

Non-Confidential Version

Nestlé Australia Ltd

**Response to submission by
ALDI Stores regarding
exclusive dealing notification N31488**

8 March 2006

Nestlé Australia Ltd

Response to submission from ALDI Stores regarding exclusive dealing notification N31488

1 Introduction and executive summary

1.1 Introduction and purpose of submission

This submission is made by Nestlé Australia Ltd (“**Nestlé Australia**”). This submission responds to issues raised by ALDI Stores (“**ALDI**”) on 12 January 2006 in its submission in response to Nestlé Australia’s exclusive dealing notification N31488 (the “**Notification**”) under the *Trade Practices Act 1974 (Cth)* (“**TPA**”).

1.2 Executive summary

ALDI’s argument

ALDI’s submission claims, in summary, that Nestlé Australia’s real purpose in lodging the Notification is to discourage the parallel importation of NESCAFÉ products being offered for sale in Australia, which will result in significant public detriment through less competition, less consumer choice and higher consumer prices. ALDI’s submission also makes a number of assertions in relation to difficulties in obtaining supply from Nestlé Australia.

Nestlé Australia’s response

Nestlé Australia does not accept ALDI’s claims. In particular, Nestlé Australia submits that it does not have an anti-competitive purpose in lodging the Notification and believes that the conduct which is the subject of the Notification will not lessen competition substantially in any relevant market. Moreover, Nestlé Australia believes that the Notification will deliver public benefits which will outweigh any public detriment.

Nestlé Australia regrets some of ALDI’s assertions and does not propose to engage in a public argument in relation to those assertions. Nestlé Australia has attached in the confidential elements of this submission relevant correspondence, in particular correspondence which ALDI did not include in their submission, which gives a more balanced and factual position as to the reason for any supply “issues” as between the parties. Nestlé Australia has therefore provided a complete set of correspondence for the Commission’s ease of reference.

Nestlé Australia trusts from that set of complete correspondence, that it is clear that the supply issues arose because of the way in which ALDI seeks to do business - not because of any competition issues. In relation to the public interest question raised in ALDI’s submission, Nestlé Australia has also included examples of specific customer complaints made to Nestlé Australia in relation to NESCAFÉ branded coffee purchased at ALDI, despite the fact that the products the subject of the complaints did not carry Nestlé Australia’s contact details. These complaints illustrate the actual confusion that ALDI’s

form of advertising creates. Such actual hard evidence of confusion is more determinative than theoretical legal arguments as to which way consumers may view ALDI's marketing.

As such, Nestlé Australia has a legitimate commercial interest in protecting its brand reputation. In particular, when a retailer declines to act reasonably in product marketing, Nestlé Australia submits that a supplier is entitled to rely on statutory provisions in the TPA which entitle a supplier to decline to supply rather than engage in costly court proceedings.

Litigation under section 52 of the TPA only addresses one particular marketing approach and Nestlé Australia's experience is that another, similar marketing approach can be devised with minimal changes of wording, which then requires further legal challenge. A solution which does not involve taking legal action against a purchaser engaging in such conduct is a more commercial approach.

Nestlé Australia's public response

For the purpose of publicly responding to ALDI's submission, the key points Nestlé Australia wishes to make are as follows:

- ***the conduct the subject of the Notification is very narrow*** - the conduct which is the subject of the Notification merely requires ALDI to differentiate a very limited number of products (two coffee brands imported from overseas) from NESCAFÉ BLEND 43;
- ***in these circumstances, the differentiation requested is reasonable and is supported by actual evidence of customer complaints to Nestlé Australia*** - Nestlé Australia is merely seeking to protect its NESCAFÉ BLEND 43 brand and its product reputation to ensure that customers are fully apprised of the essential characteristics of the products which they are purchasing and can make an informed decision. Accordingly, Nestlé Australia's purpose is neither punitive nor anti-competitive and there is categorically no purpose of substantially lessening competition;
- ***ALDI's suggestion that not being able to stock Nestlé Australia's coffee products seriously disadvantages them in the grocery market, and that Nestlé Australia has some form of market strength, is not demonstrated by ALDI's unequivocal written rejection of Nestlé Australia's reasonable requests for ALDI to differentiate the imported coffee brands from NESCAFÉ BLEND 43*** - ALDI's unequivocal written response to Nestlé Australia suggests that Nestlé Australia does not have any market power. If it did, ALDI would not have been in a position to reject Nestlé Australia's request in such an unequivocal manner;
- ***the conduct the subject of the Notification does not seek to prevent ALDI from parallel importing*** - the conduct the subject of the Notification does not seek to stop ALDI from importing coffee products from overseas into Australia. Nestlé Australia wishes to make this clear that this is not within the purpose, scope or intention of the Notification;

