



Mick Keogh, Deputy Chair
Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

17 October 2024

Dear Mr Keogh,

ABA Submission to ACCC re Draft Determination

Authorisation number: AA1000665

The Australian Breastfeeding Association (ABA) along with the listed endorsees below, strongly supports the ACCC recommendation to refuse the application for revocation of AA1000534 and substitution of new authorisation AA1000665 of the Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement (MAIF Agreement) sought by the Infant Nutrition Council (INC). This decision should be maintained in the Final Determination.

The MAIF Agreement has proven ineffective in preventing the marketing of breast milk substitutes (BMS) from undermining breastfeeding in Australia. ABA strongly supports the ACCC's findings that the MAIF Agreement does not provide a sufficient public benefit to outweigh the public detriment of allowing its exemption. ABA eagerly awaits the establishment of new statutory regulations for the marketing of infant formula in Australia, in line with *Recommendation 1* of the *Review of the Marketing in Australia of Infant Formulas: Manufacturers and Importers Agreement – Final Report* (DOHAC 2023).

The urgency of confirming this draft decision in the ACCC's final determination is highlighted by several critical factors. Recent evidence shows a rising prevalence of aggressive marketing practices by the infant formula industry, which continue to compromise infant nutrition and health. Findings from the 2023 Lancet Series on Breastfeeding (Rollins et al. 2023), along with a WHO/UNICEF multi-country report (WHO & UNICEF, 2022), underscore the significant public health risks linked to these marketing strategies.

Breastfeeding confers significant health advantages for both mothers and their infants – regardless of where they live in the world. The way that infants are fed has profound influence on their development – neuro-psycho-social and physiological – from birth through to 36 months and beyond. It is *as important* in Australia as it is in low- or middle-income countries to ensure that families can make informed decisions about how to feed their babies, free from the influence of commercial interests or manipulative or misleading marketing tactics.

While a voluntary, industry-led and taxpayer-funded code of conduct such as the MAIF Agreement is in place, it creates the harmful illusion that the public's ability to make informed decisions about infant feeding is being protected. The ongoing existence of the MAIF Agreement fails to adequately protect against inappropriate marketing of BMS in Australia. The experience over the past several decades has made it clear that the only effective way to regulating BMS is for government to fully legislate the *WHO International Code of Marketing of Breast milk Substitutes* (WHO 1981) and subsequent WHA resolutions (the WHO Code). Implementing the WHO Code in its entirety is essential for addressing any potential loopholes to ensure robust protection for women and families.

Several factors are highlighted by the ACCC's Draft Determination as significantly undermining the effectiveness of the MAIF Agreement in achieving a public benefit.

These include the MAIF Agreement's:

1. Voluntary nature

2. Failure to include retailers, particularly supermarkets
3. Ineffectiveness, conflicts of interest and lack of transparency of the MAIF Complaints Committee and lack of penalties or sanctions for breaches of the MAIF Agreement
4. Permitting of advertising and promotion of toddler milks with the likelihood of cross-promotion of infant formula
5. Inability to capture the breadth of modern digital-marketing methods for both toddler milks and infant formula
6. Permitting of marketing in health facilities and to health professionals

Future legislation modelled on the WHO Code will protect families when faced with infant feeding challenges.

1. Voluntary nature

Government-led mandatory legislation has greater potential to effectively protect populations than voluntary approaches. Voluntary and self-regulatory frameworks are not fit for the purpose of regulating the marketing of BMS, rather they undermine breastfeeding and violate parents' rights to be appropriately informed regarding nutrition for their baby and violate a child's right to health (WHO & UNICEF, 2022).

The MAIF Review leaves no doubt about the need for a prescribed mandatory code to replace the MAIF Agreement.

ABA looks forward to a formal commitment from the Federal Government to adopt a strong regulatory framework using a prescribed mandatory code which adopts provisions of the WHO Code in full, in line with *Recommendation 1* of the Department of Health's independent review of the MAIF agreement.

2. Failure to include retailers, particularly supermarkets

The ACCC considers that retailer marketing activities are relevant to their assessment as this activity is likely to affect consumer decisions. In turn this reduces the public benefit of the MAIF Agreement.

