Australian Breastfeeding Association

Response to INC application for MAIF authorisation

SUMMARY OF RECOMMENDATIONS

1. The MAIF Agreement is not fit for purpose and should NOT be authorised for any period of time.
2. Australia must expedite the drafting, implementation, monitoring and enforcement of effective and sustainable legislation that implements the full provisions of the International Code of Marketing of Breastmilk Substitutes and subsequent WHA resolutions (The WHO Code).
3. In the interim, the ACCC should be empowered to monitor and enforce the existing Australian Food Standards Code legislation to protect consumers from aggressive and inappropriate marketing of breastmilk substitutes while suitable legislation is being prepared and enacted.

INTRODUCTION

Breastfeeding confers significant health advantage for both breastfeeding mothers and their infants and as such should be protected, promoted, and supported (Pérez-Escamilla et al, 2023; WHO, 2003). Globally, governments are urged to take action to stop 'misleading, aggressive and inappropriate' marketing of breastmilk substitutes, through full implementation of the World Health Organization's 1981 International Code of Marketing Breastmilk Substitutes (The WHO Code) and subsequent World Health Assembly (WHA) Resolutions.

The stated aims of The WHO Code were 'to contribute to the provision of safe and adequate nutrition for infants, by the protection and promotion of breastfeeding' (WHO, 1981). All subsequent WHA Resolutions calling for actions which update the 1981 WHO Code were also endorsed by Australia. The current MAIF Agreement does not meet the agreed international standards set by The WHO Code and does not protect and promote breastfeeding in Australia.

The Australian Breastfeeding Association (ABA) is actively committed to ensuring the full legislation of the International Code of Marketing of Breastmilk Substitutes and the subsequent relevant World Health Assembly Resolutions (The WHO Code) in Australia (ABA, 2022).

This commitment shapes ABA's submission to the ACCC regarding the Infant Nutrition Council's application for authorisation of the Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement (MAIF Agreement). We argue that the MAIF Agreement does not protect and promote breastfeeding in Australia.

1. The MAIF Agreement is not fit for purpose and should not be authorised for any period of time.

The MAIF Agreement is a voluntary and self-regulatory code of conduct that cannot be enforced.

The MAIF Agreement is an industry-based voluntary, self-regulatory code of conduct that cannot be enforced under the Competition and Consumers Act 2010. Voluntary and self-regulatory frameworks are not fit for the purpose of regulating marketing of breastmilk substitutes, rather they undermine breastfeeding, violate parents' rights to make an informed decision about feeding their baby, and violate a child's right to health (WHO & UNICEF, 2022).

Only enforceable statutory legislation can be considered as a response to The WHO Code. The Australian Department of Health and Aged Care describe the MAIF Agreement as 'Australia's response to The WHO Code 'but measured against the WHO's criteria for assessing national compliance with The WHO Code, the MAIF Agreement is among the weakest measures internationally (WHO & UNICEF, 2022).

The leading recommendation in the recent *MAIF Review: Final Report* (DOHAC, 2023) indicates that a prescribed mandatory code is the appropriate framework to restrict the marketing of infant formula in Australia as it will "embed stronger monitoring and reporting and be enforceable under law." Also cited are the "improved public health and associated economic benefits" of this stronger model.

While the MAIF Agreement is in place, stakeholders are misled into assuming that the Australian Government is working to protect breastfeeding and consumer choices. The MAIF Agreement is a poor substitute for health policy measures that encompass the full scope of the International Code of Marketing of Breastmilk Substitutes (The WHO Code).

The MAIF Agreement Complaints Handling Processes fail to protect Australian families' infant feeding choices from commercial influence.

There have been widely expressed concerns about the make-up and functionality of the current MAIF Agreement Complaints Committee. Concerns have been expressed in the current *MAIF Review: Final Report* with recommendations six and seven calling for improved efficiency, transparency and robustness and the removal of industry influence to reinstate public confidence in the MAIF Agreement. The National Breastfeeding Strategy also specifically mentioned the complaints process as a reason for the MAIF Agreement to undergo review.

