



# ALDI Stores

(A Limited Partnership)

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**PRESTONS REGION**

18<sup>th</sup> March 2015

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Productivity Commission  
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Dear Commissioner

## **Submission to Workplace Relations Framework Inquiry**

Thank you for the opportunity to provide a submission to the Productivity Commission's inquiry into Australia's Workplace Relations Framework. As a large employer in Australia, ALDI Stores (ALDI) welcomes the invitation to contribute to enhancements of the Workplace Relations Framework.

ALDI notes the broad scope of the inquiry and that submissions are invited on any aspect of the Fair Work framework - not just matters raised in the Issues Papers. We also note that the review intends to go beyond just an evaluation of the existing system to considering what system would be in the wider, long term interests of employees, employers and the wider Australian community.

This submission focuses on particular issues experienced by ALDI and our workforce under the Fair Work system and we use the headings and numbering adopted in the Issues Papers for ease of reference.

## **Background to ALDI**

From a standing start in 2000, ALDI now employs approximately 8,500 Australians in quality jobs in our stores, distribution centres, logistics supply chain and administration functions. The company has made considerable inroads into the Australian grocery market and it is estimated to account for around 11% of the grocery market on the Eastern Seaboard<sup>1</sup>. Currently, our Australian operations comprise five distribution centres spread across NSW/ACT, Victoria and Queensland servicing 367 'small format' stores (around one-third the size of a traditional full-line supermarket).

The company's investment in Australia exceeds \$2 billion. We are continuing to invest in new stores, employment and the sourcing of Australian products. Our company is able to offer our customers consistently lower prices because of our efficient and globally tested business model that is in several ways quite distinct from the major supermarket chains (MSCs). ALDI's key points of difference include: substantially smaller store footprint (1,300-1,600m<sup>2</sup>); substantially lower number of product lines (around 1,350); shorter opening hours; fewer truck deliveries (typically 2-4 per day) and a truck vehicle fleet that is owned and operated by ALDI enabling a much greater level of control over delivery numbers and times.

We believe that by standardising and simplifying as many operations as possible, we can keep costs low and pass these savings on to customers in the form of *everyday* low prices.

ALDI currently has five enterprise agreements in place with our workforce, which are based on the geographic regions across Eastern Australia served by our five current distribution centres and associated store networks. These agreements cover store, warehouse and transport personnel.

<sup>1</sup> Dring, G. 'Discount Discovery. How Australians Have Embraced ALDI', 28 November 2014, <http://www.nielsen.com/au/en/insights/news/2014/discount-how-australians-have-embraced-aldi.html>



In 2011/2012, ALDI sought approval of three Enterprise Agreements to cover three of our Regions, replacing Workplace Agreements made in 2008 under the previous legislation. There were few changes in the terms and conditions under the new agreements compared to the existing conditions enjoyed by employees. The Fair Work Commission (FWC) initially refused certification of these Agreements, following representations by unions, including one union which had not participated in the bargaining process. An unsuccessful appeal by ALDI to the Full Bench nonetheless provided guidance as to the minor changes required to the Enterprise Agreements in order for them to be approved. The bargaining and ballot process was repeated and the Enterprise Agreements were approved, over 18 months after initially being submitted to the FWC. In both ballots, employees overwhelmingly voted in favour of the Enterprise Agreements.

## **Issue Paper 2: Safety Nets**

### 2.3 National Employment Standards

ALDI recommends that the National Employment Standards (NES) be amended to enable employers and employees greater flexibility to determine reasonable additional working hours above the standard 38 hour week. This would allow employees to work the hours they wish and enhance the ability of employers to utilise labour more productively. If an employee seeks additional hours – as occurs regularly at ALDI – it is not clear why they should be denied the opportunity to boost their income.

In the 2012 proceedings at first instance, the FWC found that the Enterprise Agreements with our employees could not be approved, in part, due to the lack of conformity with the National Employment Standards (NES). Specifically, the Commissioner was concerned about provisions requiring full-time salaried store and warehouse employees to work 38 hours per week plus reasonable additional hours, on any five out of seven days. Concern was also expressed for similar clauses relating to transport and distribution employees.

The decision was made despite the total hours per week and commensurate remuneration being agreed on engagement of employees, there being no evidence of any employee requests to reduce hours being refused or leading to adverse consequences and the proposed agreements being overwhelmingly supported by employees. The FWC found that the NES required full time work to be 38 hours, plus reasonable additional hours, and an agreement guaranteeing a number of hours of work to an employee of greater than 38 hours was not in accordance with the NES.

ALDI's experience is that employees are keen for the opportunity of guaranteed additional hours and commensurate income, and prefer this arrangement to a limit of 38 hours plus additional hours to be worked as needed.

In the appeal decision, the Full Bench provided guidance as to the minimal wording changes required to the Enterprise Agreements to allow the Agreements to be approved, so the hours of work arrangements which had been in place for over 10 years could continue.