- ***there are other competing products and suppliers of NESCAFÉ BLEND 43 and other coffee products*** - such that there is no material impact on competition and in particular consumer choice and availability. NESCAFÉ BLEND 43 will continue to be available in a large range of retail outlets, including Coles, Woolworths and stores supplied by Metcash. In addition, Coles, Woolworths, stores supplied by Metcash and other wholesalers-- according to ALDI's own submission -- are more price competitive than ALDI. There are also a number of other competing coffee products supplied by major competitors. ALDI also has the option of importing alternative products or producing its own house brands, as it does overseas. Therefore, barriers to entry are low. Accordingly, the conduct which is the subject of the Notification will not result in a substantial lessening of competition in any relevant market.

ALDI's submission also admits that its market share is approximately 3.7% of the national packaged retail grocery market. Accordingly, on ALDI's own market share data, even if no coffee whatsoever was available in ALDI stores (and this is clearly not the case), ALDI's market share is not significant enough to warrant the argument that there is a lessening of competition which is "substantial";

- ***as for public benefits vs public detriments, Nestlé Australia has received a number of complaints from consumers regarding the imported coffee brands in question*** - in light of these complaints, the conduct which is the subject of the Notification (which seeks to minimise such confusion), will not lead to a public detriment and will deliver real, discernable public benefits. It is an alternative to costly and unproductive litigation. Conversely, to allow ALDI to maintain the status quo would be to condone (even if implicitly) conduct which is misleading and which has led consumers to complain to Nestlé Australia. Nestlé Australia also notes that ALDI's submission suggests that if the Commission has concerns with ALDI's marketing, it would discuss that with the Commission. However, the damage that misleading and deceptive conduct causes is a matter for the owner of the brand to assess. Moreover, deciding whether something is misleading and deceptive as a matter of law is, ultimately, a matter for the Courts; and
- ***ALDI's references to the Universal Music case are not on point*** - The *Universal Music* case involved a request by various competitors to cease the import of a competing product and to seek to put in place certain joint distribution procedures. In any event, this matter does not concern a request to reduce or cease the importation of a product of a competing producer or even the importation of a Nestlé overseas product.

1.3 The Commission's draft Guide to Exclusive Dealing Notifications

Having regard to the Commission's recently released draft Guide to Exclusive Dealing Notifications, and adopting the format taken by the Commission, Nestlé Australia notes the following points:

- ***Purpose of Notification*** - the purpose of the Notification is to notify conduct which falls within the legal concept of exclusive dealing, but which does not, in Nestlé Australia's view, satisfy either the 'purpose' or 'effects' tests in section 47(10) of the TPA. However, the TPA provides a mechanism to seek immunity for such conduct and Nestlé Australia is entitled to use this statutory mechanism. In so doing, the relevant purpose of Nestlé Australia is clearly set out in the Confidential Annexures, which also provide contemporaneous evidence that Nestlé Australia does not have a purpose of limiting imports or a purpose of substantially lessening competition. Importation is taken as a fact. However, while this is the case (and in relation to imports generally), Nestlé Australia expects a purchaser of products not to act in a manner which confuses consumers of the Nestlé Australia product, which is sold to it.

- ***Effect of the notified conduct*** - equally, the conduct which is the subject of the Notification does not have the effect of substantially lessening competition for the following reasons:
 - ALDI continues to have the ability to source competing products from other Australian suppliers;
 - ALDI continues to have the ability to source competing products from overseas;
 - ALDI continues to have the ability to manufacture its own house brand of coffee, as it has done overseas;
 - ALDI has made it very clear, as set out in the Confidential Annexures, what it would do if Nestlé Australia did not supply it. This demonstrates that Nestlé Australia does not have any market power (and suggests that ALDI has strong buyer power, as ALDI threatened to bypass Nestlé Australia or to seek alternatives); and
 - ALDI accounts for a small share of the grocery sector and a small share of total coffee sales, such that it is difficult to see how the conduct in question could give rise to a substantial lessening of competition.

