

MALLESONS STEPHEN JAQUES

Mr Scott Gregson
General Manager, Adjudication
Australian Competition & Consumer Commission
470 Northbourne Avenue
DICKSON ACT 2602

2 June 2006

Dear Mr Gregson

Exclusive Dealing Notification N31488 - submission from Nestlé Australia Ltd

We enclose a submission from Nestlé Australia Ltd (“**Nestlé Australia**”) in response to the Commission’s Draft Notice dated 3 April 2006 in relation to Nestlé Australia’s Notification N31488, dated 2 December 2005.

Yours sincerely

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Nestlé Australia Ltd
Notification N31488

Submission in response to
Australian Competition & Consumer
Commission Draft Notice dated
3 April 2006

**Lodged by Mallesons Stephen Jaques
on behalf of Nestlé Australia Ltd**

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Nestlé Australia Ltd - Notification N31488

Submission in response to Australian Competition & Consumer Commission Draft Notice dated 3 April 2006

1 Purpose and structure of response to Draft ACCC Notice

The purpose of this Submission is to respond publicly to the matters set out in the draft notice issued on 3 April 2006 by the Australian Competition & Consumer Commission (“ACCC”) (“**Draft ACCC Notice**”), which proposes to revoke the exclusive dealing notification N31488 (“**Notification**”) lodged by Nestlé Australia Ltd (“**Nestlé Australia**”) on 2 December 2005 under the *Trade Practices Act 1974* (Cth) (“**TPA**”).

This public submission on behalf of Nestlé Australia analyses the Draft ACCC Notice on the following basis:

- The Draft ACCC Notice contains many incorrect assumptions and statements.
- The ACCC’s analysis is incorrect as it proceeds on the basis that the Notification was intended to stop imports.
- The ACCC’s analysis of the notified conduct does not satisfy the legal test in section 93(3) of the TPA to allow revocation of the Notification by the ACCC.
- It was not a purpose of the notified conduct to stop ALDI from continuing to supply the Overseas Nescafé Brands. Instead, Nestlé Australia’s purpose was to ensure that its own products supplied to ALDI were sufficiently differentiated from the imported products so as to avoid customer confusion.
- The Draft ACCC Notice contains no factual foundation or analysis of market delineation or dynamics to warrant a finding of a substantial lessening of competition in any relevant market.
- ALDI was not faced with mutually exclusive decisions as alleged by the ACCC.¹ It clearly had multiple choices and decisions.
- The ACCC’s analysis is flawed as it made the erroneous assumption that Nestlé Australia was not entitled to seek product differentiation. Nestlé Australia’s request for product differentiation under the Notification is reasonable because ALDI’s corrective measures are inadequate and actual consumer confusion is evidence to this effect. ALDI’s own documents indicate that it would not engage in discussion with Nestlé Australia on supply terms. Nestlé Australia was required to supply on ALDI terms or be de-listed.

¹ Paragraph 5.33, Draft ACCC Notice.

- The ACCC's assessment of the matter is flawed as the ACCC proceeded on the basis of an incorrect counterfactual that Nestlé Australia's request for differentiation created costs for ALDI that would not otherwise be incurred.
- The ACCC's conclusion that the notified conduct has the effect or likely effect of substantially lessening competition has little factual or theoretical foundation. There is no evidence as to the importance of the relevant products to competition in any market.
- The ACCC's analysis is flawed as it ignores the fact that ALDI was always going to be able to import the Overseas Nescafé Brands and that ALDI replaced the product supplied by Nestlé Australia such that there was a minimal impact on competition, if any.
- The intent of the notified conduct is to allay any potential confusion. This is a public benefit which is accepted by the ACCC as so.
- The public benefits outweigh the public detriments. The ACCC has put forward no evidence of any public detriment. There is substantial benefit in allowing Nestlé Australia to make products for Australians - it promotes Australian choices, tastes, local employment and benefits the Australian community. The factory that makes NESCAFÉ Blend 43 employs over 300 people in Queensland. The Draft ACCC Notice ignores Australian public benefits.

We now examine these issues in turn.

2 The Draft ACCC Notice proceeds on incorrect assumptions and statements and does not satisfy the statutory test in section 93(3) of the TPA

2.1 Introduction

At the outset, it is important to highlight incorrect assumptions and statements within the Draft ACCC Notice.

The notified conduct

Key points

The Notification lodged by Nestlé Australia concerns a request to ALDI that if they wish to continue to purchase NESCAFÉ Blend 43 from Nestlé Australia, they should reasonably differentiate that product from the Overseas Nescafé Brands (as defined in the Notification). The Notification does not stop ALDI from importing and it does not stop ALDI from purchasing the product it previously bought from Nestlé Australia from third party suppliers.

ALDI did, and Nestlé Australia understands continues to, purchase Overseas Nescafé Brands from third party importers. Accordingly, the matter is not, as has been suggested by the ACCC, actually about ALDI importing - it is about a reasonable request to ask ALDI that if it wishes to buy NESCAFÉ Blend 43 from Nestlé Australia, it must reasonably differentiate that product from the Overseas Nescafé Brands so that no consumer confusion arises with respect to those brands.²

To put matters beyond doubt, if the ACCC believes the wording in the Notification does not make it clear that it does not prevent ALDI from importing, Nestlé Australia hereby clarifies that it has no such application.

The ACCC's analysis of the notified conduct proceeds on terms which were not actually in the Notification. The Draft ACCC Notice states that:

"... Nestlé Australia places some weight on the argument that it only required ALDI to cease supply of the imported Nescafé instant coffee brands where it would not agree to differentiate the products in the manner stipulated by Nestlé Australia" (paragraph 5.14).

At no stage did Nestlé Australia require ALDI to cease supply of the Overseas Nescafé Brands. Further, it at no stage required ALDI to cease supply of the Overseas Nescafé Brands if ALDI would not agree to differentiate the products in the manner stipulated by Nestlé Australia. Nestlé Australia has never requested that ALDI cease supply of the Overseas Nescafé Brands.

² See in particular the language used in the Notification itself at paragraph 2(b).

Instead, the Notification provides that the Australian-produced NESCAFÉ Blend 43 (and such other products as Nestlé Australia considered appropriate) would only be provided by Nestlé Australia to ALDI if ALDI differentiated the NESCAFÉ Blend 43 products from the Overseas Nescafé Brands. Moreover, contrary to what is suggested by ALDI, the differentiation was only as to NESCAFÉ Blend 43.³ In addition, ALDI is also free to source NESCAFÉ Blend 43 from third parties.

The ACCC's analysis in the Draft ACCC Notice therefore proceeds upon an incorrect assumption.

The Notification does not apply to third parties

The Draft ACCC Notice stated that:

"... the refusal to supply Nestlé Australia's full range of products including flagship retail brands of NESCAFÉ Blend 43 and MILO is likely to be seen by other retailers as strong discipline by Nestlé Australia" (paragraph 5.22).

