



Australian Government
Department of Health

Deputy Secretary

Mr David Hatfield
Director, Competition Exemptions Branch
Australian Competition and Consumer Commission
adjudication@accc.gov.au

Dear Mr Hatfield

Thank you for your correspondence of 1 March 2021 regarding the Australian Competition and Consumer Commission (ACCC) draft determination in respect of the application for re-authorisation lodged by the Infant Nutrition Council (INC).

I note the draft determination issued by the ACCC proposes to grant re-authorisation for a further 5 years. Based on the demonstrated history of the authorisation, the Department of Health is supportive of the application for the renewal of the authorisation of the MAIF Agreement for a further 5 years. Authorisation of the MAIF Agreement is necessary to continue to result in public benefits in the form of promotion and protecting breastfeeding through the restriction of inappropriate advertising of infant formula.

I also note that the ACCC is considering whether a condition may be required, which would extend the MAIF Agreement to cover toddler milk products, and has invited submissions to provide further information which will assist Commissioners in making their final determination.

Further detail on the Department's views of the ACCC's draft determination is provided in our enclosed submission. I acknowledge this letter and the Department of Health submission forms part of the authorisation process and will be published on the ACCC public register.

Yours sincerely


Tania Rishniw
Primary and Community Care Group

8 April 2021

Phone:  Email: 



Australian Government

Department of Health

**Re-authorisation of the Marketing in Australia of Infant
Formulas: Manufacturers and Importers Agreement
(MAIF Agreement) by the Australian Competition and
Consumer Commission (ACCC)**

**Submission to the ACCC – draft determination consultation
April 2021**

DEPARTMENT OF HEALTH

April 2021

The Department of Health (Health) acknowledges the Australian Competition and Consumer Commission's (ACCC) draft determination for authorisation of the Marketing in Australia of Infant Formulas: Manufacturers and Importers Agreement (MAIF Agreement) by the Infant Nutrition Council (INC). Health welcomes the ACCC's recognition of the importance of protecting breastfeeding in considering the re-authorising of the MAIF Agreement.

Health is committed to the objectives of the *Australian National Breastfeeding Strategy: 2019 and Beyond* (the Strategy) including increasing the proportion of babies who are exclusively breastfed to around 6 months of age (up to 40 per cent by 2022 and 50 per cent by 2025) particularly in priority populations and vulnerable groups" and continued breastfeeding with appropriate complementary foods until 12 months of age and beyond. Health notes that the Strategy also includes a recommendation to strengthen the regulatory arrangements for marketing of infant formula and breastmilk substitutes which will be considered in the review of the MAIF Agreement to commence in late 2021.

Health notes the ACCC's specific call for comments on the potential for a condition under the MAIF Agreement in relation to toddler milk marketing. Toddler milk and toddler milk marketing has been an ongoing area of discussion in the food regulatory system, in the MAIF Complaints Committee and in the international space. This is a complex area as there are differences in definitions used in regulations and in public health guidance and differences in how these products are regulated around the world.

Regardless of the final decision made by ACCC Commissioners, Health recognises that the MAIF Agreement is one tool among many to improve breastfeeding rates and Health will continue to work with all stakeholders in an effort to achieve improved population health objectives.

International context

World Health Organization (WHO) Code

In 2016, based on concerns about the confusion around the range of products targeted to infants and young children in the market the WHO published guidance to clarify that breast-milk 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 infants and young children up to the age of 3 years (including follow-up formula and growing-up milks)*"¹.

Health recognises that there is debate in the community about the appropriateness of the term "toddler milk", but notes that this is the term currently used by the WHO.

¹ World Health Organization. Guidance on ending the inappropriate promotion of foods for infants and young children. 2016. http://apps.who.int/gb/ebwha/pdf_files/WHA69/A69_7Add1-en.pdf?ua=1

Codex Alimentarius (Codex)

Codex has two standards which regulate product for infants and young children. The infant formula standard covers products suitable from birth to six months of age. The follow-up formula standard covers products suitable for infants (from six months up to 12 months) and young children (from 12 months up to 36 months). The 2016 WHO guidance suggests both standards could be considered to regulate breast milk substitutes.