Accordingly, the combination of alternative suppliers, ALDI's ability to import and the ability to produce a house brand itself (as it does overseas), suggests that there can be no substantial lessening of competition as a result of the Notification.

- ***Public benefits and detriments*** - The Commission has previously stated that the supply of better information to consumers and businesses to permit informed choices constitutes a "public benefit". Nestlé Australia has included actual evidence of consumer confusion resulting from ALDI's current marketing of the imported coffee brands, as well as product support issues. As such, Nestlé Australia believes that the conduct the subject of the Notification will deliver clear and discernable public benefits.

Moreover, ALDI's own correspondence makes the point that the Nestlé Australia branding could differentiate imported NESCAFÉ brands as it so wished. If Nestlé Australia were to do so along the lines of the product differentiation that was requested of ALDI, it would result in a far greater cost being passed on to Australian consumers than if ALDI were to take those steps itself. Accordingly, the assessment of any detriment which may arise must properly be confined to the conduct the subject of the Notification (that is, the detriment which arises from the marketing and product differentiation requested by Nestlé Australia). In the face of actual complaints from customers regarding ALDI's marketing, it is difficult to assert that the requested differentiation is not reasonable.

Key points

Nestlé Australia submits that the relevant conduct - that is, the conduct which is the subject of the Notification - concerns a request by Nestlé Australia for ALDI to differentiate its marketing of two products - "NESCAFÉ Classic Deluxe" and "NESCAFÉ Matinal" - and the consumer confusion that arises from ALDI's current marketing of those products. The relevant conduct is not concerned with parallel importing or pricing - ALDI remains free to import whichever products it chooses and to set prices as it sees fit.

Nestlé Australia has a legitimate commercial interest in protecting its brand reputation and when a retailer declines to act reasonably in product marketing, Nestlé Australia submits that a supplier is entitled to rely on statutory provisions in the TPA which entitle a supplier to decline to supply, rather than engage in costly court proceedings.

Accordingly, the Notification does not have a purpose or, for the reasons set out above, an effect of lessening competition substantially. In addition, in light of evidence of actual consumer confusion resulting from ALDI's marketing of certain imported NESCAFÉ brands, Nestlé Australia believes that the conduct which is the subject of the Notification will deliver discernable public benefits.

2 The factual context of the Notification

2.1 Background

ALDI previously and so far as Nestlé Australia is aware, is still importing into Australia “NESCAFÉ Classic Deluxe” and “NESCAFÉ Matinal” branded coffee (“Overseas Nescafé Brands”), manufactured in Indonesia and Brazil respectively in 200g containers. ALDI has previously purchased NESCAFÉ BLEND 43 branded coffee, which is manufactured in Australia, from Nestlé Australia.

Full details of the factual background were provided to the Commission with Nestlé Australia’s Notification dated 2 December 2005.

2.2 Conduct which forms the subject of the Notification

Against this background, Nestlé Australia submitted the Notification to the Commission, by which Nestlé Australia will supply ALDI with NESCAFÉ BLEND 43 coffee and any other Nestlé Australia products on condition that ALDI appropriately differentiates the Overseas Nescafé Brands from NESCAFÉ BLEND 43. There is no requirement that ALDI cease importing Overseas Nescafé Brands or any other form of coffee.

2.3 Commercial rationale for the conduct

Contrary to claims by ALDI that the conduct which is the subject of the Notification is motivated by an anti-competitive or punitive purpose, Nestlé Australia wishes to reiterate at the outset that its motivation for submitting the notification to the Commission is a legitimate desire to ensure that the Overseas Nescafé Brands that ALDI is choosing to import are sufficiently and clearly distinguished from NESCAFÉ BLEND 43.

In particular, Nestlé Australia has **not** sought to stop ALDI, or any other third party, from importing the Overseas Nescafé Brands or engaging in parallel importing. That is not part of the conduct which is the subject of the Notification.

