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## **Response to the Infant Nutrition Council Limited application for authorisation A91506 and A91507, *Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement (MAIF Agreement)***

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### **Introduction**

An application by the Infant Nutrition Council (INC) to the Australian Competition and Consumer Commission (ACCC) for re-authorisation of the Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement (MAIF Agreement) was lodged on 23 July 2015 with comments due by 14 August. The MAIF Agreement is a voluntary self-regulatory code of conduct developed by the industry to govern its marketing of infant formula for infants up to 12 months.

This submission sets out why the MAIF Agreement is not fit for purpose as Australia's official application of the World Health Organization's (WHO) International Code of Marketing of Breast Milk Substitutes *and subsequent World Health Assembly (WHA) resolutions* and does not protect optimal breastfeeding effectively in Australia's current regulatory and commercial environment.

This submission explains why it is highly inappropriate to reauthorise the MAIF Agreement for 10 years when WHO has recently released new recommendations on the marketing of foods to infants and children and these will be considered by the WHA in 2016.<sup>1</sup> Australia's public health regulation of marketing breastmilk substitutes and foods for children may be pre-empted by the proposed reauthorisation of the MAIF Agreement now before the ACCC. Our recommendation is that any authorisation should be only interim, until the Australian Parliament has considered its response to the revised WHO recommendations.

The WHO recommends six months of exclusive breastfeeding and ongoing breastfeeding for two years or more for the optimal health of mothers and children, but less than 15% of Australia's children are exclusively breastfed and only around one in twenty receives continued breastfeeding. Optimal breastfeeding in Australia has not improved over the period since 1992 when the MAIF

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<sup>1</sup> WHO Consultation on the public draft of the *Clarification and guidance on inappropriate promotion of foods for infants and young children* <http://www.who.int/nutrition/events/inappropriate-food-promotion-consultation/en/> Accessed 9 August 2015

agreement was first developed, and it is evident that much stronger action is needed to protect public health.

Appendix 1 of this document contains our comments against each section of the INC application. Examples of marketing practices that are not covered by the MAIF Agreement but are within the scope of the WHO International Code for Marketing of Breast-milk Substitutes are provided in Appendix 2.

## Executive Summary

1. The imperative to prevent commercial marketing of infant and young child food products from undermining breastfeeding has increased since 1992.
  - a. There is now greater knowledge of the harms of suboptimal breastfeeding than when the MAIF Agreement was introduced. Australia falls far short of the World Health Organisation recommends exclusive breastfeeding for six months and continued breastfeeding for two years or more (WHO 2003). In 2010 only 39% of infants were exclusively breastfed to 4 months; and only 15% were breastfed to around 6 months.<sup>2</sup> Ongoing breastfeeding has barely improved (as a result of paid maternity leave) with less than one in four infants still breastfed at aged 12 months and 9% at 18 months<sup>3</sup>
  - b. Partial breastfeeding and premature weaning in developed as well as developing economies have been shown to lead to suboptimal child and maternal health outcomes and limitations to children's intellectual development, with health system costs estimated to be at least \$100 million in Australia in 2002.<sup>4</sup>
  - c. In the light of increasing concern for the rapid increase in childhood obesity and lifetime risks of non-communicable diseases in Australia, evidence has also emerged that children who are not breastfed have increased risk of overweight/obesity and type-2 diabetes.<sup>5</sup> Mothers also have increased risk of breast cancer.<sup>7</sup> Epidemiological studies suggest around 8-24% of chronic disease in Australia may be attributable to formula feeding of infants during the 1960s when industry marketing of breastmilk substitutes was unregulated and aggressive.<sup>8</sup>
2. Protection of marketing of breastmilk substitutes is now included within the broader scope of protection of marketing for a wide range of foods for children. Several important international and domestic reviews that are relevant to public health policy on marketing of breastmilk substitutes are underway. These include:
  - a. Consultation by the World Health Organization (WHO) on marketing of foods for children (including breastmilk substitutes) for the World Health Assembly meeting in 2016;

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<sup>2</sup> Australian Institute of Health and Welfare 2011, 2010 Australian National Infant Feeding Survey: Indicator Results. Canberra: AIHW.

<sup>3</sup> Australian Institute of Family Studies (AIFS) 2008, Growing Up In Australia: The Longitudinal Study of Australian Children, Annual Report 2006-07; [www.aifs.gov.au/growingup/pubs/ar/ar200607/breastfeeding](http://www.aifs.gov.au/growingup/pubs/ar/ar200607/breastfeeding) (accessed 9 August 2015).

<sup>4</sup> Smith JP, Thompson JF, Ellwood DA. Hospital system costs of artificial infant feeding: estimates for the Australian Capital Territory. *Aust N Z J Public Health.* 2002;26(6):543-551.

<sup>5</sup> Horta, B. L., Bahl, R., Martinez, J. C. and Victora, C. G. (2007) Evidence on the long term effects of breastfeeding: systematic review and meta analyses, World Health Organisation, Geneva.

<sup>6</sup> Horta BL, Victora CG. Long-term effects of breastfeeding: a systematic review. World Health Organization, Geneva 2013

<sup>7</sup> Beral V, Bull D, Doll R, Peto R, Reeves G. 2002. Breast cancer and breastfeeding: collaborative reanalysis of individual data from 47 epidemiological studies in 30 countries, including 50 302 women with breast cancer and 96 973 women without the disease. *The Lancet*, 358, 187-95

<sup>8</sup> Smith JP and Harvey PJ 2011. Chronic disease and infant nutrition: is it significant to public health? *Public Health Nutrition* 14,2, 279-289.

- b. Renegotiation of Australia’s National Breastfeeding Strategy, which expires in 2015, and
  - c. Ongoing FSANZ review of Food Standard 2.9.1 which includes labelling requirements for infant foods that fall within the scope of the WHO Code.<sup>9</sup>
3. The Australian public is not protected sufficiently from the marketing of breastmilk substitutes because the MAIF Agreement does not give full effect to the WHO Code and subsequent World Health Assembly resolutions:
- a. Toddler milks and growing-up milks are not within the scope of the MAIF Agreement. Consumers do not differentiate between these products and infant formula and follow-on milks.<sup>10 11</sup>
  - b. Baby cereals, infant meals and drinks are not included, even if marketed for infants under 6 months of age.
  - c. Distributors and retailers (for example, supermarkets and pharmacies) are not included.
  - d. Pricing is not included.
4. The MAIF Agreement is an ineffective regulatory instrument:
- a. The MAIF Agreement has not constrained consumption of breastmilk substitutes, as indicated by the high rates of growth of sales volumes of infant formula (28%), follow on formula (44%) and toddler milk (237%) in Australia from 2009 to 2014. The total value of milk formula sales more than doubled over this period from AUD \$240 million to AUD \$546 million.<sup>12</sup> In contrast, gains in breastfeeding rates are slow.<sup>13</sup>
  - b. The MAIF Agreement is voluntary and not all industry members are signatories (i.e. members of the Infant Nutrition Council).
  - c. It applies only to companies that are signatories to the Agreement and misses major industry players that would otherwise be required to comply if a legislative regulatory instrument were adopted.
  - d. Oversight of the MAIF Agreement by the Advisory Panel on the Marketing in Australia of Infant Formula ceased in 2013<sup>14</sup> without public consultation. It was replaced by a MAIF Complaints Tribunal administered by the St James Ethics Centre.
  - e. The MAIF Agreement is not enforceable and the Tribunal has no power to impose penalties.
  - f. There is a lack of clarity about processes for bringing a complaint about a breach of the MAIF Agreement via the Department of Health and then to the MAIF Complaints Tribunal, its funding arrangements and reporting of decisions and outcomes to the public.
  - g. The definition of the ‘infant formula market’ adopted in MAIF does not capture substitutable products, including toddler and follow-up formulas (consumers cannot differentiate these products).<sup>10</sup>
  - h. Health claims for infant formula can be made through weak grounds that speculatively link ingredients to health outcomes, despite the prohibition of health and nutrition

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<sup>9</sup> FSANZ 2012 Consultation Paper: Regulation of Infant Formula Products in the Australia New Zealand Food Standards Code, <http://www.foodstandards.gov.au/code/infant/Pages/default.aspx> Accessed 11 August 2015

<sup>10</sup> Berry NJ, Jones SC and Iverson D. 2012. Toddler milk advertising in Australia: Infant formula advertising in disguise? *Australasian Marketing Journal* 20, 24–27

<sup>11</sup> Berry NJ, Jones SC and Iverson D. 2012. Circumventing the WHO Code? An observational study. *Archives of Disease in Childhood*;97:320–325

<sup>12</sup> Euromonitor International 2014. *Baby Food In Australia*.

<sup>13</sup> Smith J 2007. The contribution of infant food marketing to the obesogenic environment in Australia. *Breastfeeding Review*. 15,1 23-35

<sup>14</sup> Department of Health <http://www.health.gov.au/internet/main/publishing.nsf/Content/health-pubhlth-publicat-document-brfeed-complaints.htm>, accessed 8 August 2015

claims in Australian Food Standard 2.9.1. These claims may also be made through line branding and claims for toddler milk, which are outside the scope of the MAIF Agreement.

5. As a result, the MAIF Agreement should be replaced with a mandatory regulatory instrument that gives full effect to the WHO Code and subsequent World Health Assembly resolutions, as recommended in *The Best Start* 2007 report of the Parliamentary inquiry into the health benefits of breastfeeding.
6. In the interim, consideration should be given to maintaining at least the limited protection of breastfeeding provided by the MAIF Agreement to ensure that public policies that constrain marketing of foods for children are recognised as part of Australia's regulatory and commercial environment.

