

Nestlé Australia Ltd
Notification N31488

Submission in response to
supplementary submission by ALDI
Stores dated 16 June 2006

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

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Nestlé Australia Ltd

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1 Introduction and executive summary

The purpose of this Submission is to respond publicly to the matters set out in the supplementary submission by ALDI Stores (“ALDI”) dated 16 June 2006.

ALDI’s supplementary submission responded to the submission by Nestlé Australia Ltd (“Nestlé Australia”) dated 2 June 2006, which was in response to the draft notice issued by the Australian Competition & Consumer Commission (“ACCC”) on 3 April 2006 (“Draft ACCC Notice”), which proposes to revoke the exclusive dealing notification N31488 (“Notification”) lodged by Nestlé Australia on 2 December 2005 under the *Trade Practices Act 1974 (Cth)* (“TPA”).

Notifications under the TPA are specific to the parties involved - they do not apply to other parties. ALDI is the only party to have raised an objection to the Notification or put forward any submissions. We do not believe that ALDI’s submissions contain any factual evidence to demonstrate a substantial lessening of competition as is required under the TPA as a precondition to the revocation of the Notification.

Nestlé Australia’s key points in response to ALDI’s supplementary submission are as follows:

- **The purpose of the Notification was not to stop imports of the Overseas Nescafé Brands and there was no purpose to lessen competition substantially.**
- **No evidence of a substantial lessening of competition has been put forward.**
- **The Notification results in public benefits as there is actual evidence of consumer confusion.**
- **The requested differentiation was and is reasonable in the circumstances, being that actual confusion has arisen from ALDI’s marketing practices.**

2 The statutory test in section 93(3) of the TPA

2.1 Introduction

The Notification is required to be assessed under section 93(3) of the TPA. The following is an analysis of the key elements of ALDI's supplementary submission and explanation of why ALDI's arguments do not satisfy the statutory test in section 93(3) of the TPA. The analysis also addresses certain specific assertions made by ALDI.

2.2 The purpose of the Notification was not to stop imports of the Overseas Nescafé Brands and there was no purpose to lessen competition substantially

ALDI claims that Nestlé Australia's purpose in lodging the Notification was anti-competitive¹. The statutory test is actually whether the conduct has or would have the purpose or effect, or likely effect, of substantially lessening competition. Nestlé Australia did not have a purpose of lessening competition substantially. The purpose of the Notification was as is set out in the Notification, being to ensure differentiation and avoid confusion in relation to the sale of NESCAFÉ Blend 43.

In ALDI's supplementary submission, there is an assertion that Nestlé Australia took steps to "*stop wholesalers and traders from supplying ALDI with product*"² such that its purpose was anti-competitive. Nestlé Australia is not aware of any factual foundation for this assertion.

Further, Nestlé Australia rejects ALDI's assertion that Nestlé Australia's submission dated 2 June 2006 "*acknowledges that in the recent past action has been taken to stop the supply of imported Nescafé products to Australia*"³. Nestlé Australia made no such acknowledgment in the submission.

Accordingly, to satisfy the test in section 93(3) of the TPA in relation to purpose, it must be shown that Nestlé Australia had the purpose of **substantially lessening competition**. It is noted that ALDI's supplementary submission did not allege any purpose on the behalf of Nestlé Australia of substantially lessening competition and nor in our view, has such an allegation been demonstrated in ALDI's submissions to date.

2.3 ALDI has shown no evidence of an effect or likely effect of substantially lessening competition

ALDI's supplementary submission asserts that the notified conduct has an anti-competitive effect.⁴ That is not the statutory test. To satisfy the test in section 93(3) of the TPA, it must be shown that Nestlé Australia's Notification would have the effect, or likely effect, of *substantially* lessening competition. ALDI's supplementary submission does not provide any evidence that the Notification would produce a substantial lessening of competition.