Moreover, the conduct which is the subject of the Notification does not support ALDI’s claim that the conduct “*constitutes a supply on condition that ALDI not acquire soluble coffee products from Nestlé Australia’s competitors*” (paragraph 3.2). Rather, the conduct in question merely crystallises the circumstances in which Nestlé Australia will supply NESCAFÉ BLEND 43 (and other Nestlé Australia products, as considered appropriate) to ALDI -- that is, on condition that ALDI takes steps to ensure that the Overseas Nescafé Brands are sufficiently differentiated from the characteristics of NESCAFÉ BLEND 43.

Nestlé Australia's valid concerns arise with the marketing by ALDI of the Overseas Nescafé Brands, which together with the packaging and 'get up' of those products, is leading to consumer confusion in Australia. The licensing and use of all Nestlé trade marks (including the NESCAFÉ trade mark), is a matter for the Nestlé group of companies. The key issue for Nestlé Australia, however, is that it does not have any control over *third parties* who import the Overseas Nescafé Brands into Australia, which are manufactured for consumers in different countries with different taste preferences, or how those products are then marketed in Australia. Most retailers would be reasonable and be mindful of not detrimentally affecting a supplier's brand

In the current circumstances, however, Nestlé Australia is concerned that the essential characteristics of the Overseas Nescafé Brands (such as their source, blend and taste) are not sufficiently differentiated from those of NESCAFÉ BLEND 43 in ALDI's marketing, with the consequence that Australian consumers are likely to be (and have been) confused about the nature of the products they are purchasing. These are valid concerns which, in fact, have been borne out in practice. Details of consumer confusion as well as other complaints are set out in Confidential Annexure Three of this submission.

Accordingly, contrary to ALDI's assertions that the steps it has taken to differentiate the Overseas Nescafé Brands from NESCAFÉ BLEND 43 are "significant" and sufficient to allay any potential confusion that might arise in consumers' minds, Nestlé Australia submits that the measures it has previously requested, which form the condition of the Notification, are reasonable, necessary and objectively justifiable. Those steps merely seek to ensure that customers are fully apprised of the characteristics of the product they are purchasing. They do not, as suggested by ALDI, require ALDI to promote NESCAFÉ BLEND 43 as a superior product to the Overseas Nescafé Brands.

Importantly, ALDI continues to be free to source coffee products howsoever it wishes. Nestlé Australia simply requested ALDI not to engage in marketing that failed to adequately differentiate between the origin and taste of the Overseas Nescafé Brands and Nestlé Australia's NESCAFÉ BLEND 43. It is difficult to deny the validity of Nestlé Australia's request (which is now the subject of the Notification) in the face of complaints consumers have made to Nestlé Australia in relation to the marketing and taste differences of the Overseas Nescafé Brands.

2.4 ALDI's alleged supply and pricing difficulties with Nestlé Australia are incomplete

ALDI's submission alleged that it has had both supply and pricing difficulties with Nestlé Australia, and annexes certain correspondence between ALDI and Nestlé Australia in evidence of such claimed difficulties.

Nestlé Australia notes that ALDI's provision of documentation on each of these issues is incomplete and therefore misstates the state of affairs.

Nestlé Australia's response to ALDI's alleged supply and pricing difficulties appears at Confidential Annexure One.

Additionally, Nestlé Australia has annexed further correspondence on this issue at Confidential Annexure Two.

3 No substantial lessening of competition and therefore no significant public detriments

3.1 Introduction

Nestlé Australia believes that the conduct which is the subject of the Notification does not have the purpose, or effect, of substantially lessening competition in any relevant market and, consequently, will not give rise to any significant public detriments.

3.2 No purpose of lessening competition

The purpose of the conduct which is the subject of the Notification is neither punitive, nor anti-competitive. Nestlé Australia's purpose in notifying that conduct is to protect its brand and its product reputation, so that customers are fully apprised of the essential characteristics of the products they are purchasing. In particular, as discussed in Section Two of this submission and as evidenced by material contained in the Confidential Annexures, Nestlé Australia does not have a purpose of limiting imports by third parties or restricting the ability of ALDI to compete in any relevant market.

3.3 No adverse impact on consumers of soluble coffee

Nestlé Australia submits, moreover, that the conduct in question will not result in any lessening of competition for consumers who acquire soluble coffee products. NESCAFÉ BLEND 43 will continue to be available in many different retail outlets such as Coles, Woolworths, Metcash and its associated banner and franchise networks, as well as the multitude of convenience stores. For this reason, it is highly unlikely that consumers will be denied the opportunity of purchasing that brand of coffee.

