



Breastfeeding Advocacy Australia's Response:

Application for revocation of AA1000534 and the substitution of authorisation AA1000665 lodged by Infant Nutrition Council Ltd in respect of the Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement, and associated guidelines.

17 October 2024



BAA's response to the
ACCC's draft determination (including Annexure)

17 October 2024 ©Breastfeeding Advocacy Australia



Foreword

In response to the Australian Competition and Consumer Commission's recent denial of the Infant Nutrition Council's (INC) application, we must highlight the ongoing failures of the Australian Government to uphold its responsibility to protect breastfeeding mothers and their children. Since the inception of the World Health Organization's (WHO) *International Code of Marketing of Breast-milk Substitutes* (the WHO Code or International Code) the Australian Government has defaulted on monitoring and evaluating the effectiveness of the *Marketing in Australia of Infant Formulas: Manufacturers and Importers Agreement* (MAIF Agreement) leaving this crucial task to unpaid volunteer breastfeeding advocates. This reliance is not only exploitative but constitutes sex-based discrimination. It is unacceptable for breastfeeding mothers to shoulder the burden of defending their human rights and those of their children against unethical marketing practices that undermine successful breastfeeding. Women are not a source of free labour for the Australian Government.

The MAIF Agreement has proven to be little more than a façade. Industry stakeholders exploit it as a mask to create the illusion of compliance while continuing to engage in predatory marketing practices aimed at pregnant and breastfeeding mothers. This agreement enables the industry to access health workers, government agencies, and public health organisations, often disguising their marketing campaigns as 'education'. Furthermore, they utilise proxies such as health workers, academics, and social media influencers to circumvent their responsibilities under the Agreement.

The complicity of various Australian Government agencies – including the Department of Health and Ageing, Food Standards Australia and New Zealand, the Department of Agriculture, Water and the Environment, and others – in prioritising commercial interests over the health of mothers and infants is deeply troubling. Their policies and actions favour industry involvement while sidelining the voices of mothers, who are crucial stakeholders in this issue. The Australian Government is failing to protect mothers and infants during their most vulnerable stages of life.

The dedication of countless volunteer hours contributed by members of Breastfeeding Advocacy Australia (BAA) to prepare this document, and other reports, reflects a desperate need for change. These volunteers invest their time – often at the expense of their families, paid work, and personal wellbeing – advocating for protection against unethical marketing practices. The Australian Government is exploiting these women by failing to fulfil its own regulatory responsibilities.

This review is a pivotal opportunity for the Australian Competition and Consumer Commission (ACCC) to challenge the devaluation of women's labour and health by making strong recommendations to the Australian Government. The goal should be to protect, promote, and support breastfeeding as well as infant and young child feeding.



The MAIF Agreement attempts to implement the WHO's International Code but has been independently reviewed by Allen + Clarke Consulting, which concluded in April 2024 that:

'...there remains significant room for improvement in the coverage and operation of regulation of infant formula marketing that, if implemented, would more effectively meet the aims of the MAIF Agreement and result in a range of benefits.

The MAIF Agreement in its current form has been found to contribute to several unintended negative outcomes. Efforts should be made to address these through future amendments to the MAIF Agreement or the broader regulatory environment.'

~ Allen + Clarke Consulting

This report provides compelling evidence that the MAIF Agreement has consistently failed to monitor and respond to violations effectively and does not fulfil the aims of the International Code. The application for authorisation by the INC only highlights the inadequacies of the MAIF Agreement in the current marketing landscape, particularly its lack of transparency and accountability. It is clear that the structure favours industry interests over consumer protection.

Therefore, we call for the establishment of appropriate regulatory frameworks, including an independent breastfeeding committee free from conflicts of interest, to oversee and effectively monitor industry practices. The current self-regulatory model of the MAIF Agreement is ineffective and does not align with the WHO European model law, which represents robust legislation.

It is essential for Australia to take urgent action to improve its standing in breastfeeding protection. The *Australian National Breastfeeding Strategy 2019 (ANBS)* provides a framework for coordinated action and aims to implement effective strategies to enhance breastfeeding rates in Australia. However, for the ANBS to succeed, it must be fully implemented.

We urge Australia to adopt robust legislation that not only adheres to the International Code as a minimum standard but also surpasses it. This legislation should encompass pregnancy through to 60 months, include penalties for violations, and actively eliminate aggressive marketing practices.

This report addresses each section of the ACCC's draft determination regarding the MAIF Agreement, using the same headings for clarity.



The application for revocation and substitution

BAA's Response:

The MAIF Agreement is supposedly Australia's 'response' to the International Code. Yet, MAIF is a voluntary, self-regulated code of conduct that was drafted in partnership with the breastmilk substitute industry and has ZERO penalties for breaches. On paper and in practice MAIF does not fulfill any of Australia's obligations as a World Health Assembly (WHA) Member State and signatory to the *International Code of Marketing of Breast-milk Substitutes* and subsequent World Health Assembly resolutions.

