



# Draft Determination

Application for revocation of 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.

1 March 2021

Commissioners: Sims  
Keogh  
Rickard  
Brakey  
Court  
Crone  
Ridgeway

## Summary

The ACCC proposes to re-authorise the *Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement* (MAIF Agreement) and associated guidelines, but is considering whether a condition may be required.

The MAIF Agreement, amongst other things, prohibits the advertising and promotion of infant formula by manufacturers and importers directly to the public. The ACCC accepts that restrictions on the promotion of breast milk substitutes are likely to result in public benefits by protecting breastfeeding rates, with significant consequential health benefits. Since 1992, the MAIF Agreement has been the primary means by which the Australian Government has chosen to give effect to the World Health Organisation's *International Code of Marketing of Breast-Milk Substitutes*, to which Australia was an early signatory.

The ACCC proposes to grant re-authorisation for five years.

However, the ACCC considers that a number of factors are likely to undermine the benefits of the MAIF Agreement, the most significant of these being linked to the potential effects of marketing of toddler milk by infant formula companies as part of a range of products which includes infant formula. There is now further information, including a series of statements from the WHO, which indicates that there is consumer confusion between infant formula and toddler milk products, such that marketing toddler milk has the same effect as marketing infant formula.

To address this issue the ACCC is considering whether to grant authorisation subject to a condition extending the restrictions on advertising and promotion of infant formula to include all breast milk substitutes as defined by the World Health Organisation (which includes toddler milk products sold by infant formula companies).

The ACCC invites submissions in relation to this draft determination before making its final decision, in particular to provide any further available evidence or information which indicates the extent to which toddler milk marketing has the same effect as marketing infant formula, therefore reducing rates of breastfeeding.

### 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 is seeking 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 seeks 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 includes provisions which:

- prohibit the advertising and promotion of infant formula to the general public
- 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 breast milk 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 other breast milk substitutes such as infant foods. The MAIF Agreement also does not apply to retailers (such as supermarkets and pharmacies) or distributors of infant formula.

1.5. The MAIF Agreement has been authorised in more or less its current form since 1992.<sup>1</sup> The current application seeks re-authorisation of the MAIF Agreement on the same terms as it was most recently re-authorised in 2016. The current authorisation is due to expire on 15 July 2021.

1.6. In addition to the MAIF Agreement, the conduct for which authorisation is sought includes the following guidelines and policies:

- guidance documents developed and endorsed by the MAIF Agreement’s current and previous complaint handling bodies, which are published on the Australian Department of Health website (**Committee Guidelines**), specifically interpretation guidelines related to:
  - the MAIF Agreement generally, which is applied by the MAIF Complaints Committee (the **Committee**) (referred to by, but not binding on, the Committee)
  - electronic media marketing

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<sup>1</sup> 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.

- scientific and factual information
  - information and education
  - the meaning of ‘the general public and parents and/or carers’ (including information provided to retailers, and
  - information on appropriate age range on infant formula labels.
- Council publications, including guidelines, policy and brochure documents (**Council Publications**). These are specifically:
    - guidance for MAIF Agreement signatories relating to:
      - marketing of toddler milk drinks
      - the promotion of breastfeeding
      - interactions with healthcare professionals
      - distribution of samples to health care professionals
    - information for retailers regarding the MAIF Agreement, and
    - infant formula samples request form.
- 1.7. The Council has 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.
- 1.8. The ACCC can grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.

## 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 concerns over a perceived decline in breastfeeding rates, and as a ‘minimum acceptable requirement’ for the marketing of breast milk substitutes. The aim of the WHO Code is to protect and promote breastfeeding and to ensure that marketing of breast milk substitutes, feeding bottles and teats is appropriate. 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.<sup>2</sup>

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<sup>2</sup> 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>

- 2.3. Member States that are signatories to the WHO Code agree that products which function as breast-milk 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 infants and young children up to the age of 3 years”. This includes infant formula and toddler milk products.<sup>3</sup>
- 2.4. Australia currently implements the WHO Code and related WHA resolutions in a number of ways, the primary mechanism being the MAIF Agreement.<sup>4</sup> 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.
- 2.5. While the MAIF Agreement relates only to marketing of infant formula by manufacturers and importers, 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.