In support of this view, Nestlé Australia notes that on the basis of ALDI's data, ALDI has only a small share of the retail grocery market (approximately 3.7% of the national packaged retail grocery market), whereas ALDI's major competitors, Coles and Woolworths, account for a combined share of over 70%.¹ Therefore, even if no coffee whatsoever was available in ALDI stores (and this is clearly not the case), ALDI's market share is not significant enough to warrant that there would be any lessening of competition which is "substantial".

Moreover, ALDI's submission also states that Coles and Woolworths are more price competitive with respect to the sale of NESCAFÉ BLEND 43. Accordingly, Nestlé Australia submits that the conduct in question should not lead to higher prices for consumers.

In any event, by commenting that "[t]he representations that ALDI has made concerning the quality of Nescafé Matinal and Classic Deluxe have been made following testing of the products" (paragraph 7.6), ALDI's submission appears to suggest that ALDI regards the Overseas Nescafé Brands as effective substitutes to NESCAFÉ BLEND 43. It is difficult to see how the conduct in question can lessen competition substantially when -- on ALDI's own argument -- substitutes for NESCAFÉ BLEND 43 are readily available

¹ Paragraph 2.2 of ALDI's submission.

to ALDI and consumers. Indeed, it is always open to ALDI to source competing products from other Australian suppliers, from overseas suppliers, or to manufacture its own house brands.

3.4 No lessening of competition in the retail grocery market

Nestlé Australia believes that the relevant competition assessment of the Notification should focus on whether the conduct in question lessens competition in any relevant market. The statutory test does not focus on whether the conduct impedes ALDI's ability alone to compete effectively in the retail grocery market. This view is consistent with the Australian Competition Tribunal's ("Tribunal") reasoning in *Ford Motor Co of Australia* (1977) ATPR 40-043, that is, that competition evaluations should be made on the basis of the overall market effect involved, not upon whether the conduct in question advances the cause of any particular market player.

In any event, if ALDI were to have such concerns, ALDI's conduct is surprising given its unequivocal refusal of Nestlé Australia's request to differentiate the Overseas Nescafé Brands and ALDI's other conduct set out in the Confidential Annexures. Nevertheless, given that ALDI has raised arguments concerning this market, Nestlé Australia considers it appropriate to briefly address some of those points.

In summary, ALDI claims that the conduct the subject of the Notification disadvantages ALDI in its ability to compete with other grocery retailers -- namely, if ALDI is unable to acquire NESCAFÉ BLEND 43 and MILO on competitive terms, ALDI not only runs the risk of losing sales to its competitors, but also runs the risk of losing sales of unrelated products as consumers might be less inclined to shop at ALDI stores.

Nestlé Australia believes that the terms on which ALDI acquires NESCAFÉ BLEND 43 and MILO are not relevant to the competition assessment of the conduct which is the subject of the Notification. The assessment should properly focus on whether *that* conduct has the purpose, effect, or likely effect of substantially lessening competition.

On this basis, which Nestlé Australia submits is the correct approach, the relevant issue is whether the supply of NESCAFÉ BLEND 43 (and other Nestlé Australia products), which is conditional on the differentiation of the Overseas Nescafé Brands, has the purpose, effect, or likely effect of substantially lessening competition. Nestlé Australia submits that it will not, for the reasons that:

- Nestlé Australia's purpose in notifying the conduct in question, as set out in Section Two of this Submission, is a legitimate purpose of seeking to protect the reputation of the NESCAFÉ BLEND 43 brand from ALDI's form of marketing, thereby alleviating actual customer confusion;
- the conduct in question does not seek to stop ALDI or any third party from acquiring NESCAFÉ BLEND 43 coffee or other Nestlé products from Nestlé Australia or from Nestlé entities overseas. Nestlé Australia is merely seeking differentiation of a very small group of products -- the Overseas Nescafé Brands -- from NESCAFÉ BLEND 43; and

- by its own admission, ALDI accounts for only a very small share of the national packaged retail grocery market (3.7%) and a small proportion of coffee sales.

In these circumstances, it is difficult to see how the conduct which is the subject of the Notification will impede the ability of ALDI to compete against Coles or Woolworths in the retail grocery market, particularly where ALDI is free to import (or source from other Australian suppliers) any number of substitutes for NESCAFÉ BLEND 43 or, alternatively, manufacture its own house brand coffee, as it has done overseas.