It is well understood internationally that voluntary, self-regulatory systems are ineffective in reducing the power of, and exposure to, breastmilk substitute marketing and other infant and young child feeding products. Evidence of this being true in Australia is the ongoing disregard by the signatories when they have been found in breach of the MAIF Agreement. In fact, in the financial year of 2024, 19 out of the 24 breaches were committed by the same perpetrator – with zero penalty. This is simply allowing the company to continue with unethical marketing techniques and is undeniable evidence of the sheer disregard for the agreement they signed.

The INC is using cartel tactics to pressure the ACCC into renewing the MAIF Agreement and maintaining the status quo – a calculated manoeuvre that perpetuates a system of minimal, ineffective protections for breastfeeding. The voluntary nature of the MAIF Agreement, combined with the absence of meaningful penalties for breaches, fails to safeguard the health of mothers and infants. This manipulation prioritises corporate interests over public health, and we oppose any attempt to sustain a framework that lacks the strength to protect our most vulnerable members.

As outlined in sections 1.6 and 1.7, the Applicant's members engage in strategic direction planning. This raises the question: Is this a coordinated effort to undermine breastfeeding in order to increase market share? Under the current MAIF Agreement, it appears that the Applicant's members may be acting more like a cartel than a legitimate industry organisation.

Breastfeeding Advocacy Australia (BAA) supports the continuation of the MAIF Agreement on an interim basis until stronger legislation can be established. However, we caution against allowing this interim period to extend for too long. The ACCC must urge the Department of Health to act swiftly and implement the *International Code of Marketing of Breast-milk Substitutes*, utilising the EU model law as a framework for this implementation. This approach represents a minimum standard that is essential for effectively protecting the rights of mothers and infants in Australia.



The Conduct

BAA's Response:

The request for authorisation concerning the MAIF Agreement and its associated guidelines is grossly inadequate for several compelling reasons, primarily centred around the voluntary nature of the agreement, the absence of penalties for breaches, and significant conflicts of interest in decision-making.

Voluntary Compliance: All provisions outlined in the application are entirely voluntary, rendering the MAIF Agreement ineffective. This voluntary compliance means that signatories can opt-out without any legal consequences. The lack of mandatory enforcement mechanisms undermines any real commitment to protecting breastfeeding mothers and their infants.

Absence of Penalties: The MAIF Agreement is devoid of any penalties for violations, making it a toothless initiative. Without consequences for non-compliance, companies can and will continue engaging in predatory marketing practices without fear of repercussions. This lack of accountability not only emboldens unethical behaviour but also directly jeopardises the health and wellbeing of breastfeeding mothers and their children. This framework fails to provide any meaningful deterrent against harmful marketing practices that can undermine breastfeeding efforts.

Conflict of Interest in Decision-Making: The inclusion of an industry-elected member on the MAIF Complaints Committee is a glaring conflict of interest that fundamentally compromises the integrity of the decision-making process. This industry representation raises serious doubts about the objectivity and impartiality of the committee's decisions, which could easily favour commercial interests over the health rights of mothers and infants. A truly effective regulatory framework must ensure that all committee members are independent and free from industry influence to safeguard public health interests.

Limited Scope and Lack of Transparency: The guidelines for which the Applicant seeks authorisation are not only inadequately defined but also lack the necessary transparency. The reliance on documents that may not be binding creates ambiguity in how complaints are managed, resulting in inconsistent enforcement of guidelines. This lack of clarity undermines stakeholders' understanding of their rights and protections. The current framework provides too much leeway for the industry, allowing for exploitation and obfuscation of unethical practices.

Historical Ineffectiveness: Evidence from various studies has consistently shown that voluntary agreements like MAIF fail to curb unethical marketing practices effectively. The historical context of these frameworks indicates that they have not led to significant improvements in breastfeeding rates or protections against aggressive marketing tactics. Given this track record, there is an urgent necessity for a comprehensive, binding regulatory framework that enforces compliance and establishes clear accountability measures.



Background

Overview of the MAIF Agreement

Marketing in Australia of Infant Formulas: The MAIF Agreement is Australia's response to the WHO Code. It is a non-compulsory voluntary agreement that Australian manufacturers can become signatories to – if they choose. The MAIF Agreement restricts the advertising of infant formula (0–12 months) to the public and health workers. It does not **prohibit** growing-up milks (GUMS), bottles, teats, and other products advertised as partial or full replacements for breastfeeding. MAIF has been identified as ineffective by the **ACCC** and is currently under review by the Federal Department of Health and Ageing.

An important point that needs to be understood for the context of this review is that the ACCC should never have been tasked with stewardship of the MAIF Agreement. The ACCC promotes competition in markets to benefit consumers, businesses, and the community. The International Code and WHA resolutions are human rights instruments and therefore it is egregious that the Australian Government has tasked an organisation that handles matters of trade with caretaker responsibilities. It is time for the Government to prioritise health and human rights over trade.

