether to extend marketing restrictions to toddler milk is an issue more appropriate for consideration by the Department of Health in its upcoming review.

## Length of authorisation

4.126. The Act allows the ACCC to grant authorisation for a limited period of time.[37] This enables the ACCC to be in a position to be satisfied that the likely public benefit will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefit and detriment that have resulted, after an appropriate period.

4.127. In this instance, the Council seeks re-authorisation for 10 years, on the basis that:

- very few changes have been made to the MAIF Agreement over a long period of time
- the Federal Government has not yet indicated any intention to make requested changes to the MAIF Agreement or to otherwise change its policies in respect of the marketing and promotion of infant formula
- if any such changes were to occur, this would take a considerable amount of time to agree and implement
- any significant change in the policy environment during the period of authorisation is likely to provide a basis for the ACCC to review the authorisation if it wishes to do so, and
- the costs involved in applying for re-authorisation are considerable.

4.128. The Department of Health is of the view that a 5 year authorisation would be more appropriate than the requested 10 year period, as this would support ongoing collection of information (including the planned review of the effectiveness of the MAIF Agreement), and recognise the rapidly evolving marketing environment, to reduce the risk of a negative impact of these arrangements.

4.129. A number of interested parties have called for the MAIF Agreement to be re-authorised for no longer than two years, to allow time for the upcoming review of the effectiveness of its operation. Many of these parties appear to expect that the review will result in an alternate regulatory approach to restrictions on marketing of breastmilk substitutes in Australia.

4.130. Given the number of issues described above, which the ACCC considers may reduce the benefit of the MAIF Agreement, and the uncertainty as to the potential

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[37] Subsection 91(1).

outcomes that may follow from the Department of Health's planned review of the effectiveness of the arrangements, the ACCC has decided to grant re-authorisation for a period of three years.

4.131. The ACCC considered granting authorisation for two years, but if the Council were to seek to have the MAIF Agreement re-authorised again, it would likely start preparing a new application about 12 months prior to this authorisation expiring – which would be in 12 months' time. The ACCC is conscious that the Department of Health review is unlikely to have been completed and its recommendations, if any, implemented within such a short timeframe.

4.132. The ACCC considers that a period of 3 years provides a reasonable balance between the burden on the Applicants of having to prepare another application, should they wish to seek further authorisation of the MAIF Agreement, and the likelihood of changes coming out of the upcoming review – particularly in circumstances where the ACCC's assessment of benefit and detriment is so finely balanced.

## Future application for re-authorisation

4.133. If the Council were to seek re-authorisation of the MAIF Agreement again in the future, the ACCC is likely to seek detailed information to inform its assessment, including:

- evidence in support of public benefit claims that the MAIF Agreement has protected rates of breastfeeding
- the extent and nature of brand, infant formula and toddler milk marketing that has occurred over the previous period, including via social media, and how it has changed over time,
- complaints made about marketing of infant formula and toddler milk and how they were addressed,
- changes over time in volumes of infant formula sold in Australia, and
- how the Council has responded to any recommendations that may follow from the planned Department of Health review.

## Broader concerns

4.134. The ACCC notes that many of the issues raised by this application go well beyond the scope of competition law. The application raises significant health policy issues and the ACCC recognises that Australia's response to health policy issues is a matter for the Australian Government, largely through the Department of Health. Some of the issues around industry coverage and participation, the resolution of complaints, and marketing by third parties are not issues which can be addressed by the ACCC through this process. Nonetheless, these issues are relevant to the effectiveness of the MAIF Agreement and to the ACCC's consideration of the Conduct and net public benefit test.

4.135. While the ACCC is satisfied that the Conduct in the current application is likely to result in a public benefit that would outweigh any likely public detriment from the Conduct, the assessment was finely balanced and only marginally satisfied the public benefit test for the ACCC to grant authorisation. As noted throughout this Determination, the ACCC remains concerned that a number of factors undermine the effectiveness of the MAIF Agreement.

4.136. The ACCC notes comments that the potential for the MAIF Agreement to stand in the way of consideration of a more effective legislative regime is significant. The ACCC considers it is more appropriate that these issues are dealt with through government policy and legislation, rather than the competition law regime and authorisation process.

4.137. These issues highlight the importance of the upcoming comprehensive review of the MAIF Agreement by the Department of Health, which the ACCC understands will consider strengthening the regulatory arrangements for the marketing of breastmilk substitutes, the scope of the MAIF Agreement (including the age range of products captured), how products are defined, and whether a voluntary agreement remains an appropriate mechanism for managing this issue.

