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16 June 2006

Our Ref: 423043-v1\AJC\GMF

By email and courier

Scott Gregson
General Manager Adjudication
Australian Competition & Consumer Commission
470 Northbourne Avenue
Dickson ACT 2602

Dear Mr Gregson,

Nestle Australia Ltd exclusive dealing notification

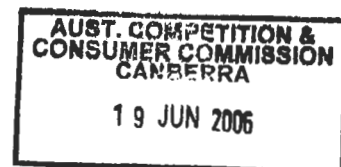
Please find enclosed ALDI Stores' submissions in response to the Nestle Australia Ltd submission dated 2 June 2006.

Please note that confidential exhibit 1 to the submission is not confidential as against Nestle Australia Ltd.

Yours sincerely,



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Australian Competition & Consumer Commission

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Exclusive dealing notification lodged by
Nestle Australia Limited

Supplementary submission of ALDI Stores

1. Introduction

- 1.1 The purpose of this supplementary submission is to respond to the submission lodged by Mallesons Stephen Jaques on behalf of Nestle Australia Limited (Nestle) dated 2 June 2006 (the **Submission**).
- 1.2 The Submission is essentially repetitive of Nestle's previous submissions and notification. There are no new points of substance that have not previously been raised by Nestle. For this reason ALDI has kept this submission brief. ALDI has also set out in Annexure 1 to this submission, a brief response to some of the allegations made by Nestle in the Submission. The brevity of ALDI's submission should not be construed as an admission of any of the assertions or arguments contained in the Submission.

2. Discussion

- 2.1 The basic facts relevant to Nestle's notification bear repeating. They are as follows:
- (a) ALDI was unable to obtain reliable and competitive terms of supply from Nestle for its Nescafe Blend 43 product. This product has strong consumer demand and is one of the small number of non-private label products stocked by ALDI in its supermarkets. ALDI regards Blend 43 as an "iconic product". The fact that Blend 43 is an iconic product is accepted by Nestle and is common ground between the parties.
- (b) In response to ALDI's concerns over terms of supply, and given the demand for Nescafe coffee, ALDI sought to source other Nestle branded coffee from overseas sources. These other Nestle coffee brands are different to Nescafe Blend 43 in their packaging. Nestle claim that these other coffee brands are also different in their taste. ALDI made it emphatically clear to its customers that the imported Nestle coffee was imported and clearly differentiated the imported coffee from Nescafe Blend 43.¹
- (c) Under the guise of protecting consumers from confusion, Nestle sought to impose on ALDI a requirement that ALDI undertake the following:²
- (i) affix and display "very prominent stickers no less than 6cm by 6cm in size to be placed over the mugs of the front" of the jars using the following words:

"This product is not supplied by Nestle 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 NESCAFE BLEND 43 coffee sold by Nestle Australia Ltd in Australia";

¹ See further paragraph 7.4 of ALDI's submission of 12 January 2006. See also Annexure 1 to this submission which responds to some of the specific issues raised in section 4.2 of Nestle's submission.

² Letter from Mallesons Stephen Jaques to ALDI dated 25 November 2005.

- (ii) replace banner signage at point of sale in each ALDI store with banners the same size and containing no visual imagery:

"This product is not supplied or endorsed by Nestle Australia Ltd and has not been blended specifically for Australian tastes. [NESCAFE Classic Deluxe/NESCAFE Matinal] is imported from overseas and has a different blend and taste to NESCAFE BLEND 43 coffee sold by Nestle Australia Ltd in Australia. NESCAFE BLEND 43 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 [NESCAFE Classic Deluxe/NESCAFE Matinal] coffee";

- (iii) publish a full page front or back page "corrective" notice in ALDI's store catalogue in the same terms as the signage referred to at (ii) above, with the notice to also appear on ALDI's website; and
- (iv) provide any future marketing materials for overseas Nestle coffee brands to Nestle for review and written approval.
- (d) When ALDI refused to accede to Nestle's demands on the basis that there was a sufficient level of product differentiation between the imported coffee products and Nescafe Blend 43 so as to avoid any consumer confusion, Nestle's response was to discontinue the supply of *all* products supplied to ALDI by Nestle, including unrelated products such as Milo (another iconic product) and a range of private label non-Nestle branded products.³
- (e) ALDI's position has been vindicated by the fact that it has received no consumer complaints or any other consumer feedback suggesting confusion. Further, the imported Nestle products have, since being introduced to the market, quickly established a significant consumer following.⁴

2.2 In ALDI's view, Nestle's notified conduct evidences an anti-competitive purpose and has an anti-competitive effect. Further, there is no public benefit, only detriment, arising from Nestle's notified conduct.