### Recommendations

1. The MAIF Agreement should **not** be reauthorised for 10 years, but for a lesser period of no more than two years, pending the reports and consultation in Australia on the policy reviews mentioned above.
2. The MAIF Agreement should conform with the latest WHO consultation document on promotion of foods for children currently available online.<sup>15</sup> Reauthorisation of the current MAIF Agreement will lock in the industry's outdated and inadequate arrangements that exclude follow-on and toddler formula.
3. The MAIF Agreement should be replaced with legislation that gives full effect to the WHO Code and subsequent World Health Assembly resolutions and WHO recommendations on promotion of foods for children.
4. Infant formula is no ordinary commodity and has the potential to cause considerable harm if marketed and consumed inappropriately.<sup>16</sup> It should be given special consideration by ACCC in collaboration with government health agencies.

### Disclaimer

These comments represent the personal views of Julie Smith, Libby Salmon and Phillip Baker and not the official position of the Australian National University or the Australian Breastfeeding Association.

### Declaration of Interests

Dr Julie Smith and Libby Salmon are also volunteer breastfeeding counsellors and members of the Australian Breastfeeding Association. Dr Smith is funded by an ARC Future Fellowship. Libby Salmon is a PhD candidate at the Regulatory Institutions Network, ANU funded by an Australian Postgraduate Award. Dr Phillip Baker is a Research Fellow at the Regulatory Institutions Network, ANU.

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<sup>15</sup> WHO Consultation on the public draft of the *Clarification and guidance on inappropriate promotion of foods for infants and young children* <http://www.who.int/nutrition/events/inappropriate-food-promotion-consultation/en/> Accessed 9 August 2015

<sup>16</sup> In recognition of the vulnerability of infants and young children consuming these products, the Australian and New Zealand Food Standards Code, Standard 2.9.1 - Infant Formula Products '*is the most prescriptive of all standards in the Code that regulate a food category*'. FSANZ 2012 Consultation Paper: Regulation of Infant Formula Products in the Australia New Zealand Food Standards Code, page 7 <http://www.foodstandards.gov.au/code/infant/Pages/default.aspx> Accessed 11 August 2015

## Appendix 1. Response to Infant Nutrition Council’s supporting information

### Section 2. Authorisation of the MAIF Agreement

#### 2.1 Terms of authorisation

We strongly object to reauthorisation of the MAIF Agreement for 10 years, as requested by INC.

##### 2.1 (a)

A ten year term is inappropriate and the MAIF Agreement should be reauthorised for a lesser period of no more than two years.

It would be inappropriate to commit to the MAIF Agreement for a longer period without evaluation of the evidence presented to the World Health Assembly (WHA), and the important international and domestic reviews that are relevant to national policy on marketing of breastmilk substitutes. These include:

- a. The World Health Organization (WHO) *Consultation on the public draft of the Clarification and guidance on inappropriate promotion of foods for infants and young children* 20 July-10 August 2015. This discussion paper, based on evidence commissioned by the WHO since 2013, ‘provides a set of recommendations that countries and other stakeholders can use to ensure that promotion of foods and beverages for infants and young children is ethically sound, is guided by appropriate, enforceable legal and regulatory measures, and does not undermine optimal nutrition, including exclusive and continued breastfeeding’.<sup>17</sup> Following this consultation the document will be submitted to the WHO Executive Board in January 2016 in preparation for consideration by Member States at the World Health Assembly (WHA) meeting in May 2016.
- b. Renegotiation of Australia’s National Breastfeeding Strategy, which expires in 2015.
- c. Ongoing FSANZ review of Food Standard 2.9.1 which includes labelling requirements for infant foods that fall within the scope of the WHO Code.

Australia needs to stay in step with international health guidelines and ensure its regulations are consistent and up to date with WHO recommendations on infant and young child feeding and marketing of foods for children, which include protection from marketing of breastmilk substitutes.

Australia’s international responsibilities as a WHA member and trading partner are also relevant to the regulation of marketing breastmilk substitutes.<sup>18</sup> As a major exporter of breastmilk substitutes<sup>19</sup>

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<sup>17</sup> WHO Consultation on the public draft of the *Clarification and guidance on inappropriate promotion of foods for infants and young children* <http://www.who.int/nutrition/events/inappropriate-food-promotion-consultation/en/> Accessed 9 August 2015

<sup>18</sup> In 2013 ‘Australia exported nearly 4,000 tonnes of infant formula to China, worth \$76 million AUD. With these numbers set to continue rising in 2014, Australia is well placed to deliver a clean, premium product to the Chinese market. Maintaining this clean and safe reputation, meeting a rapidly growing demand and understanding changing regulations for exporting to China are some of the challenges that face the infant nutrition sector’ (Australian Business Council 2014 [http://www.acbc.com.au/events\\_149-1](http://www.acbc.com.au/events_149-1))

<sup>19</sup> In 2014 Australia exported 38% of its milk production, representing about 7% of world dairy trade. Of this, 75,000 tonnes of wholemilk powder was exported, a category that includes ‘infant powder’ (data not available). Dairy Australia. <http://www.dairyaustralia.com.au/Markets-and-statistics/Exports-and-trade/Latest-export-statistics.aspx> Accessed 11 August 2015.

<sup>20</sup>, Australia has moral obligations to observe the WHO Code and subsequent WHA resolutions in overseas markets, as well as Australia. These moral obligations exist irrespective of the extent of the legal implementation of the WHO Code in those markets.<sup>21 22</sup> For both domestic and transnational companies, the ethical marketing of infant food within a well-governed food regulatory system helps maintain their business reputation, as well as that of Australia, as suppliers of safe, high quality products. Consumer confidence in food regulatory systems gained particular prominence after the 2008 melamine contamination scandal in China<sup>23</sup> that was exacerbated by global infant formula recalls for other food safety issues.<sup>24</sup>

Looking more broadly at the potential effects of trade on health, questions have also been raised about the ability of Australian health policy to withstand future legal challenges that may be brought under investor protection clauses in trade agreements.<sup>25</sup>

In our opinion the MAIF Agreement should be replaced with a mandatory form of regulation, namely legislation that implements the WHO Code and subsequent WHA resolutions in full, with effective penalties for breaches and provision for independent monitoring. The case for legislation (Box 1) is relevant to the ACCC's deliberations about the effectiveness and period of reauthorisation of the MAIF Agreement.

The Department of Health's 2013 *Review of the effectiveness and validity of the operations of the Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement* stated that: 'The currency of the MAIF Agreement should be reviewed regularly through: (a) an external review every five years of the efficiency, effectiveness and appropriateness of the MAIF Agreement (b) annual reviews of the coverage and effectiveness of interpretive guidelines.' (Recommendation 7).<sup>26</sup>

However oversight of the MAIF Agreement was disrupted after the removal of APMAIF in November 2013 and annual reviews have not been reported.

Until these health, trade and regulatory matters are clarified, the current MAIF Agreement should be reauthorized for less than two years, pending its replacement.

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<sup>20</sup> Grindlay D. Victorian dairy company locks in 15-year deal to export infant formula tins to China 'A Victorian dairy company has locked in a deal to export \$600 million worth of infant milk formula to China, every year for the next 15 years.... Camperdown Dairy International had already secured 20-year contracts with dairy buyers in the United States and the Middle East and last week received permits to export Australian tins of milk to China. Hong Kong wholesale import and distribution company Great Wall Capital Trading contracted the west Victorian company as its exclusive supplier of 10 million tins annually.' "At the moment, we've only got about five million tins, out of 125 million being imported, so while the market might be slowing down, I think Australia's got some real room to grow." 27 July 2015. ABC Rural.

<http://www.abc.net.au/news/2015-07-27/dairy-exports-milk-powder-infant-formula-china-camperdown/6650804>

Accessed 11 August 2015

<sup>21</sup> Galtry J. 2013. *Punching above its weight: does New Zealand's responsibility for protecting, promoting, and supporting breastfeeding extend beyond its own borders?* Journal of Human Lactation 29, 2, 128-131.

<sup>22</sup> WHO 2013. Country implementation of the International Code of Marketing of Breast-milk Substitutes Status Report 2011 <http://www.who.int/nutrition/publications/infantfeeding/statusreport2011/en/>

<sup>23</sup> Pei X, Tandon A, Alldrick A, Giorgi L, Huang W, Yang R. The China melamine milk scandal and its implications for food safety regulation. Food Policy. 2011;36:412–20.

<sup>24</sup> Botulism threat to infant milk formula. 4 August 2013.

[[http://newsstore.fairfax.com.au/apps/viewDocument.ac?page=1&sy=nstore&kw=botulism+threat+AND+infant&pb=all\\_ffx&dt=selectRange&dr=entire&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=nrm&clsPage=1&docID=SHD130804D17L638LA9H](http://newsstore.fairfax.com.au/apps/viewDocument.ac?page=1&sy=nstore&kw=botulism+threat+AND+infant&pb=all_ffx&dt=selectRange&dr=entire&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=nrm&clsPage=1&docID=SHD130804D17L638LA9H)]. Accessed 11 August 2015.

<sup>25</sup> Friel S, Hattersley L, and Townsend R 2015. Trade Policy and Public Health. Annual Reviews of Public Health 2015. 36:4.1–4.20

<sup>26</sup> Marketing in Australia of Infant Formulas: Manufacturers and Importers Agreement. Department of Health. <http://www.health.gov.au/apmaif> Accessed 14 August 2015

## Box 1. Legislation of the WHO Code and subsequent WHA resolutions in Australia

It is reasonable to expect industry self-regulation of the WHO Code to be replaced with legislation in the near future.