The WHO Code

In 1981 the *International Code of Marketing of Breast-milk Substitutes* was **drafted in response** to the unethical and aggressive marketing of infant formula and the idealisation of bottle feeding over breastfeeding by companies such as Nestlé. It is estimated that over 66,000 infants died from **malnourishment** or infection, and millions more became seriously unwell or sick due to inappropriate feeding practices associated with the use of breastmilk substitutes. Because of the special vulnerability of this population group, it was decided that usual marketing practices should not apply. Consequently, the World Health Assembly (WHA) adopted **the Code** which prohibits the marketing of breastmilk substitutes, feeding bottles, and teats. Since the formation of the International Code, there have been 20 **WHA resolutions** to the International Code urging governments to adopt tighter controls which plug loopholes that industry has found in the Code to exploit. One such product is toddler drink, which is an ultra-processed milk powder marketed for use in infants 12 months old to 3 years. The product is entirely unnecessary as infant formula is recommended to be discontinued at 12 months. Toddler drink was invented to cross-promote infant formula and circumvent **marketing restrictions** that often stop at the 12-month age.

A new resolution was adopted by Member States in May 2016 during the World Health Assembly (WHA), which urges countries to follow the World Health Organization's guidelines on ending the inappropriate promotion of food products for infants and young children. The objective is to further safeguard breastfeeding, prevent obesity and chronic diseases, and encourage a healthy diet. Furthermore, the guidelines aim to provide caregivers with accurate and transparent information on feeding. The World Health Organization formulated these guidelines as a response to mounting evidence suggesting that advertising breastmilk substitutes and some commercial foods for infants and young children hinders progress towards optimal feeding practices. These guidelines complement existing tools such as the International Code, relevant WHA resolutions, and the *Global Strategy on Infant and Young*



Child Feeding. The **resolution** encourages Member States to establish stronger national policies that protect children under the age of 36 months from harmful marketing practices.

'Effective regulatory frameworks for ending inappropriate marketing of breast-milk substitutes and foods for infants and young children in the WHO European Region' is a policy brief that provides step-by-step guidance on how to review the current level of national implementation of the International Code, WHA resolutions, and the Guidance on Ending Inappropriate Promotion of Food for Infants and Young Children, and then proceed to strengthen measures and establish effective systems for implementation and enforcement. This includes the use of a "model law" developed specifically for the Region to demonstrate what effective regulations should look like. The Australian Government should be utilising these instruments and working closely with WHO, UNICEF and International Baby Food Action Network (IBFAN) to ensure effective implementation, free from industry influence.

Previous ACCC authorisations

Since the previous Authorisation in 2021, there has not appeared to be a change in behaviour from signatories, and there has been a remarkable increase in digital marketing techniques. Due to the voluntary nature of MAIF, mothers are being exposed to more predatory marketing than ever before.

The previous 3 years have allowed for the determination that MAIF is no longer fit for purpose, and in fact recommends the establishment of a stronger regulatory framework in the form of a legislated, prescribed, mandatory code. This is long overdue, and there are international cases that Australia should be looking to for implementation examples.

The INC has attempted to undermine the findings of many individuals, advocacy groups and organisations that have expertise in navigating the damage that has resulted from an ineffective voluntary framework. Previous authorisations have been granted to a common denominator only – industry.

Review of the MAIF Agreement

- **BAA's Response to 2.16, Recommendation 1:**

We oppose the recommendation to 'develop a stronger regulatory framework to restrict the marketing of infant formula in Australia by adopting a prescribed mandatory code'. This recommendation is fundamentally flawed and fails to address critical issues surrounding infant nutrition and maternal health.

Rationale:

1. Inadequate Scope of Regulation

The proposed regulatory framework is far too narrow. It focuses exclusively on marketing infant formula, neglecting a more comprehensive examination of all breast milk substitutes (BMS), including toddler milks and other complementary feeding products. This narrow



approach does not account for the myriad of products that can mislead consumers and undermine breastfeeding efforts.

2. Legislation as a Minimum Standard

Recommending a mandatory code is inadequate. Legislation must serve as a foundation for real accountability and must include substantial penalties and fines for violations. A 'regulatory framework' will only enable manufacturers to exploit loopholes, allowing harmful marketing practices to persist unchecked. We must not accept weak measures that prioritise corporate interests over the health and safety of infants.

- **BAA's Response 2.16, Recommendation 2 and 3:**

We strongly oppose retaining the current scope of regulated products, as it is far too limited. The evidence clearly demonstrates that the current scope of regulated products is inadequate. Breastfeeding Advocacy Australia (BAA) has submitted numerous reports of breaches involving products beyond infant formula, such as toddler milks and follow-on formulas. These products are aggressively marketed in ways that undermine breastfeeding practices and target vulnerable parents. The breastmilk substitute industry's tactics exploit regulatory loopholes, showing a deliberate intent to circumvent the guidelines. Therefore, limiting the regulation solely to infant formula fails to address the broader spectrum of harmful marketing practices.