2.3 The purpose behind Nestle's conduct is clear. It is to dissuade ALDI from selling imported Nestle coffee in its stores. Although Nestle has asserted a concern over consumer confusion for this conduct, this assertion is not genuine. If Nestle had genuinely been motivated by customer confusion, it:

- (a) would not have stopped supplying Milo and other unrelated non-Nestle branded products to ALDI. Whatever view is taken of potential consumer confusion, there are simply no legitimate grounds for terminating supply of Milo and the other unrelated products. ALDI regards Milo as an equally important product. ALDI understood the termination of supply to be, in effect, punishment for refusing to comply with Nestle's unreasonable demands. This aspect of Nestle's conduct is deliberately downplayed in its submissions;

³ Letter from Nestle to ALDI dated 2 December 2005, see also Nestle letters of 6 and 7 December 2005.

⁴ Nestle's claim that consumers will "vote with their" feet and not buy the imported products is not supported by the facts.

- (b) would have been satisfied with the extensive steps taken by ALDI to differentiate the imported Nestle products from Nescafe Blend 43. Those steps make it abundantly clear to consumers that the products have not been sourced from Nestle and that the blend is different to the locally sourced product. Further, in terms of the packaging of the imported products, Nestle has demanded of ALDI that ALDI differentiate Nestle's own products, the packaging of which is in Nestle's direct and sole control;
- (c) would not have sought to impose manifestly unreasonable requirements on ALDI to differentiate the products.⁵ Nestle's "differentiation" required ALDI to denigrate the overseas Nestle products as being inferior to Nescafe Blend 43 and to dissuade customers from acquiring those products. As a matter of commercial reality, Nestle's proposed "differentiation" gave ALDI no real choice: it could obtain products from Nestle or it could continue to supply the imported products, doing both was not feasible; and
- (d) it would not have sought to prohibit ALDI from promoting the overseas Nescafe products in its stores and other materials (which is the effect of Nestle's requested prohibition on the use of visual imagery); nor would it have required ALDI to promote Nescafe Blend 43 in a manner dictated by Nestle.⁶
- 2.4 In this regard, it is also worth noting that Nestle itself sells a range of Nescafe instant coffee products in the Australian market. However, Nestle has not felt the need that such steps be taken to ensure that consumers understand that Nescafe Blend 43 is "*a unique coffee that is sourced, blended and roasted in a specific way to meet the sophisticated taste of the Australian market*" and that it is "*distinctly different*" from other local Nescafe coffee products.
- 2.5 The demands made and subsequent action taken by Nestle in relation to the imported Nestle products conveyed a clear message to ALDI: unless ALDI stopped carrying the imported Nestle coffee products, Nestle would not supply it with *any* products.
- 2.6 Nestle's anti-competitive purpose is further evidenced by the steps that have been taken to stop wholesalers and traders from supplying ALDI with product. Whilst Nestle claims that its purpose is not to stop ALDI from supplying imported Nescafe products, this claim is inconsistent with the steps Nestle has taken. The simple position is that Nestle does not want imported Nestle products in the Australian market. In the Submission, Nestle acknowledges that in the recent past action has been taken to stop the supply of imported Nescafe products to Australia.
- 2.7 Nestle's real concern is that the selling of imported Nestle coffee brands will promote intra-brand competition and thus erode the price premium and consumer franchise that Nestle values in its Nescafe Blend 43 product. Nestle's purpose is to prevent competition between Nescafe Blend 43 and the imported Nestle coffee products. This is clearly an anti-competitive purpose.
- 2.8 The anti-competitive effect of Nestle's conduct is also clear. The likely effect of the conduct can only be judged over the medium to long term and must be assessed in relation to the

⁵ Nestle's reliance on corrective measures adopted in other cases to demonstrate the "reasonableness" of Nestle's demands is ill-founded as those cases involve misleading and deceptive conduct. In contrast, in the present case, there is no misleading and deceptive conduct given the steps taken by ALDI.

⁶ It is not appropriate for a retailer such as ALDI to be making representations of the kind sought by Nestle. It is also somewhat inconsistent that Nestle should require ALDI to obtain its approval for all marketing material for the overseas Nescafe products whilst at the same time requiring ALDI to state that Nestle does not endorse the product.

impact that the notified conduct has both in relation to ALDI's ability to compete with the other major grocery chains and also in relation to competition with respect to Nescafe and Milo, the two products principally the subject of the conduct. Nestle's conduct will negatively impact on ALDI's ability to compete with the other major grocery chains thereby lessening competition in the broader grocery market and will reduce competition in the instant coffee and nutritional milk modifiers markets.