ABA believes that there are further, major concerns with the complaints process:.Many complaints are out of scope of the MAIF Agreement so there are no consequences for many of the complaints being made, even though there is evidence that the reported practices threaten breastfeeding.

1. As the MAIF Agreement is voluntary, non-signatories are not subject to enforcement of MAIF Agreement conditions.
2. Complaints are commonly considered months after they have been received, meaning a company can undertake MAIF Agreement breaching activities with impunity.
3. Even when a breach is found to have occurred, there is no penalty imposed.
4. There are no community or consumer representatives on the Complaints Committee who have a broad understanding of the issues facing parents and who can advocate on their behalf.

These failings are reflected in the outcomes from the complaints committee in 2020-2021 when 66 complaints were considered. Of these, 55 complaints were resolved (18 in scope, 37 out of scope). Of the 18 in scope, the Committee found 10 breaches by signatories to the MAIF Agreement including on social media platforms, Google search advertising and email marketing campaigns. Most complaints were dismissed because they related to companies which had not signed the MAIF Agreement, or the promotion of toddler milks or retailers' marketing activities, which are not in scope of the Agreement. The number of complaints that are considered 'out of scope', 73% in 2021-22, clearly shows the inadequacy of the MAIF Agreement and the many loopholes that formula manufacturers can use to market their products despite the existence of the MAIF Agreement.

The MAIF Agreement Complaints Committee is a passive 'regulator' of breaches of the MAIF Agreement. It depends on receiving complaints from members of the public before it acts to determine whether something is a breach of the MAIF Agreement.

An effective regulatory model in Australia for infant formula marketing must have a transparent and real-time complaints monitoring system with effective penalties.

The MAIF Agreement cannot combat globalised digital marketing practices.

The MAIF Agreement struggles to meaningfully address infant formula marketing within Australia, while the behemoth of global digital marketing practices can only be tackled when The WHO Code is fully enacted in Australia.

A recent WHO study (WHO, 2022) investigated how the marketing of formula products affects infant feeding choices around the world, including in high income countries, and found that formula milk marketing is pervasive, personalised, and powerful. Across all the countries studied, formula milk companies use a range of tactics to engage women through online and offline channels and platforms. Digital marketing provides a rich stream of personal data which is used by companies to refine and optimise marketing strategies.

Marketing executives have revealed that formula milk companies increasingly rely on digital channels to reach women. Social media channels are often inaccessible to many of the regulations by which traditional media abide. Digital marketing provides formula milk companies with a rich stream of personal data that they use to sharpen and focus their marketing campaigns. Women report being targeted by online marketing, with promotions prompted by their search behaviour for infant feeding advice and information. Some women spoke of being inundated by marketing for formula milk.

What should Australia do to combat these marketing practices?

The WHO recommends that countries should urgently adopt or strengthen comprehensive national mechanisms to prevent formula milk marketing, including domestic legislation – health, trade and labour – in line with The WHO Code, closing all loopholes; robust enforcement and accountability mechanisms, including holding formula milk companies accountable for their practices (WHO & UNICEF,2022).

Retailers must be included in an Australian framework that protects informed feeding choices.