4.138. The ACCC considers that substantial changes to the MAIF Agreement are likely to be required to ensure that it continues to result in public benefit in the future. The Department of Health's review of the MAIF Agreement provides an opportunity for the MAIF Agreement to be improved to ensure it is effective. The ACCC strongly encourages the Department of Health to consider the following issues closely in its upcoming review:

- whether the scope of products the MAIF Agreement applies to should be expanded to all breastmilk substitutes, including toddler milk. As noted above, recent WHO statements on toddler milk advertising, together with academic studies, lend increased weight to the conclusion that toddler milk marketing has the effect of also marketing infant formula. The ACCC considers that advertising of toddler milk products in Australia exhibits characteristics consistent with those over which concerns have been raised by the WHO and studies, such as an emphasis on elements which are common to the entire 'range' of breastmilk substitute products including packaging and branding.
- whether the scope of parties to which the MAIF Agreement applies should be expanded to capture retailers, such as supermarkets and pharmacies.
- ways in which the effectiveness of the complaints handling process regarding potential breaches of the MAIF Agreement can be improved to reduce delays involved in the process of considering and publishing breaches, increase publicity resulting from breach findings and reduce involvement of the industry in the consideration of complaints.

# 5. Determination

## The application

5.1. On 26 October 2020 the Council lodged an application to revoke authorisations A91506 and A01507 and substitute authorisation AA1000534 for the ones revoked (referred to as re-authorisation). This application for re-authorisation AA1000534 was made under subsection 91C(1) of the Act.

5.2. The Council sought re-authorisation for the MAIF Agreement and associated guidelines.

## The authorisation test

5.3. The ACCC must not make a determination revoking the existing authorisation and substituting another authorisation of the Conduct unless satisfied that it would not be

prevented under section 90(7) of the Act from granting the substituted authorisation, if it were a new authorisation sought under section 88.[38] Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.

5.4. For the reasons outlined in this determination and on the information currently available, the ACCC is satisfied on balance, in all the circumstances, that the Conduct would be likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would result or be likely to result from the Conduct, including any lessening of competition.

5.5. Accordingly, the ACCC has decided to revoke authorisations A91506 and A91507 and grant re-authorisation to application AA1000534.

## Conduct which the ACCC authorises

5.6. The ACCC has decided to revoke authorisations A91506 and A91507 and grant authorisation AA1000534 in substitution to enable the Infant Nutrition Council Limited and manufacturers in, and importers into, Australia of infant formula that are current or become future signatories to the MAIF Agreement to sign up to, agree to comply with and give effect to the provisions of the MAIF Agreement as it stands at the time of this determination.

5.7. Authorisation is also granted to the Infant Nutrition Council Limited to make and give effect to associated guidelines to the MAIF Agreement, and to comply with and give effect to recommendations and decisions of the MAIF Complaints Committee, provided they are within the scope of the MAIF Agreement.

5.8. Authorisation is also granted to the MAIF Agreement signatories (as identified above) to agree to comply with and give effect to all associated guidelines to the MAIF Agreement, as well as recommendations and decisions of the MAIF Complaints Committee, provided they are within the scope of the MAIF Agreement.

5.9. A copy of the MAIF Agreement is at Annexure B, and a list of current associated guidelines is at Annexure C.

5.10. The authorised conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.

5.11. The ACCC grants authorisation AA1000534 until 31 August 2024.

## Date authorisation comes into effect

5.12. This determination is made on 27 July 2021.

5.13. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 18 August 2021.

# 6. Interim authorisation

6.1. Authorisations A91506 and A91507 are due to expire on 8 August 2021.

[38] s91C(7).

6.2. Given the ACCC's determination will not come into force until after the expiry of these authorisations, the ACCC has decided to suspend the operation of authorisations A91506 and A91507, and grant interim authorisation in substitution.

6.3. Interim authorisation is granted to the Infant Nutrition Council Limited and MAIF Agreement signatories (as described in paragraph 5.6) to enable them to engage in the conduct described in paragraphs 5.6, 5.7 and 5.8 above.

6.4. Interim authorisation commences immediately and will remain in place until the date the ACCC's final determination comes into effect or the ACCC decides to revoke interim authorisation.

