

# MALLESONS STEPHEN JAQUES

## PUBLIC REGISTER VERSION

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

31 July 2006

Dear Mr Gregson

**Nestlé Australia Ltd - Exclusive Dealing Notification N31488**

### *Introduction*

We refer to the submission dated 30 June 2006 from Nestlé Australia Ltd ("Nestlé Australia") in relation to exclusive dealing notification N31488 ("Notification"). The submission may be placed on the public register, *however please note that Annexures One and Two are commercially confidential and are therefore not for the public register.*

[REDACTED]

### *Nestlé Australia's purpose in lodging the Notification and the purpose of the Notification*

[REDACTED]

[REDACTED]

Indeed it is difficult to see how the Notification could have the purpose or the effect, or likely effect, of substantially lessening competition when:

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[REDACTED]

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[REDACTED]

Moreover, if there is any doubt as to whether Nestlé Australia's purpose in seeking differentiation is a legitimate commercial purpose, then we submit that not only do the Board Minutes and other marketing documents previously provided to the ACCC make the purpose clear - but also

[REDACTED]

Further, as explained in the submission dated 30 June 2006 and section 3.2 of Nestlé Australia's submission dated 2 June 2006, the ACCC's inferences of anti-competitive purpose behind the Notification are difficult to sustain in light of the factual context of the matter and in particular that it will always be practically possible to import forms of the Overseas Nescafé Brands in what ALDI itself has acknowledged is a global market. Again, in these circumstances, it could not be assumed that Nestlé Australia could have a purpose of stopping imports or reducing competition substantially as it could never have expected to stop imports.

*Nestlé Australia's purpose of lodging the Notification was to ensure that the Overseas Nescafé Brands were sufficiently and reasonably differentiated from NESCAFÉ Blend 43 so as to avoid consumer confusion*

[REDACTED]

It was therefore a given fact that ALDI would continue to import as the terms offered by Nestlé Australia were unacceptable to ALDI. However, ALDI still asked to buy small quantities of NESCAFÉ Blend 43 from Nestlé Australia<sup>2</sup> and use those products in comparative advertising that in Nestlé Australia's view was and is misleading and deceptive. It would not seem to be unreasonable for any manufacturer faced with such marketing practices by a retailer, which it viewed as repugnant and which could not be resolved by differentiation, to request the retailer that if they wished to continue to engage in such conduct that they obtain product elsewhere.

It is submitted that it is reasonable for Nestlé Australia to request, in relation to these small volumes and in the context of this marketing campaign by ALDI, to seek what it considers to be a reasonable product differentiation or otherwise decline to supply. The addition of the other miscellaneous products included in the Notification needs to be considered in this context as well as ALDI's previous threat to delist Nestlé Australia products. It was not "punitive" conduct as ALDI assert - in fact very much to the contrary.

<sup>2</sup> Nestlé Australia seeks to put this matter in context that its total sales to ALDI of all products were in the order of only approximately [REDACTED] million and that coffee and MILO sales were considerably less.


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Nestlé Australia would also like to address some additional factual matters raised in ALDI's supplementary submission. ALDI's supplementary submission claims at paragraph 2.6 that Nestlé Australia took steps to stop traders and wholesalers from supplying ALDI. Nestlé Australia is unaware of the basis for this claim. If there has been any suggestion provided to the ACCC by ALDI of such conduct in relation to any wholesalers or traders in Australia, please let us know so that Nestlé Australia can respond.


Instead, as was explained in Nestlé Australia's submission dated 2 June 2006, on its own separate volition some three months before the Notification was lodged, Nestlé Singapore ceased to supply a third party Singaporean wholesaler - who may or may not have been supplying the Overseas Nescafé Brands to Australia. Accordingly, there is no factual or causal link between locating a source of imports and an alleged anti-competitive purpose to cease imports. The Notification does not in fact stop imports and only seeks differentiation.

*Nestlé Australia has actual evidence of consumer confusion*

To satisfy the test in section 93(3) of the *Trade Practices Act 1974* (Cth) ("TPA") in relation to purpose, the ACCC must determine that Nestlé Australia had the purpose of substantially lessening competition. The Notification has no such purpose. The ACCC appears to be focusing on the nature and level of consumer complaints to assess whether there is an anti-competitive purpose in Nestlé Australia's conduct. If that is correct, then Nestlé Australia has actual evidence of such confusion - this will now be reiterated.



In any event, Nestlé Australia's request for product differentiation under the Notification is reasonable because ALDI's corrective measures were and remain inadequate. As explained in the submission dated 30 June 2006, the fact that posters were not evident during a visit to ALDI's Edgecliff store on 22 June 2006 undermines ALDI's statement that differentiation is in place.



The inadequacy of the differentiation is also highlighted by the fact that there has been actual consumer confusion over the products.