The MAIF Agreement remains largely unaltered since its introduction in 1992, despite large shifts in marketing practices, in particular the use of electronic and social media. Introduction of the WHO Code and subsequent WHA resolutions into Australian law was recommended in the 2007 Parliamentary inquiry into breastfeeding *The Best Start* report.<sup>27</sup> This followed an independent review in 2000 of APMAIF and the MAIF Agreement that stated ‘if there is no commitment to work cooperatively then “serious consideration” should be given to legislative reform.’<sup>28 29</sup>

Since these reviews, the deficiencies of the MAIF Agreement in terms of its scope, oversight and implementation through a voluntary Code of Practice have been exacerbated (see below). Oversight of the MAIF Agreement was further weakened by the removal of APMAIF in 2013 and its replacement with the MAIF Complaints Tribunal. More than two years has elapsed since the last report on complaints about the MAIF Agreement was made available publically (mid 2013).<sup>30</sup>

The INC itself has stated its expectation that legislation of the WHO Code in New Zealand was likely. In its application to the New Zealand Commerce Commission for the power to enforce the INC Code of Practice on its members in December 2014,<sup>31</sup> the INC stated its expectation of future ‘mandatory regulations’ and that ‘the Ministry of Health would likely take steps to impose analogous restrictions through regulation or by engaging with each marketer and manufacturer on a bilateral basis’.<sup>32</sup>

It is inconsistent for the INC to state the need for legislation of the WHO Code in New Zealand and not in Australia, given INC’s representation of manufacturers and importers in both countries, the globalised ownership of many manufacturers in Australia and shared food standards that include labelling of infant foods.<sup>33</sup> The principle of implementing the WHO Code in both countries is the same: both countries have suboptimal breastfeeding rates in their populations, highly profitable infant formula manufacturing industries with rapidly expanding export markets and retail sectors whose marketing of breastmilk substitutes is not restricted.

Exporters have regulatory and moral obligations to meet the requirements of trading partners with respect to their implementation of the WHO Code. The WHA states that the international regulatory regime for the WHO Code is national legislation.

<sup>27</sup> Commonwealth of Australia 2007. *The Best Start*. Report on the inquiry into the health benefits of breastfeeding. House of Representatives Standing Committee on Health and Ageing.

[http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=haa/breastfeeding/report.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=haa/breastfeeding/report.htm) page 142

<sup>28</sup> Knowles 2003. *Independent advice on the composition and modus operandi of APMAIF and the scope of the MAIF Agreement*. Department of Health and Ageing. <http://www.health.gov.au/internet/main/publishing.nsf/Content/health-pubhlth-publicat-document-brfeed-knowles.htm>

<sup>29</sup> Department of Health. *Australia - The WHO Code and Breastfeeding: An International Comparative Overview* <http://www.health.gov.au/internet/publications/publishing.nsf/Content/int-comp-whocode-bf-init~int-comp-whocode-bf-init-ico~int-comp-whocode-bf-init-ico-aus> Accessed 9 August 2015

<sup>30</sup> Department of Health. Annual Report of the Advisory Panel on the Marketing in Australia of Infant Formula 2012 – 2013. [http://www.health.gov.au/internet/main/publishing.nsf/Content/phd-brfeed-apmaif\\_12](http://www.health.gov.au/internet/main/publishing.nsf/Content/phd-brfeed-apmaif_12) Accessed 9 August 2015

<sup>31</sup> The New Zealand Commerce Commission has authorised under Section 58 of the Commerce Act members of the Infant Nutrition Council (INC) to follow their Code of Practice that restricts advertising and marketing of infant formula for children under six months of age. (NZ Commerce Commission 2 April 2015. New Zealand Commerce Commission 2015. Infant Nutrition Council restrictive trade practice application. BF\51189345\INC - APPLICATION UNDER SECTION 58\(\20). <http://www.comcom.govt.nz/business-competition/anti-competitive-practices/anti-competitive-practices-authorisations-register/infant-nutrition-council-restrictive-trade-practice-application/> Accessed 9 August 2015

<sup>32</sup> NZ Commerce Commission 2015. BF\51189345\INC - APPLICATION UNDER SECTION 58\(\20, page 3

<sup>33</sup> FSANZ 2012 Consultation Paper: Regulation of Infant Formula Products in the Australia New Zealand Food Standards Code. <http://www.foodstandards.gov.au/code/infant/pages/default.aspx>



## 2.1 (b) Application to both current and future members

We agree that any implementation of the WHO Code and subsequent WHA resolutions should apply to both current and future members of the INC.

### ***The effects on of non-INC members and non-signatories on self-regulation***

However, under this clause (2.1.b), the INC's application for re-authorisation highlights the weaknesses of a voluntary self-regulatory implementation of the WHO Code. After 23 years of operation, INC finds it necessary to request that the MAIF Agreement should continue to provide for future parties to 'encourage' new signatories because 'market participants would be less inclined to operate outside the terms of the MAIF Agreement and thereby result in the erosion of the public benefit resulting from the MAIF Agreement.'

In New Zealand the INC has also argued that those who are not INC members have an unfair advantage over those that are INC members and signatories to the INC Code of Practice (the New Zealand equivalent of the MAIF Agreement but covering only infant formula for children up to 6 months and not follow-on formula). In New Zealand, competing infant formula manufacturers and marketers who are not INC members 'comprise less than 1% of the market'.<sup>34</sup> Yet despite their small numbers they have a large influence on marketing behaviour of INC members, as stated in INC's application to the NZ Commerce Commission:

- *'...it would be clear to all members of the Infant Nutrition Council that they would not, and could not, be bound by relevant restrictions in the INC Code of Practice. Non-members, perceiving the potential for more active marketing, may be incentivised to increase their own marketing with the overall effect of a reduction in the rate of breastfeeding of infants'.*<sup>35</sup>
- *'While INC members have been committed to restrictions of the type embodied in the INC Code of Practice and its predecessor (the NZIFMA Code of Practice) for some time, in the event that there was any increase, however small, in marketing by an industry participant, each INC member would have to reassess its position'.*<sup>36</sup>

Thus membership of the INC does not ensure industry-wide participation in the MAIF Agreement. It is unclear how discretionary membership of INC ensures that the anticompetitive outcomes of the MAIF Agreement apply equally to all manufacturers and importers in Australia.

### ***Industry coverage by INC***

The number of infant formula manufacturers and importers in Australia who are not INC members is unclear. The INC is faced with the difficulty of promoting self-regulation for the domestic infant formula market, in a new economic environment that features the entry of manufacturers who are based in Australia primarily to manufacture breastmilk substitutes for expanding export markets in Asia.<sup>37</sup> Infant formula from some of these companies are available on the Australian domestic market. Some manufacturers of infant formulas who are not members of INC are shown in Table 1

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<sup>34</sup> NZ Commerce Commission 2015. BF\51189345\INC - APPLICATION UNDER SECTION 58(\20), page 18

<sup>35</sup> NZ Commerce Commission 2015. BF\51189345\INC - APPLICATION UNDER SECTION 58(\20,), page 4.

<sup>36</sup> *ibid*

<sup>37</sup> Similarly, in New Zealand, 'The potential for new entry or expansion in the market for wholesale supply of infant formula in New Zealand is strongly linked to the export market in Asia, particularly China. This is because New Zealand is a very small market and any new entry or expansion would likely be supported primarily by expansion into the growing Asian market'. NZ Commerce Commission 2015. (BF\51189345\INC - APPLICATION UNDER SECTION 58(\20), page 21.



(this list is not exhaustive). It is also not clear how many members of INC include manufacturers in Australia of private label brands used in Australia, for example by chemists.<sup>38</sup>

**Table 1. Examples of brands of breastmilk substitutes for children up to 12 months that are available in Australia but whose manufacturers in or importers into Australia are not members of INC.** This includes manufacturers of private label infant formulas that are supplied to retailers. Retailers are not covered by the scope of the current MAIF Agreement. (Note that this list is not exhaustive)

Infant formula Brand	Manufacturer	Address
Bellamy's Organic	Bellamy's Organic Pty Ltd	Bellamy's Organic Pty Ltd 54 Tamar Street, Launceston, TAS, 7250 <a href="http://www.bellamysorganic.com.au">http://www.bellamysorganic.com.au</a>
Nutriforme	Manufactured by and undisclosed company as a private label for Coles supermarkets. Coles Group is a division of Wesfarmers Limited	Wesfarmers Limited 11th Floor, Wesfarmers House, 40 The Esplanade, PERTH, WA, 6000 <a href="http://shop.coles.com.au/online/national/baby/formula">http://shop.coles.com.au/online/national/baby/formula</a>
Mamia	Manufactured in Australia by an undisclosed company as a private label for Aldi Stores supermarkets.	Aldi Stores 1 Sargents Rd, Minchinbury NSW 2770 <a href="https://www.aldi.com.au/en/groceries/baby-care/">https://www.aldi.com.au/en/groceries/baby-care/</a>
ROYAL AUSNZ	Gotop Group Manufactured in Australia.	Gotop Group Level 1, 299 Elizabeth Street, Sydney, NSW, 2000 <a href="http://gotop.com.au">gotop.com.au</a>
OZcare Premium	Careline Group Pty. Ltd, a leading pharmaceutical and cosmetic company in Australia. Their infant formula is manufactured by Tatura, a Bega Cheese Pty Ltd company.	Oz Care Australia Pty Ltd, 41-43 Bellona Ave, Regents Park, NSW 2143 <a href="http://www.ozcaredairy.com.au">www.ozcaredairy.com.au</a>

Verifying market share is not straightforward. Market analyses of retail sales are not free or publically available but suggest that the combined market share of these non-INC members is likely to be less than 10%.<sup>39</sup> However Bellamy's Organic market share of baby formula in Australia was claimed to be approximately 10% in 2013.<sup>40</sup>

<sup>38</sup> For example some private label breastmilk substitutes for Australian chemists are manufactured in the USA by Perrigo. Perrigo Australia, Head Office, Perth 25 - 29 Delawney St, Balcatta, Western Australia 6021 <http://perrigo.com.au/infant-milk-formula/>

<sup>39</sup> Euromonitor International 2014. Baby Food In Australia.