- 2.9 Many of Nestle's contentions proceed on the assumption that there are alternative viable sources of Nescafe Blend 43 and Milo available to ALDI. In the case of Milo, due to import restrictions, it cannot be obtained from overseas. Further, in the case of both Nescafe Blend 43 and Milo, there are in fact only very limited sources of alternative supply and, ultimately, Nestle controls these sources of supply. Nestle ultimately controls the quantity, price and other terms on which these products are supplied to third parties, including retailers such as ALDI (whether directly or indirectly via wholesalers).
- 2.10 ALDI's current supply situation is not tenable in the long term. Whilst to date, ALDI has been able to maintain supply of Milo and Nescafe Blend 43, Nestle's conduct has imposed significant additional costs on ALDI in relation to the supply of these products and has meant that ALDI has no certainty with respect to the supply of these products. Without Nestle's support, ALDI will not be able to continue supply of Milo and Nescafe Blend 43 to its customers. As a supermarket, it is essential that ALDI be able to ensure consistent supply to its customers. If critical products such as Milo and Nescafe Blend 43 are not available at ALDI stores, then consumers will not patronise ALDI supermarkets.
- 2.11 Since first opening in Australia, Nescafe Blend 43 has been one of a small number of products identified by ALDI as being necessary for it to carry in order to successfully compete in the Australian grocery market. Milo is another such product.⁷ Both of these products have very strong customer loyalty; are heavily promoted and are clear market leaders in their respective categories. The importance of Nescafe Blend 43 and Milo to ALDI is demonstrated by:
- (a) the fact that Nescafe Blend 43 and Milo are always displayed in prominent positions at the front of all ALDI stores;
 - (b) the fact that ALDI has been prepared to sell Nescafe Blend 43 and Milo at a loss over an extended period of time; and
 - (c) the lengths that ALDI has gone to since Nestle terminated supply to ensure that it can continue to offer Nescafe Blend 43 and Milo to its customers.

The importance of Nescafe Blend 43 and other Nestle products (including, in particular, Milo) in the Australian grocery market is also well acknowledged.⁸ Nestle's own coffee shopper study recognises the importance of brand in coffee purchases.⁹

- 2.12 Whilst ALDI is currently a relatively small player in the Australian grocery market, ALDI's presence has generated significant competition in that market. This is well recognised. It is the fact that the Australian market is dominated by Coles and Woolworths that means that a small player, such as ALDI, which offers consumers a better value alternative will have a disproportionate effect on competition in the market. However, Nestle's conduct will, if allowed to continue, undermine ALDI's ability to compete in the Australian market. Nestle's

⁷ ALDI carries over 750 grocery products, of which there are only a small number of branded products.

⁸ See further paragraphs 2.5, 2.6 of ALDI's submissions of 12 January 2006.

⁹ See confidential exhibit 1 to this submission.

conduct threatens ALDI's ability to supply Nescafe Blend 43 and Milo. For a supermarket, reliability of supply of key products is critical. Without iconic products such as these, ALDI is not such a viable alternative for many consumers.