The MAIF Review *Recommendation 3* failed to recommend the inclusion of retailers within the scope of the proposed new statutory legislation. Instead, it recommended a review of the scale and impact of inappropriate marketing of supermarkets and pharmacies to determine whether the regulatory framework should include retailers in its scope.

The Virtual Violators Detector Tool ([VIVID](#)) developed by [Alive and Thrive](#), has already captured significant data on the inappropriate and aggressive digital marketing of breastmilk substitutes by retailers in Australia (and across countries including China, Malaysia, New Zealand, the Philippines, Singapore, UK and US).

The ABA WHO Code Breach Survey data showed that 35% of breaches reported between October 15, 2022, and April 3, 2023, were by supermarket and pharmaceutical retailers.

In the drafting of the new statutory legislated code that will replace the MAIF Agreement, ABA urges the DOHAC to extend the scope to include retailers and adopt the terminology and definitions of the World Health Organisation in the WHO Code, which uses the term 'distributor' rather than 'retailer' to include persons, corporations or any other entity in the public or private sector engaged in the business (whether directly or indirectly) of marketing infant formula at the wholesale or retail level.

3. The ineffectiveness, conflicts of interest and lack of transparency of the MAIF Complaints Committee and lack of penalties or sanctions for breaches of the MAIF Agreement

ABA has described the failures of the MAIF Complaints Committee in previous submissions to the ACCC. We reiterate our final statement from that submission: an effective regulatory model for infant formula marketing in Australia must have a transparent and real-time compliance monitoring system, along with effective penalties for breaches. These problems with process and penalties were addressed in *Recommendations 6 and 7* of the MAIF Review.

Any future complaints committee supporting the monitoring and enforcement of the new statutory legislation should be government-administered and include community and/or consumer representatives who have a broad understanding of the issues faced by parents and can advocate on their behalf. It is essential that industry representatives are not included on this committee to ensure unbiased oversight and effective safeguarding for consumer interests.

4. Allowing advertising and promotion of toddler milks with the likelihood of cross-promotion of infant formula

The ACCC specifically mentioned in their Draft Determination the significant concern expressed by interested parties about the proliferation and unchecked marketing of toddler milks in Australia. This concern covers potential nutritional problems with these products and the fact that toddler milks act as a device for cross-promotion of infant formula.

The ACCC states that any cross-promotion of infant formula that occurs via toddler milk advertising undermines the purpose of the MAIF Agreement.

Recommendation 2 of the MAIF Review, however, rejected a revision of scope and instead recommended monitoring and adopting as necessary, recommendations arising from the FSANZ review of infant formula regulation. There are significant gaps between changes included in Division 3 of the food standard (Proposal P1028 Infant Formula) variation that came into effect on 13 September 2024 regarding the labelling and packaging of follow-on milks, and the full provisions of the WHO Code, which covers BMS from birth to 36 months.

ABA strongly advocates for legislation that fully aligns with the WHO Code as it provides clarity about scope through the 2016 WHA resolution which demands marketing protection from birth to 36 months.

5. Inability to capture the breadth of modern digital-marketing methods for both toddler milks and infant formula

The INC's application and response to interested party submissions on the question of managing digital marketing focuses on their efforts to offer online product information to parents and advice to INC members about best practice in online marketing.

The ACCC appreciates the global reach that digital marketing and platforms have that transcend jurisdictional regulations and finds that these are outside the control of the INC and undermine the purpose and effectiveness of the MAIF Agreement.

Indeed, WHO has described the trends of unrestrained digital marketing of BMS a recognised global threat to informed infant feeding choices (WHO, 2022). The MAIF Review *Recommendation 4* describes including explicit reference to electronic marketing and advertising in the new statutory code to ensure it is specifically addressed in any new regulatory frameworks.

We urge the DOHAC to commit to confronting the significant threat of digital marketing by adopting WHO's recommended approach, which includes robust enforcement and national accountability mechanisms (WHO & UNICEF, 2022).