Legislation, not a regulatory framework, is needed. A legislation that includes all breastmilk substitutes, including but not limited to toddler milks. A legislation backed by penalties and fines for breaches. Simply monitoring, and leveraging Food Standards Australia and New Zealand's findings is insufficient. Immediate, decisive action is necessary to curb aggressive marketing practices that undermine breastfeeding. A broader legislative approach, with enforceable penalties, is essential to ensure genuine protection for mothers and infants.

- **BAA's Response 2.16, Recommendation 5:**

Robust legislation that not only adheres to the International Code as a minimum standard but also surpasses it is required. All products that are marketed to replace breastfeeding should be covered in its scope including, but not limited to, infant formula (0–12 months), follow-on formula (6–12 months), toddler drinks (12+ months), bottles and teats, pacifiers/dummies, and formula dispensers. This legislation should encompass pregnancy through to 60 months, include penalties for violations, and actively eliminate aggressive marketing practices.

- **BAA's Response 2.16, Recommendation 6 and 7:**

See response 1. Legislation with penalties and fines for breaches as a minimum.

- **BAA's Response 2.16, Recommendation 9:**

Raising awareness about the 'appropriate' use of infant formula is insufficient and risks normalising its use as an acceptable alternative to breastfeeding rather than emphasising that formula should be a last resort. Formula feeding carries numerous health risks and serious consequences, including increased susceptibility to infections, gastrointestinal issues, and chronic conditions like obesity and diabetes later in life. It also lacks the



antibodies and protective factors found in breastmilk that are essential for an infant's immune system development.

Healthcare professionals and parents should be educated on the risks and limitations of infant formula, emphasising that it is only necessary when breastfeeding is truly not possible. Education must focus on the importance of breastfeeding as the healthiest, safest option for infant nutrition and the need for skilled support to help mothers initiate and sustain breastfeeding, even when challenges arise.

Simply promoting the 'appropriate' use of formula without addressing its risks and the importance of breastfeeding as the priority fails to protect the health of infants and undermines global and national health recommendations.

- **BAA's Response 2.16, Recommendation 10:**

Review findings released by Allen + Clark concerning the recommendation to establish policies and guidelines for donating infant formula in emergency and disaster contexts. While the intention behind this recommendation may stem from a desire to provide assistance during crises, we strongly oppose this approach based on the significant and detrimental implications for maternal and child health.

Rationale:

1. Increased Risks in Emergency Situations

As noted in recent reviews, Australia has seen a rise in emergencies, including the COVID-19 pandemic and natural disasters like floods and bushfires. Donating infant formula may seem beneficial, but it poses severe health risks to vulnerable populations. Mothers displaced to temporary accommodations lack essential resources, such as clean water, sterilising equipment, and safe preparation methods for infant formula. The absence of these necessities heightens the risk of severe gastrointestinal infections, including diarrhea and gastroenteritis, which can be life-threatening for infants.

2. Safety Concerns with Powdered Formula

The preparation and handling of powdered infant formula demand rigorous hygiene standards that are often impossible to meet in emergency contexts. For instance, mixing powdered formula with water that has been heated to at least 70 degrees Celsius is critical for eliminating potential pathogens. In situations where resources are scant, such safety measures are frequently disregarded, exposing infants to harmful bacteria such as *Cronobacter sakazakii* and *Salmonella*. These pathogens pose a real threat, leading to severe health complications, including meningitis and severe gastrointestinal infections.

3. The Imperative of Breastfeeding

Allen + Clark's findings must acknowledge the critical role breastfeeding plays in ensuring the health of infants, particularly during emergencies. Breastmilk provides not just nutrition but, also immunity, which is indispensable in crisis situations. With the right support, mothers can successfully continue breastfeeding, even amid stress. Promoting formula use can inadvertently disrupt this vital practice, leading to decreased milk production and



compromising the infant's health. It is essential to prioritise resources and support systems that empower mothers to maintain breastfeeding, ensuring that both mother and child remain healthy.

4. Negative Impact on Maternal Mental Health

Moreover, the decision to introduce formula can have a profoundly negative impact on a mothers' mental health. During stressful periods, mothers may mistakenly believe they are losing their milk supply, leading them to turn to formula as a quick fix. This not only undermines their breastfeeding efforts but also diminishes their overall mental wellbeing. Support should focus on reassuring and equipping mothers to breastfeed, thus boosting their confidence and reducing stress, which is critical for both mother and infant health.

5. Adherence to International Guidelines

Importantly, the World Health Organization and other reputable bodies endorse exclusive breastfeeding in emergencies. The *Operational Guidance on Infant and Young Child Feeding in Emergencies* emphasises the necessity of sustaining breastfeeding as the primary feeding method for infants in crisis situations. Any initiative promoting the distribution of breastmilk substitutes undermines these guidelines, jeopardising the health and wellbeing of infants, especially in vulnerable communities.