<sup>40</sup> Bellamy's Initial Public Offer Prospectus 2014, page 10, [http://bellamysorganic.com.au/ipo\\_prospectus/](http://bellamysorganic.com.au/ipo_prospectus/)

In Section 3 of its application (page 5, paragraph 6), the INC cites Food Standards Australia New Zealand (FSANZ) that *'most infant formula products are imported into Australia'*.<sup>41</sup> However the FSANZ 2012 report in fact states that *'...data were not available for Australia, but it was reported that the majority of infant formula products are imported to Australia from the EU or from New Zealand'*. However we do not know if this is still the case. Since 2011 when FSANZ reported the lack of data, several changes have occurred in the ownership of breastmilk substitute manufacturers and importers into Australia. Nonetheless, the INC goes on to state that *'The signatories to the MAIF Agreement account for the majority of sales in Australia'*. It is not clear what this means in precise terms to the INC, Australian regulatory authorities such as FSANZ and the Department of Health, or the public. A legislative approach to implementing the WHO Code and subsequent WHA resolutions would apply to **all** manufacturers and importers and avoid these uncertainties.

These issues highlight the need for mandatory regulation or legislation that would:

- a. apply equally to all companies, and not give some an unfair advantage over others in both Australia's domestic and export markets, and
- b. ensure that the WHO Code was implemented across all sectors and deliver the benefit of constrained marketing to all consumers.

In addition, INC membership (and the MAIF Agreement) do not include distributors and retailers. These are key sectors involved in marketing and promotion of breastmilk substitutes that are included in the WHO Code and subsequent WHA resolutions (see below).

- The MAIF Agreement cannot bridge these gaps in the exposure of consumers to marketing of breastmilk substitutes.

## 2.2 Legislative bases for the authorisation application

Infant formula is no ordinary commodity with the potential to cause considerable harm if marketed and consumed inappropriately. It should be given special consideration by ACCC in collaboration with government health agencies.

The MAIF Agreement fails as an anti-competitive regulatory instrument:

- a. The definition of the 'infant formula market' adopted in MAIF does not capture substitutable products, including toddler and follow-up formulas (consumers cannot differentiate these products from infant formula and follow-on formula).<sup>42 43</sup>
- b. The MAIF represents a commitment by industry to responsibly market infant formula, and yet it does not include price competition which is a fundamental driver of consumer choice. This represents a clear failure of MAIF as a regulatory instrument to lessen competition.

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<sup>41</sup> Food Standards Australia New Zealand, Consultation Paper, Regulation of Infant Formula Products in the Australia New Zealand Food Standards Code (26 September 2012), p11.

<sup>42</sup> Berry NJ, Jones SC and Iverson D. 2012. Toddler milk advertising in Australia: Infant formula advertising in disguise? Australasian Marketing Journal 20, 24–27

<sup>43</sup> Berry NJ, Jones SC and Iverson D. 2012. Circumventing the WHO Code? An observational study. Archives of Disease in Childhood;97:320–325

- c. It applies only to companies that are signatories to the Agreement and misses major industry players that would otherwise be required to comply if a legislative regulatory instrument were used.

### Section 3. The infant formula market

#### *Toddler milks and growing up milks*

For the purposes of this reauthorisation, the MAIF Agreement applies to the products 'Starter Infant Formula and Follow-On Formula (IFFO Formula)', as described in the INC application.

However this product category highlights the deficiencies of the current MAIF Agreement, which does not include toddler milks and growing-up milks. Toddler milks and growing up milks are unequivocally included in the WHO Code and Subsequent WHA resolutions. In 2010 World Health Assembly (WHA) called upon *'infant food manufacturers and distributors to comply fully with their responsibilities under the International Code of Marketing of Breast-milk Substitutes and subsequent relevant World Health Assembly resolutions'*.<sup>44</sup> The WHO stated in 2013 that follow on and toddler formulas are marketed in a way that confuses consumers, and reduces breastfeeding.<sup>45</sup>

The Commonwealth Department of Health and Aging commissioned consultants to review the effectiveness of MAIF. The 2012 consultant's report found that:

- *'Companies have adopted strategies to minimise the effects of the Code on sales and profits in Australia, including increasing toddler formula ...and brand promotion...to the public.'*
- Labelling of toddler milks was misleading, and recommended that *'... products should be sufficiently different to enable consumers to clearly and quickly distinguish between infant formula and toddler milk drinks'*.<sup>46</sup>

This recommendation was rejected by the Department on the basis that *'the WHO Code does not support an extension of focus to toddler milk'*.<sup>47</sup> The Department's position directly contradicts that of the WHO and WHA positions on infant and young child feeding that include follow-up formula and toddler milks within the scope of the WHO Code.

In July 2015 the WHO *Consultation on the public draft of the Clarification and guidance on inappropriate promotion of foods for infants and young children* made seven recommendations.<sup>48</sup> In the draft report the importance of WHO Code implementation including follow-up formula and growing-up or toddler milks is reiterated in Recommendation 2:

- *'Implementation of the International Code of Marketing of Breast-milk Substitutes should clearly cover all products that function as breastmilk substitutes. This should include any milk products (liquid or powdered) marketed for young children up to two years (including follow-up formula and growing-up milks).'*<sup>49</sup>

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<sup>44</sup> The WHA Resolution WHA63.23 2010 ([http://apps.who.int/gb/ebwha/pdf\\_files/WHA63/A63\\_R23-en.pdf](http://apps.who.int/gb/ebwha/pdf_files/WHA63/A63_R23-en.pdf)).

<sup>45</sup> [http://www.who.int/nutrition/topics/WHO\\_brief\\_fufandcode\\_post\\_17July.pdf](http://www.who.int/nutrition/topics/WHO_brief_fufandcode_post_17July.pdf)

<sup>46</sup> <http://www.health.gov.au/internet/main/publishing.nsf/Content/review-effective-infant-formula>

<sup>47</sup> <http://www.health.gov.au/internet/main/publishing.nsf/Content/review-effective-infant-formula> accessed 8-8-2015

<sup>48</sup> <http://www.who.int/nutrition/events/inappropriate-food-promotion-consultation/en/>

<sup>49</sup> Discussion Paper: Clarification and Guidance on Inappropriate Promotion of Foods for Infants and Young Children. Report of the Scientific and Technical Advisory Group (STAG) on Inappropriate Promotion of Foods for Infants and Young Children <http://www.who.int/entity/nutrition/events/draft-inappropriate-promotion-infant-foods-en.pdf?ua=1>

### ***Baby cereals and baby foods and drinks***

Regarding the exclusion of baby cereals and baby foods and drinks from the MAIF Agreement, the INC states: *'Other infant food products include baby cereals and baby foods and drinks, however the INC does not consider these to be appropriate substitutes for breast-milk, and for that reason, not substitutable for infant formula.'* (INC application, page 5, paragraph 3).

The INC position conflicts with the findings of the WHO Scientific and Technical Advisory Group (STAG) on *Inappropriate Promotion of Foods for Infants and Young Children*, which stated in July 2015 that:

- *'Complementary foods have been shown to displace the intake of breast milk if the amounts provided represent a substantial proportion of energy requirements.'*<sup>50</sup> and
- *'Evidence from numerous countries has shown that foods are being sold as suitable for introduction before six months of age, breastmilk substitutes are being indirectly promoted through association with commercial complementary foods, and inaccurate claims are being made that products will improve a child's health or intellectual performance.'*<sup>51</sup>

To improve breastfeeding rates and lower childhood obesity in Australia, the Commonwealth government needs to replace the outdated and ineffective MAIF Agreement and fully implement WHO infant and young child feeding policies.

### ***Retailers***

The INC application states that: *'The MAIF Agreement relates only to IFFO Formula and prohibits manufacturers and importers of IFFO Formula from advertising or promoting IFFO Formula directly to the general public. The MAIF Agreement does not apply to GUMs/toddler milks nor to retailers (such as supermarkets) or distributors of infant formula.'* (INC application, page 5, paragraph 4).

Retailers are included in the WHO Code and both the Knowles report in 2003<sup>52</sup> and *The Best Start* report in 2007<sup>53</sup> made recommendations to include retailers in Australia's implementation of the WHO Code and subsequent WHA resolutions. Since these reports, developments in retailer in-store promotions, pricing and use of internet selling and other electronic media have exacerbated this deficiency in the MAIF Agreement.

In 1992 the Trade Practices Commission determination that authorised the MAIF Agreement did not anticipate marketing practices in a commercial and environment that included the internet and the recent boom in globalized trade in breastmilk substitutes. Since then the sale and marketing of breastmilk substitutes via the internet and social media has blurred the distinction between manufacturers, importers, distributors and retailers. Internet and social media connectivity means

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<sup>50</sup> ibid. Page 1

<sup>51</sup> Discussion Paper: Clarification and Guidance on Inappropriate Promotion of Foods for Infants and Young Children. Report of the Scientific and Technical Advisory Group (STAG) on Inappropriate Promotion of Foods for Infants and Young Children <http://www.who.int/entity/nutrition/events/draft-inappropriate-promotion-infant-foods-en.pdf?ua=1>

<sup>52</sup> Knowles 2003. *Independent advice on the composition and modus operandi of APMAIF and the scope of the MAIF Agreement*. Department of Health and Ageing. Pages 10-15.

<http://www.health.gov.au/internet/main/publishing.nsf/Content/health-publth-publicat-document-brfeed-knowles.htm>

<sup>53</sup> Commonwealth of Australia 2007. *The Best Start*. Report on the inquiry into the health benefits of breastfeeding. House of Representatives Standing Committee on Health and Ageing. Pages 138-142.

[http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=haa/breastfeeding/report.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=haa/breastfeeding/report.htm)

that it is also difficult for Australian consumers to avoid exposure to internet marketing of breastmilk substitutes, including advertisements from other countries of brands that are available in Australia.<sup>54</sup>

INC *Guidelines on 'Marketing of infant formulas via electronic media'* attempt to address marketing by manufacturers and importers through websites and social media under their control. However product information and pricing on a manufacturer's webpage that allows direct sale to consumers can become indistinguishable from banner advertisements and 'pull marketing' for breastmilk substitutes on search engines and the webpages of online retailers. Other practices include 'push marketing' in stores, cross-branding, cross-marketing of products and the development of branded educational materials and customer loyalty programmes that encourage interaction with and build trust in manufacturers and their products through branded websites, consumer 'carelines' and online communities, private email or chat lines, with the stated intention of providing nutritional information, advice and support (see Appendix 2). Among Australian members and non-members of INC, there is wide variation in the use of these promotional methods.