3.5 Nestlé Australia does not have market power

In a letter dated 25 November 2005 (which has already been supplied to the Commission), Nestlé Australia made reasonable requests of ALDI to differentiate its Overseas Nescafé Products from NESCAFÉ BLEND 43.

ALDI unequivocally rejected these requests, stating that “[t]he demands ... of your letter are rejected and will not be implemented ...”.

ALDI’s unequivocal rejection of Nestlé Australia’s request strongly suggests that Nestlé Australia does not have any market power. Nestlé Australia also has difficulties with the assertion that the NESCAFÉ BLEND 43 brand is as effective at attracting consumers as ALDI asserts. If it were, ALDI would have sought to be more reasonable in its response to Nestlé Australia. If Nestlé Australia did have market power in the market for soluble coffee, ALDI would not have been in a position to refuse the request.

Accordingly, Nestlé Australia submits that in dealing with the uncompromising approach of ALDI, particularly given the material in the Confidential Annexures, it is entirely reasonable for it to use what commercial negotiating position it has, by making the supply of other Nestlé Australia products conditional on the differentiation of the Overseas Nescafé Brands.

In this regard, it is important to note that the additional Nestlé Australia products which are set out in the Notification comprise only a limited number of brands, which account for only very small sales.

Accordingly, contrary to ALDI’s assertions in paragraph 7.13 of its submission that the conduct in question will result in “[a] reduction in competition to the detriment of Australian consumers”, Nestlé Australia submits that any impact on consumers (and competition) will be minimal and certainly not substantial.

4 The proposed conduct will give rise to public benefits

4.1 Introduction

Nestlé Australia submits that the conduct the subject of the Notification will not result in any public detriment and if any public detriment were to arise, this would certainly be outweighed by public benefits because:

- it will ensure that consumers of Nestlé Australia's soluble coffee are aware that the Overseas Nescafé Brands are not supplied or endorsed by Nestlé Australia; and
- it will ensure that consumers will not be confused with respect to the source, blend and taste of Nestlé Australia's NESCAFÉ BLEND 43 product.

The conduct the subject of the Notification also obviates the need for expensive and time consuming litigation in relation to the ALDI marketing.

4.2 Alleviation of confusion

Nestlé Australia submits that in the absence of the Notification, the continued marketing and sale by ALDI of the Overseas Nescafé Brands will be likely to cause consumer confusion, as well as a long term loss of value to the NESCAFÉ brand and the trust that Australian consumers place in that brand.

This is because, being part of the Nestlé Group, the Overseas Nescafé Brands have similar labelling and overall get-up as NESCAFÉ BLEND 43. However, these products are different from NESCAFÉ BLEND 43, including with respect to the source and blend of its coffee beans and taste of its coffee. When positioned and marketed in the manner undertaken by ALDI, there is actual confusion and customer complaints -- some of these complaints, which demonstrate the legitimacy of Nestlé Australia's concerns, are made directly to Nestlé Australia.

As Nestlé Australia does not have the purpose (or ability) to control third parties who may choose to import the Overseas Nescafé Brands, Nestlé Australia's conduct has been motivated by a legitimate need and desire, as the brand owner, to ensure that marketing materials sufficiently and clearly differentiate the Overseas Nescafé Brands from NESCAFÉ BLEND 43.

ALDI states that it does not accept that there is any risk of consumer confusion. However, contrary to ALDI's assertion, Nestlé Australia has received a number of consumer complaints in relation to ALDI's marketing. Details of the complaints are set out in the Confidential Annexure Three. In light of these complaints which are real, and not merely hypothetical, Nestlé Australia is entitled to seek differentiation of the Overseas Nescafé Brands and in turn, such differentiation will deliver a discernable public benefit in avoiding confusion.

Indeed, this approach is consistent with previous determinations of the Commission, in which the Commission has acknowledged that the supply of better information to consumers and businesses to permit informed choices in their dealings, constitutes a public benefit². Conversely, to allow ALDI to continue to market the Overseas Nescafé Brands in the current manner would be to implicitly condone misleading conduct and to allow a public detriment.