In the submission dated 30 June 2006 we have included additional examples of actual consumer confusion. **These examples highlight actual consumer confusion, failure of the ALDI differentiation and brand damage to Nestlé Australia through ALDI's marketing practices.** In particular, we have included examples where:

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[REDACTED]

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[REDACTED]

Further, we note from our discussions that there appears to be an assumption within the ACCC's analysis that it is necessary to have a significant number of members of a class of purchasers misled in order to establish that a course of conduct is misleading or deceptive in breach of section 52 of the TPA. That is not, in our view, the correct state of the law - see the High Court's decision in *Campomar Sociedad, Limitada v Nike International Ltd* (2000)<sup>3</sup> and the Federal Court decision in *au.Domain Australia Ltd v Domain Names Australia Pty Ltd* (2004)<sup>4</sup>. The question of whether conduct is misleading or deceptive is to be assessed by reference to a **representative member** of the class to whom the representation is directed. The evidence of actual complaints received by Nestlé Australia indicates that representative members of the class of consumers purchasing Nescafé products at ALDI **have been misled and confused**.

Nestlé Australia has provided the ACCC with factual evidence of consumer confusion. Additional evidence is included in Confidential Annexure Two of the submission dated 30 June 2006.

The ACCC does not appear to have placed any weight on actual evidence of consumer confusion or the damage that ALDI's form of comparative marketing is doing to the NESCAFÉ Blend 43 brand.

[REDACTED]

[REDACTED]

[REDACTED]

Nestlé Australia dealt with this consumer complaint. Confidential Annexure Two includes additional details of ALDI customers who have not noticed signs in store.

<sup>3</sup> (2000) 202 CLR 45.

<sup>4</sup> (2004) FCA 424.

In our view, irrespective of the number of complaints received, the fact that consumers are confused calls into question the ACCC's view that ALDI has demonstrated sufficient differentiation. From a legal perspective we also find it difficult for the ACCC to implicitly condone the use of comparative advertising of the kind utilised by ALDI by not taking action in the face of actual consumer confusion. ALDI does not have to engage in such comparative advertising to sell the Overseas Nescafé Brands. Furthermore, Nestlé Australia's request to receive prior notice of such comparative advertising was intended to not give ALDI an opportunity to make minor changes in advertising in order to engage in the same basic conduct. For example, it is unclear to us that in relation to the marketing of the Overseas Nescafé Brands by ALDI there is any genuine belief in the marketing by ALDI that they really do "taste just as good" as NESCAFÉ Blend 43.

If, in response to the above arguments and criticism of ALDI's comparative advertising, the ACCC were to consider a response that ALDI's need for comparative advertising is based on its need to stock NESCAFÉ Blend 43 in order to be competitive, then Nestlé Australia's response is that there has been no factual evidence of this claim. Indeed, ALDI's position has changed from claiming that the NESCAFÉ Blend 43 products are "must have" products to "important products" to what is stated in the latest submission as "iconic" products. ALDI has not substantiated what benefit these particular "iconic" products of Nestlé Australia have on the dynamics of competition compared with other "iconic" products.

*The Notification's assessment period has allowed time for evidence of the Notification's effect on competition to be adduced - but no evidence of a substantial lessening of competition has been put forward*

We believe that this final point is perhaps one of the most important in the assessment of this matter. ALDI, as the only complainant in this matter, has put forward many broad statements, claims and assertions, but has submitted no factual evidence of how the notified conduct has lessened competition substantially since the Notification was lodged on 2 December 2005, which is now over six months ago. For example ALDI stated at paragraph 2.10 of ALDI's supplementary submission that:

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

If such broad arguments as to impact on competition are put forward, then in our view it is incumbent on the ACCC as a competition authority to put forward factual evidence of any lessening of competition in any relevant market for analysis and response by Nestlé Australia. The European Court of First Instance ("CFI") and the European Court of Justice have constantly highlighted that the European Commission ("Commission") must support its conclusions with cogent, consistent and sufficiently precise evidence. For example, in *Airtours v European Commission - Case T-342 / 99* at paragraph 63, the CFI stated that the Commission is obliged to produce "convincing evidence". In relation to assessments of effects assessments, in *Schneider Electric SA v European Commission - Case T310/01* - at paragraph 179, the CFI stated:

*"these effects may not be presumed to exist ... on the contrary the Commission must provide sufficient evidence that they do".*

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We believe that in a public notification process this issue is even more important. ALDI has not put forward sufficient evidence or data on which the ACCC could base any decision that competition has been lessened substantially in any market as a result of the Notification. Currently, all that ALDI's submissions indicate is that:

- ξ ALDI is still sourcing NESCAFÉ Blend 43 and no evidence has been provided of any additional cost to ALDI. ALDI did not refute Nestlé Australia's estimate of not more than \$100,000 in costs, a cost more than outweighed by the cost to Nestlé Australia of rebranding as ALDI has somewhat cheekily suggested should instead occur; and
- ξ ALDI is still importing the Overseas Nescafé Brands, and competition remains vigorous in the market.

We believe that the hard evidence before the ACCC points to a balance of costs and benefits in favour of Nestlé Australia's arguments as to the impact on competition and public benefits.

In these circumstances, we believe that it is difficult to ascertain any purpose or effect of a lessening of competition, let alone a lessening of competition which is substantial based on "convincing evidence". As such, we submit on behalf of Nestlé Australia that the ACCC does not have the necessary evidence on which to revoke the Notification under section 93(3) of the TPA.

Yours sincerely

[Sgd] D Poddar

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