#### **Examples of ALDI employee hours**

**Store Management employees** are paid a salary plus a Business Review Payment to work an average of 50 hours per week. They are responsible for rostering themselves and other employees to achieve full coverage of the store. A time in lieu system operates and they also receive 5 weeks of annual leave each year. If they wish, employees can also choose to work a 45 hour or 40 hour week with the commensurate salary.

**Transport Operators** can choose from a range of Contract Hours to work per month, up to the equivalent of 50 hours per week. Their base hourly rate includes a component for working hours over 38 hours, and penalty and shift loadings also apply to afternoon, night and weekend work. Transport Operators who choose 173, 195 or 208 Contract Hours per month are guaranteed to work an average of these hours each month, and can rely on receiving this income every month. Hours worked in excess of these Contract Hours can be 'banked' to reduce the number of hours worked in future months. Employees who do not work their Contract Hours in a month still receive payment for the Contract Hours in that month, and can work more hours in future months to balance these negative 'banked' hours.



## Issue Paper 3: The Bargaining Framework

### 3.2 Types of enterprise bargaining and their key processes

The current Act provides significant scope for third parties with very minor coverage to frustrate and delay the finalisation of an enterprise agreement. The FWC also feels obliged to consider in detail each provision of an enterprise agreement, rather than simply ensuring it meets key standards such as a good faith bargaining process, level of employee support, and that it matches or exceeds award conditions.

As an example from ALDI's recent experience concerning several of our Australian regions, a union with coverage of only a very small number of employees was able to intervene late in the approval process and on issues unrelated to the employees it purports to represent. The finalisation of these enterprise agreements, which differed in only minor respects to previous agreements, took over 18 months from initiation of the original bargaining process to final approvals by the FWC. This undue delay had negative consequences for both ALDI and our employees in terms of uncertainty, financial cost, and distraction from managing the business.

To address these issues ALDI recommends that the FWC review submissions from third parties concerning enterprise agreements using an administrative, rather than adversarial judicial, process. This would enable agreements that meet or exceed key standards and where majority agreement from employees has been secured, to be approved in an efficient way that minimises expense and delay.

ALDI believes that a mechanism along the lines of that which existed prior to 2004 under the Office of the Employment Advocate (OEA) should be considered. Under those arrangements, administrative officers within the OEA who understood, or were able to gain an understanding of, the relevant business or workplace were able to confirm promptly the reasonableness and acceptability of agreement terms and conditions when compared to the relevant award.

Where agreements have been through the OEA-style mechanism, these agreements should only be capable of being challenged by third parties on the grounds of defects of process.

#### *Agreements need to make employees 'better off overall'*

While ALDI endorses the relevant modern award as the relevant comparator, we believe greater flexibility is required in the application of the 'better off overall' test. This is particularly the case where the provisions of an enterprise agreement do not reflect the structure of the relevant award, but nonetheless benefit employees on a collective basis.

ALDI has always employed the majority of our employees on a permanent part-time basis. Employees are guaranteed to be rostered an average number of hours each month and will receive payment for this at a minimum. They receive all the benefits of permanent employment, including paid leave, and can be rostered to work 5 out of 7 days in a week. This gives employees the security of ongoing employment and guaranteed minimum earnings each month. Importantly, ALDI also provides rates of pay well in excess of any comparable modern award.

In 2012 proceedings considering ALDI's proposed Enterprise Agreements in three regions, the FWC determined these could not be approved, in part, because relevant employees were not properly part time employees and should be paid as if they were casual workers under the award. This is despite the fact that employees would have been financially better off under the proposed agreements, receiving rates of pay in excess of the casual rates payable under the award, as well as paid leave benefits. This example illustrates the flexibility embodied in ALDI's 'bankable hours' concept and the benefits to both the company and employees, however the FWC could not recognise these benefits, as this work arrangement does not match the structure of working hours in the relevant awards.

ALDI recommends that the legislation be amended to clarify/reinforce FWC's role in applying the 'better off overall' test to one of ensuring that employees will be advantaged in a total or global sense by the enterprise agreement, rather than a line-by-line comparison with the terms and structures of the relevant award. In making this assessment, consideration should be given to monetary advantages such as enhanced rates of pay, as well as non-monetary benefits such as permanent employment and the actual existence of a job that is made possible by flexible working hours (e.g. those who may only be available to work on nominated days in the week due to other responsibilities.).



### *Requiring parties to bargain in good faith*

ALDI is concerned the current system of good faith bargaining provides little incentive for parties to act appropriately. In preparation for the expiry of enterprise agreements in 2012, ALDI commenced a negotiation process with our employees and their unions in August 2011. All good faith bargaining obligations were met, including meeting with employees and their representatives and considering the proposals made in formalising the final agreement. This bargaining process concluded in mid-October 2011 when the agreements were voted on by employees, and approved with 'yes' votes of between 70 and 80% of employees who voted in each region.

However in hearings before the FWC to approve the agreements, a union with negligible coverage of ALDI's employees opposed an agreement in one of the regions, having chosen not to participate in the bargaining process to date. In this instance, the union also called no evidence and could not point to any member complaining about the proposed agreement.