In light of the review findings and the overwhelming evidence against the recommendation to facilitate infant formula donations, we strongly urge the ACCC to reject this proposal. Instead, we implore you to advocate for policies and initiatives that support and empower breastfeeding mothers in emergency contexts. Breastfeeding is not merely a nutritional choice; it is a fundamental component of child health that provides lifelong benefits.



ACCC assessment

It will be imperative for any governing body who has influence over decisions regarding the MAIF Agreement to ensure that there are protections in place for mothers and infants. The only option is to implement a more robust legislated framework with penalties and fines. Anything less than this, or maintaining the status quo, will be of detriment to the public.

- **BAA's Response:**

Support for 4.1: We agree with the ACCC's careful consideration of the balance between public benefits and detriments. Ensuring that any authorisation aligns with the broader public interest is essential, especially when it concerns potential anti-competitive behaviour. This aligns with our commitment to promoting public health and protecting breastfeeding as the best practice for infant feeding.

Support for 4.2: We understand the ACCC's stance that regulating the Food Standards Australia and New Zealand Code and enforcing compliance with WHO recommendations is not within their jurisdiction. We support this clarity of roles and responsibilities, as it allows for appropriate bodies like the Australian Government and health authorities to take the lead on these essential matters. It ensures that health policy decisions remain within the scope of those best equipped to make them.

Support for 4.3: We appreciate the ACCC's transparency in outlining the limits of its authority and scope. By focusing on commercial conduct within Australia that falls under its jurisdiction, the ACCC sets realistic expectations for its assessment and enforcement capabilities. The responsibility for monitoring international obligations like the WHO Code, and addressing health policy issues related to infant feeding falls directly within the remit of the Department of Health and related government agencies. By clearly defining these boundaries, the ACCC ensures that advocacy efforts, including those by BAA, are directed towards the appropriate regulatory and health bodies equipped to create effective and lasting solutions for breastfeeding protection and support.



Future with and without the Conduct

The *Australian National Breastfeeding Strategy 2019* (ANBS) is an essential framework aimed at improving breastfeeding rates and promoting infant health across the country. It outlines comprehensive goals to support mothers in initiating and sustaining breastfeeding, addressing key barriers such as lack of support and misinformation. The successful implementation of this strategy is crucial, as it not only enhances maternal and infant health outcomes but also fosters a culture that recognises the importance of breastfeeding as the optimal form of infant nutrition.

Integral to the ANBS is the inclusion of the World Health Organization's (WHO) *International Code of Marketing of Breast-milk Substitutes*. This code provides critical guidelines that restrict the marketing of infant formula and related products, ensuring that mothers receive truthful information and appropriate support for breastfeeding. By fully implementing the ANBS and adhering to the WHO Code, Australia can create a protective environment for breastfeeding, safeguard the health of infants, and uphold the rights of mothers to receive unbiased support. Neglecting to implement these frameworks undermines the health of future generations and diminishes the efforts to cultivate a supportive atmosphere for breastfeeding in Australia.

The Department of Health is acutely aware that the ANBS was commissioned by the Australian government, providing a clear roadmap to enhance breastfeeding rates across the nation. In light of the ACCC's findings, it is imperative that political will and funding are dedicated to the full implementation of the ANBS. The strategy represents a vital commitment to safeguarding maternal and infant health, and its effective execution is essential for overcoming the challenges identified in the ACCC's assessment.

Conclusion on Public benefits

- **BAA's Response, 4.87:**
We support.



Summary

Breastfeeding rates

Australia has limited data on breastfeeding rates; however, evidence suggests that countries that have enacted legislation aligned with the International Code tend to have **higher rates** of exclusive breastfeeding and continued breastfeeding compared to those that have not implemented the Code or have adopted only a few of its provisions. The implementation of this Code is strongly associated with increased breastfeeding rates. It is misleading to disregard the impact of breastmilk substitutes on breastfeeding, especially given that sales of commercial milk formulas have risen to approximately US\$55 billion annually, with a projected growth rate of 4.35% from 2024 to 2029.

Marketing tactics that disrupt informed decision-making, downplay the risks of ultra-processed products, and employ emotional manipulation are prevalent, leading to a notable decline in breastfeeding rates from initiation to six months. The correlation between aggressive marketing techniques and this decrease is evident.

As an advocacy group, Breastfeeding Advocacy Australia (BAA) witnesses, in real-time, the experiences of Australian mothers. We collect data showing how marketing undermines their breastfeeding journeys, accompanied by women's stories that clearly articulate the reasons for not meeting their breastfeeding goals. It is simply untrue to claim that breastfeeding rates are increasing.

Extent to Which the MAIF Agreement Restrains Marketing

Marketing is an omnipresent aspect of daily life, experienced by virtually everyone. However, the marketing of formula milk products differs significantly from the promotion of everyday items like shampoo or shoes. The feeding practices of children during their first three years profoundly affect their survival, health, and development throughout their lives. Therefore, decisions about how we feed our infants and children should be based on the best available information and **truthful evidence**, influenced solely by what is best for the child and parents, free from commercial interests.