The Codex Committee on Nutrition and Foods for Special Dietary Uses is currently reviewing the global standard for products for follow-up formula. At the 2019 meeting, the committee considered how to address the prohibition of cross-promotion because of concerns ‘that it misleads caregivers and discourages breastfeeding’. The intent of the committee was to avoid consumer confusion through clear differentiation of labelling between products and prevent products for infant’s aged 6-12 months containing reference to products for young children or infant formula. Wording was introduced into the draft revised Standard to reflect this.

The Australia New Zealand Food Standards Code (the Food Standards Code)

The Food Standards Code defines infant formula and follow on formula² as breast milk substitutes. Standard 2.9.1 regulates infant formula (suitable from birth up to 12 months), follow-on formula (suitable from 6-<12 months) and infant formula for special dietary uses (suitable from birth up to 12 months). This Standard sets legal requirements for the composition, safety and labelling of infant formula products. Many of the labelling requirements implement Article 9 and 10 of the WHO Code. No nutrition content or health claims can be made on any infant formula products, consistent with the WHO Code. There is currently nothing in the Food Standards Code that directly restricts or prohibits joint line marketing of infant formula products and toddler milks. The Code requires that infant formula carry a statement to inform caregivers of the age ‘suitability’ of infant formula i.e. that the product is suitable from birth.

Toddler milks are not a defined food in the Food Standards Code. Milk based products for young children (aged 1-4 years) are captured as supplementary products. *Formulated supplementary foods for young children* (FSFYC) is the regulatory category that includes toddler milks as well as other foods targeted to young children. These are regulated by Standard 2.9.3 and are not regulated as breast milk substitutes. FSFYC are not subject to the same labelling requirements and restrictions as infant formula products. These products are permitted to have nutrition content claims on labels.

FSANZ review of the regulation of infant formula

Food Standards Australia New Zealand (FSANZ) is currently reviewing the regulation of infant formula and infant formula for special dietary uses within Standard 2.9.1. This review does not include follow-on formula (suitable from 6-<12 months). The review is considering issues related to cross promotion and stage labelling. Through public consultation evidence

² *infant formula* means an infant formula product that:

- (a) is represented as a breast-milk substitute for infants; and
- (b) satisfies by itself the nutritional requirements of infants under the age of 4 to 6 months.

follow-on formula means an infant formula product that:

- (a) is represented as either a breast-milk substitute or replacement for infant formula; and
- (b) is suitable to constitute the principal liquid source of nourishment in a progressively diversified diet for infants from the age of 6 months.

has been provided to highlight concerns with cross promotion, demonstrating that mothers understand toddler milk advertisements to be promoting a range of products that includes infant formula and follow-on formula, when products share brand identities^{3,4,5,6}. The issues of cross promotion and ‘stage labelling’ has also been raised through the FSANZ review. Many stakeholders raised concerns that ‘Stages’, or numbers to imply stages, directly contributes to this confusion. It may also lead to the mistaken belief that babies should progress through these ‘Stages’, and that toddler milk is an essential part of the growing child’s diet^{7,8}.

FSANZ review of voluntary addition of oligosaccharides to infant formulas and toddler milk

Throughout 2019 and 2020 FSANZ consulted on whether to change to the Food Standards Code to allow the voluntary addition two oligosaccharides identical to those found in human milk to infant formula products and FSFYC. Throughout this process, concerns about the addition to FSFYC were raised, citing the likelihood of cross promotion of ‘human milk oligosaccharides’ in FSFYC with infant formula. In November 2020, the Australia and New Zealand Ministerial Forum on Food Regulation agreed to allow the voluntary addition of the two oligosaccharides to infant formula and follow-on formula products. However, Ministers did not agree to allow their voluntary addition to FSFYC, as it is not a breastmilk substitute.

Toddler milk and infant formula marketing issues

Stage information

The MAIF Tribunal (the former body responsible for considering MAIF complaints) considered that the use of staging information in certain complaints received was promotional, and a breach of the MAIF Agreement. The current MAIF Complaints Committee issued guidance in December 2020 which states that numbers indicating stage 1 or 2 is acceptable, but “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”.

Confusion between products

The MAIF Complaints Secretariat continues to receive complaints relating to toddler milk marketing or ‘range branding’ activity that does not overtly market infant formula⁹ and are therefore generally determined as out of scope of the MAIF Agreement.