- 2.13 In the short time the imported Nescafe products have been available, they have promoted competition in the instant coffee market. ALDI's overall sales of instant coffee have significantly increased and, as noted above, a significant consumer following has developed for the imported Nescafe products. Nescafe Blend 43 is sold at a significant premium to the imported Nescafe products. Whilst many customers are electing to continue purchasing Nescafe Blend 43, a significant number are, to borrow Nestle's language, "voting with their feet" and choosing the imported Nescafe products. It is apparent that these customers like the taste of the imported Nestle products notwithstanding that it has not been "sourced, blended and roasted in a specific way to meet the sophisticated taste of the Australian market". By offering Nescafe Blend 43 and the imported products, ALDI is offering consumers choice and value. The likely effect of Nestle's conduct will be to significantly restrict this emerging intra-brand competition in relation to the most important brand in the instant coffee market.
- 2.14 Finally, it is important to note that there is no public benefit associated with Nestle's conduct. Nestle confuses its own personal benefit with benefits to the public. There are however overwhelming public benefits from not allowing Nestle's notification to stand. These are the public benefits in the strong competition that results from the availability of a wide-range of economically priced products including a range of products manufactured by the same supplier. This is well recognised (see *Universal Music*).
- 2.15 ALDI accepts that there is a public benefit in ensuring that product differentiation is clear from product labelling and in-store display. ALDI considers that it is incumbent on Nestle as the manufacturer of the imported product to ensure that it is sufficiently differentiated from any of the other product it manufactures. ALDI further considers that the differences in the packaging mean that it is clear to consumers that the imported products are different Nescafe products to Blend 43. Nonetheless, ALDI has taken its own steps to differentiate the products. These steps are extensive and self-evidently adequate. ALDI continues to adopt these measures.¹⁰ This is evidenced by the lack of any consumer complaint or confusion. Nestle has not, on the public record, produced any cogent evidence of such confusion. On Nestle's own account, complaints have related not to confusion but to alleged disappointment with the flavour of the product. ALDI has received no reported instances of consumer confusion or complaints in relation to the imported Nestle products.¹¹ ALDI offers a remedy in the form of a money back guarantee to any customers who are not satisfied with the product. ALDI is not aware of any customers taking up this offer. ALDI's own experience is that customers have embraced the overseas Nescafe products.

Baker & McKenzie

16 June 2006

¹⁰ Contrary to Nestle's allegation, ALDI has not removed the banners in some stores. The direction to all stores remains in place; if a banner was not on display at a particular store at a certain time this was only a temporary and isolated incident which has since been remedied.

¹¹ Nestle's assertion that ALDI has no clear consumer complaint mechanism is without foundation. ALDI has procedures in place in all stores for dealing with consumer complaints. ALDI's experience is that consumers will, if they have a complaint, take advantage of those procedures and make a complaint.

Annexure 1
Response to specific issues raised in Nestle's submissions

Nestle submission	ALDI comments
<p><i>"It was not the purpose of the notified conduct to stop ALDI from continuing to supply the Overseas Nescafe Brands": page 1; see also pages 2, 3, 11, 19</i></p>	<p>Nestle's purpose is to stop ALDI from continuing the supply of the imported Nestle products: see further paragraph 2.3 above. Significantly, the terms of Nestle's "differentiation" meant that ALDI was, in effect, issued with an ultimatum: it could continue to receive local Nestle products on uncompetitive terms or it could import the overseas Nestle products.</p> <p>Further, Nestle has in fact stopped overseas supply of Nestle products to ALDI. If Nestle's purpose was not to stop the supply of these products to ALDI, then it would not have taken such steps.</p>
<p><i>"Nestle 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 ... ALDI's corrective measures are inadequate and actual consumer confusion is evidence to this effect": page 1; see also pages 9, 13-15, 17</i></p>	<p>For the reasons set out above, ALDI refutes that this was Nestle's actual purpose. The steps taken by ALDI to differentiate the product are more than adequate. This is supported by the fact that there is no evidence of consumer confusion. The only customer "complaints" that Nestle has apparently received concern alleged disappointment with the taste and one product safety complaint; not any confusion. ALDI has not received any customer complaints about the imported products nor have any customers taken up ALDI's money back guarantee. ALDI's experience with other products is that customers do utilise ALDI's everyday guarantee if they are not satisfied with a product.</p> <p>Contrary to Nestle's assertions, customers are in fact "voting with their feet" by choosing to buy the imported Nescafe products. ALDI's sales experience evidences that the products have attracted a strong consumer following.</p> <p>In relation to Nestle's specific complaints about the measures taken by ALDI to ensure there is no confusion, ALDI notes the following:</p> <ul style="list-style-type: none"> • stickers are not "on the bottom of jars" they are in fact clearly visible on the sides of the jars, as can be seen from the photograph on page 14 of in Nestle's submission. ALDI notes however that this photograph has been misleadingly cropped such that the shelf labels are not seen. ALDI encloses further photographs taken of the display at this store (see exhibit 2). ALDI refutes that the photographs display any "confusing similarity"; • the posters "use" the red coffee mug imagery only because they contain a photograph of the product which itself contains a red coffee mug; • ALDI has been unable to confirm that the poster was not displayed at the Shepparton store as alleged by Nestle. The poster is currently on display at the store (see exhibit 3¹²). Given the angle of the photograph used, Nestle has not provided any clear evidence that the poster was not displayed;

¹² ALDI notes that the poster displayed at the Shepparton store refers to Nescafe Original and Nescafe Matinal. Nescafe Original is ALDI's replacement product for Nescafe Classic Deluxe, following Nestle taking steps to stop supply of that product to ALDI.