Driving much of this intense online infant formula marketing presence is demand for infant formula manufactured in Australia from consumers overseas, especially China. A proportion of breastmilk substitutes produced in Australia for the domestic market is purchased and exported through personal consignments and informal channels, especially to China. The volume and value of this informal trade is difficult to quantify.<sup>55</sup> Some breast milk substitutes appear to be intended for export markets but are available through internet and physical retail outlets. For example, Royal AUSNZ infant formula, manufactured by the Gotop Group,<sup>56</sup> is available at Bloom's Chemists across eastern Australia.

The INC application confirms that in the past APMAIF decided that the MAIF Agreement did not include retailers that '*source infant formula from export manufacturers, brand the infant formula with their own company label and then sell it in the retail sector*' (page 7, paragraph 3).

In the process of sourcing breastmilk substitutes via the internet, consumers move between links from the plethora of retailer websites to manufacturer websites and manufacturers' social media pages using search engines that contain banner advertising for breastmilk substitutes. Some manufacturers' websites also clearly sell directly to consumers and online sales are listed in their reports as sources of revenue.<sup>57 58</sup> Not all these manufacturers are INC members and bound by the MAIF Agreement (for example Gotop Group Pty Ltd), although some (for example Bellamy's Organic Pty Ltd), provide website information that reflects the company's interpretation of the WHO Code.

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<sup>54</sup> For example the Similac video advertisement 'The Mother 'Hood' is not available to an Australian domain name from the Similac site in the United States <https://www.youtube.com/watch?v=Me9yrREXOj4> but is available via YouTube <https://www.youtube.com/watch?v=d63jMSdXDAM> Accessed 11 August 2015

<sup>55</sup> Official statistics on the volume of breastmilk substitutes manufactured in or exported from Australia do not differentiate breastmilk substitutes and include 'infant powder' in 'whole milk powders' (Dairy Australia 2014. Annual Report 2013/14. <http://www.dairyaustralia.com.au>). Data on the volume and value of Australian breastmilk substitutes sold in retail outlets in Australia is available (Euromonitor International 2014. Baby Food In Australia).

<sup>56</sup> GoTop Group Pty Ltd <http://gotop.com.au/about-us/> Accessed 9 August 2015

<sup>57</sup>: 'Online baby product sales have undergone a rapid growth spurt over the last five years attributed to technological change and innovation. It is a growing form of distribution though there is little verifiable data to clearly indicate the levels at which it is growing.' Bellamy's IPO Prospectus 2014 p23 [http://bellamysorganic.com.au/ipo\\_prospectus/](http://bellamysorganic.com.au/ipo_prospectus/) Accessed 9 August 2015

<sup>58</sup> Bellamy's Australia Limited Interim Report December 2014 <http://investors.bellamysorganic.com.au/reports> Accessed 9 August 2015

However to the consumer searching for breastmilk substitutes on the internet, manufacturers and retailers may be indistinguishable. As a result, manufacturer notices about the effects of breastmilk substitutes on breastfeeding are not consistently delivered.

### **Health Claims**

Tins of formula and follow-up formula sold in Australia make nutrition and health claims by associating images and statements about ingredients with development (see Appendix 2, Example 2). These claims are based on weak or spurious grounds that speculatively link ingredients to health outcomes based on the composition of breastmilk or poorly understood physiological effects of the ingredients.

#### **Box 2. An example of a health claim for infant formula**

Appendix 2, example 2 shows a tin of Nutricia's Aptamil Profutura Infant formula (0-6 months) with the text '*Help build strong foundations for Immunity, Brain + Metabolism*'.

Health claims for infant formula are prohibited by the MAIF Agreement and Food Standard 2.9.1 Section 24. 1(f)

The image of the double helix and the advertisement text '*Our most advanced formulation*' build an association with science and '*idealises the use of infant formula product*', which contravenes Australian Food Standard 2.9.1 Section 24. 1(b).

However complaints to APMAIF in the past about this type of health claim have been rejected.<sup>59</sup>

The MAIF Agreement Clause 9(a) requires manufacturers and importers to follow the Australian Food Standard on labelling: '*Manufacturers and importers must ensure that infant formulas sold in Australia conform to the Australian Food Standard R7 — Infant Formula.*'

The MAIF Agreement Clause 9(a) also refers to WHO Code Article 9.2 which states that '*neither the container nor the label should have pictures of infants, nor should they have other pictures which may idealize infant formula*'... and that '*The terms "humanized", "maternalized" or similar terms should not be used.*'<sup>60</sup>

In response to misleading nutrient claims, the 2005 WHA resolution 58.32 urged Member States to: '*Ensure that nutrition and health claims for breastmilk substitutes are not permitted unless national/regional legislation allows.*'<sup>61</sup>

Nutrient claims are prohibited in the current and revised Australian Food Standard 2.9.1 Section 24 (1)(f) on labelling (Box 3). FSANZ has stated that since it was first gazetted, this standard '*has been amended several times to clarify this intent and support the regulatory approach for a prohibition on nutrition and health claims.*'

<sup>59</sup> *Guidelines on the interpretation and application of the MAIF Agreement by the Advisory Panel on the Marketing in Australia of Infant Formula (APMAIF)* –see Infant Nutrition Council Limited application to ACCC for authorisation A91506 and A91507, Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement (MAIF Agreement)

<sup>60</sup> <http://www.who.int/nutrition/publications/infantfeeding/9241541601/en/>

<sup>61</sup> [http://www.who.int/nutrition/topics/WHA58.32\\_icycn\\_en.pdf](http://www.who.int/nutrition/topics/WHA58.32_icycn_en.pdf)

Health claims for infant formula may also be made indirectly via line branding via a health claim for a product (toddler milk) that remains outside the scope of the MAIF Agreement. However despite these statements, complaints to APMAIF in the past about this type of health claim and line branding have had little success, based on the interpretations of label health claims in Food Standard 2.9.1, the scope of the MAIF Agreement as described in *Guidelines on the interpretation and application of the MAIF Agreement by the Advisory Panel on the Marketing in Australia of Infant Formula (APMAIF)* attached to the INC's application.

Legislation with clearer guidance and that includes toddler milks would avoid this confusion in which advertising of breastmilk substitutes proliferates.

### **Box 3. Australian Food Standard 2.9.1 –labelling**

The revised Australian Food Standard 2.9.1 is due to commence on 16 March 2016.<sup>62</sup> Section 24 repeats the current content of clause 20 of Standard 2.9.1, which prohibits a range of representations on packages of infant formula product.

'(1) The label on a package of infant formula product must not contain:

- (a) a picture of an infant; or
- (b) a picture that idealises the use of infant formula product; or
- (c) the word 'humanised' or 'maternalised' or any word or words having the same or similar effect; or
- (d) words claiming that the formula is suitable for all infants; or
- (e) information relating to the nutritional content of human milk; or
- (f) subject to subsection 2.9.1—14(2), a reference to the presence of any nutrient or substance that may be used as a nutritive substance, except for a reference in:
  - (i) a statement relating to lactose under subsection 2.9.1—14(6); or
  - (ii) a statement of ingredients; or
  - (iii) a declaration of nutrition information under section 2.9.1—21; or
  - (g) subject to Division 4, a representation that the food is suitable for a particular condition, disease or disorder.

(2) Subject to subsection 2.9.1—14(2), the label on a package of infant formula product must not contain a reference to \*inulin-type fructans or \*galacto-oligosaccharides except for a reference in:

- (a) a statement of ingredients; or
- (b) a declaration of nutrition information under section 2.9.1—21.'

### **Pricing**

The INC submission does not describe the pricing arrangements of manufacturers and importers supplying the health sector with breastmilk substitutes. This was clearly described for the New Zealand INC application to the NZ Commerce Commission.<sup>63</sup>

Price competition is a fundamental driver of consumer choice. Marketing includes pricing to compete for buyer attention (see Appendix 2). Reauthorisation of the MAIF Agreement should consider price as this gives retailers freedom to market.

<sup>62</sup> Australia New Zealand Food Standards Code – Standard 2.9.1 – Infant formula products - F2015L00409. Dated 25 March 2015 and due to commence on 16 March 2016 <https://www.comlaw.gov.au/Details/F2015L00409>

<sup>63</sup> NZ Commerce Commission 2015. BF\51189345\INC - APPLICATION UNDER SECTION 58\(\20)



## **Section 4. The MAIF Agreement**

### **4.2 The Scope of the MAIF Agreement**

See comments on Section 3 above regarding the scope of the MAIF Agreement for toddler milks and growing up milks, complementary foods and retailers.

### **4.4 Guidelines on the interpretation and application of the MAIF Agreement**

The INC application points out that since APMAIF was replaced with the MAIF Complaints Tribunal established by the MAIF signatories, and appointed by the St James Ethics Centre, interpretation of the MAIF Agreement has changed and that *'the MAIF Complaints Tribunal ...does not have to apply the Interpretation Guidelines when it makes a decision.'* (page 8, paragraph 2). INC guidelines on interpreting the MAIF Agreement were also not binding for MAIF signatories.