The Notification was not expressed to apply to and has no application to any other party other than ALDI. Nestlé Australia's exclusive dealing notification referred to the supply of NESCAFÉ Blend 43 coffee "and other Nestlé Australia products, as Nestlé Australia considers appropriate, to ALDI". There was and is no suggestion as to application of the notified conduct to any other party. The Notification also does not involve "strong discipline" in relation to ALDI or any other party. Such application is the ACCC's own theory and is without factual foundation.

Key Points

The "strong discipline" that the Draft ACCC Notice alleges in relation to the full range of products needs to be considered in light of the factual reality of the products involved.

Nestlé Australia did not have any long term supply contracts with ALDI. Apart from the [] / worth of sales of NESCAFÉ Blend 43 to ALDI, the Notification concerned only [] of MILO products, assorted confectionery, such as confectionery snakes, frozen pizzas and other products on a limited tender basis, which together amounted to less than [] in products. Ceasing to supply such products was not "strong discipline" and not "punitive" as the Draft ACCC Notice suggests.⁴ As discussed later in this Submission, ALDI made it clear that Nestlé Australia had to supply on Nestlé Australia's terms or it would be de-listed. It is difficult to see the Notification as being "strong discipline" for a party who had already threatened to de-list Nestlé Australia.

³ It is noted that the description in paragraph 1.8 of the ACCC's Draft Notice does not actually match the paragraphs in the Notification as it omits the definition of "Overseas Nescafé Brands".

⁴ Paragraph 4.10, Draft ACCC Notice.

Instead of being in a position of strength, Nestlé Australia's only practical option was to supply under a Notification with the aim of seeking differentiation or to bring separate proceedings under section 52 of the TPA. Nestlé Australia chose to lodge the Notification because it provided a simple procedure available under the TPA and in Nestlé Australia's view, did not have the purpose or effect of lessening competition in any market.

It is worthwhile summarising what Nestlé Australia believes is a fundamental flaw in factual reasoning in the Draft ACCC Notice from a purpose or effects analysis. For Nestlé Australia's conduct to have any effective form of compulsion or "discouragement" over ALDI, it would need to be viewed by ALDI as having a material or significant effect on ALDI. It was acknowledged by the ACCC and ALDI at the Pre-Decision Conference that Nestlé Australia had been told that it must supply on ALDI's terms or it would be de-listed. As Nestlé Australia was well aware that ALDI had other options for sourcing alternative product (including a multitude of third party distributors or importers), it is extremely difficult in our view for the ACCC to assert that the conduct could be viewed as Nestlé Australia having a purpose or effect of substantially lessening competition in any market.

Market definition

The ACCC's assessment of market definition is unusual and contrary to what the ACCC suggest, it is not supported by Nestlé Australia's Submissions. The Draft ACCC Notice stated:

"On the other hand, the ACCC also considered whether there might exist a narrower market incorporating Nestlé branded instant coffee. Again, both ALDI and Nestlé submissions as to consumer preference support such consideration" (paragraph 5.3).

Nestlé Australia's Submissions did not put forward such a narrow market. No such narrow market exists and such a suggestion of such a narrow market reverts to the discredited case of *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975)⁵ which found a single product market for Datsun vehicles as a separate market.

2.2 The notified conduct does not satisfy the requirements of section 93(3) of the TPA

The ACCC's analysis of the conduct the subject of the Notification is in our view fundamentally flawed. The ACCC's analysis proceeds on a basis of analysis of the impact on competition in relation to stopping imports and the effect on other retailers. The Notification does not relate to imports or apply to or affect other retailers.

Equally, the ACCC's analysis of the statutory test ignores the multi-layered analysis in section 93(3) of the TPA as to purpose and effect, public benefits and detriments.

In Nestlé Australia's view and as submitted previously, the notified conduct does not satisfy the legal requirements of section 93(3) of the TPA such as to lead to a position of allowing revocation of the Notification.

⁵ 1975 ATPR ¶40-004.

3 The purpose of the Notification

3.1 Introduction - ACCC's analysis

The ACCC has concluded that, having regard to certain internal Nestlé Australia documents, a substantial purpose of the notified conduct was to deter ALDI from continuing to supply imported instant coffee products in Australia, so as to:

- lessen the competition generated by ALDI's sale of products in competition with Nestlé Australia products; and
- lessen competition by attempting to reduce the likelihood that other larger supermarkets would seek to sell imported instant coffee products in competition with ALDI.

We now analyse the ACCC's above approach to explain why Nestlé Australia believes that it is wrong in factual and theoretical foundation.

3.2 Nestlé Australia's internal documents do not lead to a conclusion that its purpose was to substantially lessen competition

Key points

The ACCC's inference of an anti-competitive purpose behind the Notification is difficult to sustain when faced with board minutes, other marketing documents contradicting that inference and Nestlé Australia's practical inability to stop imports.

Nestlé Australia fundamentally disagrees with the ACCC's analysis regarding its purpose. The ACCC's inference from certain internal Nestlé Australia documents needs to be considered in context. Nestlé Australia believes that when considered in context, they do not lead to a conclusion that Nestlé Australia's purpose in lodging the Notification was to substantially lessen competition. The ACCC's assessment of purpose is in our view incorrect and not supported by the broader factual context.

First, the contemporaneous handwritten notes of, and the minutes to, the relevant board meeting of Nestlé Australia (that were provided to the ACCC) indicate that Nestlé Australia's board had examined the issues, including the cost of taking proceedings for misleading and deceptive conduct against ALDI pursuant to section 52 of the TPA. The board's informed judgment should dispel any "purpose" arguments.

It is therefore, in our view, not possible to impugn the accuracy of these notes and the minutes.

Secondly, the ACCC's unfair criticism⁶ of Nestlé Australia's proposed marketing campaign to persuade Nestlé Australia customers to buy NESCAFÉ Blend 43 rather than the Overseas Nescafé Brands - (effectively buy Australian) - is inconsistent with any intention to stop imports. In fact, the existence of such a campaign lends support to Nestlé Australia's view, not the ACCC's view, of purpose. Nestlé Australia was simply seeking to differentiate the products through educating consumers. Moreover, such a campaign is healthy competition, not anti-competitive.

In our view, the ACCC's reasoning as set out in the Draft ACCC Notice involves considerable supposition and unfounded leaps of analysis. First, at paragraph 5.20 the ACCC puts a "likely" position on purpose, then at paragraph 5.22, it states that it "considers that the notified conduct could also be intended to provide a signal" and then at paragraph 5.23, the ACCC leaps to the position that it "considers such purpose(s) to constitute a purpose of substantially lessening competition". The analysis in the ACCC Draft Notice is flawed as it is based on conjecture without proper factual foundation.