### **Breast milk substitutes**

- 2.6. Breast milk substitutes potentially include infant formula and toddler milk products.

#### *Infant formula*

- 2.7. Infant formula is an industrially produced 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. Comprehensive mandatory compositional and labelling requirements for infant formula in Australia are set out in the Australia New Zealand Food Standards Code – Standard 2.9.1. (**FSANZ Formula Standard**). Only products which comply with this standard are permitted to be represented as an infant formula product.
- 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.<sup>5</sup>

#### *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 comprehensive or prescriptive as the FSANZ Formula Standard.

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<sup>3</sup> WHO/UNICEF (2019) “Information Note: Cross-promotion of infant formula and toddler milks”.

<sup>4</sup> Department of Health submission dated 3 December.

<sup>5</sup> <https://www.foodstandards.gov.au/code/infant/Pages/default.aspx> Accessed 15 December 2020.

## **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 breast milk substitutes 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 does not have information as to what proportion of sales of infant formula, by volume, is covered by signatories to the MAIF Agreement. 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. Infant formula brands not covered by the MAIF Agreement include those manufactured by Royal Australia New Zealand, Munchkins, Blackmores, and some supermarket brands.

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 seeks authorisation to cover any future signatories.

## **New complaints handling process**

2.15. Prior to 2014, the MAIF complaints process was managed by the Department of Health's 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.

2.16. 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. It has been submitted to the ACCC that complaints regarding toddler milk advertising are generally ruled out of scope of the MAIF Agreement and therefore not considered in depth by the Committee.

### **National Breastfeeding Strategy**

2.17. On 8 March 2019, all health ministers endorsed the *Australian National Breastfeeding Strategy: 2019 and beyond* (the **Breastfeeding Strategy**). The revised strategy sought to incorporate recent research on effective strategies to support breastfeeding. 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.

2.18. 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.

2.19. The Department of Health advises it is currently developing an implementation plan and governance arrangements for the Breastfeeding Strategy, and relevantly, anticipates undertaking a review of the MAIF Agreement in 2021.<sup>6</sup>

## **3. Consultation**

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

3.2. The ACCC invited submissions from a range of potentially interested parties including government, industry and non-government organisations,<sup>7</sup> seeking comment on the application for re-authorisation.

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<sup>6</sup> Department of Health submission dated 3 December, p3.

- 3.3. The ACCC received 23 submissions from interested parties in relation to the application.
- 3.4. Submissions from signatories and the Australian Food and Grocery Council expressed unconditional support for the application. The remaining submissions - including from government, 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 benefits 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 Complaints Committee is not impartial, transparent or timely in decision making
  - concerns that the period of authorisation sought (10 years) is too long.
- 3.5. These concerns, and the response to them by the Council, are addressed in further detail as relevant throughout this draft determination.
- 3.6. Public submissions by the Council and interested parties are on the Public Register for this matter.

## 4. ACCC assessment

- 4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. The Council has 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,<sup>8</sup> 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 is to assess whether the likely public benefits of the current MAIF Agreement and guidelines for which the parties have sought

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<sup>7</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

<sup>8</sup> See subsection 91C(7).



authorisation will outweigh the likely public detriments. The ACCC's assessment does not extend to determining or commenting on health policy in relation to infant feeding.

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 benefits 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 breast milk 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 or misleading marketing claims
- 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)
- consider conduct which occurs outside of Australia.

4.5. As such, the ACCC's proposal to authorise the MAIF Agreement is not an endorsement that these arrangements are the best way, or only way, to address issues relating to the promotion of breast milk substitutes.

## 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 benefits and detriments. However, for the purpose of assessing the Conduct the ACCC considers it appropriate to assess the effect of the Conduct on competition between manufacturers and importers of various breast milk substitutes.

