



Australian
Competition &
Consumer
Commission

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www.accc.gov.au

Our Ref: N31488
Contact Officer: Tim Scott
Contact Phone: (02) 6243 1221

9 December 2005

Mr Dick Wells
Chief Executive
Australian Food and Grocery Council
Level 2, Salvation Army Building
2 - 4 Brisbane Avenue
BARTON ACT 2600

Dear Mr Wells

Exclusive Dealing Notification lodged by Nestlé Australia Ltd.

The Australian Competition and Consumer Commission (the ACCC) has received a notification from Nestlé Australia Ltd (Nestlé) with regard to the conditions under which it proposes to supply Nestlé brand and private label products to Aldi Stores (Aldi). I am writing to you as a party who may be interested in providing a submission to the ACCC in relation to this notification. I also understand that the Australian Food and Grocery Council is a peak representative body. In that role, could I please ask you to pass this correspondence onto those of your members that you believe may be interested in this matter?

As you may be aware, the ACCC is responsible for administering the *Trade Practices Act 1974 (TPA)*. The competition provisions of the *TPA* prohibit certain forms of anti-competitive conduct or arrangements. Section 47 of the *TPA* prohibits, amongst other things, conduct known as exclusive dealing where it has the purpose or effect of substantially lessening competition. Exclusive dealing covers a variety of conduct and includes situations where one business trades with another, and imposes restrictions on the other's freedom to choose with whom, or in what, it deals.

Notification process

While the *TPA* prohibits certain forms of anti-competitive conduct, it does, however, recognise that compliance with the competition provisions of the *TPA* may not always be in the public interest. It therefore allows immunity to be afforded for conduct that falls under some of the provisions of the *TPA*, in certain circumstances.



One way those businesses may obtain immunity for conduct that might be at risk of breaching the exclusive dealing provisions of the *TPA* is to lodge a notification with the ACCC. Once a notification has been lodged with the ACCC, immunity for the notified conduct commences immediately.

The ACCC may revoke notifications of exclusive dealing (other than third line forcing) if the conduct has, or is likely to have, the purpose or the effect of substantially lessening competition and the ACCC is satisfied that: the conduct has not resulted or will not result in a benefit to the public; or the likely detriment to the public will outweigh any public benefit from the conduct constituted by any lessening of competition resulting from the conduct.

Notification lodged by Nestlé

On 2 December 2005, Nestlé lodged a notification concerning the supply of all Nescafé products to Aldi. Nestlé notified the ACCC that it will continue to supply its products to Aldi on condition that:

- Aldi does not obtain from Nestlé's competitors imports of Nescafé coffee products with similar appearance and "get-up" as Nescafé Blend 43 coffee; unless
- Aldi expressly states in promotions, advertising, marketing, point of sale, packaging and other materials that the products are imported and have a different taste.

A copy of the Nestlé submission is attached and is also available from the ACCC website at: www.accc.gov.au.

Request for Submissions

To assist the ACCC in considering this notification it would be helpful to obtain your views on whether the conduct would substantially lessen competition and whether the public benefits flowing from the notified conduct are likely to outweigh any anti-competitive detriments. The ACCC asks for submissions to be in writing so they can be made publicly available in order to ensure that parties interested in the matter (including the notifying party) have access to issues raised about the notified conduct. Submissions are placed on a public register for this purpose. A copy of this letter will be placed on the public register.

Persons lodging a submission with the ACCC may request that information included in the submission be treated as confidential and not placed on the public register. If confidentiality is granted in respect of information the ACCC may take it into account, even though not publicly available. Guidelines for seeking confidentiality are attached.

Submissions can be sent to:

Tim Scott
Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
DICKSON ACT 2602

Alternatively, submissions can also be lodged by e-mail to: tim.scott@acc.gov.au.

It would be appreciated if you could provide your submission to the ACCC by **cob Friday, 16 December 2005**.

Should you have any queries or if you wish to discuss any aspect of this matter please contact Tim Scott on (02) 6243 1221.

Yours sincerely



David Hatfield
Director
Adjudication Branch

GUIDELINES FOR CONFIDENTIALITY CLAIMS

The process whereby the ACCC assesses applications for authorisation or notification is very public, transparent and consultative. The *Trade Practices Act 1974* (the Act) requires the ACCC to maintain a public register in respect of authorisation and notification applications.

Applicants and interested parties can request that a submission, or a part of a submission, be excluded from the public register.

The ACCC is required under the Act to exclude from the public register upon request details of:

- (i) secret formulae or processes;
- (ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or
- (iii) the current manufacturing, producing or marketing costs of goods or services.

However, even if a document does not meet these technical requirements, the ACCC may still grant confidentiality where, in the ACCC's view, it is desirable to do so.

The ACCC also has the discretion, under s89 of the Act, to exclude material from the public register if it is satisfied that it is desirable to do so, either by reason of the confidential nature of the material or for any other reason. The ACCC expects that a party claiming confidentiality on these grounds will present a case for its treatment in this manner.

Under Regulation 24 of the *Trade Practices Regulations*, when a request for confidentiality is made to the ACCC:

- (a) where the request is that a whole document be excluded, the words "**Restriction of Publication Claimed**" should appear in red writing near the top of each page; and
- (b) where the request is that part of a document be excluded, the words "**Restriction of Publication of Part Claimed**" should appear in red near the top of the first page of each document, and the part for which confidentiality is claimed should also be marked in red. A submission of more than 5 pages should also include a description of the whereabouts of the parts for which confidentiality is claimed.

Applicants, as a matter of course, should remove headers claiming "confidential communication" from all Emails and otherwise, unless they have a particular piece of information that they justify to the ACCC deserves exclusion from the public register. If confidentiality is not requested but a header cannot be removed, it should be clearly stated at the beginning of the communication that confidentiality is not requested.

If the ACCC denies a confidentiality request, the requesting party may ask that the material be returned. As a matter of practice, the ACCC will specify a period (usually 14 days) in which they can request the return of such material. Upon response, the ACCC will return the original material and destroy all associated copies. The ACCC will not consider this material when reaching its decision.

If the ACCC does not receive a response within the specified period, the original material will be placed on the public register.

Information or documents granted confidentiality may be used by the ACCC pursuant to its powers generally under the *Trade Practices Act*.

*** TRANSMISSION REPORT ***

SID : ADJUDICATION ACCC

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