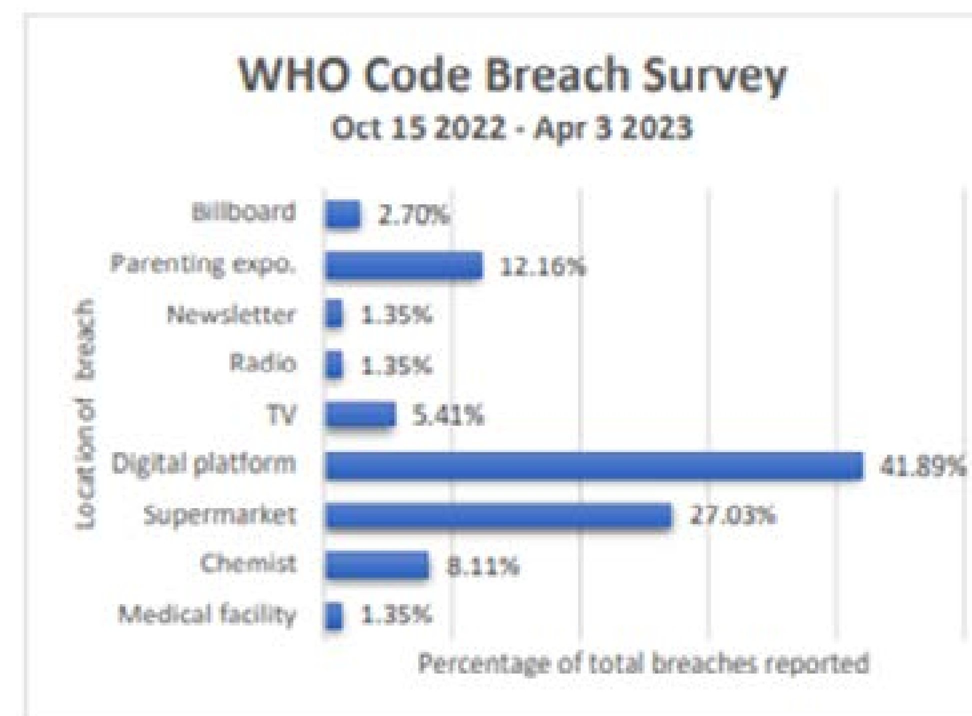
Retailers, including pharmacies and supermarkets, are not included in the MAIF Agreement and have no restrictions or repercussions placed on their own marketing of breastmilk substitutes. The INC argue in their application that making changes to the MAIF Agreement to include retailers would involve "significant costs".

In Australia, all types of formula can be found advertised in supermarket and pharmacy catalogues and formula products are often discounted on retailers' shelves.

The Virtual Violators Detector Tool (VIVID) developed by Alive and Thrive, is an automated solution that uses artificial intelligence and supervised machine learning to detect commercial violations on digital platforms. VIVID has already captured significant data on the inappropriate and aggressive digital marketing of breastmilk substitutes by retailers in Australia.

The ABA WHO Code Breach Survey data (Figure 1) showed that 35.14 % of breaches reported between October 15, 2022, and April 3, 2023, were by supermarket and pharmaceutical retailers. It is not possible to determine whether these outlets have been given information and images from the companies or not to use in these promotions.

Figure 1. ABA WHO Code Breach Survey results 2022-2023



The exclusion of toddler milks from the MAIF Agreement does not reflect current evidence.

Toddler milks are known to be an unnecessary and unhealthy food that were developed to be used as a proxy to cross promote infant formula in jurisdictions where infant formula marketing was restricted.

In its 2021 Determination that provided a relatively short reauthorisation of the MAIF Agreement, the ACCC cited, 'the ability for signatories to advertise toddler milk products, which often has almost identical packaging to infant formula and can have the effect of promoting infant formula' as something which substantially undermined the effectiveness of the MAIF Agreement.

The WHO stated in 2019:

> *The now common cross-promotion practice by which breast-milk substitutes for Infants are promoted through labelling and advertisements of toddler formulas is a threat to breastfeeding and infant health. This marketing tactic has become highly prevalent in an apparent attempt to circumvent national regulation of the marketing of products for infants. (WHO, 2019)*

The current Australian National Health and Medical Research Council (NHMRC) Infant Feeding Guidelines (2012) state that: "Toddler milks and special and/or supplementary foods for toddlers are not required for healthy children. From 12 months of age and beyond, toddlers should be consuming family foods consistent with the Australian Dietary Guidelines."

Proliferation of toddler milks has occurred under the MAIF Agreement and despite national and global condemnation of the product and its links to marketing of infant formula, there seems to be no appetite for regulation.