## Future with and without the Conduct

4.9. In applying the authorisation test, the ACCC compares the likely future with the Conduct that is the subject of the authorisation 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 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 and the Australian Consumer Law.
- 4.11. Any alternative regulatory response by the Australian Government to give effect to Australia's obligations under the WHO Code would likely take a number of years to develop and implement. It is not possible to know what form any response by Government would take, and whether such a regulatory regime may be more or less restrictive than the current MAIF Agreement. The ACCC also notes it is likely there would be costs associated with developing, implementing and operating an alternative regulatory regime.
- 4.12. The ACCC therefore assumes that in the future without the Conduct, the signatories to the MAIF Agreement are likely to promote the sale of infant formula alongside their promotion of toddler milk and other breast milk substitutes. Although, due to the reputational risk of advertising infant formula, it is possible that some Council members may voluntarily abide by much the same restrictions without an agreement.

## Public benefits

- 4.13. 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.*<sup>9</sup>

- 4.14. 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

- 4.15. 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 respiratory tract infection and acute otitis media.<sup>10</sup> Therefore increased rates of breastfeeding in infants will likely lead to improved health outcomes and lower public health costs.
- 4.16. 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.<sup>11</sup>

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<sup>9</sup> 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.

<sup>10</sup> 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).

<sup>11</sup> World Health Organization (2017), "The International Code of Marketing of Breast-milk Substitutes: Frequently Asked Questions (2017 Update)".

- 4.17. For this reason, the ACCC accepts that the promotion of breast milk substitutes in Australia is likely to negatively influence the 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 breast milk substitutes.
- 4.18. Therefore, to the extent marketing of breast milk substitutes by MAIF Agreement signatories were to increase in the absence of the MAIF Agreement, the ACCC considers the restrictions in the MAIF Agreement are likely to protect and promote breastfeeding and result in a significant public benefit compared to the future without it, at least until any alternative regulatory regime takes effect.
- 4.19. However, the ACCC also notes that much of this benefit may not be realised if other marketing practices are able to circumvent the MAIF Agreement by effectively promoting infant formula while remaining within the letter of the agreement – for example, by marketing other products which are sold as part of a range which includes infant formula (such as toddler milk). Additionally, there are a number of other factors raised by interested parties which may limit the effectiveness of the MAIF Agreement and therefore negatively impact the level of the benefit which results or is likely to result from it, such as marketing by parties who are not signatories to the MAIF Agreement (including manufacturers who have not signed up and retailers) and the complaints process. These issues are discussed in further detail below.

### **Factors which may limit the public benefit**

- 4.20. A number of issues have been raised by interested parties which they submit limit the level of public benefit potentially achieved by the MAIF Agreement.

#### *Marketing of toddler milk*

- 4.21. 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.
- 4.22. In its 2016 determination, the ACCC considered that the marketing of toddler milk products was likely to, in some circumstances, effectively also act as marketing for infant formula and therefore may potentially undermine the benefit of the MAIF Agreement. At the time of the 2016 determination, the ACCC concluded it was not appropriate to require changes to the MAIF Agreement in relation to toddler milk, because of (then) recent or upcoming expected developments which may have resulted in changed industry practices in the area. In its determination, the ACCC noted that the issue of toddler milk marketing would be a relevant factor in its consideration of any future authorisation applications by the Council.
- 4.23. 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 toddler milk products.
- 4.24. The WHO has “clearly stated that toddler milks are breast-milk substitutes” and therefore should not be marketed.<sup>12</sup>

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<sup>12</sup> WHO/UNICEF (2019), “Cross-promotion of infant formula and toddler milks: information note”.

4.25. 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.<sup>13</sup> 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.

4.26. 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.<sup>14</sup>*

4.27. 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.

4.28. 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.<sup>15</sup>

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<sup>13</sup> World Health Assembly Resolution WHA69.9, "Ending inappropriate promotion of foods for infants and young children", May 2016.

<sup>14</sup> WHO/UNICEF (2019), "Cross-promotion of infant formula and toddler milks: information note".

<sup>15</sup> 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 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," *Maternal & 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;

- 4.29. 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.
- 4.30. The Council also submits that toddler milk is not a substitute for breast milk 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.
- 4.31. 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 breast milk
  - clearly specifying the intended age group
  - avoiding featuring images of infant formula products on toddler milk drinks.
- 4.32. 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
  - 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

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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.