**Annexure A**

**Examples of product line packaging of MAIF Agreement signatories**




**Annexure A**


Nestlé NAN SUPREME 1, Starter Infant Formula Powder From

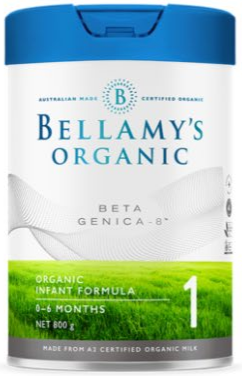

Nestlé NAN SUPREME 2, Follow-On Formula Powder From 6


Nestlé NAN SUPREME 3, Toddler Milk Drink From 1 Year – 800g


Nestlé NAN SUPREME 4, Toddler Milk Drink From 2 Years – 800g

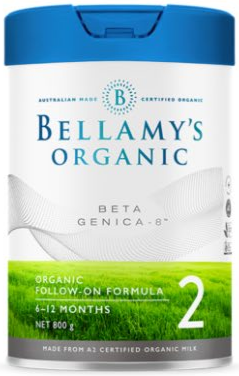







Certified Organic
**Beta Genica-8™ Step 1 Infant Formula**

**0 - 6 MONTHS**




Certified Organic
**Beta Genica-8™ Step 2 Follow-On Formula**

**6 - 12 MONTHS**


Certified Organic
**Beta Genica-8™ Step 3 Toddler Milk Drink**

**12+ MONTHS**


Certified Organic
**Step 1 Infant Formula**

0 - 6 MONTHS


Certified Organic
**Step 2 Follow-on Formula**

6 - 12 MONTHS


Certified Organic
**Step 3 Toddler Milk Drink**

12+ MONTHS


Certified Organic
**Step 4 Junior Milk Drink**

3 + YEARS


Certified Organic
**Pregnancy Formula**

ADULT

**Annexure A**


Oli
Goat Milk
Oli
Natural
Goat Milk
Powder
Oli
Premium Goat Milk
Oli
Premium Goat Milk

## Marketing in Australia of Infant Formulas: Manufacturers and Importers Agreement

## The MAIF Agreement

### Preamble

This document sets out the obligations of manufacturers in and importers to, Australia of infant formulas and gives effect in Australia to the principles of the *World Health Organization's International Code of Marketing of Breast Milk Substitutes* (WHO Code).[1]

### Clause 1: Aim

The aim is to contribute to the provision of safe and adequate nutrition for infants, by the protection and promotion of breastfeeding and by ensuring the proper use of breast milk substitutes, when they are necessary,[2] on the basis of adequate information and through appropriate marketing and distribution. (WHO Code Article 1)

### Clause 2: Scope

This document applies to the marketing in Australia of infant formulas when such products are marketed or otherwise represented to be suitable, with or without modification, for use as a partial or total replacement of breast milk. It also applies to their quality and availability, and to information concerning their use. (WHO Code Article 2)

### Clause 3: Definitions

(a) 'Breast milk substitute' - any food marketed or otherwise represented as a partial or total replacement for breast milk, whether or not suitable for that purpose.

(b) 'Container' - any form of packaging of infant formulas for sale as a normal retail unit, including wrappers.

(c) 'Health care system' - governmental, non-governmental or private institutions engaged, directly or indirectly, in health care for mothers, infants and pregnant women and nurseries or child-care institutions. It also includes health workers in private practice. For the purposes of this document, the health care system does not include pharmacies or other retail outlets.

(d) 'Health care professional' - a professional or other appropriately trained person working in a component of the health care system, including pharmacists and voluntary workers.

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[1] Where applicable, clauses in this document are cross-referenced to the relevant articles from the World Health Organization (1981) *International Code of Marketing of Breast-milk Substitutes, Geneva (WHO Code).*

[2] For the purposes of the Aim, 'necessary' includes mothers who make an informed choice to use breast milk substitutes.

(e) 'Infant formula' - any food described or sold as an alternative for human milk for the feeding of infants up to the age of twelve months and formulated in accordance with all relevant clauses of the Australia New Zealand Food Standards Code, including Infant Formula Products Standard 2.9.1.

(f) 'Label' - any tag, brand, mark, pictorial or other descriptive matter written, printed, stencilled, marked, embossed or impressed on, or attached to, a container of infant formulas.

(g) 'Marketing' - includes the promotion, distribution, selling, advertising, public relations and information services related to infant formulas.

(h) 'Marketing personnel' - any persons whose functions include the marketing of infant formulas.