6. Marketing in health facilities and to health professionals

This topic has been added despite the ACCC not assessing it as a significant contributor to public detriment. The recent Lancet Series on breastfeeding reported that industry representatives describe health professionals as *category entry points* (Rollins et al, 2023). In their application and response to interested party submissions, the INC described their efforts to provide information about appropriate contact with health professionals regarding BMS but failed to allay these concerns about conflicts of interest created by industry, and health professionals and associations who deal with them.

In Australia, where infant formula is a carefully regulated food product, it is both inappropriate and non-compliant with the WHO Code for formula companies to organise 'information sessions' for health professionals. All commercial milk formulas are required to meet food standards, and impartial and accurate information about these products and hygiene principles are available freely on independent health information websites such as [Raising Children](#) and the [Grow and Go Toolbox](#).

The WHO Code and recent WHO reports and guidelines that cover global digital marketing demonstrate the key role that health professionals play in promoting infant formula on behalf of the industry. Health professionals play a role as 'trusted voices' for families and are targeted as such by companies globally. It is not a requirement for all Australian health professionals to learn about breastfeeding in pre-practice education, much less the purpose of the WHO Code, despite their regular proximity in clinical practice to breastfeeding mothers and children. However, the MAIF Review's report's *Recommendation 9* for awareness-raising amongst health professionals does not go far enough.

ABA calls on the government to ensure that all Australian health professionals receive pre-registration education about the rationale of the WHO Code and the importance of protection and promotion of breastfeeding.

Community concerns re future without the MAIF agreement

ABA acknowledges community concerns about uncontrolled and unchecked advertising of infant formula once the MAIF Agreement has expired. Indeed, we have been made aware that many of the interested parties to the ACCC's first public consultation regarding the INC's reauthorisation application for the MAIF Agreement, have been directly contacted by one of the largest and most powerful trans-global infant formula companies. This lobbying tactic, we believe, is intended to constrain criticisms, co-opt opponents, and curtail regulatory threats, mostly obscured from public view. This tactic is also well described within the Lancet Series (Rollins et al, 2023).

Nevertheless, in the Draft Determination (section 4.120), the ACCC outlines several factors likely to restrain marketing of infant formula when the MAIF Agreement expires. These include "industry norms, and the risk of reputational harm"; the effort needed for industry to start advertising after not having had this as part of their current marketing strategy; and the additional regulation through FSANZ Review amendments and expected response from the Australian Government to the MAIF Review.

ABA strongly supports the ACCC's analysis that marketing activity is unlikely to increase in the absence of the MAIF Agreement. We agree with the ACCC that company self interest lies in maintaining their public reputation.

ABA suggests the ACCC could strengthen such self-interest by announcing it will be closely monitoring the Commercial Milk Formula (CMF) industry and retailers for the coming 12 months, or until the Code is fully implemented in law in Australia, in line with *Recommendation 5* of the MAIF review. To ensure such risk is fully addressed, we urge the ACCC to increase its own monitoring and enforcement activities, and for the government to fund the ACCC to conduct such an enhanced role.

ABA renews its call to the ACCC to undertake a market review to understand the risks to consumers and to identify market failures and how to address them with advocacy and law reform.

Conclusion

ABA reiterates that the marketing of infant formulas, not the product itself, disrupts parents' ability to access accurate information and undermines breastfeeding. Marketing targets parents' vulnerabilities and creates as well as exploits these vulnerabilities.

Marketing of formula products is different from the marketing of everyday items. Milk is uniquely the sole food of infants. Feeding practices in the first three years of life profoundly affect the child's health and developmental outcomes, and women's lifelong health.

Decisions about infant and child feeding should be based on the very best information and truthful evidence, free from the influence of commercial interests of the formula industry.

ABA congratulates the ACCC on this Draft Determination. This decision should be maintained in the Final Determination.

ABA urges the ACCC to ensure full transparency in the process leading to the publication of the Final Determination. This includes continuing the practice of making all submissions from all parties publicly available, as well as recommending the publication all meetings conducted stakeholders.

The ACCC Determination on the MAIF Agreement represents a critical moment for Australia to move without delay toward the drafting, implementation, monitoring and enforcement of legislation that encompasses the full scope of the WHO Code, in line with *Recommendation 1* of the Department of Health and Age Care's independent review of the MAIF Agreement.

Yours sincerely,



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