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Our Ref: 20140527
Your Ref: AM2016/15

BY EMAIL amod@fwc.gov.au

The Associate to his Honour Justice Ross
Fair Work Commission

Dear Associate

AM2016/15 - PLAIN LANGUAGE - GENERAL RETAIL INDUSTRY AWARD

We act on behalf of Australian Business Industrial (**ABI**) and the NSW Business Chamber (**NSWBC**) with respect to the above proceedings and refer to the Decision of the Full Bench issued on 18 January 2019 (**Decision**).

In a submission dated 22 November 2018, the National Retail Association (**NRA**) proposed an amendment to clause 24.4(g) of the revised Plain Language Exposure Draft (**PLED**), which concerns time off instead of payment for overtime. In the context of an employee making a request under section 65 of the *Fair Work Act 2009* (Cth) (**the Act**) for flexible working arrangements, the NRA proposed the insertion of a cross-reference in clause 24.4(g) to what will become clause 6A of the PLED (currently 31A of the Award).

At [14] of the Decision, the Full Bench expressed a provisional view that the clause should be amended as proposed by the NRA. The amended clause is as follows (amendments underlined):

> *"**(g)** An employee may, under section 65 of the Act or clause 6A of this Award, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause 24.4 will apply for overtime that has been worked.*
>
> *NOTE: If an employee makes a request under section 65 of the Act or clause 6A of this Award for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act)."*

Our clients respectfully oppose the proposal to amend the clause in this way.

The basis for this objection arises from potential confusion which may arise regarding the source of power to make a request for flexible working arrangements. Section 65 of the Act is the source of an employee's entitlement to *make* a request. The new clause 6A (currently clause 31A) is a term *about*

"the facilitation of flexible working arrangements" within the meaning of section 139(1)(b).[1] It prescribes obligations on the employer in *responding* to a request which has been made pursuant to section 65. The proposed wording may create the impression that a request may be made under clause 6A, *in the alternative* or *in addition* to a request under section 65 of the Act.

We thank the Commission for the opportunity to provide this correspondence. If you have any questions, please contact Kate Thomson on (02) 4989 1003.

Yours sincerely

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[1] [2018] FWCFB 5753 at [66].