The report *How the Marketing of Formula Milk Influences Our Decisions on Infant Feeding* exposed the extensive and aggressive marketing tactics employed by the formula milk industry, which often violate the *International Code of Marketing of Breast-milk Substitutes*. The WHO and its partners are actively working to help countries fully implement the standards of the Code and protect parents from harmful marketing influences. Unfortunately, the extent to which the MAIF Agreement restrains marketing is insufficient.

Voluntary Nature of the MAIF Agreement

The MAIF Agreement is voluntary, which is a known problematic model of regulation. Without mandatory participation, there is no enforcement mechanism to ensure industry compliance. This lack of enforceability has allowed current signatories to ignore or partially adhere to the agreement, as evidenced by consistent breaches – particularly by repeat offenders listed on the MAIF website.



Moreover, this model leads to inconsistent standards, as industry signatories often exploit loopholes or regularly breach their requirements. Consequently, accountability is limited due to the absence of penalties for such breaches. From a consumer perspective, this arrangement creates a facade that misleads consumers into believing they are being protected, even though it is unlikely that an individual will review recorded complaints before purchasing a product.

This suggests that industry players sign the agreement primarily to enhance their image and leverage their 'compliance' as a marketing tool, rather than making substantive efforts to adhere to the agreement. Additionally, the Agreement only covers marketing up until the age of 12 months, allowing cross-promotion as a loophole to market inappropriate products, particularly through digital marketing techniques.

The voluntary nature of MAIF leaves a significant segment of the market unregulated. Any future code must be mandatory across all breastmilk substitutes, including infant formula, toddler drinks, and follow-on formulas. This mandatory code will ensure consumer protection and full transparency, eliminating any uncertainty regarding compliance.

Voluntary agreements create opportunities for lobbying for leniency, prioritising profit over public health, generating loopholes, and influencing monitoring and enforcement. An evidence-based, legislated code with penalties and fines is essential to protect priority populations of women and children in Australia. Breastfeeding Advocacy Australia has long maintained that the marketing techniques of both signatories and non-signatories are equally aggressive and predatory. However, signatories often use cross-promotion as a loophole to market their products. Ultimately, the voluntary nature of MAIF undermines breastfeeding protection and is unlikely to make a significant impact without reform.



Annexure



Annexure to ACCC Draft Determination

The World Health Organization, in multiple research papers and directives, describes the artificial formula industry as aggressive. The Australian government fails to recognise the true nature of this industry and continues to give it unwarranted credibility and status.

Breastfeeding Advocacy Australia received a solicitation (see page 22) from Nestlé in an effort to influence our position in relation to the ACCC draft determination.

Nestlé acts with impunity, exploiting the Australian government's neglect of requiring industry accountability.



'The voluntary code is not working': Experts call for an end to the 'exploitative marketing' used by the baby formula milk industry

08-Feb-2023 By Oliver Morrison

Formula milk marketing tactics are exploitative, and regulations need to be urgently strengthened and properly implemented, according to a new three paper series published in The Lancet.

<https://www.foodnavigator.com/Article/2023/02/08/The-voluntary-code-is-not-working-Experts-call-for-an-end-to-the-exploitative-marketing-used-by-the-baby-formula-milk-industry>



Nestlé's corporate promises fail to match their actions

According to allegations recorded in Wikipedia, Nestlé has been involved in a number of controversies: slavery, child labour, contaminated and infected food products, preventing access to non-bottled water to impoverished countries, actively spreading disinformation about recycling, illegal water pumping from drought stricken native American reservations, price fixing, extensive union busting activity and deforestation.

*'Nestlé is the target of a boycott because it contributes to the unnecessary death and suffering of infants around the world by aggressively marketing baby foods in breach of the **International Code of Marketing of Breastmilk Substitutes and the 20 World Health Assembly Resolutions** that have been adopted by the World Health Assembly since 1981 (together called The International Code).*

*Nestlé uses its power and wealth to influence policies in their favour. For more see **Policy Basics / Conflicts of Interest / Global Monitoring / Policy Blog**'*

~ <https://www.babymilkaction.org/nestlefree>

Companies not only lobby and pressure low- and middle-income countries, similar tactics are applied to high income countries.

'Companies commonly influence public health through lobbying and party donations. This gives politicians and political parties an incentive to align decisions with commercial agendas.'

~ <https://www.wits.ac.za/news/latest-news/opinion/2024/2024-04/sugar-in-baby-food-why-nestle-needs-to-be-held-to-account-in-africa.html>

It is clear that Nestlé attempts to cultivate a positive corporate image when the reality is subterfuge, deception and the distortion of reality.

Nestlé's statement that they endorse breastfeeding as the "best choice" is disingenuous and cached with subliminal riders; "maternal diet, breastfeeding is



not always an option for every family". Nestlé fails to unconditionally endorse the vital role breastfeeding plays in health and wellbeing.

Breastfeeding is the competitor of artificial formula feeding companies. As such, attempting to influence a competitor could be seen as being anti-competitive behaviour.