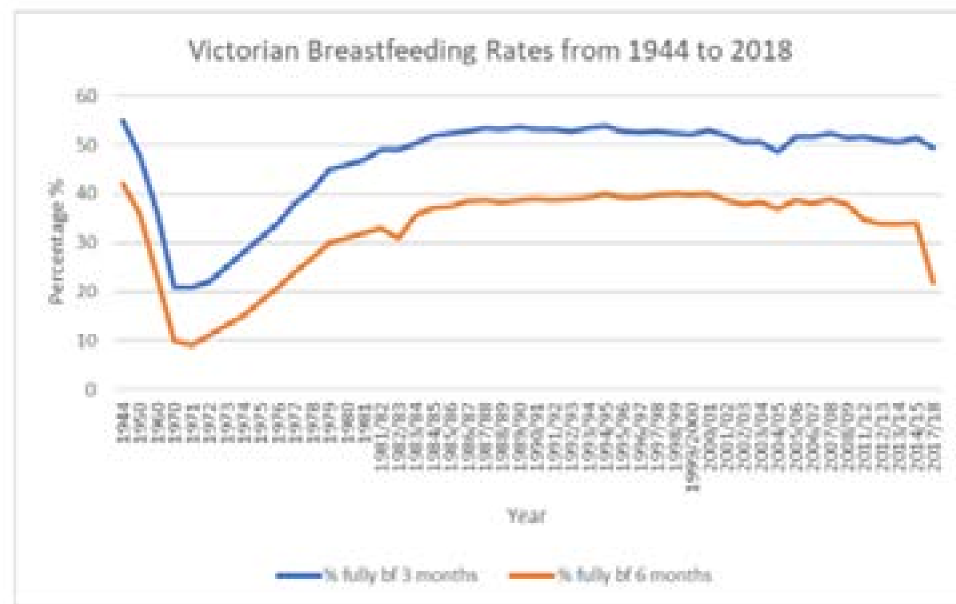
The MAIF Agreement has not improved Australian breastfeeding rates.
Australia has a poor record for monitoring national breastfeeding rates generally and there is very little data that might be able to provide evidence of the impact of the MAIF Agreement on national breastfeeding rates.

The Australian Government itself acknowledges this serious problem and stated in the Australian National Breastfeeding Strategy; 2019 and beyond (ANBS, COAG Health Council, 2019) that:

> *"The extent and nature of national monitoring and evaluation of breastfeeding practices can influence public awareness and support for breastfeeding and whether it is valued at the population level as part of the food system" (p 37).*

Only when we are collecting national data about breastfeeding in Australia in a consistent way over a period of time can we determine whether interventions are having an effect.

Figure 2. Victorian breastfeeding rates from 1944 to 2018



Source: Victorian Maternal and Child Health Service. Data presented are the percentage of fully-breastfed infants (not exclusively-breastfed infants) at 3 and 6 months, according to the definition used by the Victorian Maternal and Child Health Service. Breastfeeding data from 2015/2016 and 2016/2017 and after 2017/2018 were not published. https://www.health.vic.gov.au/maternal-child-health/maternal-child-and-health-reporting-and-data

Breastfeeding is a complex health behaviour, with numerous known and unknown determinants associated with initiation and duration across populations. The MAIF Agreement came into effect in 1992. The absence of national data forces us to consider whatever data is publicly available, including state-based data. Through the 1980s and 1990s there was little change in breastfeeding at 3 months and 6 months in a representative Australian population and certainly no increase in breastfeeding over those 2 decades (see Figure 2 for Victorian rates only).

The apparent decrease in breastfeeding since the mid-2000s is linked with an increase of formula supplementation in hospital, sometimes within the first 24 hours (Safer Care Victoria, 2024) The aetiology for this is again, complex.

There is also a clear relationship between the extent of WHO Code provisions in a country and breastfeeding rates up to 36 months (Figure 3).