ALDI recommends that the good faith bargaining requirements of the Fair Work Act be amended so that the option of an agreement made directly with employees is available, similar to an agreement made under s170LK of the *Workplace Relations Act 1996*, in addition to the option of an agreement made with employees who are directly represented by unions. Third parties who choose not to participate in a bargaining process for an enterprise agreement should not be permitted to later oppose the agreement in the FWC, despite having coverage and membership at that location.

### *Individual Flexibility Arrangements*

ALDI concurs with the discussion in the Issues Paper that individual flexibility arrangements (IFAs) as they are presently defined under the Act are of limited practical value. IFAs are not currently used in ALDI's workplace primarily due to the legislative limitations that have been placed upon them – their prescription as short-lived contracts, the maximum 28 day notice period to terminate and the inability to offer them to new employees. For IFAs to be useful in ALDI's context, they would need to be able to have a term equal to an enterprise agreement and be permitted to be offered to new, as well as existing employees.

### 3.5 Resolving disputes over terms and conditions

While ALDI has never had a circumstance arise where it has been the subject of formal enforcement action by the Fair Work Ombudsman (FWO) in relation to the terms and conditions of an enterprise agreement, ALDI has found the approach of the FWO to be pragmatic and constructive when investigating complaints from employees. The FWO appears to operate along lines which ALDI believes should more generally characterise the Fair Work System – quality engagement, information requests and a focus on substance over form.

## **Issue Paper 4: Employee Protections**

### 4.2 Unfair dismissal

ALDI notes as positive developments the introduction in 2010 of teleconferences for hearing unfair dismissal claims and the streamlining measures proposed in the *Fair Work Amendment Bill 2014* currently before the Senate.

We have been party to unfair dismissal claims where the FWC has ordered a hearing in circumstances where there is no prospect of the claim succeeding – this is not in the interests of any stakeholder. ALDI accordingly recommends that the Act be amended, as proposed in the *Fair Work Amendment Bill 2014*, to provide for an initial assessment of all unfair dismissal claims 'on the papers' to ensure all jurisdictional requirements can be met before any hearing is scheduled. We believe this will lead to a less legalistic and more efficient process for resolving unfair dismissal claims.

### 4.4 General protections and 'adverse action'

ALDI believes a more balanced approach is needed to determine general protection disputes. Generally speaking, ALDI's experience of this element of the Fair Work system is that it operates in a very legalistic manner. A similar approach to conciliation as is used in unfair dismissal claims would be less time-consuming and less costly for the parties.



A reverse onus of proof exists in the Act on employers subject to adverse action claims, meaning they have to prove such action was not wholly or partly related to the employee exercising a workplace right.

ALDI contends that the requirement to disprove a negative going to the employer's motivation (or partial motivation) is an unreasonable burden. This is particularly the case as these claims are heard in either the Federal Circuit Court or Federal Court, with the corresponding time and expense involved if the FWC is unable to resolve the claim via conciliation.

ALDI recommends that the Act is amended to put the onus on the claimant to establish that adverse action was related to the exercise of a workplace right. Alternatively, an amendment could provide that establishing an adverse action claim requires the exercise of a workplace right to be the primary reason for the adverse action.

## **Issue Paper 5: Other Workplace Relations Issues**

### **5.2 How well are the institutions working?**

Based on our experience, the length of time taken for FWC consideration of enterprise agreements can be unduly prolonged, costly and disruptive to continuing business operations, which is disadvantageous to all stakeholders. This is not acceptable in a modern, flexible economy.

Further, the scope for the FWC to involve itself in the detail of enterprise agreements is anomalous in circumstances where a substantial majority of the workforce has approved the agreement, where relevant unions representing the majority of employees are either supportive or not opposed, and where no evidence has been led against the reasonableness of the agreement's terms or its comparability with the modern award.

ALDI is also concerned about the inability of an employer to sit down with FWC staff to explain the practical operation of an agreement and what proposed pay and conditions actually mean so that a thorough and considered assessment of agreement terms and conditions may be undertaken compared to the relevant modern award. Under legislative arrangements that existed prior to 2004, the approving body for workplace agreements gained a clear understanding of the way in which ALDI's agreements operated, and promptly sought additional information to address any concerns about how proposed terms and conditions compared to those in the relevant award. This enabled ALDI to tailor working arrangements to suit our business needs, rather than simply replicate industry arrangements. We note the guidance provided by the Full Bench in its appeal decision as to the minor changes required to the Enterprise Agreements, but note the delay and considerable expense required to achieve this outcome.

### **5.7 Other elements of the Workplace Relations framework**

#### *Right of entry*

ALDI agrees with the proposed changes to the rights of entry provisions contained in the *Fair Work Amendment Bill 2014*, particularly in relation to the location for discussions and meetings. These changes are to revert to the arrangements which applied up to 1 January 2014.

To discuss any aspect of the submission please contact David Zalunardo, Managing Director – Prestons, ALDI Stores

Yours Sincerely

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ALDI Stores