Without addressing every paragraph in the Draft ACCC Notice which Nestlé Australia takes to be flawed, it is worthwhile refuting the following specific comments about Nestlé Australia's documents. In particular, the Draft ACCC Notice⁷ alleges that the documents:

- *"raised concern over the impact ALDI's importation of Nescafé instant coffee brands would have on the brand value and profitability of Nestlé Australia and in particular its potential to encourage the competitive importation of instant coffee products"* - Concern over brand value and profitability is normal business practice against any ordinary market event. The references to competitive importation of instant coffee products were not linked with any strategy or approach. To have concern over such issues does not lead to a purpose of intending to substantially lessen competition. Moreover, to have these initial concerns does not create any causal linkage with the Notification, particularly when it is taken into account that the Notification does not in fact stop imports and only seeks differentiation.
- *"indicated awareness of consideration by at least one larger Australian retailer to the possible importation of instant coffee products in order to compete with ALDI Stores"* - The response to this is as above. Internal emails have considered this a potential issue. However, no steps were taken and no discussions with retailers occurred in relation to the proposed issue of the Notification. The ACCC's assessment based on such meetings and discussions occurring is flawed.

⁶ Paragraph 5.51, Draft ACCC Notice

⁷ Paragraph 5.12, Draft ACCC Notice.

- “sought advice as to the ability to limit ALDI Stores’ importation of Nestlé branded instant coffee products, including efforts with Nestlé Singapore to locate the source of the imports” - As explained earlier, this should be considered in the context of provisions in the TPA allowing related bodies corporate to have such distribution positions based on efficiency reasons such as marketing, local tastes and product differentiation. This approach leads to differentiation and innovation and is a positive for competition and consumers.⁸ Factually, in any event, on its own separate volition some three months before the Notification was lodged, Nestlé Singapore had ceased to supply what may have been the third party wholesaler in Singapore supplying to Australia. Accordingly, there is no factual link between locating a source of imports and the alleged anti-competitive purpose of the Notification to cease imports.
- “sought options available to cease the supply of Nestlé Australia products to ALDI Stores” - This is perfectly acceptable and legitimate commercial behaviour. As the ACCC noted in paragraph 5.16 of the Draft ACCC Notice, where concerns over the manner in which a product is being marketed cannot be resolved, a supplier may reasonably withdraw supply of its product from a retailer. Paragraph 5.16 provides as follows:

“[i]n particular, it may be reasonable for a manufacturer to withdraw supply from a retailer which is unfairly comparing the supplier’s product with the product of the supplier’s competitors”.

The issue of sponsorship and affiliation and appropriate differentiation is not an argument that is new. The ACCC has itself instituted court proceedings in relation to a party which it believed was unfairly using its brand and reputation to endorse products⁹.

3.3 Nestlé Australia’s purpose was to ensure that the imported products were sufficiently differentiated from its own so as to avoid customer confusion

Key points

Nestlé Australia had concerns that ALDI’s approach and the parallel importing of the Overseas Nescafé Brands would have an impact on consumers’ perception of the Australian NESCAFÉ Blend 43, which has a different source, blend and taste from the Overseas Nescafé Brands. Nestlé Australia does not have an issue with characteristics of the Overseas Nescafé Brands. However, consumers should not be confused as to what they are buying.

⁸ The failure of the ACCC to note the specific exception in the TPA in relation to such conduct between related bodies corporate lacks, in our view, balance.

⁹ See, for example, ACCC media release # MR 130/04, “ACCC takes court action against Advanced Medical Institute, publicist and TV star for alleged misleading claims”

The ACCC is aware of and has details of some of the consumer complaints that have arisen. Nestlé Australia has not published them due to consumer privacy. However, for what is equivalent to less than 1% of Nestlé Australia's coffee sales, the ALDI promotions generate approximately 10% of consumer coffee complaints and issues raised with Nestlé Australia.

The ACCC is also aware that even though the Overseas Nescafé Brands are not sold by Nestlé Australia, Nestlé Australia has received consumer complaints and has provided replacement products itself to seek to minimise brand damage arising from consumer confusion caused by ALDI .

Nestlé Australia's purpose in relation to the Notification was to reduce consumer confusion. The Draft ACCC Notice provided no mention of the consumer complaints or how they should be dealt with as a consumer protection body.

Having regard to ALDI's apparent absence of any clear mechanism to make consumer complaints in relation to the Overseas Nescafé Brands, it is not surprising that consumers are complaining to Nestlé Australia rather than ALDI.

For what is equivalent to less than 1% of Nestlé Australia's coffee sales, the ALDI promotions generate approximately 10% of consumer coffee complaints and issues raised with Nestlé Australia. This is a significant number given that consumers do not generally complain and instead "vote with their feet" by ceasing to buy the relevant product. A 2005 survey conducted by TMI and SOCAP¹⁰ found that generally, customer dissatisfaction goes unreported to organisations. In the report, it was found that too much trouble, lack of time and lack of conviction that the problem would be resolved were the key reasons why discontent was not highlighted to the organisation concerned. It was further reported that 95% of people with a bad experience will tell or warn others - as much to "hurt" a company as to genuinely warn others. Accordingly, the proportion of complaints received by Nestlé Australia suggests that there is a major issue and supports our view that it is legitimate for Nestlé Australia to be concerned that ALDI's marketing approach would have a detrimental impact on consumers' perception of NESCAFÉ Blend 43.

3.4 The ACCC has shown no purpose of substantially lessening competition in any market

The ACCC's analysis must show a purpose of substantially lessening competition. That is, even if the ACCC asserts an intention to restrict distribution in some manner, that is not sufficient. The purpose must be a purpose to lessen competition substantially.

¹⁰ TMI/SOCAP Complaint Culture Survey: 2005 National Report, November 2005, TMI Services Pty Ltd, © Reserved

The United States Supreme Court's ruling in *Continental TV Inc v GTE Sylvania Inc*¹¹ is instructive on this point. In that case, the Court recognised that vertical restrictions imposed by a manufacturer as to where or to whom its dealers may sell, may promote efficiency and inter-brand competition. While customer and territory restrictions may restrict intra-brand competition, inter-brand competition is promoted by allowing manufacturers to achieve efficiencies in the distribution of their products. In addition, retailers are more likely to invest capital and labour in product distribution increasing efficiency, distribution and consumer benefits.

The European Commission takes a similar approach. The Guidelines on Vertical Restraints make the general comment that, for most vertical restraints, competition concerns can only arise if there is insufficient inter-brand competition, ie if there is some degree of market power at the level of the supplier or the buyer or both. The Commission also notes the general rule that vertical restraints which reduce inter-brand competition are generally more harmful than vertical restraints that reduce intra-brand competition. There are no such restrictions in this matter.

In our view, the Draft ACCC Notice has made significant assumptions on purpose that are difficult to sustain. The Draft ACCC Notice ignored all pro-competitive efficiency reasons and also failed to consider the economic basis for the exception in the TPA between related bodies corporate.