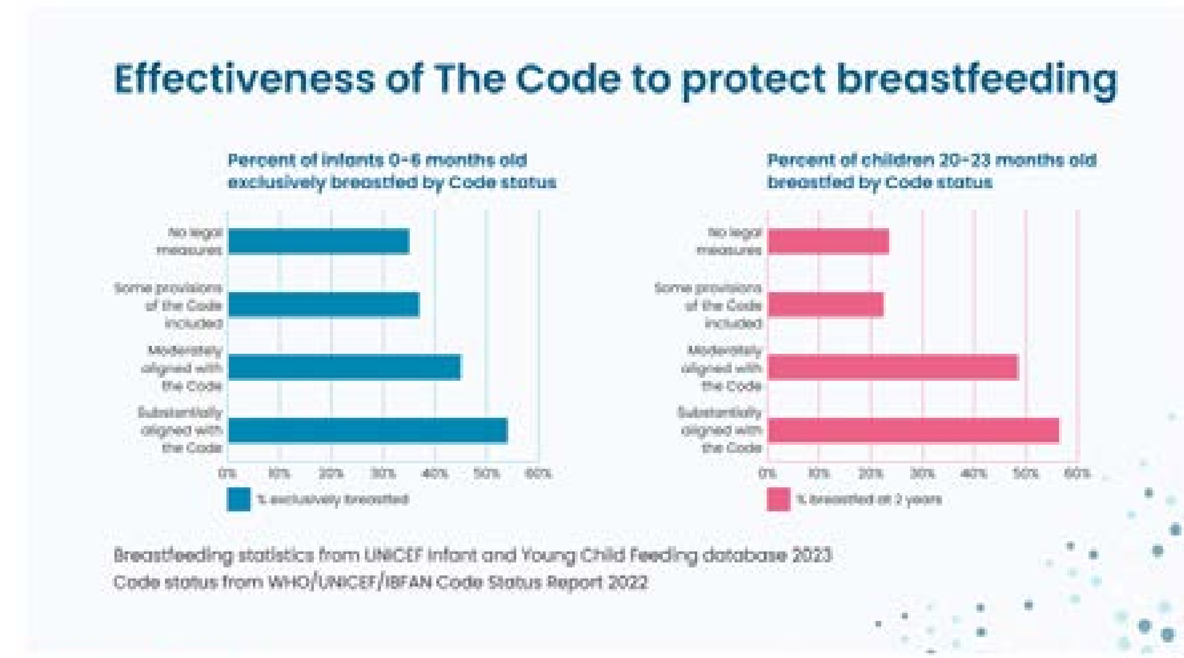


Figure 3. Relationship between the extent of WHO Code provisions in a country and breastfeeding rates up to 36 months
The MAIF Agreement and emergency supplies of infant formula

Recommendation 10 in *The MAIF Agreement Review: Final Report* states that policy and guidelines should be established to *enable donations of infant formula* in emergency and disaster situations. In the INC submission to the ACCC (paragraph 62b) there is reference to a guidance document produced by the INC about infant formula donation in emergency settings that is waiting for DOHAC approval . In contrast to this, the National Breastfeeding Strategy (2019) Action Area 3.2 called for the development of a national policy *on infant and young child feeding in emergencies.*

This recommendation in *The MAIF Review: Final Report* is beyond the scope of the terms of the Review and it is beyond the reach of the stated ANBS action by mentioning donations of infant formula rather than infant and child feeding policy. It is concerning to see this link between the Review of MAIF and the INC submission to the ACCC that clearly contradicts the National Breastfeeding Recommendations. ABA has produced a draft model policy on *Managing Infant Formula Donations, Procurement and Distribution in Emergencies* as part of its research into best practice for management of infant and child feeding in emergencies. Donations of formula in emergency situations need specific guidelines as they are difficult to manage and likely to cause harm.

2. Australia must expedite the drafting, implementation, monitoring and enforcement of effective and sustainable legislation that implements the International Code of Marketing of Breastmilk Substitutes and subsequent WHA resolutions (The WHO Code) in full.
The current MAIF Agreement is not fit for purpose and should be replace with legislation that implements The WHO Code. The recent *MAIF Review: Final Report* and the ANBS (2019) both recommend the introduction of more WHO Code-like regulatory features in Australian frameworks.