(i) 'Samples' - single or small quantities of an infant formula provided without cost. (WHO Code Article 3)

**Clause 4: Information and Education**

(a) Manufacturers and importers of infant formulas in Australia agree that informational and educational materials, whether written, audio or visual, dealing with the feeding of infants and intended to reach pregnant women and parents of infants and young children, should always include clear information on all the following points:

(i) the benefits and superiority of breastfeeding;

(ii) maternal nutrition, and the preparation for and maintenance of breastfeeding;

(iii) the negative effect on breastfeeding of introducing partial bottle-feeding;

(iv) the difficulty of reversing the decision not to breastfeed; and

(v) where needed, the proper use of infant formula, whether manufactured industrially or home prepared. (WHO Code Article 4.2)

(b) When such materials contain information about the use of infant formulas, they should include the social and financial implications of its use, the health hazards of inappropriate foods or feeding methods and, in particular, the health hazards of unnecessary or improper use of infant formulas. Such materials should not use any pictures or text which may idealise the use of infant formulas. (WHO Code Article 4.2)

(c) Manufacturers and importers of infant formulas should not donate informational or educational equipment or materials unless it is at the request of, and with the written approval of, the appropriate government authority or within guidelines given by the

Commonwealth, State or Territory Governments for this purpose. Such equipment or materials may bear the donating company's name or logo, but should not refer to a proprietary infant formula, and should be distributed only through the health care system. (WHO Code Article 4.3)

**Clause 5: The general public and mothers**

(a) Manufacturers and importers of infant formulas should not advertise or in any other way promote infant formulas to the general public. (WHO Code Article 5.1)

(b) Manufacturers and importers of infant formulas should not provide samples of infant formulas to the general public, pregnant women, parents or members of their families. (WHO Code Article 5.2)

(c) Manufacturers and importers of infant formulas should not distribute to pregnant women, or parents of infants and young children, any gifts of articles or utensils which may promote the use of breast milk substitutes or bottle-feeding. (WHO Code Article 5.4)

(d) Marketing personnel, in their business capacity, should not seek direct or indirect contact with pregnant women or with parents of infants and young children. This does not prevent appropriately qualified personnel from responding to complaints or unsolicited requests for information. For these requests, parents should be referred to a health care professional whenever health advice is required. (WHO Code Article 5.5)

**Clause 6: Health care system**

(a) Manufacturers and importers of infant formulas should not use any facility of the health care system for the purpose of promoting infant formulas. This does not, however, preclude the dissemination of information to health care professionals as provided in clause 7(a). (WHO Code Article 6.2)

(b) Manufacturers and importers of infant formulas should be aware that facilities of health care systems should not be used for the display of products within the scope of this document, for placards or posters concerning such products, or for the distribution of material provided by a manufacturer or distributor other than that specified in clause 4(c) above. (WHO Code Article 6.3)

(c) The use by the health care system of pharmacies or retail outlets, 'professional service representatives', 'mothercraft nurses', or similar personnel, provided or paid for by manufacturers or importers of infant formulas is not permitted. (WHO Code Article 6.4)

(d) Manufacturers and importers of infant formulas should be aware that feeding with infant formulas, whether manufactured or home prepared, should be demonstrated only by

health care professionals. Such demonstrations should be made only to the parents or other persons who need to use it, and the information given should include a clear explanation of the hazards of improper use. (WHO Code Article 6.5)

(e) Manufacturers and importers of infant formulas may make donations, or low-priced sales, of infant formulas to institutions or organisations, whether for use in the institutions or for distribution outside them. Such provisions should only be used or distributed for infants who have to be fed on breast milk substitutes. If these provisions are distributed for use outside the institutions, this should be done only by the institutions or organisations concerned. Manufacturers or importers should not use such donations or low- price sales as a sales inducement. (WHO Code Article 6.6)

(f) Manufacturers and importers of infant formulas should note that, where donated infant formulas are distributed outside an institution, the institution or organisation should take steps to ensure that these provisions can be continued as long as the infants concerned need them. Donors, as well as the institutions or organisations concerned should bear in mind this responsibility. (WHO Code Article 6.7)

(g) Equipment and materials, in addition to those referred to in clause 4(c), donated to a health care system may bear a company's name or logo, but should not refer to any proprietary infant formulas. (WHO Code Article 6.8)

**Clause 7: Health Care Professionals**

(a) Manufacturers and importers of infant formulas providing information about the formulas to health care professionals should restrict the information to scientific and factual matters. Such information should not imply or create a belief that bottle-feeding is equivalent or superior to breastfeeding. It should also include the information specified in clause 4(a) above. (WHO Code Article 7.2)

(b) Manufacturers and importers of infant formulas should provide members of the medical profession and related health care professionals with information about the products, and this information should accurately reflect current knowledge and responsible opinion. Such material should be clearly identified with the name of the manufacturer or importer, the brand names of the infant formulas, and the date of publication.