3.5 The alleged signalling to, and the alleged disciplinary effect on other grocery retailers

Earlier in this Submission it was explained that one reason why the "purpose" element was lacking by Nestlé Australia against ALDI was that the notified conduct could not be viewed as a meaningful discouragement if ALDI had already threatened to de-list Nestlé Australia. We now turn to why the ACCC's assessment of an alleged signal to other retailers (not to seek to sell imported instant coffee products), is also equally hollow and ineffective such that it could not have an anti-competitive purpose even if it were made (which it was not).

The ACCC has not set out the economic mechanism by which the alleged signalling through lodging the Notification would be an effective deterrent to other grocers. From the perspective of economic theory, the question is whether Nestlé Australia would be able to credibly threaten to not supply either all or a subset of its products to any supermarket.¹²

This is because such a threat would only be credible if the harm that an actual refusal to supply would inflict on the retailer would exceed the loss incurred by Nestlé Australia itself. In a matter such as this, such a threat would not be credible as it would be uneconomic for Nestlé Australia to carry out such a threat. The Draft ACCC Notice's theory of such signalling through the Notification of a threat to other retailers therefore lacks any sustainable economic foundation.

¹¹ *Continental TV Inc v GTE Sylvania Inc*, 433 US 36 (1977)

¹² Paragraph 5.42, Draft ACCC Notice.

3.6 Relevance of the *Universal Music Case*

There is no similarity between the circumstances of this matter and those in the *Universal Music Case*¹³. The particular paragraphs of that case noted by the ACCC at paragraph 5.23 of the Draft ACCC Notice were taken out of context with no analysis of competition between competing brands.

Nestlé Australia disagrees with the ACCC over the relevance of the *Universal Music Case*. Nestlé Australia's primary argument is that in the *Universal Music Case* the issue was the import of undifferentiated products and as such the issue of customer confusion did not play a role.

In addition, in *Universal Music*, the stores that were allegedly targeted had the sales of CDs as their sole purpose. If those stores did not have access to a relatively complete range of CD hits, there was arguably little scope for them to survive, much less to compete. This is plainly not the case with ALDI, for which sales of Nestlé Australia products must be a very minor element.

Finally, it is worth noting that the market structure in *Universal Music* differed in important respects from that at issue here. In particular, the distribution of CDs is much less concentrated than are retail grocery sales. As a result in *Universal Music*, eliminating sales to a small number of relatively minor outlets had little effect on the likely sales or profitability of the major studios. Moreover, the threat with respect to other retailers was likely to be credible, as even the largest of those retailers accounted for a relatively low share of total sales.

In contrast, retail grocery sales are very highly concentrated. It is implausible that Nestlé Australia could withhold supply of all its products from, for example, Coles or Woolworths, much less both. In economic terms, any such threat would lack credibility.

3.7 Conclusion

In conclusion, Nestlé Australia disagrees with the ACCC's analysis on purpose for the reasons that:

- imports could not be stopped, so the Notification itself could not lessen competition substantially; and
- the ACCC's theory that the Notification was a form of signalling and threat to other grocery retailers lacks economic foundation and is implausible.

¹³ *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* (2003) ATPR ¶41-947

4 Effect or likely effect of the notified conduct on competition

4.1 Introduction

The ACCC's analysis of impact on competition is based on the ACCC's assessment of reasonableness of product differentiation. The Draft ACCC Notice states that ALDI was faced with mutually exclusive decisions of either buying from Nestlé Australia or not being able to effectively sell the imported product because the differentiation requested by Nestlé Australia went too far and would disadvantage the product in comparison with local production.¹⁴

The ACCC stated at paragraphs 5.29 and 5.30 as follows:

"5.29 The conduct would increase ALDI's costs. Either it would import products and differentiate as instructed by Nestlé Australia, which would make the imported products less attractive to consumers, reducing sales and increasing the costs of importing and holding stocks of the imported products; or it would import and not differentiate, thereby losing supply of the Nestlé Australia products and the profit from sales of those products especially Milo. This would impact on the number of customers shopping at ALDI stores.

...

5.30 The ACCC considers that these outcomes would have the effect of substantially lessening competition in the instant coffee market."

We do not believe that this is an appropriate analysis.

4.2 Was Nestlé Australia entitled to seek differentiation?

The first technical response to the ACCC is that it is not the decision maker as to what is reasonable differentiation for a brand owner. That is ultimately a decision for the Courts. More importantly, in Nestlé Australia's view the Draft ACCC Notice is incorrect in saying that the differentiation ALDI has undertaken is reasonable because ALDI's corrective measures have proven to be inadequate.

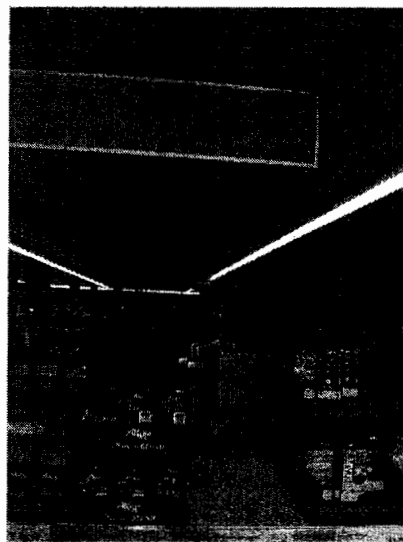
The differentiation requested by Nestlé Australia

We now turn to the ACCC's statements and why it believes ALDI's differentiation is reasonable. The Draft ACCC Notice states that:

¹⁴ Paragraph 5.32, Draft ACCC Notice.

- Posters were placed above the displays of imported Nescafé instant coffee products¹⁵ - *This is not always the case and is therefore factually incorrect. Based on Nestlé Australia's inspections of a random sample of ALDI stores in each State, the banners were in fact displayed in different sections of the ALDI stores and not necessarily above the displays of the Overseas Nescafé Brands. The ACCC's analysis of differentiation and ALDI's claims of differentiation are based on such banners being always in place above the Overseas Nescafé Brands. This is factually not always the case.*

**Figure 1 - Example of signage
(ALDI Shepparton, April 2006)**



Aldi Shepparton

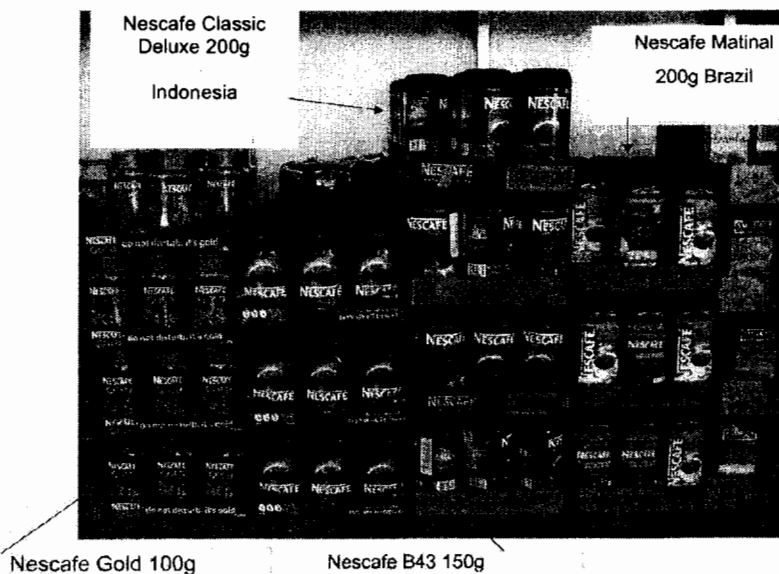
Please note this store does not have the larger sign

The use of the red coffee mug imagery on the posters should be noted. ALDI are clearly relying on that imagery as between the different Nescafé products notwithstanding the different taste and ingredient profile of the Overseas Nescafé Brands.