The WHO Code has greater scope than the MAIF Agreement and consequently its full implementation has measurably greater impact on breastfeeding rates. As Figure 3 above showed – there is compelling evidence for adoption of The WHO Code and improved breastfeeding outcomes.

The Euromonitor International database shows how implementation of The WHO Code negatively affects sales of formula milks in the Philippines where The WHO Code has been effectively implemented. Lower formula sales reflect

higher breastfeeding rates at a population level and vice versa. In contrast, a lack of adequate implementation of the WHO Code in Indonesia shows how formula milk companies profit from poor regulatory measures.

WHO provides step-by-step guidance for review of jurisdictional levels of implementation of WHO Code measures so that these can be strengthened and so effective systems for implementation and enforcement can be established (WHO, 2022). Policy makers, such as the Australian Department of Health and Aged Care, may refer to this "model law" for assistance in strengthening national regulations on the marketing of breastmilk substitutes.

Strengthening the existing Food Standards Act and Standards to incorporate more of The WHO Code's scope, including expanding the scope to include all products from birth to 36 months and capturing retailers as well as manufacturers and importers, would offer further protections for Australian families who are making infant feeding decisions.

The Model Law prohibits:

1. promotion to the public, including at the retail level
2. promotion through the health-care system and contact with health workers and health systems, including those activities considered to constitute a conflict of interest
3. behaviour by health workers or their associations that would constitute a conflict of interest
4. the use of health or nutrition claims,
5. cross-promotion; and
6. the use of inappropriate messages in the promotion of complementary foods, while requiring statements that support breastfeeding and reinforce the appropriate age of introduction of complementary feeding (WHO, 2022).

In contrast, the MAIF Agreement is an industry-led, voluntary, self-regulatory arrangement that does not curb harmful marketing of breastmilk substitute products in Australia.

3. In the interim, the ACCC should be empowered to monitor and enforce existing Food Standards Code legislation to protect consumers from aggressive and inappropriate marketing of breastmilk substitutes while suitable legislation is being prepared and enacted.

We would not presume to tell the Australian Government how to create a regulatory system that protects breastfeeding and allows Australian families to make informed decisions about infant feeding free of commercial interference. But there will be concerns about how discontinuing the MAIF Agreement will impact on infant formula marketing until The WHO Code can be fully legislated in Australia.

In the interim, we recommend that the Australian Government explores mechanisms to empower the ACCC to monitor and enforce existing statutory legislation to provide protection for consumers. The ACCC could be given authority to monitor and enforce the Food Standards Act (1991) standards, which is suited to their current role.

There are existing food standards that are upheld through relevant Food Standards Australia and New Zealand (FSANZ) legislation which fall within the scope of The WHO Code and provide protections to consumers of breastmilk substitutes. These are the Food Standards Act (1991) and Standard 2.9.1, Standard 1.2.1, and Standard 1.2.7 and are enforceable by law.

As the INC states in their submission: "In the absence of the MAIF Agreement manufacturers would still be constrained in their ability to market infant formula, particularly under foods standards legislation and any restrictions which in future exist under a regulatory regime put in place to implement The WHO Code."

The usefulness of these food standards is best illustrated by the 2022 WHO Country Status Report for Australia that was assessed on existing legal and enforceable measures . Australia scored 27/100 overall but gained these points from the Food Standards Act and three Standards. The MAIF Agreement was not considered because it is voluntary and unenforceable.

CONCLUSION

Formula milk marketing, not the product itself, disrupts parents' informed decision-making and undermines breastfeeding. Marketing of formula products is different from the marketing of everyday items. Feeding practices in the first three years of life profoundly affect the child's future health outcomes. Parents' decisions about how infants and children are fed should be based on the very best information and truthful evidence, and not the commercial interests of formula manufacturers and retailers.

Australia must move towards the drafting, implementation, monitoring and enforcement of legislation that encompasses the full scope of The WHO Code, rather than expending resources on the modification or continuation of the MAIF Agreement that does not protect the right of families to make informed decisions about infant feeding.

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