In fact, the industry group, the Infant Nutrition Council, may be considered a cartel working in opposition to their competitor, breastfeeding.

Several issues face companies like Nestlé. Should MAIF be repealed, then they would be at a disadvantage to their competitors based on their statements to, in their words, abide by the WHO Code. When legislation with penalties and fines is introduced the expansion of artificial formula use will be greatly reduced. Because Australia is a developed country, the global impact on infant feeding will be similar to tobacco reduction. Breastfeeding will increase as other nations follow Australia's example.

Australia stands at a pivotal point in health protection history. We have led the world in tobacco and vaping marketing restrictions and saved countless lives.

Similarly, we now have the opportunity to replicate this leadership with artificial formula marketing legislation.

The power of industry has created an artificial feeding platform. The same would have happened with vaping had the government not stepped up to curtail the rapid acceptance of vaping as a smoking substitute.

Vaping and artificial formula have very similar roles in society. Both are a product of last resort, both should only be used under strict medical supervision, not available for general consumption.

The tobacco and vaping marketing laws could be applied to artificial formula. As a consequence, there would be a significant reduction in artificial feeding social influence. The value of breastfeeding would be enhanced and the necessary structures to support breastfeeding would gain popularity.

The recent World Health Organization directive for artificial formula use to be from 0–6 months has received a lacklustre response from Australian health bodies. This is an example of the influence of the artificial formula lobby having



created, through propaganda, a faction, with the belief that artificial feeding is benign and a necessity.

<https://www.who.int/publications/i/item/9789240081864>

This influence and lack lustre response extends to several areas of infant care including the WHO directive to introduce Mother Newborn Intensive Care Units (MNICU) to improve infant survival.



Mother Newborn Care Unit: An innovation in care of small and sick newborns

The failing of the proposed Australian Centre for Disease Control omitting Breastfeeding as part of their remit highlights another failure.

The preventative disease impacts of Breastfeeding are integral to health. The role Breastfeeding plays in survival during emergencies is vital.

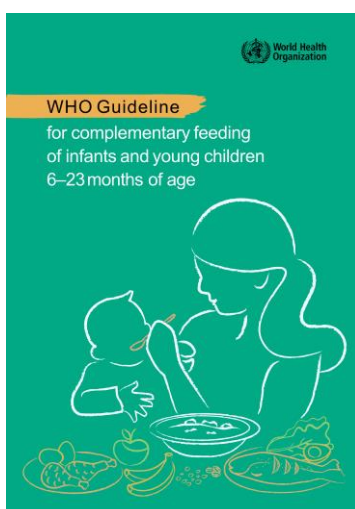
Currently, in the USA the flooding of artificial formula into disaster areas is excessive and against the IYCF-E Operational Guidance. Australia must move to ensure this is not replicated in our future disasters.

Operational Guidance on Infant Feeding in Emergencies (OG-IFE) version 3.0 (Oct 2017) | ENN

Academy of Breastfeeding Medicine Position Statement: Breastfeeding in Emergencies | Breastfeeding Medicine

All these examples evolve from one source, the rampant influence of the formula industry on Government and Society from their marketing and lobbying.

Australia stands at the crossroads. Do we continue the same path, or do we become a world leader in breastfeeding protection as we have done with tobacco and vaping marketing legislation?



WHO Guideline for complementary feeding of infants and young children 6-23 months of age



Email received by Breastfeeding Advocacy Australia from Nestlé. Email received, 1 October 2024

Nestlé Australia (Nestlé) is a long-standing signatory to the Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement (**MAIF Agreement**).

Breast milk is the best nutritional choice for babies, providing ideal nutrition for healthy growth and development. We are committed to supporting breastfeeding and recommend breastfeeding over all other feeding alternatives. We also recognise that optimal breastfeeding is not always an option for every family. For infants who are not breastfed or who are partially breastfed, Australian *Infant Feeding Guidelines* provide that commercial infant formulas should be used as an alternative to breast milk until 12 months of age.

We appreciate that a number of organisations and people wish to see the MAIF Agreement discontinued, however, the implications of the ACCC's Draft Determination deeply concern us. I would like to explain our view:

- We believe the MAIF Agreement, together with the MAIF guidance documents developed over time, has been an effective self-regulatory code. It has provided a sound compliance framework for many years for the vast majority of infant formula manufacturers and importers who are signatories.
- We also agree that well-drafted and well-implemented regulation is the most effective way to secure responsible marketing practices for infant formula products in Australia and create a level playing field. However, this is a matter for government, and it is reasonable to expect that any regulation will take some time to implement.
- Should the Draft Determination be finalised, there will be a vacuum with no specific restrictions on infant formula advertising and promotion in Australia by industry, beyond the Food Standards Code and general restrictions under Australia consumer laws. There will also be no framework to hold signatories to account.
- In the absence of specific restrictions, growth in advertising and promotion of infant formula products is inevitable. While some manufacturers, including Nestlé, will be bound by internal policies, these policies generally cover a narrower scope of products compared to the MAIF Agreement.
- Until such time as there is regulation in place, reauthorisation of the MAIF Agreement in its current form is the most practical way to ensure that there is a framework in place to restrict inappropriate marketing of infant formula products in Australia by signatories.