¹⁵ Paragraph 2.5, Draft ACCC Notice.

- Stickers were placed on the bottom of jars¹⁶ - *Yes stickers are on the bottom of jars - however, Nestlé Australia requested that the stickers be on the front of jars where they can be read at the time of purchase - not afterwards and too late.*¹⁷ Also, people believe that these stickers are by Nestlé Australia - they are not, adding to confusion as it suggests incorrect sponsorship or affiliation.

Figure 2 - Example of stock placement
(ALDI Woodridge, April 2006)



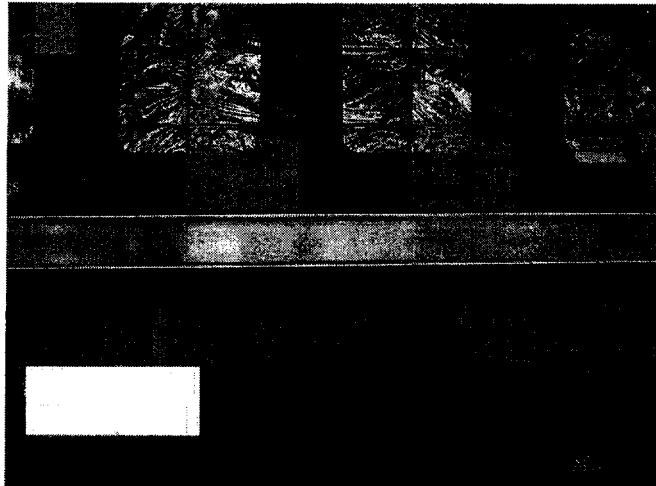
The images highlight the obvious confusing similarity between the different tasting NESCAFÉ Blend 43 and NESCAFÉ Classic Deluxe without the use of appropriate stickers.

¹⁶ Paragraph 2.5, Draft ACCC Notice.

¹⁷ See *Cerebos Greggs Ltd v Unilever NZ Ltd* (1994) 5 NZBLC 103, 497 which related to misleading allegations relating to coffee where Justice Fisher stated that: "Relevant questions are whether the product is of a type and cost which would be likely to prompt inquiry over source; whether it has been sold quickly; whether the nature and extent of labelling would be sufficient to avoid a deception." Justice Fisher also stated that "... labelling will be likely to avoid the result only if prominent and the warning unmistakable."

- Shelf labels are placed next to price labels which differentiate the product¹⁸ - *The colour and size of the shelf labels are the same as other shelf labels in the ALDI store - they are not a different colour, or readily discernable to consumers as the ACCC suggests and in Nestlé Australia's view do not adequately differentiate the Overseas Nescafé Brands from NESCAFÉ Blend 43.*

**Figure 3 - Example of shelf label
(ALDI Woodridge, April 2006)**



The shelf labels appear to be like any other product description and have no differentiation ability.

- The ACCC states in the Draft ACCC Notice that instructions were provided to ALDI staff so that they could explain the difference in the products to consumers who enquired and the ACCC seem satisfied by that.¹⁹ *On 10 April 2006, after the issue of the Draft ACCC Notice, one of the lawyers from Mallesons Stephen Jaques attended the ALDI store at Edgecliff in Sydney to purchase jars of the Overseas Nescafé Brands and while waiting to purchase, observed an elderly lady discussing the Overseas Nescafé Brands with an ALDI salesperson and becoming confused as to which Nescafé branded product she was purchasing.*

Nestlé Australia is not so willing as the ACCC to accept that ALDI's salespeople have been adequately instructed on how to sell the Overseas Nescafé Brands or that such instructions can overcome the consumer uncertainty and confusion arising from the packaging.

¹⁸ Paragraph 2.5, Draft ACCC Notice.

¹⁹ Paragraph 2.5, Draft ACCC Notice.

In Nestlé Australia's view, these issues are not as clearly differentiated or as "black and white" in terms of how the ACCC presents these matters in paragraph 2.5 of the Draft ACCC Notice.

The case law shows that, in practice, it is very difficult to overcome the importance consumers attach to the get-up of a product. This is clear from the cases set out below:

- (a) In *Abundant Earth Pty Ltd v R & C Products Pty Ltd (1985)*²⁰ in respect of stickers on a potentially misleading product, Justices Toohey, Morling and Beaumont found that: *"..where the competing products are small, inexpensive items the efficacy of a disclaimer, however prominent, cannot be assumed."*
- (b) In *Cerebos Greggs Ltd v Unilever NZ Ltd (1994)*²¹ in respect of misleading allegations relating to coffee, Justice Fisher said that: *"Relevant questions are whether the product is of a type and cost which would be likely to prompt inquiry over source; whether it has been sold quickly; whether the nature and extent of labelling would be sufficient to avoid a deception."* Justice Fisher also said that: *"labelling will be likely to avoid the result only if prominent and the warning unmistakable."*
- (c) In *Eveready Australia Pty Ltd v Gillette Australia Pty Ltd (1998)*²² Justice Dowsett commented that: *"..the impact of the stickers may vary depending upon the customer, whether he or she is in a hurry."*

Based on above case law, the ACCC cannot assume that in circumstances where consumers purchase low value items, in a rush, stickers and signage will dispel a misleading impression arising from the overall get-up of a product.

To counter the misleading impression created by the similarity of ALDI's imported product to the well known get-up of Nestlé Australia's NESCAFÉ Blend 43 (which would be brought to a consumer's mind when seeing the similar get up of ALDI's imported product) any signs or stickers would need to conclusively and definitively minimise consumer confusion.

Did Nestlé Australia's corrective measures go beyond what was required?

Whether Nestlé Australia's corrective measures went beyond what was necessary is a question of fact. In assessing this question, the Courts' comments in corrective advertising cases and also undertakings required by the ACCC provide some additional context.