Nestle submission	ALDI comments
	<ul style="list-style-type: none"> ALDI has issued further directives to stores to ensure that posters and point of sale material are correctly displayed and that staff are able to respond to any customer inquiries regarding the imported products.
<p><i>"Nestle Australia was required to supply on ALDI terms or be de-listed": page 1; see also pages 4, 5</i></p>	<p>This statement is not correct. Nestle and ALDI were negotiating terms for the supply of Nescafe products. ALDI did not threaten to delist Nestle's products. ALDI advised Nestle that it was reviewing its position on Nescafe (letter from ALDI to Nestle dated 19 July 2005). The result of this review was ALDI's decision to import the overseas Nescafe products (letter from ALDI to Nestle dated 8 November 2005).</p> <p>Further, the statement on page 5 that the ACCC and ALDI acknowledged at the Pre-Decision Conference that Nestle had been told that it must supply on ALDI's terms or be de-listed is also incorrect (see Minutes of Pre-Decision Conference, 11 May 2006).</p>
<p><i>"ALDI was always going to be able to import the Overseas Nescafe Brands and ... ALDI replaced the product supplied by Nestle Australia such that there was a minimal impact on competition, if any": pages 2, 18</i></p>	<p>This is not correct. In relation to the imported Nescafe products, Nestle has endeavoured to stop supply of these products to ALDI. In relation to local Nestle products, whilst ALDI has managed to obtain supply to date, this is not a viable long term solution. Nestle's conduct will not have a minimal impact on competition; it will, particularly in the medium to long term, have a substantial effect on competition in both the instant coffee market and the broader grocery market.</p>
<p><i>"Nestle Australia did not have any long term supply contracts with ALDI ... Ceasing to supply such products [i.e. Milo and other unrelated products] was not 'strong discipline' and not 'punitive'": page 4; see also page 5.</i></p>	<p>Whilst the formal terms were not finalised, ALDI has had long term supply arrangements in place with Nestle. ALDI has acquired Nestle products since it first started trading in Australia.</p> <p>Ceasing supply of the non-Nescafe products could only be punitive given that there was absolutely no risk of consumer confusion in respect of these products. Nestle's conduct has, with respect to those products, imposed significant costs on ALDI for no reason.</p> <p>ALDI further believes that Nestle's conduct sends a strong message to the market, including other retailers, that it will not accept parallel imports of Nestle products.</p>
<p><i>"ALDI had other options for sourcing alternative product (including a multitude of third party distributors or importers)": page 5</i></p>	<p>ALDI strongly refutes that there are a "multitude" of third party distributors or importers for the Nestle products. Nestle has not in its submission or elsewhere identified these third party distributors or importers.</p>
<p><i>"The ACCC's assessment of market definition is unusual and ... is not supported by Nestle Australia's Submissions ...": page 5</i></p>	<p>ALDI's arguments regarding the substantial lessening of competition do not rely on a single product market. ALDI does not however concede, given their particular position in the Australian market, the possibility that there are single product markets for Nescafe products and Milo.</p>

Confidential Exhibit 1

**EXCLUDED FROM
PUBLIC REGISTER**



BREAKFAST

Coffee Classic
Decaffeinated

\$4.69

Information

For more information on our products, visit us online at www.nestle.com. For more information on our products, visit us online at www.nestle.com.

Coffee Maltod
Granulated

\$4.69



new new new new

9

Information

Nestlé Matinal and Nescafé Original are sourced by Aldi from the importational market, not from Nestlé Australia. Whilst the blend is sourced locally, we believe that the quality of these products is as good.

200g

NESCAFÉ
Coffee
Matinal
Granulated

\$4.69

great value 200g

NESCAFÉ Matinal

NESCAFÉ Original

\$4.99

CLASSIC TASTE

INCREDIBLY LOW PRICE

To ensure consistent supply and a great price, ALDI have sourced two more superb Nescafé blends: Original 200g import and Matinal 200g import. We believe they taste just as good as Blend 43 and at a more competitive price, offer satisfaction or your money back.

13 06 2006 16:51

new

NESCAFE

Coffee Original

Granulated

210g

new

new

new

8517

\$4.99

Information

Nescafe Matinal and Nescafe Original are sourced by ALDI from the International market, not from Nestle Australia. Whilst the blend is different to the locally sourced product we believe that the quality of these products is as good.

NESCAFE

Coffee

Matinal

Granula

200g

9071

\$

06.2006 16:51