We have written to the ACCC expressing these concerns, and ask you to consider them should you choose to respond to the Draft Determination. I have attached a copy of this letter.

I must add that Nestlé takes its compliance obligations very seriously and we are committed to marketing breast milk substitutes responsibly: this is fundamental to our approach and our values as a company. Globally, we implement our *Nestlé Policy for Implementing the WHO Code*, an industry-leading policy on the responsible marketing of breast milk substitutes, and report annually on our compliance. You can read more on our website: <https://www.nestle.com/sustainability/performance-reporting/breast-milk-substitute-compliance>.

I am happy to discuss this further.

Regards,



Attachment referred to in Nestlé's email above



Nestlé Good food, Good life

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27 September 2024

Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

Infant Nutrition Council Limited - application for revocation of authorisation AA1000534 and substitution of AA1000665

Nestlé Australia (**Nestlé**) is a long-standing signatory to the Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement (**MAIF Agreement**) and a member of the Infant Nutrition Council. We appreciate the opportunity to respond to the [ACCC's Draft Determination on the application lodged by the INC in respect of the MAIF Agreement](#) and associated guidelines.

Breast milk is the best nutritional choice for babies, providing ideal nutrition for healthy growth and development. We are committed to supporting breastfeeding and recommend breastfeeding over all other feeding alternatives. We also recognise that optimal breastfeeding is not always an option for every family. For infants who are not breastfed or who are partially breastfed, Australian *Infant Feeding Guidelines* provide that commercial infant formulas should be used as an alternative to breast milk until 12 months of age¹.

Nestlé takes its compliance obligations very seriously and we are committed to marketing breast milk substitutes responsibly. Compliance is fundamental to our approach and our values as a company. Globally, Nestlé implements and upholds our *Nestlé Policy for Implementing the WHO Code (Nestlé Policy)*², an industry-leading policy on the responsible marketing of breast milk substitutes. In Australia, we comply with the MAIF Agreement and our global Nestlé Policy, whichever is stricter.

We believe the MAIF Agreement, together with the MAIF guidance documents developed over time, has been an effective self-regulatory code. It has provided a sound compliance framework for many years for the vast majority of infant formula manufacturers and importers who are

¹ National Health and Medical Research Council (2012) (**NHMRC**) *Infant Feeding Guidelines* 2012 [Infant Feeding Guidelines: information for health workers](#) | NHMRC. See also NHMRC's April 2024 statement: [Infant Feeding Guidelines](#) | NHMRC

² The Nestlé Policy is available here: [nestle_policy_who_code_en.pdf](#)

Building D, 1 Homebush Bay Drive, Rhodes NSW 2138



Attachment referred to in Nestlé's email continued



Nestlé Good food, Good life

signatories, with demonstrated compliance by major signatories. As well, the MAIF Agreement has been adapted to the changing marketing landscape through updated guidance, developed with the input of government. This has included guidance on the use of digital media within the control of signatories.

Our Nestlé processes for compliance with the MAIF Agreement are part of our every day. Our extensive internal training, review and governance processes are informed by MAIF guidance documents in addition to the information published by the MAIF Complaints Committee and its predecessors about complaints and decisions. This includes systems to review digital channels within our control. We also provide regular reminders and guidance to our retail customers about the MAIF Agreement and Nestlé's compliance policies and obligations.

It is important to appreciate that within the industry there is a strong commitment to the MAIF Agreement and it has supported norms of behaviour that help protect and support breastfeeding. This includes the requirement that signatories provide clear information on the superiority of breast milk, as well as restrictions on inappropriate marketing. In addition, signatories monitor and hold each other to account. The MAIF Agreement has also been useful within the industry in helping guide new signatories to understand appropriate behaviour.

We are deeply concerned that the ACCC is proposing not to re-authorise the MAIF Agreement. Should the Draft Determination be finalised, there will be a vacuum with no specific restrictions on infant formula advertising and promotion in Australia by industry, beyond the Food Standards Code and general restrictions under consumer laws. There will also be no framework to hold signatories to account. In the absence of specific restrictions, growth in the advertising and promotion of infant formula products is an inevitable result. While some manufacturers, including Nestlé, will continue to be bound by internal policies, such policies generally cover a narrower scope of products than those covered by the MAIF Agreement.

We support well-drafted and well-implemented regulation as the most effective way to secure responsible marketing practices for infant formula products in Australia and create a level playing field. We acknowledge this is a matter for government and will take time – we look forward to further consultation with government in this regard.

In the meantime, we support reauthorisation of the MAIF Agreement in its current form to ensure that a long-standing framework remains in place to restrict inappropriate marketing of infant formula products in Australia by signatories.

Yours sincerely,



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