²⁰ (1985) 59 ALR 211

²¹ (1994) 5 NZBLC 103,497

²² (1998) 44 IPR 463

Attachment A to this Submission lists the types of undertakings previously required by the ACCC. For example, in January 2005, Flight Centre gave undertakings agreeing to stop using its 'Lowest Airfares Guaranteed' slogan for five years, stop using the 'Global Buying Power' representation in the future without giving prior notice to the ACCC, publish a total of 44 corrective notices in 11 major newspapers, and display A3-sized corrective notices in the front window of each of its retail outlets continuously for four weeks.

With respect to how far the corrective measures should go to protect consumers, the undertakings obtained by the ACCC are a useful guide. Comparing the ACCC's undertakings with Nestlé Australia's corrective measures, the proposed measures correspond favourably with undertakings required by the ACCC in similar circumstances, ie contraventions of section 52 of the TPA. Attachment A contains a table comparing ALDI's corrective measures, Nestlé Australia's suggested corrective measures and undertakings obtained by the ACCC.

In summary, Nestlé Australia believes that its request for differentiation was reasonable and did not impose unnecessary or unreasonable costs on ALDI.

Key points

Nestlé Australia's product differentiation request was intended to be reasonable. Nestlé Australia regrets that the ACCC believes that the request went too far (although it notes that the ACCC has declined to say which elements do or do not go too far). However, Nestlé Australia believes that ALDI's marketing of the Overseas Nescafé Brands, as well as the changes in ALDI's marketing approaches which were anticipated (the removal of the banner in some stores), as well as colour and sticker formatting have led to actual consumer confusion.²³ Nestlé Australia believes that these additional facts and the further evidence that has arisen in the meantime as to ALDI's marketing and actual consumer confusion, will assist the ACCC in revising its views as to the reasonableness of the requested differentiation.

In any event, Nestlé Australia has demonstrated a genuine desire to seek to address the ACCC's comments on the extent of differentiation. It is difficult to assert that Nestlé Australia has been unreasonable when the ACCC will not engage in discussions on the topic.

²³ The ACCC commented at paragraph 5.31 that the requirement that "*future advertising be approved by Nestlé Australia, would simply not have been acceptable to any retailer*". Nestlé Australia notes that it works closely with the other grocery retailers and this approach means that it is aware of the promotions and advertising. ALDI has its own approach and does not advise Nestlé Australia so that its position is quite unique.

4.3 ACCC's conclusion that conduct has the effect or likely effect of substantially lessening competition is unfounded

Key points

The ACCC's analysis on the Notification's impact on competition does not consider the terms of the Notification and the resultant effect of the conduct - the Notification does not stop ALDI importing and does not affect pricing, which ALDI controls. Indeed, ALDI continues to source the Overseas Nescafé Brands from a third party and irrespective of the notified conduct, ALDI will continue to have a multitude of third party distributors/importers to whom it may turn.

ALDI is also able to source NESCAFÉ Blend 43 and MILO from third parties in Australia.

As noted above, Paragraph 5.30 of the Draft ACCC Notice provides that the ACCC considers that particular "outcomes" would have the effect of substantially lessening competition in the instant coffee market. Nestlé Australia believes that there is simply no factual basis put forward in the Draft ACCC Notice for the ACCC's analysis.

In the Draft ACCC Notice, the ACCC concludes that a substantial lessening of competition arises due to a number of factors. Each is dealt with in turn below.

- **The ACCC's analysis is flawed as it proceeds on a basis that differentiation and any associated additional cost of differentiation is not unwarranted.** This assumption is flawed as there is actual evidence of confusion. Further, there is no evidence of how these additional costs would substantially lessen competition.
- **The Draft ACCC Notice proceeds on the basis that ALDI will not be able to obtain NESCAFÉ Blend 43 or MILO if it continues to import.** The ACCC did not take into account the fact that ALDI could and in fact has sourced from third parties those products as well as the other products Nestlé Australia ceased to supply.
- **The Draft ACCC Notice alleges that ALDI has a strong effect on price competition disproportionate to its market size -** No economic analysis or justification for such an assertion is provided. This is also inconsistent with the ACCC's own analysis of grocery matters such as in the ACCC's assessment of shopper docket discounts²⁴ and the recent Woolworths / FAL merger analysis which suggests that the primary competition is as between Woolworths and Coles.²⁵ The ACCC's own documents and data demonstrate this inconsistency.

²⁴ ACCC, *Assessing shopper docket petrol discounts and acquisitions in the petrol and grocery sectors*, February 2004.

²⁵ ACCC, *Public Competition Assessment, Woolworths' proposed acquisition of 22 Action stores and development sites*, 19 October 2005.

Moreover, the standard economic approach of looking not so much at the position of particular competitors as to the state or condition constituting the market appears to have been ignored. The approach in the Draft ACCC Notice instead concentrates unduly on the position of one particular competitor, ALDI. Nestlé Australia's conduct does no more than affect a particular entity in a limited manner, and therefore does not constitute a substantial lessening of competition.

Paragraph 5.44 of the Draft ACCC Notice states that *"it is the degree to which competition has been lessened which is critical, not the proportion of that lessening to the whole of the competition which exists in the total market"*.

As to the degree to which competition has been lessened, the issue of pricing should be considered. ALDI, according to the Draft ACCC Notice was loss-leading the NESCAFÉ Blend 43 product and Nestlé Australia's sales were approximately [] per year. Nestlé Australia, taking into account the amount of these sales, the estimated cost of obtaining these products from third parties and Nestlé Australia's understanding that ALDI increased the retail price for these products, estimates that ALDI would have incurred an additional cost in the order of no more than approximately \$100,000. Given that ALDI is a substantial company, was already loss leading and the estimation of an additional cost of no more than \$100,000, it is difficult to see that the Notification leads to such a significant degree of lessening of competition that it could lead to a substantial lessening of competition in a market.

Nestlé Australia also notes that the ACCC's analysis at paragraph 5.44 reverts to an analysis of a small market segment for Overseas Nescafé Brands - there is no such market. An assessment of competition based on a market segment comprising the imported products is inappropriate as these products were always going to be imported irrespective of the Notification.

- **The Draft ACCC Notice alleges that Nestlé Australia's products are essential products which ALDI must stock in order to compete effectively** - Nestlé Australia does not see the factual basis for this proposition by the ACCC given that in the Pre-Decision Conference in this matter, ALDI stated that NESCAFÉ Blend 43 and MILO are only iconic but yet did not give any indication that they are essential to maintain ALDI's competitiveness. ALDI's continued acquisition of NESCAFÉ Blend 43 does not robustly establish that Nestlé Australia's products, rather than any other well known products, are important for ALDI's ability to compete. It merely indicates some positive effect that this product has on a consumers' inclination to purchase other ALDI products. In light of ALDI's operations and limited product range, this analysis of the ACCC is highly speculative.