(c) Manufacturers and importers of infant formulas should not offer any financial or material inducement to health care professionals or members of their families to promote infant formulas, nor should such inducements be accepted by health care professionals or members of their families. (WHO Code Article 7.3)

(d) Manufacturers and importers of infant formulas should not provide samples of infant formulas, or of equipment or utensils for their preparation or use, to health care professionals except when necessary for the purpose of professional evaluation or research at the institutional level. (WHO Code Article 7.4)

(e) Manufacturers and importers of infant formulas should disclose to institutions, to which a recipient health care professional is affiliated, any contribution made to him/her, or on his/her behalf, for fellowships, study tours, research grants, attendance at professional conferences, or the like. (WHO Code Article 7.5)

**Clause 8: Persons employed by manufacturers and importers**

(a) In systems of sales incentives for marketing personnel, the volume of sales of infant formulas should not be included in the calculation of bonuses, nor should quotas be set specifically for sales of these products. This should not be understood to prevent the payment of bonuses based on the overall sales by a company of other products marketed by it. (WHO Code Article 8.1)

(b) Personnel employed in marketing infant formulas should not, as part of their job responsibilities, perform educational functions in relation to pregnant women or parents of infants and young children. This does not prevent such personnel from being used for other functions by the health care system. (WHO Code Article 8.2)

**Clause 9: Quality and Labelling**

(a) Manufacturers and importers of infant formulas must ensure that infant formulas sold in Australia conform to all relevant clauses of the Australia New Zealand Food Standards Code, including Infant Formula Products Standard 2.9.1. (WHO Code Articles 9.2, 9.4, 10.1 and 10.2)

(b) Manufacturers and importers of infant formulas must ensure that labels provide the information required to be provided by the Australia New Zealand Food Standards Code Part 1.2 and Infant Formula Products Standard 2.9.1., and also provide the necessary information about the appropriate use of infant formula and should not discourage breastfeeding. (WHO Code Article 9.1)

**Clause 10: Implementation and monitoring**

(a) Independently of any other measures taken to implement their obligations under this document, each manufacturer and importer of infant formulas should regard itself as responsible for monitoring its marketing practices according to the principles and aim of this document, and for taking steps to ensure that its conduct at every level conforms to those principles and aims. (WHO Code Article 11.3)

(b) Each manufacturer and importer of infant formulas should apprise its personnel of the existence of this document and of their responsibilities under it. (WHO Code Article 11.5)

**Associated guidelines**

MAIF Complaint Committee guidelines

*Guidelines on the interpretation and application of the MAIF Agreement by the Advisory Panel on the Marketing in Australia of Infant Formula (APMAIF)*

*MAIF Complaint Committee's interpretation of the MAIF Agreement related to electronic media marketing* (February 2020)

*MAIF Complaint Committee's interpretation of Clause 7(a) of the MAIF Agreement relating to scientific and factual information provided by health care professionals* (February 2020)

*MAIF Complaints Committee's interpretation of the MAIF Agreement related to information and education* (December 2020)

*MAIF Complaint Committee's interpretation on the Interpretation of the MAIF Agreement related to Clause 5(a): The general public and parents and/or carers (including information provided to retailers)* (December 2020)

*MAIF Complaint Committee's interpretation of Clauses 5(a) and 9(b) of the MAIF Agreement relating to information on appropriate age range on infant formula labels* (December 2020)

*Principles for the consideration of interactions with health care professionals for the purpose of interpreting the MAIF Agreement*

Council guidelines

*Best-practice Guidance for INC Members for the Marketing of Toddler Milk Drinks to Consumers* (February 2018)

*Information for Retailers brochure*

*Policy – Breastfeeding* (July 2010)

*Guidance on Interactions with Healthcare Professionals* (January 2012)

*Policy – Distribution of Infant Formula Samples to Health Care Professionals* (May 2010)

*Template Infant Formula Samples Request Form (Australia)* (August 2010)