Labelling is also a key part of marketing. It is important to note that a measure designed to implement the provisions of the WHO Code, namely mandatory labelling for infant formula (in FSANZ Standard 2.9.1) is under review *'and this work is expected to take three years to complete. A consultation paper is scheduled for release in the second half of 2015.'*<sup>64</sup>

### **4.5 Compliance with the MAIF Agreement**

The MAIF Agreement is not enforceable nor does it contain reporting requirements for breaches. Oversight by APMAIF, before it was disbanded in 2013, only required reporting of breaches to the Australian Parliament. The then Department of Health and Ageing stated the limitations of its authority as follows:

- *'APMAIF has no statutory or formal regulatory powers either to obtain information from industry participants or other parties or to enforce the MAIF Agreement. Instead the APMAIF relies upon the cooperation of the industry participants in the MAIF Agreement and other stakeholders to provide information. Changes to marketing practices that are requested by the APMAIF also depend on the voluntary commitment of industry participants.'*
- *'There are no financial or legal sanctions associated with breaches of the MAIF Agreement. If the APMAIF determines that a breach of the MAIF Agreement has occurred, the Parliamentary Secretary is informed and details of the breach are published in the APMAIF's annual report. While this report is not a legal or financial sanction, it provides for a level of public reporting that can receive global publicity and brand damage for the manufacturer involved. The APMAIF's annual report is usually tabled in Parliament and copies will be made available to all stakeholders. The reports are also made available from the MAIF website on the Department's website.'*<sup>65</sup>

In 2014, following the removal of APMAIF, infant formula manufacturers and importers established and wholly funded a MAIF Complaints Tribunal administered through the St James Ethics Centre.<sup>66</sup> The independence of this arrangement, the Tribunal's terms of reference, procedures and expertise in infant feeding and marketing of infant foods have been questioned by the Public Health

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<sup>64</sup> FSANZ. Reviewing Standard 2.9.1 – Infant Formula Products. September 2014.

<http://www.foodstandards.gov.au/code/infant/pages/default.aspx>

<sup>65</sup> Department of Health. 2012-2013 Annual Report of the Advisory Panel on the Marketing in Australia of Infant Formula (APMAIF) [http://www.health.gov.au/internet/main/publishing.nsf/Content/phd-brfeed-apmaif\\_12](http://www.health.gov.au/internet/main/publishing.nsf/Content/phd-brfeed-apmaif_12)

<sup>66</sup> Infant Nutrition Council 2015. Code Compliance in Australia. <http://www.infantnutritioncouncil.com/code-compliance/australia/> Accessed 9 August 2015

Association of Australia.<sup>67</sup> The PHAA asked whether the Public Health Association of Australia and the Australian Breastfeeding Association were invited to nominate representatives for the public health and consumer positions on the Tribunal, which may be held for up to six years.

The timeliness of reports to the MAIF Complaints Tribunal's decisions and public access to them have not been described.

Self-regulation of the WHO Code requires multi-stakeholder engagement and monitoring that is based on transparency and independence. The failure to 'deliver effective corporate governance' of the WHO Code is not unique to Australia and requires political will as well as good governance structures at international and national levels.<sup>68</sup> The influence of the corporate sector in international public health and nutrition policy decision-making and delivery has prompted ethical guidelines on the WHO Code for health professionals for decades<sup>69</sup> and more recently for public-private partnerships.<sup>70</sup>

## Section 5. Significant benefits to the public

The benefits of protecting breastfeeding to the Australian community is undisputed. Box 3 summarises health and financial costs of weaning prematurely in developed country settings. i.e. failing to breastfeed exclusively for six months and to continue breastfeeding for two years or more. In 2002 premature weaning in Australia was estimated to cost \$60-120 million annually for just 5 childhood diseases.<sup>71</sup> Recent estimates in the United Kingdom assessed the cost of premature weaning as £40-60 million if maternal breast cancer was included.<sup>72</sup>

This highlights the costs to Australian health and the economy of an inadequate system for regulating the marketing of breastmilk substitutes. While initiation of breastfeeding in Australia exceeds 96%, in 2010 rates of exclusive breastfeeding at 5 months are low (15%)<sup>73</sup>, and only 28% of children were still being breastfed at 12 months, 9% at 18 months and 5% at 24 months.<sup>74</sup>

The contribution of breastfeeding to achievement of human potential is quantifiable. A recent study confirmed earlier analyses of the relationship between breastfeeding and intelligence, with those breastfed for 12 months or more having a higher IQ of 3.76 points compared with those breastfed

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<sup>67</sup> Public Health Association of Australia (PHAA), Re: Invitation to comment on successor to APMAIF. 3 September 2014. <http://www.phaa.net.au/documents/141020%20comment%20on%20successor%20to%20APMAIF.pdf>

<sup>68</sup> Forsyth S. 2013. Non-compliance with the International Code of Marketing of Breast Milk Substitutes is not confined to the infant formula industry. *Journal of Public Health* 35, 2 185-190.

<sup>69</sup> NHMRC 2013. *Infant Feeding Guidelines: Information for Health Workers* (2012) <https://www.nhmrc.gov.au/guidelines-publications/n56>

<sup>70</sup> Quinn v, Zehner E, Schofield et al 2010. GAIN working Paper series No. 3. Using the Code of Marketing of Breast-milk Substitutes to Guide the Marketing of Complementary Foods to Protect Optimal Infant Feeding Practices. Global Alliance for Improved Nutrition (GAIN) 2010. <http://www.gainhealth.org/knowledge-centre/maternal-infant-young-child-nutrition-using-code-marketing-breast-milk-substitutes/>

<sup>71</sup> Smith, Thompson and Ellwood. Hospital system costs of artificial infant feeding: estimates for the Australian Capital Territory. *Aust NZ J Public Health* 2002 26, 6

<sup>72</sup> Renfrew M. et al. Preventing disease and saving resources: the potential contribution of increasing breastfeeding rates in the UK. UNICEF UK 2012

<sup>73</sup> Australian Institute of Health and Welfare 2011, 2010 Australian National Infant Feeding Survey: Indicator Results. Canberra: AIHW.

<sup>74</sup> Australian Institute of Family Studies (AIFS) 2008, *Growing Up In Australia: The Longitudinal Study of Australian Children, Annual Report 2006-07*; [www.aifs.gov.au/growingup/pubs/ar/ar200607/breastfeeding](http://www.aifs.gov.au/growingup/pubs/ar/ar200607/breastfeeding) Accessed 9 August 2015.

for less than one month. These results translated to measurable gains in education levels and earning capacity in adulthood.<sup>75</sup>

**Box 3. Risks of premature weaning in developed country settings:**

- 1. Infections –children < 5 years
  - Diarrhoea<sup>a</sup> - mortality and hospital admissions x 1.2  
- morbidity x 2
  - Respiratory<sup>b,c</sup> - mortality x 1.6, hospital admissions x 2  
- morbidity x 3.3
- 1. Non-communicable diseases
  - overweight/obesity
  - type 2 diabetes
- 1. Lower development -cognitive and emotional<sup>b</sup>
- 2. Health system costs
  - Australia: - A\$ 60-120 million p.a. - 5 diseases<sup>d</sup>
  - £31 million (life) - breast cancer<sup>e</sup>
  - USA:\$13 billion p.a. -10 diseases<sup>f</sup>

Sources:

- a. Horta BL, Victora CG. Short-term effects of breastfeeding: a systematic review on the benefits of breastfeeding on diarrhoea and pneumonia mortality. WHO, 2013. Geneva.
- b. Horta BL, Victora CG. Long-term effects of breastfeeding. WHO, 2013. Geneva.
- c. Duijts L, et al Breastfeeding protects against infectious diseases during infancy in industrialized countries. A systematic review. *Matern Child Nutr.* 2009; 5:199–210.
- d. Smith, Thompson and Ellwood. Hospital system costs of artificial infant feeding: estimates for the Australian Capital Territory. *Aust NZ J Public Health* 2002 26, 6
- e. Renfrew M. et al. Preventing disease and saving resources: the potential contribution of increasing breastfeeding rates in the UK. UNICEF UK 2012
- f. Bartick M and Reinhold A. The burden of suboptimal breastfeeding in the United States: A pediatric cost analysis. *Pediatrics* 2010; 125, 5

**Section 6. The MAIF Agreement is an effective voluntary code**

This submission strongly disputes the claim that the MAIF Agreement is an effective voluntary code.

On page 12 (last paragraph) , the effectiveness of industry self-regulation cannot be judged by the low number of applications to APMAIF or the Department of Health in recent years, as in the past most complaints were determined to be outside the scope of the MAIF Agreement, particularly for breastmilk substitutes for children over 12 months and marketing activities of retailers.<sup>76</sup> These data suggest the MAIF Agreement is ineffective in its scope, and needs to include toddler milks and retailers, in line with community expectations of effective protection of breastfeeding and knowledge of the WHO Code and subsequent WHA resolutions.

Recommendations to use industry self-regulation are conditional on *industry* coverage, which must include (a) all manufacturers and importers and (b) retailers, as discussed earlier.

<sup>75</sup> Victora CG, Horta BL, de Mola CL, et al 2015. Association between breastfeeding and intelligence, educational attainment, and income at 30 years of age: a prospective birth cohort study from Brazil. *Lancet Glob Health* 2015; 3: e199–205.

<sup>76</sup> Department of Health. Annual Report of the Advisory Panel on the Marketing in Australia of Infant Formula 2012 – 2013. [http://www.health.gov.au/internet/main/publishing.nsf/Content/phd-brfeed-apmaif\\_12](http://www.health.gov.au/internet/main/publishing.nsf/Content/phd-brfeed-apmaif_12) Accessed 9 August 2015

In addition, the conclusion of the 2012 review of the MAIF Agreement<sup>77</sup> that it is the ‘*most cost effective regulatory mechanism*’ was not based on estimates of real costs of premature weaning such as those used by Smith, Thompson and Ellwood<sup>78</sup> and the United Kingdom<sup>79</sup> (Box 2).

### **6.1 TPC concluded that the MAIF Agreement was likely to result in public benefits**

This conclusion was made in 1992 before the MAIF Agreement was introduced.

No data are provided by the INC to substantiate their claims for reauthorisation, other than the number of complaints handled by APMAIF up until 2013.