- **The Draft ACCC Notice alleges that Nestlé Australia’s proposed conduct will have the effect of deterring other retailers from replicating ALDI’s behaviour** - The ACCC has not set out any economic mechanism by which the notified conduct would have the effect of deterring other retailers. As set out in Section Three, Nestlé Australia would not be able to credibly threaten not to supply its products as suggested by the ACCC.

4.4 Conclusion

Nestlé Australia believes that the ACCC has proceeded on the basis of the wrong test in this matter. At paragraph 5.26 of the Draft ACCC Notice, the ACCC stated as follows:

“This requires the formulation of a counterfactual which can be compared with the state of competition in the market with the conduct. The ACCC believes that the appropriate counterfactual for the assessment of this conduct is a situation where ALDI was free to advertise and sell Nescafe instant coffee brands while continuing to receive supply of the full range of Nestlé Australia products.”

This is a flawed analysis as it:

- incorrectly assumes ALDI was lawfully entitled to so advertise;
- assumes that ALDI would not be required to differentiate or incur some costs of differentiation; and
- assumes that ALDI would not replace the products sourced from Nestlé Australia from third parties.

Finally, the ACCC’s assessment of the impact of the conduct the subject of the Notification proceeds on a very narrow market delineation, ignores competing products and undertakes no assessment of the dynamics of competition.

5 Public benefits outweigh any public detriments

Key points

The ACCC considered public benefits of the Notification in just five paragraphs in the Draft ACCC Notice.

The Draft ACCC Notice did not take into consideration any of the standard and globally accepted competition principles of brand and product differentiation, nor any of the efficiency benefits of distribution territories.

NESCAFÉ Blend 43 is a unique coffee that is sourced, blended and roasted in a specific way to meet the tastes of Australian consumers. It is distinctly different from the Overseas Nescafé Brands. NESCAFÉ Blend 43 is also produced in Australia at a production plant in Queensland which employs over 300 people. The ACCC has not taken into account the relevant public benefits when assessing the Notification.

5.1 The public benefits outweigh the public detriments.

The Draft ACCC Notice accepts that product differentiation does provide public benefits, but draws the conclusion that there is little benefit from differentiation in this case - presumably on the basis that ALDI's differentiation was reasonable. Nestlé Australia submits that the factual basis (ie the existence of banners as well as an absence of actual confusion) on which the ACCC made its assessment is incorrect.

ACCC has not engaged in any weighing exercise - as is required under the test in section 93(3) of the TPA.

5.2 No evidence in the Notification of any public detriment

The Draft ACCC Notice provides no evidence of public detriment other than unsubstantiated assertions of a substantial lessening of competition.

To the best of Nestlé Australia's estimations, the notified conduct means that the cost or detriment to ALDI would be no more than approximately \$100,000. If that is the public detriment, it is far outweighed by the public benefit as discussed below.

5.3 The intent of the notified conduct is to allay any potential confusion, which is a public benefit

Numerous actual complaints have been received by Nestlé Australia with respect to the Overseas Nescafé Brands. Such details have been provided to the ACCC previously but were not mentioned in the Draft ACCC Notice.

Consumer confusion could have a longer term effect of reducing the extent and variety of products that Nestlé Australia is prepared to offer Australians. Consumer confusion can distort the results of advertising and consumer education so it would be more difficult to introduce new products or nationally (Australian) customised products which require informational advertising to sell. The Draft ACCC Notice has not considered the damage to brand, advertising and decisions to locally produce. If the brand was damaged by consumer confusion it could lead to it being discredited, lower cost ingredients being used and production moving offshore. This would result in loss of Australian employment and associated flow-on loss to the local community.

The Draft ACCC Notice has ignored many years of antitrust analysis as to the public benefits and efficiencies of distribution systems and branding. ALDI's implicit position in its correspondence to Nestlé Australia that Nestlé Australia should rebrand its products rather than risk confusion with the Overseas Nescafé Brands, leads to consideration of the actual cost to Nestlé Australia that would arise from such rebranding; a cost of well over \$100,000. The factual basis of the Notification has also been overlooked, in that importation is still occurring under the Notification so there is no public detriment in relation to imports ceasing. Accordingly, the matter is solely in relation to a difference of opinion with respect to the level of differentiation requested by Nestlé Australia if it is to supply ALDI (given that ALDI can in any event purchase the same products from third parties). The public benefits in terms of costs, point to allowing the requested differentiation under the Notification rather than not.

6 Conclusion

Nestlé Australia disagrees with the analysis in the Draft ACCC Notice regarding Nestlé Australia's purpose behind the Notification. The purpose behind the Notification is exactly as set out in the Notification and the board minutes - to ask ALDI to reasonably differentiate the NESCAFÉ Blend 43 product from the Overseas Nescafé Brands if it wishes to purchase NESCAFÉ Blend 43 from Nestlé Australia. It does not restrict or prevent ALDI from importing and certainly there was no purpose to lessen competition substantially in any market.

As to the effect of the Notification, Nestlé Australia does not believe that it could have the effect of lessening competition substantially in any market. ALDI continues to import the Overseas Nescafé Brands and to source products from third parties. There was never in place any form of trading terms or contract between Nestlé Australia and ALDI for the supply of NESCAFÉ Blend 43 or MILO - they were on an order by order basis. ALDI has in any event stated that it is now acquiring them from third parties. The balance of products the subject of the Notification were on a limited tender basis- in any event ALDI stated in the Pre-Decision Conference that it has obtained these products elsewhere. Leaving aside the fact that ALDI had no certainty of supply and that the ACCC's counterfactual analysis is flawed, Nestlé Australia believes that at most, the notified conduct is causing ALDI to secure MILO and NESCAFÉ Blend 43 from third parties at a cost estimated to be less than \$100,000. In these circumstances it is difficult to see any lessening of competition which is substantial in any market.

Having regard to the suggestion from ALDI for Nestlé Australia to rebrand the Nestlé Australia product in order to address consumer confusion, which would have incurred substantial costs far greater than \$100,000, together with the other public benefits associated with product differentiation for Australian consumers and Australian production, Nestlé Australia believes that the public benefits of the requested differentiation outweigh any detriment (if any) and the Notification should be allowed to stand.