- 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.
- 4.33. The ACCC notes that a number of complaints regarding toddler milk advertising have been considered by the Committee and reported on in recent years. It has been submitted that marketing of toddler milk is generally considered by the Committee to be beyond the scope of the MAIF Agreement, except for some cases where marketing of toddler milk unambiguously has the effect of marketing infant formula – such as when images of infants clearly not over 12 months of age are used, or references are made to “infant formula” within the marketing material. 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.
- 4.34. 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 the concerns of interested parties that the promotion of toddler milk as part of a product line including infant formula may result in the proxy promotion of infant formula.
- 4.35. 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.
- 4.36. 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 breast milk substitute products including packaging and branding.
- 4.37. 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, the ACCC considers there is a risk that the marketing of some toddler milk products communicates indirectly with consumers about infant formula products, and is likely to have much 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. If this is the case, the impact on consumers of the marketing and promotion of toddler milks may be such that the purpose of the MAIF Agreement is undermined and the public benefit resulting, or likely to result, from the Conduct significantly reduced.
- 4.38. The ACCC is considering the appropriate way to address this issue. This is discussed further at paragraphs 4.87-4.90 below.

*Branding and product ranges beyond toddler milk*

- 4.39. 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.

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

- marketing of product ranges which share a brand with breast milk 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
- parents' and expectant mothers' clubs (online, via social media, or via email lists)
- 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.

4.41. 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).”<sup>16</sup>

4.42. 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 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.

4.43. The ACCC considers that marketing of brands which include infant formula products may have the effect of increasing awareness of infant formula products, thereby potentially increasing sales of infant formula and undermining the public benefit of the MAIF Agreement. While this is a similar issue to the marketing of toddler milk products as discussed above (and would be partially addressed by any solution to the issues around toddler milk), the ACCC notes that brand and product line marketing is less likely to function as proxy marketing for infant formula than the marketing of toddler milk. The ACCC considers that at this point there is not sufficient evidence that brand and product range marketing is likely to reduce the benefits of the MAIF Agreement for the purpose of the current assessment. The ACCC expects to consider this issue further in any application for reauthorisation which may be lodged in the future.

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<sup>16</sup> 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”.

## *Oversight and complaints*

- 4.44. Interested parties have raised concerns about the effectiveness of the Committee in resolving complaints regarding potential breaches of the MAIF Agreement, due to:
- the limited expertise of Committee members in relation to infant feeding, including breastfeeding
  - alleged close affiliations of two of the three members of the Committee to formula manufacturers and importers, as one is an industry representative and a second has received significant funding from industry sources<sup>17</sup>
  - the lack of a member to act as an advocate on behalf of parents and/or the community more generally, and
  - a number of factors which dissuade the public from lodging complaints regarding potential breaches of the MAIF Agreement, including: the low proportion of complaints which are upheld; that the majority of complaints are ruled to be out of the scope of the MAIF Agreement; the lack of enforcement consequences when a breach is found; the lack of transparency or accountability for companies due to a lack of timely or clear reporting; and the difficulty of lodging a complaint because the form is not in a mobile-friendly format.
- 4.45. 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.<sup>18</sup> Breastfeeding Advocacy Australia provided data which indicates that, during the years the industry was not present on the complaints panel (that is, under the Tribunal operated by the Ethics Centre 2014 – 2017) there was a significantly higher percentage of complaints found to be breaches.<sup>19</sup>
- 4.46. The Council submits that the new mechanism for resolving complaints alleging breaches of the MAIF Agreement is stronger and more transparent than the 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.
- 4.47. 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.
- 4.48. 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.

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<sup>17</sup> Declarations of interest by Committee members are listed on the Department of Health's website: <https://www1.health.gov.au/internet/main/publishing.nsf/Content/MAIF-Complaints-Committee>

<sup>18</sup> Annual Report: Marketing in Australia of Infant Formula Independent Tribunal 2017-2018.

<sup>19</sup> Breastfeeding Advocacy Australia submission dated 4 December 2020, p28



- 4.49. The ACCC has previously noted that any public benefits associated with substantive provisions of a code of conduct will only arise to the extent that the code is effective in its operation. In this regard, the ACCC considers that it is important that complaint handling is robust 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.
- 4.50. The ACCC notes that the appointment of Committee members, and operation of the complaints process more generally, has been a decision of government, not of industry. The ACCC's role in assessing this application does not therefore extend to making recommendations regarding the composition or processes of the complaints handling body.