The subsequent ineffectiveness of the MAIF Agreement to constrain marketing is perhaps better indicated by the high rates of growth in sales volumes of infant formula (28%), follow on formula (44%) and toddler milk (237%) in Australia from 2009 to 2014.<sup>80</sup> The total value of milk formula sales more than doubled over this period from AUD \$240 million to AUD \$546 million.<sup>81</sup> In contrast, gains in breastfeeding rates are slow.<sup>82</sup>

- In 2015 it is difficult to reconcile the evidence of harm from premature weaning (Box 2) and the rising consumption of breastmilk substitutes with the 1992 Trade Practices Commission determination, or more correctly speculation, that the MAIF Agreement would provide ‘safe and adequate nutrition for infants’.
- The growth of toddler milk sales in the last five years underscores the urgent need to constrain marketing of breastmilk substitutes children older than 12 months and include them in Australia’s WHO Code implementation.

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<sup>77</sup> Department of Health and Ageing 2012. Review of the effectiveness and validity of operations of the MAIF Agreement: Research Paper. <http://www.health.gov.au/internet/main/publishing.nsf/Content/review-effective-infant-formula> Accessed 9 August 2015.

<sup>78</sup> Smith, Thompson and Ellwood. Hospital system costs of artificial infant feeding: estimates for the Australian Capital Territory. Aust NZ J Public Health 2002 26, 6

<sup>79</sup> Renfrew M. et al. Preventing disease and saving resources: the potential contribution of increasing breastfeeding rates in the UK. UNICEF UK 2012

<sup>80</sup> Some of these figures may represent informal export and not Australian consumption, but the data are not available.

<sup>81</sup> Euromonitor International 2014. Baby Food In Australia.

<sup>82</sup> Smith J 2007. The contribution of infant food marketing to the obesogenic environment in Australia. Breastfeeding Review. 15,1 23-35

## **6.2 Continued public benefit will result from reauthorisation**

The public benefits claimed in this section of the INC application are not delivered under the current voluntary industry self-regulated Code of Practice for reasons outlined above.

Protection of breastfeeding from marketing of breastmilk substitutes is required, but the MAIF Agreement is insufficient in scope, reach and unenforceable.

In addition, since 2013 the governance of the MAIF Agreement has been weakened and become less transparent and independent.

## **Section 7. Benefits outweigh any public detriments**

Australia still has an urgent need to fully protect breastfeeding, for both the health and wellbeing of infants, young children and their mothers, and to reduce the risks of obesity and other associated non-communicable diseases later in life. Australian children fall far short of optimal nutrition, in terms of WHO infant and young child feeding practices, and suffer escalating rates of childhood obesity and other non-communicable diseases over their lifetime.

In principle, any commercial detriments from constraining marketing in some industry sectors, for example anticompetitive elements from incomplete INC membership coverage and the omission of retailers and pricing from the current MAIF Agreement are outlined earlier, are vastly outweighed by the benefits of breastfeeding to the Australian population and economy.

In practice, the question is whether the MAIF Agreement provides effective protection of breastfeeding. For the reasons outlined in this document, we conclude that it does not, and that the MAIF Agreement should be replaced with legislation that implements in full the WHO Code and subsequent WHA resolutions.

- However interim reauthorisation of the MAIF Agreement is probably required to protect breastfeeding while the Australian Government and stakeholders consider the current WHO consultation on promotion of foods for children and completes reviews of Australia's national infant and young child feeding policies.
- Reauthorisation of the MAIF Agreement for a period of not more than two years would provide limited but necessary protection of breastfeeding and contribute to providing impartial information on infant and young child feeding to parents and caregivers.

## Conclusions

Australia urgently needs to prevent commercial marketing of infant and young child food products from undermining breastfeeding. Knowledge of the harms and costs of suboptimal breastfeeding has increased but breastfeeding rates are slow to improve, with only 15% of infants exclusively breastfed to around 6 months and low rates of continued breastfeeding at 12 months and two years. At the same time, sales of breastmilk substitutes, particularly toddler milks, doubled to over AUD\$500 million in the past 5 years.

We submit the following issues for consideration by the ACCC:

1. The commercial and marketing environment for breastmilk substitutes has changed since the MAIF Agreement was introduced in 1992, including the growth of Australia's export markets and the use of electronic marketing and selling.
2. The MAIF Agreement is ineffective in terms of the scope of its products (toddler milks and growing-up milks are omitted), health claims, industry coverage (some manufacturers and importers are not signatories and all retailers are omitted), oversight and enforcement.
3. The MAIF Agreement fails as a regulatory instrument because industry players are able to opt out.
4. New mandatory regulatory measures are required to implement the WHO Code and subsequent WHA resolutions.
5. However government consultation is required on new and updated health policies before the WHA on promotion of foods for children, Australia's National Breastfeeding Strategy and FSANZ Food Standards 2.9.1 for infant food labelling.
6. The MAIF Agreement should be not be reauthorised for ten years, but for a lesser, interim period of no more than two years.

## Appendix 2. Examples of marketing practices that are not covered by the MAIF Agreement but are within the scope of the WHO International Code for Marketing of Breast-milk Substitutes and subsequent WHA resolutions

1. Examples of online promotion of infant formula, follow-on formula toddler milk and complementary foods in Australia, through price discounting, a practice that is not covered by the MAIF Agreement. Retailers such as supermarkets and pharmacies are not covered by the MAIF Agreement. Some products shown here are manufactured by companies that are not INC members or signatories to MAIF (Bellamy's Organic).

- a. Pharmacy Online, <http://www.pharmacyonline.com.au/baby/baby-feeding> accessed 3 August 2015

The screenshot shows the Pharmacy Online website interface. At the top, there is a navigation bar with the Pharmacy Online logo and the tagline "Australia's #1 Pharmacy since 1998". Below this is a search bar and a "Sign in to Your Account" button. A secondary navigation bar lists various product categories like Baby, Hygiene, Embarrassing Conditions, etc. The main content area features a "MID-YEAR CLEARANCE SALE" banner on the left and right sides, both stating "SAVE UP TO 88% OFF!". The central section is titled "Baby Feeding" and contains a grid of product listings. Each listing includes a product image, name, and price. Some listings show a "Don't Pay" price crossed out, indicating a discount. The products include various infant formulas (Platinum, Aptamil, Bellamy's) and complementary foods (Bellamy's Organic). The bottom of the page shows "Add to Cart" buttons for each product.



b. Chemist Warehouse <http://www.chemistwarehouse.com.au> accessed 3 August 2015

Store Locations & Hours | Catalogues | Register | Login

**CHEMIST WAREHOUSE** **WE BEAT EVERYONE'S PRICES\*** **DISCOUNT CHEMIST** **AUSTRALIA'S CHEAPEST CHEMIST**

Shopping Cart: \$0.00 [View Cart](#)

Search for products/brands [SEARCH](#)

Fragrances | Vitamins | Beauty | Skin Care | Cosmetics | Weight Loss | Baby Care | Sexual Health | Quit Smoking | [Samples](#)  
 Prescriptions | Medicines | Cold & Flu | Krill & Fish Oil | Dental | Household | Hair Care | Protein | Best Sellers | [All Categories](#)

[FREE SHIPPING OVER \\$99\\*](#) | [AUSTRALIA'S #1 ONLINE PHARMACY](#) | [LOWEST PRICE GUARANTEED](#)










Home > Personal Care > Baby Care > Baby Formula

**Top Product Categories**

A2 (3)	NAN (11)
Aptamil (13)	Neocate (1)
Bellamy's Organic Formula (4)	Novalac (4)
Heinz Nurture (8)	S-26 (14)
Karicare (8)	SMA (1)

**All Products In Baby Formula** Sort By

66 Results View 120 per page [Prev](#) [1](#) [2](#) [3](#) [Next](#)

 Aptamil Gold+ 3 Toddler Nutritional Supplement 900g <b>\$18.99</b>	 Aptamil Gold+ 4 Junior Nutritional Supplement 900g <b>\$19.99</b>	 Bellamy's Organic Toddler Drink 900g <b>\$19.99</b> SAVE \$0.46
 Aptamil Gold+ 2 Follow-On Formula 6-12 Months 900g <b>\$24.99</b>	 Aptamil Gold+ 1 Infant Formula 0-6 Months 900g <b>\$24.99</b>	 Bellamy's Organic Follow On Formula 900g <b>\$22.99</b> SAVE \$2.97
 Karicare Goats' Milk Follow-On Formula From 6 Months 900g <b>\$34.99</b> SAVE \$1.00	 Bellamy's Organic Infant Formula 900g <b>\$22.99</b> SAVE \$2.96	 Aptamil Profutura Infant Formula 0-6 months 900g <b>\$29.95</b>

## 2. Example of retailer in-store shelf promotion of breast milk substitutes and health claim:

Shelf banner for Nutricia's Aptamil Profutura toddler milk (left) at a Woolworths supermarket, Kippax, ACT Australia, April 2015 (photo L. Salmon) and an image of an Aptamil Profutura infant formula tin (right) from an online retailer 'Pharmacy Direct'

<http://www.pharmacydirect.com.au/product/aptamil-profutura-1-infant-formula-900g-046818.aspx?gclid=CLfDmvKup8cCFVUHvAodz6ABBQ&kpid=981867X1> Accessed 14 August 2015.

- The advertisement is for a toddler milk. Toddler milks are within the scope of the WHO Code and subsequent WHA resolutions, but not covered by the MAIF Agreement.
- The line branding between the toddler milk and the infant formula product is shown by the large sized number '1' on the tin next to the numbers '2, 3, 4'.
- The health claims made in this advertisement and on the tin 'Help build strong foundations for Immunity, Brain + Metabolism' are also questionable yet used for promotion of infant formula as well as toddler milk.
- The images of the double helix and the advertisement text 'Our most advanced formulation' build an association with science and 'idealises the use of infant formula product' -Australian Food Standard 2.9.1 Section 24. 1(b).