Nestlé Australia Ltd
2 June 2006

Attachment A

Corrective measures in relation to misleading conduct Approaches taken by ALDI Stores, Nestlé Australia Ltd and ACCC			
CORRECTIVE MEDIUM	ALDI STORES	NESTLÉ AUSTRALIA LTD	ACCC
POSTER / SIGNAGE	<p>ALDI's preventative measures:</p> <ul style="list-style-type: none"> Posters above the displays of imported Nescafé instant coffee products: <i>"Everyday permanently low prices \$4.69</i> CLASSIC TASTE. INCREDIBLY LOW PRICE. <i>To ensure consistent supply and a great price ALDI have sourced another superb Nescafé blend: Classic Deluxe 200g import. We believe it tastes just as good as Blend 43 at a more competitive price, offers satisfaction or your money back."</i> 	<p>Nestlé Australia corrective requirements:</p> <ul style="list-style-type: none"> Immediately withdraw the current unsatisfactory banner signage from its stores which are likely to mislead and deceive customers as to the origin and attributes of the Overseas Nescafé Brands. Replace the banner signage at point of sale in each Aldi store with banners of the same size containing the following words and no visual imagery: <i>"This product is not supplied or endorsed by Nestlé Australia Ltd and has not been blended specifically for Australian tastes. Nescafé Classic Deluxe / NESCAFÉ Matinal* is imported from overseas and has a different blend and taste to Nescafé Blend 43 coffee sold by Nestlé Australia Ltd in Australia. Nescafé Blend 43 coffee is a unique coffee that is sourced, blended and roasted in a specific way to meet the sophisticated taste of the Australian market and is distinctly different from NESCAFÉ Classic Deluxe / NESCAFÉ Matinal* coffee."</i> The banner should be hung directly above any shippers or pallets containing Nescafé Classic Deluxe and Nescafé Matinal coffee in the same fashion as the current signage. 	<p>Undertaking requirements:</p> <ul style="list-style-type: none"> <i>"not make any down content percentage by representations that it cannot substantiate by way of testing of its finished down products by an International Down & Feather Bureau accredited testing organisation".</i> Section 87B undertaking given to ACCC by Mountain Designs Pty Ltd, (24 October 2005). <i>"the Company to cause a sign to be displayed advising of non-compliance of certain products"</i> Section 87B undertaking given to ACCC by Grab It (Qld) Pty Ltd, (5 April 2005). <i>"the Company to ensure any solicitations about the provision of its services/products disclose both prominently and in close proximity to the services/products being offered the full cost of that service"</i> Section 87B undertaking given to ACCC by Business Pages Pty L'd, (2 August 2005).

**Corrective measures in relation to misleading conduct
Approaches taken by ALDI Stores, Nestlé Australia Ltd and ACCC**

CORRECTIVE MEDIUM	ALDI STORES	NESTLÉ AUSTRALIA LTD	ACCC
<p>CATALOGUE</p>	<p>ALDI's preventative measures:</p> <ul style="list-style-type: none"> ALDI's catalogue stated: "the same words apart from "everyday permanently low prices" 	<p>Nestlé Australia corrective requirement:</p> <ul style="list-style-type: none"> Publish a full page front or back page corrective notice in the December 2005 edition of ALDI's store catalogue in New South Wales, Queensland and Victoria in the same terms as the corrective signage set out above, with the corrective notice also to appear on ALDI's website at www.aldi.com. 	<p>Commission's requirements:</p> <ul style="list-style-type: none"> "publish a total of 44 corrective notices in 11 major newspapers:" Section 87B undertaking given to ACCC by Flight Centre Ltd, (27 January 2005). "the Company place a notice on its website explaining the Commission's concerns to customers" Section 87B undertaking given to ACCC by GardenWay Nurseries (QLD) Pty Ltd, (21st December 2005). "the Company place corrective advertisements on its website for three months" Section 87B undertaking given to ACCC by Mountain Designs Pty Ltd, (24 October 2005).
<p>PRODUCT GET-UP</p>	<p>ALDI's preventative measures:</p> <ul style="list-style-type: none"> Stickers, which were placed on the backs of the jars, saying: "INSTANT SOLUBLE COFFEE Ingredients: Coffee Beans Made in Brazil (in the case of jars of NESCAFÉ Maital) Imported by: New Imports Pty Ltd 151 – 163 Wyndham St, Alexandria NSW 2015 This is an Imported Product. Composition and Taste of the coffee may differ to Local Product" 	<p>Nestlé Australia corrective requirement:</p> <ul style="list-style-type: none"> Affix and display very prominent stickers no less than 6cm by 6cm in size to be placed over the mugs on the front of the Overseas Nescafé Brands using the following words: "This product is not supplied or endorsed by Nestlé Australia Ltd and has not been blended specifically for Australian tastes. This product is imported from overseas and has a different blend and taste to Nescafé Blend 43 coffee sold by Nestlé Australia Ltd in Australia. The font size should be prominent, sans serif and not less than 5 mm in size. 	<p>Commission's requirements:</p> <ul style="list-style-type: none"> The Company in connection with the promotion of its products refrain from making "any representation that the Products have had a particular history; when the products have not had that history". Section 87B undertaking given to ACCC by Saint-Gobain Abrasives Pty Ltd, (5 April 2005). See also the <i>Eveready Australia Pty Ltd v Gillette Australia Pty Ltd</i> (1998) 44 IPR 463.

**Corrective measures in relation to misleading conduct
Approaches taken by ALDI Stores, Nestlé Australia Ltd and ACCC**

	ALDI STORES	NESTLÉ AUSTRALIA LTD	ACCC
CORRECTIVE MEDIUM			
SHELF LABELS	<p>ALDI's preventative measures:</p> <ul style="list-style-type: none"> Shelf labels, which were of the same size as the price labels and placed next to the price labels, said <i>"Information This Nescafe [Matinal/Classic] is sourced by ALDI from the International market, not from Nestlé Australia. Whilst the blend is different to the locally sourced product we believe that the quality of the product is as good."</i> This information was also displayed on larger labels placed above the shelves. 		<p>Commission's requirements:</p> <ul style="list-style-type: none"> <i>"The Company display A3-sized corrective notices in the front window of each of its retail outlets continuously for four weeks"</i> Section 87B undertaking given to ACCC by Flight Centre Ltd, (27 January 2005). <i>"not make any down content percentage representations that it cannot substantiate by way of testing of its finished down products by an International Down & Feather Bureau accredited testing organisation"</i> Section 87B undertaking given to ACCC by Mountain Designs Pty Ltd, (24 October 2005).
FUTURE ADVERTISING	<p>ALDI's preventative measures:</p> <ul style="list-style-type: none"> None. 	<p>Nestlé Australia requirement:</p> <ul style="list-style-type: none"> In addition, should ALDI wish to promote its Overseas Nescafé Brands in store or in its catalogue in the future, Nestlé requires that any marketing materials prepared for this purpose are submitted to Nestlé in advance for its review and written approval. 	<p>Commission's requirements:</p> <ul style="list-style-type: none"> <i>"The Company stop using the 'Global Buying Power' representation in the future without giving prior notice to the ACCC"</i> Section 87B undertaking given to ACCC by Flight Centre Ltd, (27 January 2005).
INSTRUCTIONS TO STAFF	<p>ALDI's preventative measures:</p> <ul style="list-style-type: none"> <i>Instructions were also provided to ALDI staff, so that they could explain the differences in the products to customers who enquired.</i> 	<ul style="list-style-type: none"> No evidence of this directive has been provided to Nestlé Australia. 	