

MALLESONS STEPHEN JAQUES

For public register

9 August 2006

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

Dear Mr Gregson

Nestlé Australia Ltd - Exclusive Dealing Notification N31488

Introduction and purpose of letter

We refer to the notice issued by the Australian Competition & Consumer Commission ("ACCC") which seeks to revoke the exclusive dealing notification N31488 ("**Notification**") lodged on 2 December 2005 by Nestlé Australia Ltd ("**Nestlé Australia**") under the *Trade Practices Act 1974 (Cth)* ("**TPA**").

On Friday, 28 July 2006, the ACCC asked for material to place on the public register in relation to the nature of complaints received by Nestlé Australia in relation to the marketing of the Overseas Nescafé Brands by ALDI. Notwithstanding the ACCC's recent decision to issue a final decision in relation to this matter ("**Decision**"), we request that this letter be placed on the public register at the same time as the ACCC's notice in order to put Nestlé Australia's perspective on this matter on the public record. That is, the Notification did not stop imports -- it sought to address complaints and customer confusion arising from the ALDI comparative marketing approach by requesting appropriate and in our view reasonable differentiation.

We note that in the Decision, the ACCC recognises that "public benefits can arise from the provision more information to consumers in a clear and explicit manner at the point where they make decision to purchase goods". However, the Commission's Decision, gives little or no weight to the need for accurate and understandable information to be provided to consumers at point of sale and ignores clear evidence that consumers are, in fact, confused as between Nescafé Australia products (most notably NESCAFÉ Blend 43) and imported products. Clearly, as complaints to Nestlé Australia concerning these imported products are continuing the steps taken thus far to differentiate Nestlé Australia products from imported products have manifestly failed.

The very fact that these complaints are being made to Nestlé Australia, concerning products that Nestlé Australia has no involvement with, is indicative of the level of consumer confusion. Further, the disproportionate level of complaints made to Nestlé Australia concerning these imported products establishes that information currently provided to consumers at point of sale is clearly inadequate or misleading.

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Nestlé Australia has previously provided the ACCC, on a confidential basis, with evidence of consumer complaints that Nestlé Australia has received in relation to the marketing by ALDI Stores ("ALDI") of the Overseas Nescafé Brands (as defined in the Notification). The purpose of this letter is to provide an overview, for the public register, of those consumer complaints.

Actual consumer complaints

Schedule One to this letter details a non-confidential summary of the consumer complaints received by Nestlé Australia about the Overseas Nescafé Brands, and also imported NESCAFÉ Original, sold by ALDI.

The complaints have been received since October/November 2005. The most recent complaint covered in Schedule One was received on 28 July 2006. The complaints are therefore continuing.

The fact that the consumers have erroneously contacted Nestlé Australia to complain about the products sold by ALDI indicates confusion as to the correct origin of the imported products, failure of the differentiation steps taken by ALDI and brand damage to Nestlé Australia resulting from ALDI's marketing practices. Each complaint received by Nestlé Australia in relation to ALDI's sale of the Overseas Nescafé Brands and NESCAFÉ Original is evidence to the effect that consumers are confused by ALDI's marketing. Importantly, the complaints demonstrate several themes, including that:

- ξ consumers are purchasing the Overseas Nescafé Brands in the erroneous belief that they are NESCAFÉ Blend 43 or another product of *Nestlé Australia*; and
- ξ consumers have not noticed ALDI's point of sale material at the time of purchase. In particular, those complaints indicate that:
 - a number of consumers did not notice ALDI's signs in store (posters and shelf labelling);
 - the stickers on jars regarding importation were not clearly visible; and
- ξ consumers disagree with ALDI's view as to the taste of the Overseas Nescafé Brands and NESCAFÉ Original, compared with NESCAFÉ Blend 43.

Accordingly, in our view, there is actual and significant evidence of consumer confusion arising from ALDI's *marketing* of the Overseas Nescafé Brands. Moreover, in our view, this is hard factual evidence that ALDI's *point of sale material* which seeks to differentiate the Overseas Nescafé Brands from NESCAFÉ Blend 43 are inadequate.

Consumers are purchasing the imported products in the erroneous belief that they are NESCAFÉ Blend 43, taste like NESCAFÉ Blend 43 or are another product of Nestlé Australia

Consumers have complained that the Overseas Nescafé Brands they purchased from ALDI were not and did not taste like NESCAFÉ Blend 43. One complainant thought that they were purchasing a larger container of NESCAFÉ Blend 43 and almost all have complained, contrary to the view expressed by ALDI, the imported products do not taste like NESCAFÉ Blend 43.

The fact that the complaints have erroneously been made to Nestlé Australia also indicates that consumers are confused as to the origin of the imported products. Indeed, one complainant erroneously wrote to Nestlé Australia to express disappointment with “the new style of instant coffee you have put out”, which is clearly indicative of a confusion over the origin of the products purchased.

Consumers have not noticed ALDI's point of sale differentiation steps at the time of purchase

Consistent with Mallesons Stephen Jaques' visit to ALDI's Edgecliff store on 6 April 2006, complainants have noted that there were no signs displayed in the ALDI stores from which they purchased the Overseas Nescafé Brands. Others have noted that they did not see any shelf labelling.

One complainant noted that it was not until he took the product home that he saw the white sticker which noted that the product was imported by a third party.

Further, when one complainant was informed that the product is imported, the consumer stated that it is very hard for a consumer to determine that is the case (presumably due to the get-up of both the product and the ALDI store). One consumer expressly noted that he thought that the marketing was “misleading”.

In Nestlé Australia's view, ALDI's differentiation and product labelling is insufficient as Nestlé Australia, rather than ALDI or the importer, is receiving complaints.