4.3 Consumers will be informed of the differences between brands

Nestlé Australia has no ability to control a third party from importing the Overseas Nescafé Brands and the differentiation proposed by Nestlé Australia merely seeks to ensure that customers are fully apprised of the characteristics of the product they are purchasing.

In particular, Nestlé Australia believes that the proposed conduct set out in paragraph 2(b) of the Notification will ensure that Nestlé Australia's soluble coffee consumers are adequately informed about their products at the point of purchase. Specifically, Nestlé Australia believes that the proposed conduct will ensure that consumers of soluble coffee are aware that the Overseas Nescafé Brands are not supplied or endorsed by Nestlé Australia.

4.4 No evidence of public detriment arising as a consequence of the conduct which is the subject of the Notification

ALDI's submission asserts that the Notification will result in significant public detriment through less competition, less consumer choice and higher consumer prices. ALDI's argument is that if ALDI is unable to acquire NESCAFÉ BLEND 43 and MILO on competitive terms, ALDI will be disadvantaged in its ability to compete with other grocery retailers.

Nestlé Australia does not accept these assertions. As noted earlier in this Submission, Nestlé Australia believes that an assessment of the Notification should properly focus on the conduct the subject of the Notification -- that is, the requirement that ALDI sufficiently and clearly differentiates the Overseas Nescafé Brands from NESCAFÉ BLEND 43 in its marketing materials. The assessment of whether the Notification gives rise to any public detriment (by reason of any lessening of competition) should therefore be confined to the impact of that specific requirement.

Conversely, ALDI's submission focuses on not being supplied with certain Nestlé Australia products and the impact of extraneous matters, such as broader "supply issues". In Nestlé Australia's view, neither are relevant to the application of the statutory test in this matter.

Rather, Nestlé Australia submits that the conduct the subject of the Notification will not give rise to any public detriment constituted by any lessening of competition. This is because that particular conduct effectively makes the supply of NESCAFÉ BLEND 43 (and a small number of other Nestlé Australia products) conditional on ALDI taking certain steps with respect to its marketing of the Overseas Nescafé Brands. It is difficult to see how this condition can give rise to any lessening of competition (and certainly not one which is "substantial"), in circumstances where:

² *Re ACI Operations Pty Ltd* (1991) ATPR (Com) 50-108; *Australian Medical Association Limited & Anor* (1998) ATPR (Com) 50-264

- the condition does not impinge on ALDI's ability to source competing coffee products from Australia and overseas or, indeed, manufacture its own house brand; and
- there will continue to be a number of alternative sources of supply (Coles, Woolworths, stores supplied by Metcash and convenience stores) from which consumers can source NESCAFE BLEND 43 coffee.

In any event, the statutory test does not focus on whether the conduct advances or, conversely, disadvantages any particular market player. The proper application of the statutory test should, as noted earlier, focus on the overall market effect and not on any impact on ALDI alone. On this basis and as discussed in Section Three of this Submission, Nestlé Australia submits that the conduct the subject of the Notification will not lessen competition in any relevant market -- and for this reason, will not give rise to any public detriments.

5 No similarity with the *Universal Music Case*

ALDI asserted that this matter is similar to the *Universal Music* case. Nestlé Australia believes that this matter is very different from the *Universal Music* case. ALDI asserted (at paragraph 5.6) that “... *it can be inferred that Nestlé Australia’s purpose is to discourage retailers, such as ALDI, from the parallel importation of Nescafé and other Nestlé Australia products*”..

The *Universal Music* case involved a request to cease the import of a competing product. However, this matter does not concern a request on the part of Nestlé Australia to reduce or to stop the import of the products of a competing producer. The Notification simply seeks the differentiation of the Overseas Nescafé Brands with the aim of alleviating consumer confusion.

Nestlé Australia has not sought to stop or restrict third party parallel importation of competing products and that is not the subject of the Notification. The material in the Confidential Annexures makes this clear in any event.

6 Conclusion

Nestlé Australia appreciates the Commission’s consideration of this matter and would be happy to meet with the Commission to discuss this matter further, if that would be helpful.

Nestlé Australia Ltd
8 March 2006

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Annexure One - (Confidential)

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Annexure Two - (Confidential)

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Annexure Three - (Confidential)

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Annexure Four - ALDI brochure

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Annexure Five - (Confidential)

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Annexure Six - (Confidential)

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