¹ Paragraph 2.2 of ALDI's supplementary submission. See also paragraphs 2.6 and 2.7

² Paragraph 2.6 of ALDI's supplementary submission

³ Paragraph 2.6 of ALDI's supplementary submission

⁴ Paragraph 2.2 of ALDI's supplementary submission

ALDI has provided no analysis to support its claims regarding the Notification's impact on competition

ALDI's supplementary submission 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. For example, there is no evidence as to the importance of the relevant products to competition in any market compared with the products of other suppliers.

ALDI has not provided any factual evidence of an effect on competition since the Notification was lodged six months ago

Since the Notification was lodged on 2 December 2005, which is now over six months ago, no evidence has been put forward by ALDI of any lessening of competition in any market. It is submitted that in order to revoke the Notification based on a lessening of competition, it is necessary for there to be some form of compelling actual evidence of any such lessening in order to provide a factual foundation for such an assessment. Further, in order to justify a revocation of the Notification, such evidence of a substantial lessening of competition must outweigh the public benefits arising from the alleviation of actual consumer confusion resulting from ALDI's marketing of the Overseas Nescafé Brands.

ALDI makes strong assertions but provides no factual basis for such assertions

ALDI's supplementary submission has made some strong assertions as to the impact on competition, but provides no factual basis for such claims.

In asserting an anti-competitive effect, ALDI's supplementary submission focuses on the impact of the Notification on ALDI's own position. Not only should there be some factual evidence of that impact on ALDI, but it is submitted that an assessment of the conduct the subject of the Notification should focus on the effect on competition, not the effect on an individual competitor.

Moreover, any references to competition generally are stated by ALDI without a factual basis. For example, ALDI claims at paragraph 2.8 that the Notification 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".

No factual basis is given in support of this broad claim and no evidence is adduced with respect to whether the claimed lessening of competition is substantial.

ALDI's supplementary submission alleges that the conduct the subject of the Notification has a strong effect on price competition as ALDI's impact on competition is disproportionate to its market size. However no factual analysis or justification for such an assertion is provided. As noted in Nestlé Australia's submission dated 2 June 2006, the ACCC's own recent analysis of grocery matters is contrary to ALDI's assertions of its impact on pricing.

ALDI also claims that if:

*“critical products such as Milo and Nescafe Blend 43 are not available at ALDI stores, then consumers will not patronise ALDI supermarkets”*⁵.

ALDI has not supplied any factual basis or analysis to support its proposition that consumers will not patronise ALDI’s supermarkets in the absence of stocking these two products. ALDI does not stock a large range of “iconic” products and this has not (so far as Nestlé Australia is aware) been suggested to adversely affect ALDI’s competitiveness to any extent.

Further, Nestlé Australia did not ever agree formal terms of supply and did not have long term supply arrangements in place with ALDI, contrary to the assertion in ALDI’s supplementary submission⁶. Having ad hoc supply even for a period of time provides no basis for certainty of future supply, so there can be no certainty that ALDI would have stocked these products in the absence of the Notification.

ALDI has also stated that *“without Nestlé’s support, ALDI will not be able to continue supply of Milo and Nescafé Blend 43 to its customers”*⁷. Such a statement does not sit well with ALDI’s threat to de-list Nestlé Australia unless it supplied on ALDI’s terms. That threat was made by ALDI at a meeting with Nestlé Australia’s executives and Nestlé Australia stands by that factual position. This calls into question any claim by ALDI that the notified conduct could substantially lessen competition in light of ALDI’s threat to source elsewhere in any event.

NESCAFÉ Blend 43 and MILO are widely available

Irrespective of the conduct the subject of the Notification, and as far as Nestlé Australia is aware, ALDI has been able to source NESCAFÉ Blend 43 and MILO (as well as the other products which, pursuant to the Notification, Nestlé Australia ceased to supply) from third parties in Australia.