#### *Industry coverage*

- 4.51. 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 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, and that many new entrants are not signatories and are marketing aggressively.
- 4.52. The Council understands 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.
- 4.53. 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.
- 4.54. 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. This supports the likely public benefits arising from the Conduct.
- 4.55. To the extent that non-signatories are engaging in aggressive marketing of infant formula the effectiveness of the MAIF Agreement may be undermined to some degree. However, the ACCC notes that these arrangements are voluntary, and the extent to which additional coverage or mandatory regulation is required is a policy issue beyond the ACCC's role in this assessment.

#### *Marketing by third parties*

- 4.56. Interested parties have raised concerns that the benefits of the MAIF Agreement are 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.

4.57. 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.

4.58. 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.

4.59. 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.

4.60. 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”.

4.61. 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 breast milk 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).

4.62. 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. Given toddler milk products have not been covered by the MAIF Agreement, the ACCC considers the fact that these products are being advertised in this way to be unsurprising; however to the extent these promotional activities are supported by MAIF Agreement signatories, signatories would be obliged to cease this support of all third party promoters of all breast milk substitutes in the event these are included within the scope of the MAIF Agreement.

4.63. 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 breast milk substitutes is ultimately a matter for government policy and the industry.

- 4.64. However, promotion (inadvertent or otherwise) 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.
- 4.65. 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 breast milk 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 benefits.

#### *Marketing to health professionals*

- 4.66. 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.
- 4.67. 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.”
- 4.68. 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.
- 4.69. The ACCC acknowledges that the MAIF Agreement, in prohibiting “inducements” to health care professionals, does not go as far as WHO recommendations, which extend to prohibiting all gifts or donations. Further, the use of the term “inducement” within the MAIF Agreement potentially permits a broad interpretation of gift giving and donations permitted.
- 4.70. 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 sufficient evidence that health care professionals are being influenced by gifts or donations of infant formula companies to undermine the aims of the MAIF Agreement for the purpose of this assessment. In particular, the ACCC notes that health care professionals are subject to a number of obligations under their own professional ethics and standards.

#### **Reduced Regulatory Costs**

- 4.71. In the absence of the MAIF Agreement the ACCC considers it is likely that there would ultimately be some form of regulatory response by Government to give effect to its

obligations under the WHO Code. While the nature and scope of such a response is uncertain, the ACCC accepts that any regulatory response would impose regulatory costs on industry, government and regulatory agencies to develop, implement and enforce a new regime.

4.72. Although a compulsory regulatory approach may address more of the concerns raised by interested parties in relation to the ACCC's assessment, the ACCC is of the view that the operating costs of a voluntary self-regulatory code are likely to be lower than the costs associated with regulatory alternatives. Consequently, the ACCC considers that the MAIF Agreement is likely to result in a public benefit to the extent that it leads to avoiding these regulatory costs, at least in the short to medium term.

### **ACCC conclusion on public benefit**

4.73. The ACCC considers that the Conduct has resulted, and has the potential to continue to result in a significant public benefit in the form of:

- protecting and promoting breastfeeding leading to improved health outcomes, and
- avoided regulatory costs from alternative solutions.

4.74. However, the ACCC considers that there are significant indications that the marketing of toddler milk by infant formula companies in some circumstances has a similar impact on consumers as the direct promotion of infant formula, and this has the potential to undermine the effectiveness of the MAIF Agreement, and creates a risk that much of the claimed public benefit may not be realised. The ACCC is considering whether it is necessary to impose a condition in the circumstances to address this risk. Such a condition would extend the advertising prohibitions within the MAIF Agreement to cover all breast milk substitutes, including toddler milk. This is discussed in further detail below.

4.75. The ACCC also considers that the benefit of the MAIF Agreement may be further limited by:

- the promotion by infant formula companies of infant formula 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 the composition of the Committee and difficulties in processes for lodging complaints
- incomplete industry coverage of the agreement
- marketing by third parties not party to the MAIF Agreement, and a lack of transparency over the possible support of signatories for this marketing
- gifts and donations to health care professionals.

4.76. However, as noted above, 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 and are appropriate for consideration by the Department of Health in its upcoming review.