The complaints received indicate a wider level of confusion

The complaints detailed in Schedule One to this letter indicate a wide level of confusion and support Nestlé Australia's view that it is legitimate for it to be concerned that ALDI's approach to marketing the Overseas Nescafé Brands detrimentally impacts upon consumers' perception of NESCAFÉ Blend 43.

The fact that consumers have gone to the trouble of contacting Nestlé Australia to complain indicates a far wider level of confusion. This is because Nestlé Australia's contact details are not listed on the Overseas Nescafé Brands. The complaints received represent only those people who took the effort to search for Nestlé Australia's contact details and lodge the complaints.

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It is submitted that many consumers would not go to such lengths and would instead simply cease to purchase the product. As such the complaints represent a wider range of complaints.

As explained in Nestlé Australia's submission of 2 June 2006, experience has shown that actual complaints are indicative of a greater number of complaints that have not been reported.

Nestlé Australia's submission dated 2 June 2006 noted that at that time, for what was equivalent to less than 1% of Nestlé Australia's coffee sales, complaints regarding ALDI's Overseas Nescafé Brands constituted approximately 10% of consumer coffee complaints received by Nestlé Australia. The submission dated 2 June 2006 also noted that a 2005 survey conducted by TMI and SOCAP¹ found that generally, consumer dissatisfaction goes unreported to organisations. It was further reported that 95% of people with a bad experience will tell or warn others.

Accordingly, in Nestlé Australia's view, the nature and proportion of complaints received by Nestlé Australia regarding the Overseas Nescafé Brands suggests that this is a major and important issue for Nestlé Australia which warrants increased differentiation in ALDI's marketing, as Nestlé Australia has requested in the Notification.

Conclusion

This letter sets out a significant number of complaints in relation to ALDI's form of marketing of the Overseas Nescafé Brands. In Nestlé Australia's view:

- ξ there are clear issues with ALDI's point of sale material in relation to the relevant products leading to consumer confusion; and
- ξ there are clear issues with ALDI's marketing of the relevant products leading to consumer confusion - for example through ALDI's use of the expression "we believe it tastes just as good as Blend 43", there are clear issues of confusion with consumers based on their adverse views on this taste comparison.

¹ TMI/SOCAP Complaint Culture Survey: 2005 National Report, November 2005, TMI Services Pty Ltd, © Reserved.

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Australian Competition & Consumer Commission

9 August 2006

Moreover, as set out in our letter dated 31 July 2006, we note that since the Notification was lodged over eight months ago, there has been no evidence put forward of any detriment (or meaningful detriment) to competition as a result of the Notification.

Yours sincerely

[Sgd] D Poddar

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Schedule One - Consumer complaints

The actual consumer complaints received by Nestlé Australia follow.

To protect the privacy of the consumers who have complained, the following are summaries of the actual complaints made to Nestlé Australia. The ACCC has been provided with additional details on a confidential basis in Schedule Two.

Date	Complaint	Store purchased
Oct/Nov 2005	Complaint in relation to Overseas Nescafé Brand: ξ complaint in relation to product packaging/external contamination ξ consumer thought it was a Nestlé Australia product	ALDI
Oct/Nov 2005	Complaint in relation to Overseas Nescafé Brand - taste comparison complaint.	ALDI
28 Dec 2005	Complaint in relation to Overseas Nescafé Brand: ξ taste comparison complaint; ξ consumer thought it was a price special in a larger jar of NESCAFÉ Blend 43.	ALDI
3 Jan 2006	Complaint in relation to Overseas Nescafé Brand - taste comparison complaint.	ALDI
3 Jan 2006	Complaint in relation to NESCAFÉ Matinal: ξ taste comparison complaint; ξ complaint in relation to failure to differentiate.	ALDI
19 Jan 2006	Complaint in relation to Overseas Nescafé Brand (from Indonesia): ξ taste comparison complaint; ξ did not see any signage at ALDI as to product differentiation; ξ complaint in relation to failure to differentiate.	ALDI

Date	Complaint	Store purchased
17 Feb 2006	Complaint in relation to NESCAFÉ Classic Deluxe: ξ product packaging complaint; ξ taste comparison complaint.	ALDI
Feb 2006	Complaint in relation to NESCAFÉ Classic Deluxe: ξ taste comparison complaint;	ALDI
	ξ did not see any signage that the product was a parallel import.	
Feb 2006	Complaint in relation to NESCAFÉ Classic Deluxe: ξ taste comparison complaint; ξ consumer expressly stated that he thought signage was “misleading”.	ALDI
Feb 2006	Complaint in relation to NESCAFÉ Classic Deluxe - consumer concerned that product was not genuine Nescafe product and might be illegal.	ALDI
12 April 2006	Complaint in relation to NESCAFÉ Classic Deluxe: ξ taste comparison complaint; ξ did not see any signage at ALDI as to product differentiation.	ALDI
20 April 2006	Complaint in relation to Overseas Nescafé Brand: ξ complaint that thought it was a Nestlé Australia product; ξ taste comparison complaint.	ALDI
8 May 2006	Complaint in relation to NESCAFÉ Matinal - taste comparison complaint.	ALDI
2 June 2006	Complaint in relation to product packaging/external contamination of Overseas Nescafé Brand.	ALDI

Date	Complaint	Store purchased
28 June 2006	Complaint in relation to NESCAFÉ Original: ξ taste comparison representation; ξ white label was not visible on shelf or noticed at time of purchase; ξ did not see any signage at ALDI as to product differentiation.	ALDI
14 July 2006	Complaint in relation to NESCAFÉ Matinal: - taste comparison complaint; - consumer confusion as to origin of product - believed it to be a Nestlé Australia product; - consumer did not notice signage or label differentiating product as import.	ALDI
28 July 2006	Complaint in relation to NESCAFÉ Original - taste comparison complaint.	ALDI