There are many third party distributors/importers from whom these products may be sourced. Confidential Annexure One provides further information on this point. Accordingly, the alleged substantial lessening of competition is difficult to see in terms of ALDI’s own supply arrangements. It is also difficult to see the impact on consumers generally as they are able to source NESCAFÉ Blend 43 and MILO from a multitude of sources at prices which appear to be competitive with those at ALDI.

⁵ Paragraph 2.10 of ALDI’s supplementary submission

⁶ Annexure 1 (page 7) of ALDI’s supplementary submission

⁷ Paragraph 2.10 of ALDI’s supplementary submission

No substantial lessening of competition in light of ALDI's threat to de-list Nestlé Australia

ALDI's supplementary submission claims that its current supply situation is "*not tenable in the long term*"⁸. It is unclear what this sentence means in terms of NESCAFÉ Blend 43, MILO or the Overseas Nescafé Brands.

In any event, it is difficult to see how the "long term" for ALDI is any different as a result of the Notification than it would have been without the Notification. In light of ALDI's threat to de-list Nestlé Australia, it is unclear that ALDI's position under the Notification "in the long term" would be any different from the position in which it would have been placed had it gone ahead with its threat to de-list Nestlé Australia's products.

2.4 The Notification results in public benefits as there is actual evidence of consumer confusion

ALDI's supplementary submission claims that "*there is no public benefit associated with Nestlé's conduct*"⁹, that "*it is incumbent on Nestlé as the manufacturer of the imported product to ensure that it is sufficiently differentiated from any of the other product it manufactures*"¹⁰ and that "*complaints have related not to confusion but to alleged disappointment with the flavour of the product*"¹¹.

We now respond to these assertions in turn.

The purpose of the notified conduct is to prevent consumer confusion - which in itself is a public benefit

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

There is also a substantial public benefit in allowing Nestlé Australia to continue to make products for Australians - it promotes Australian choices, tastes, local employment and benefits the Australian community. Consumer confusion could have a longer term effect of reducing the extent and variety of products that Nestlé Australia is prepared to offer Australians as a result of damage to brand advertising (see discussion later in this submission) and ultimately a decision to produce locally.¹²

ALDI's suggestion it is "incumbent" on Nestlé Australia to rebrand its products involves considerable costs, well in excess of the additional costs to ALDI to comply with Nestlé Australia's requests in the Notification or to obtain Nestlé Australia's products from alternate sources. Even leaving aside broader public benefits, the simplest comparison of costs to ALDI in sourcing from third parties or costs to Nestlé Australia in rebranding, points to allowing the requested differentiation under the Notification.

⁸ Paragraph 2.10 of ALDI's supplementary submission

⁹ Paragraph 2.14 of ALDI's supplementary submission

¹⁰ Paragraph 2.15 of ALDI's supplementary submission

¹¹ Paragraph 2.15 and Annexure 1 (page 6) of ALDI's supplementary submission

¹² The ALDI supplementary submission also makes a suggestion at paragraph 2.14 as to Nestlé Australia confusing personal benefits with benefits to the public. We do not believe that this is a correct interpretation of the law - see the Determination of the Australian Competition Tribunal in *Re Qantas Airways Ltd* [2004] ACompT 9.

Nestlé Australia has real evidence of consumer confusion and change to the NESCAFÉ Blend 43 brand from ALDI's marketing

Nestlé Australia has previously provided evidence to the ACCC on a confidential basis of consumer complaints received in relation to ALDI's marketing of the Overseas Nescafé Brands.

Contrary to the claim made by ALDI in its supplementary submission, these complaints in relation to the Overseas Nescafé Brands **do** in fact relate to consumer confusion (including express reference to not noticing any signs differentiating the products in the ALDI store), in addition to relating to taste dissatisfaction as well as product safety complaints.

Nestlé Australia has received a disproportionate number of complaints regarding the Overseas Nescafé Brands relative to its NESCAFÉ Blend 43 product. Although 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. The proportion of complaints received by Nestlé Australia suggests that this is a major issue such that the notified conduct will result in a public benefit.