## Public detriments

4.77. 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.<sup>20</sup>*

4.78. 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.

4.79. 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 is likely to increase barriers for potential new entrants, and
- any agreement between competitors may increase the likelihood of coordination of matters beyond the scope of the agreement itself.

4.80. However, the ACCC considers that there are a range of factors which reduce the public detriments 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 and labelling under food standards legislation

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<sup>20</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- restrictions on the marketing of infant formula may be imposed via a regulatory regime after a period, in the absence of the MAIF Agreement.

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

### **ACCC conclusion on public detriment**

4.82. 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 breast milk substitutes.

### **Balance of public benefit and detriment**

4.83. The ACCC considers that the Conduct, to the extent it restricts the promotion of infant formula to Australian consumers, is likely to result in a public benefit in the form of:

- protecting and promoting breastfeeding, leading to improved health outcomes, and
- avoided regulatory costs from alternative solutions.

4.84. The extent of this public benefit depends on the effectiveness of the MAIF Agreement in prohibiting the promotion of infant formula, both directly and indirectly, to Australian consumers. As outlined above, the ACCC has received strong submissions that the MAIF Agreement is ineffective in preventing the indirect promotion of infant formula by product manufacturers, particularly through the marketing of toddler milk. Recent WHO statements and a number of academic studies support this view.

4.85. 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 breast milk substitutes.

4.86. The ACCC therefore considers that the assessment of the public benefit and detriment is finely balanced. This is because there is a substantial risk that much of the claimed public benefit will not be realised as a result of the marketing of toddler milk by infant formula companies effectively promoting infant formula.

4.87. In order to address this risk the ACCC is considering whether to impose a condition which extends the limitations on advertising set out in Clause 5(a) of the MAIF Agreement to apply to all breast milk substitutes, including toddler milk.

4.88. The ACCC invites comment from interested parties and the Council in relation to this issue, and in particular on:

- whether such a condition is warranted and if so, the form the condition should take
- any further available evidence or information (beyond that set out in paragraphs 4.24 – 4.28 above) which indicates the extent to which toddler milk marketing is a proxy for infant formula marketing, with the potential to reduce rates of breastfeeding.

4.89. The ACCC recognises that a condition which extended the marketing restriction in this way would impact all marketing of toddler milk. The ACCC invites submissions on whether there is a more targeted way to prevent marketing of toddler milk to the extent it is effectively marketing infant formula including through the use of product lines.

## Length of authorisation

4.90. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>21</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

4.91. 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
- the costs involved in applying for re-authorisation are considerable.

4.92. The Department of Health is of the view that a five 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.

4.93. A number of interested parties have called for the agreement to be re-authorised for a period of no longer than two years, to allow for a review of the effectiveness of its operation.

4.94. Given the number of issues (described above) which the ACCC considers may reduce the benefits of the MAIF Agreement, and the uncertainty of outcome as a result of the Department of Health's planned review of the effectiveness of the arrangement, the ACCC proposes to grant reauthorisation for a period of five years.

## 5. Draft determination

### The application

5.1. On 26 October 2020 the Council lodged an application to revoke authorisation 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 seeks re-authorisation for the MAIF Agreement and associated guidelines. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

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<sup>21</sup> Subsection 91(1).

## The authorisation test

- 5.3. 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 draft 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 to the public 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 proposes to grant re-authorisation.

## Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to revoke authorisations A91506 and A91507 and grant authorisation AA1000534 in substitution to the Infant Nutrition Council and manufacturers in, and importers into, Australia of infant formula that are current or become future signatories to the *Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement (MAIF Agreement)* to make, agree to and give effect to the provisions of the MAIF Agreement and associated guidelines as at the time of authorisation, as set out in Annexure 1.
- 5.7. Authorisation is proposed to extend to current and future signatories to the MAIF Agreement agreeing to comply with associated guidelines, recommendations and decisions of the MAIF Complaints Committee provided they are within the scope of the MAIF Agreement.
- 5.8. The 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.
- 5.9. The ACCC proposes to grant authorisation AA1000534 for five years.
- 5.10. This draft determination is made on 1 March 2021.

## 6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.



## **Annexure 1**

### **Associated guidelines**

#### 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)*