3. Examples of integrated marketing via the internet and social media, with online buying.

Karicare manufacturer's website accessed 11 August 2015

<http://www.karinourish.com.au/nourish/infant-formula/karicareplus-infant-formula-stage-1/>

Karicare infant formula brands are manufactured by Nutricia Australia Pty Ltd (a division of the French multinational company, Group Danone) and is an INC member and signatory to the MAIF Agreement. These manufacturer web pages are accessible after a pop-up page of information on breastfeeding is clicked on, as specified in the MAIF Agreement (see example 5).

**Karimourish**  
...because thriving toddlers are happy toddlers

**We nourish your little one with essential ingredients from birth**

**DIGESTION** Unique blend to support a happy tummy  
**NOURISH**  
**BRAIN** Rich in Omega-3 fatty acids to support brain development  
**GROWTH** To support growing bones and teeth

**Products**  
Cereals  
Formulas

**Complete Care® Premium**  
Our Story  
Reward Feeding & Best  
Bottle Feeding  
Feeding & Digestion  
Contact Our Careline  
Karibag

**Caroline top tip!**  
When your feeding baby, make sure their belly is flat and eye contact is good and they are full!

**More in our range**  
Bottle Feeding  
Multigrains & Nuts  
Bottle On Formula

**Karicare+ Infant Formula**  
From birth  
Breast milk substitute

Specifically formulated for formula fed babies from birth, it's nutritionally complete, and contains key ingredients for growth and development

- Digestion: Unique blend of ingredients to support a happy tummy
- Growth: Good for growing bones and teeth
- Brain: Rich in Omega-3 fatty acids to support brain development
- Breast milk substitute: can be used for mixed feeding

**Buy Online**

**Feeds available**

**Ingredients**

**History and awards**

**Feeding guide**

To prepare one feed			
Age	Caroline's milk volume	Total volume of formula	Number of feeds per day
Up to 1 month	30 ml	1	7-9
1 month to 3 months	60 ml	2	6-8
3 to 6 months	90 ml	3	5-6
6 to 12 months	120 ml	4	5
12 to 18 months	150 ml	5	4-5
Over 18 months	200 ml	5	3-4

\* 1 scoop = 2.5g of powder (50%); 1 scoop of powder added to 100ml of water yields approximately 11.5g of formula. This feeding guide is a general guide (RDI) and does not replace medical advice or the label on the product.

**Directions for use**

**Karimums**  
Real experts. Real support.

**Contact our Careline on 1800 258 268**  
or email us or live chat

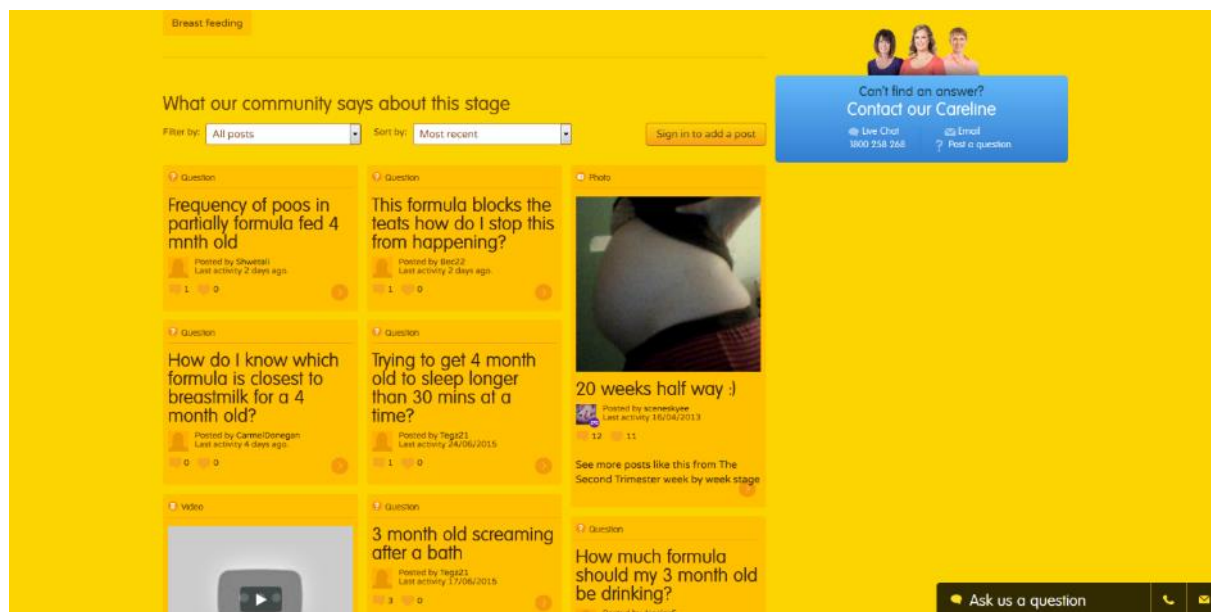
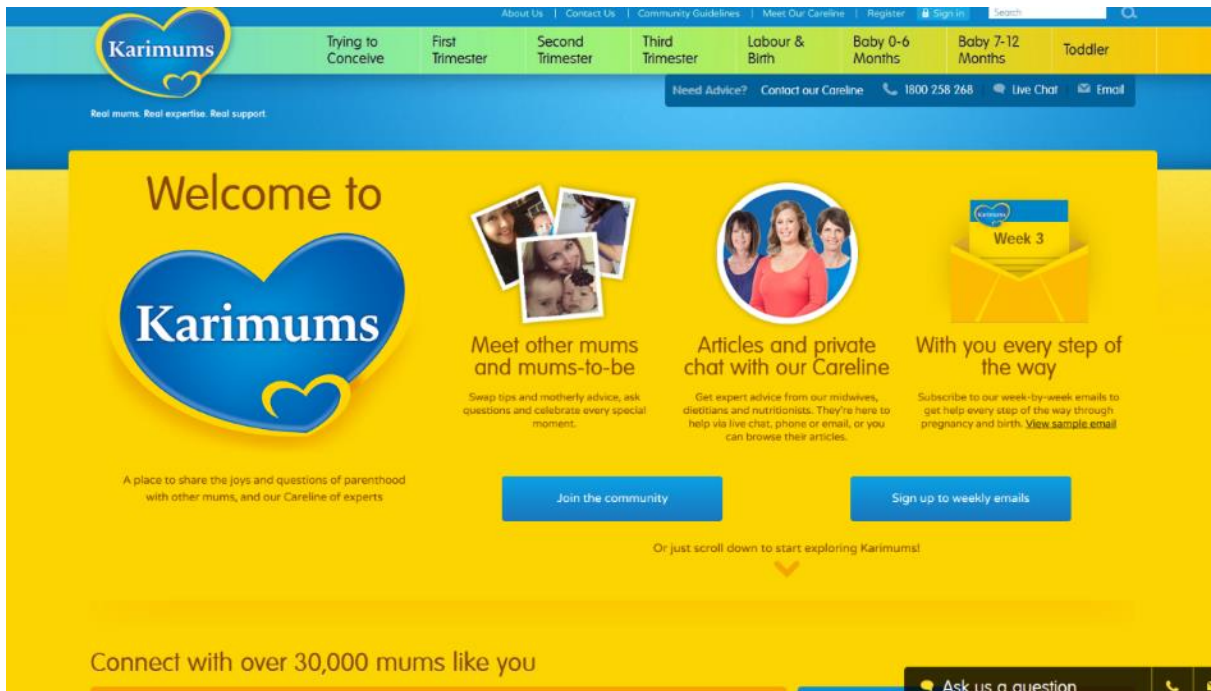
**Product update**  
Update to Danone Nutricia labelling and ingredients

Media Announcements | Our Complete Premium | Complete Nutrition | Karimourish New Zealand | Terms & Conditions | Privacy Policy

Chat with our Careline

4. **Examples of integrated marketing via the internet and social media, with online buying.**

Karicare Australia 'Karimums', a manufacturer's website (top) accessed 1 June 2015 with web page for 'Baby 0-6 months' (bottom) accessed 10 August 2015 <http://www.karimums.com.au/>. These sites provide parents with information, build relationships between the consumer and the brand, and contact with an advisor on the 'Careline' who is employed by the manufacturer. Karicare infant formula brands are manufactured by Nutricia Australia Pty Ltd (a division of the French multinational company, Group Danone) and is an INC member and signatory to the MAIF Agreement. These manufacturer web sites are accessible after a pop-up page of information on breastfeeding is clicked on, as specified in the MAIF Agreement (see Example 5).





5. **Examples of integrated marketing via the internet and social media, with online buying.**

'Karishop' web page for Karicare brand infant formula, follow-on formula and toddler milks.

[http://www.karishop.com.au/?\\_ga=1.255458568.1077678815.1439274678](http://www.karishop.com.au/?_ga=1.255458568.1077678815.1439274678)

Accessed 11 August 2015. The user must click on 'I agree' on the pop-up page with information about breast feeding (shown here on the left) before accessing the Karishop web page, as recommended in the INC document *Marketing of Infant Formulas via Electronic Media*. The use of an image of a young child drinking toddler milk is outside the scope of the MAIF Agreement. Access to the 'team' to 'get support on your order' could include a question about an infant feeding issue. Karicare infant formula brands are manufactured by Nutricia Australia Pty Ltd (a division of the French multinational company, Group Danone) and is an INC member and signatory to the MAIF Agreement.

The screenshot displays the Karishop website interface. On the left, a pop-up window titled "Breast feeding is best for babies" features a teddy bear illustration and text explaining the benefits of breastfeeding. The main content area shows a "Hi and welcome to Karishop" message and a list of products categorized by age group: "From birth to 12 months" and "From 12 months". Each product listing includes an image of the formula tin, its name, and price. At the bottom, there is a "Have a question about an order? Ask our team" section with a photo of two women and a contact form with fields for "Email", "Telephone", "Order number", and "Delivery costs".