2.5 The requested differentiation was and is reasonable in the circumstances

Nestlé Australia's request for product differentiation under the Notification is reasonable because ALDI's corrective measures were and continue to be inadequate. Actual consumer confusion as has been provided as evidence to this effect.

Nestlé Australia's product differentiation request was intended to be reasonable, given that Nestlé Australia believes that ALDI's marketing of the Overseas Nescafé Brands has led to actual consumer confusion. To highlight the actual and continued likelihood of confusion, it is worthwhile turning to some of the statements on NESCAFÉ Blend 43 and MILO in ALDI's supplementary submission such as on page 7:

"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".

ALDI's arguments as to adequate differentiation are based on a range of differentiating elements provided within an ALDI store such as the posters. The evidence previously and still, is that notwithstanding ALDI's "directives" to individual stores, they are not in place. For example, as at 22 June 2006 one of the key elements of ALDI's stated differentiation in terms of posters were not evident at the store closest to the Sydney CBD, being the Edgecliff store.¹³ The failure for the banner to be present undermines ALDI's statement that differentiation is in place.

In these circumstances, Nestlé Australia maintains that ALDI's conduct leads to a reasonable likelihood of consumer confusion and therefore it is reasonable to request differentiation.

¹³ ALDI Edgecliff store in Sydney visited at 12.20pm on Thursday, 22 June 2006.

3 Conclusion

3.1 Introduction

An exclusive dealing notification operates in the context of the actual terms of the notification itself. Nestlé Australia believes that the purpose and the effect of this particular Notification are clear on the face of the Notification.

3.2 Purpose of Notification

As to Nestlé Australia's purpose, the Notification only applies to ALDI. It is specific to ALDI because of the way ALDI has chosen to market the Overseas Nescafé Brands relative to NESCAFÉ Blend 43. It is Nestlé Australia's view that it is reasonable for a supplier to assume that a retailer will market its product in a reasonable manner so as not to confuse consumers. At paragraph 5.16 of the Draft ACCC Notice, the ACCC stated as follows:

"The ACCC also considers that it is appropriate for manufacturers to seek to ensure that retailers do not engage in marketing practices that may mislead consumers in relation to the products supplied by those manufacturers. In some cases, where concerns over the manner in which the product is being marketed cannot be resolved, a supplier of goods may reasonably withdraw supply of its product from a retailer. In 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".

In relation to such marketing practices that may mislead consumers, contrary to the suggestion in ALDI's supplementary submission, Nestlé Australia has presented actual evidence of consumers being misled and confused by ALDI's marketing and, in particular, confusion as to which product those consumers were purchasing. Nestlé Australia has also provided material to the ACCC regarding consumers who have indicated to Nestlé Australia that they would be returning product to ALDI for exchange and refund as well as those that could not as they had thrown away their receipts.¹⁴

Accordingly, actual confusion was and, in Nestlé Australia's view, is still occurring because of the way in which ALDI chooses to market through a form of comparative advertising of NESCAFÉ Blend 43 and the Overseas Nescafé Brands. In these circumstances, consistent with the ACCC's statement, Nestlé Australia believes it is reasonable and commercially legitimate to request that if ALDI wishes to purchase product from Nestlé Australia, then it must do so on a basis of reasonably differentiating the product in order not to cause confusion.

3.3 Effect of Notification

As to the effect of the Notification, the notified conduct has now been in place for over six months and there appears to be no lessening of competition. Certainly no evidence of a lessening of competition which is substantial has been put forward by ALDI.

Nestlé Australia believes that consistent with the evidence in the market to date, there is no likelihood of a substantial lessening of competition in any market, and accordingly submits that the Notification should be allowed to stand.

Nestlé Australia Ltd
30 June 2006

¹⁴ Nestlé Australia has no evidence that consumers who indicated to Nestlé Australia that they would return the product purchased at ALDI did return the product to ALDI.