³ Berry, Jones & Iverson, (2011) Relax, you're soaking in it: sources of information about infant formula. *Breastfeeding Review*, 19(1), 9-18.

⁴ Berry NJ, Jones SC, Iverson D. (2010) It's all formula to me: women's understanding of toddler milk ads. *Breastfeed Rev*, 18(1):21-30.

⁵ Berry NS, Jones S, Iverson D (2010) Toddler milk advertising in Australia: the infant formula ads we have when we don't have infant formula ads. In: Ballantine P, Finsterwalder J (eds) *Doing more with less: Australian and New Zealand Marketing Academy Conference*, 2010, Christchurch, New Zealand, pp1-8

⁶ Cattaneo A., Pani P., Carletti C., Guidetti M., Mutti V., Guidetti C. *et al.* (2014) Advertisements of follow-on formula and their perception by pregnant women and mothers in Italy. *Archives of Disease in Childhood* 0, 1–6.

⁷ Food Standards Australia New Zealand (2012) Consultation Paper Regulation of Infant Formula Products in the Australia New Zealand Food Standards Code

<https://www.foodstandards.gov.au/code/infant/documents/Infant%20formula%20review%20Consultation%20Paper%20FINAL.pdf>
Submissions <https://www.foodstandards.gov.au/code/infant/Documents/Submissions.zip>

⁸ Food Standards Australia New Zealand (2016) Supporting document 3 - Provision of information, Proposal P1028 Infant Formula

<https://www.foodstandards.gov.au/code/proposals/Documents/P1028-ConsultSD3-Information.pdf> Submissions

<https://www.foodstandards.gov.au/code/applications/Documents/P1028%20submissions%202016.zip>

⁹ Maternal, infant and young child feeding. Guidance on ending the inappropriate promotion of foods for infants and young children. In: Sixty-ninth World Health Assembly, Geneva, 23–28 May 2016. Provisional agenda item 12.1. Geneva: World Health Organization; 2016 (A69/7 Add 1; http://apps.who.int/gb/ebwha/pdf_files/WHA69/A69_7Add1-en.pdf?ua=1, accessed 4 March 2021).

In the 2020-21 financial year to date, the Secretariat has received 55 MAIF Agreement complaints¹⁰. Thirty-three were determined as being outside the scope of the MAIF Agreement. Of those 33 complaints, 12 related to toddler milks across nine different brands.

The MAIF Complaints Committee has at times held that toddler milk marketing is in-scope of the MAIF Agreement. For example, a number of complaints in the 2020-21 year related to social media marketing using images of toddler milk products, but with captions including the words “baby formula”. This social media activity, even though on the surface appeared as toddler milk advertising, was determined by the MAIF Complaints Committee to be in breach of the MAIF Agreement.

One complaint in the 2019-20 financial year, alleged that toddler milk marketing material in the form of an information leaflet by a manufacturer/importer within a retail store was a breach on the MAIF. The complaint considered the appearance of the child in the pamphlet image to be under 12 months of age, and text within the pamphlet used the words “*infant formula*” and terms such as “*start to life*”. The MAIF Complaints Committee determined the activity to be a breach of the MAIF Agreement.

Health notes the risk outlined by the Infant Nutrition Council in its application for reauthorisation that signatories may opt out if toddler milk is captured in scope of the MAIF Agreement. Careful consideration of the risks and benefits is required.

Review of the MAIF Agreement

Health intends to conduct a comprehensive review of the MAIF Agreement commencing in late 2021. Consideration of the scope of the MAIF Agreement, including the age range of products captured, and how products are defined will be central to the review. The review will also explore whether a voluntary agreement remains an appropriate mechanism for managing this issue. The public submissions provided by stakeholders to the reauthorisation process, and the outcomes of the ultimate decision made by the Commissioners, will feed into this review. As part of the review process Health will undertake consultation with all relevant stakeholders.

Health supports the ACCC’s draft decision to reauthorise the MAIF Agreement for a five year period. This will allow adequate time for a comprehensive review of the MAIF Agreement and consideration and/or implementation of recommendations.

¹⁰ A number of complaints received in the 2020-21 financial year are not finalised and final determinations are yet to be confirmed.