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Expert Panel for the Road Transport Industry

President, Hon Justice Hatcher

Vice President Asbury

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Fair Work Commission

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Matter: MS2026/1 – Proposed changes to the Road Transport Contractual Chain Supply Order

1. Introduction

1.1 The Housing Industry Association (HIA) files this submission in response to the Expert Panel's Statement of 29 May 2026 and the accompanying draft variation document.

1.2 HIA opposes several aspects of the Draft in the terms set out below and maintains the substantive positions advanced in its earlier written and oral submissions.

1.3 This submission addresses the following matters:

- the proposed variation to clause 5.3, as the only operative sunset provision in the Order, HIA opposes as a substantively unjustifiable extension of the Order's burden on the residential building industry;
- the proposed variations to clauses 4.1, 4.4 and 4.6(b), which HIA opposes as imposing additional burdens without adequate justification;
- the proposed variation to clause 4.3, which HIA opposes; and
- the Commission's failure to engage substantively with HIA's s 536JX submissions, including the bare assertion that the Panel is 'unpersuaded' of HIA's case for sectoral relief, without valid reasons.

2. Opposition to the Proposed Variation of Clause 5.3: The Four-Week Threshold

2.1 HIA strongly opposes the Panel's proposal to vary clause 5.3 so that the obligations in clause 4 will cease to apply *only* if the weekly average national terminal gate price for diesel falls below \$2.00 per litre for four consecutive weeks, rather than a single week, as currently provided.

- 2.2 The rationale offered by the Panel to attempt to justify this change is that ‘subsequent events suggest that a benchmark of a single week in which the national average terminal gate price for diesel falls below \$2.00 might not necessarily signal the end of the emergency situation, including because of temporary changes to excise duties.’
- 2.3 HIA submits that the proposed variation is substantially conclusory, unsubstantiated, and is internally inconsistent.
- 2.4 The reference to ‘temporary changes to excise duties’ reflects precisely the kind of ad hoc policy reasoning that this Commission should not be engaged in without an evidentiary basis. No evidence has been placed before the Panel establishing that a single week of sub-\$2.00 diesel pricing is insufficient to signal the end of the emergency. No modelling has been produced. No expert evidence supports the four-week threshold. The Commission is proposing to move the goalposts on the basis of speculation.
- 2.5 The inconsistency of the proposed variation is stark when measured against the Order’s own logic. The operative premise of the Order is that fuel price increases are volatile, rapid, and require immediate fortnightly adjustment to account for an emergent globally disruptive situation. That is why clause 4.1 mandates rate reviews every fortnight or twice per calendar month.
- 2.6 If the Commission accepts, as it must, having made the Order on that basis, that a single week’s fuel price movement is sufficient to require an upward rate adjustment, it cannot credibly claim that a single week’s price reduction is insufficient to signal the end of the emergency.
- 2.7 Accordingly, the proposed variation applies an asymmetric standard that benefits one class of participants at the expense of the industries bearing the compliance burden. That asymmetry requires explicit justification, which the Expert Panel in its Statement has not provided.

Inconsistency with the Minimum Standards and Road Transport Objectives

- 2.8 Section 536PT(1) requires that any variation determination be consistent with the minimum standards objective (s536JX) and the road transport objective (s40D). Section 536JX(c)(ii) requires regard to the impact of standards on business, including small business. Section 536JX(c)(iii) requires regard to the need to ensure that the standards do not impede the efficient operation of enterprises.
- 2.9 The proposed four-week threshold materially extends the period during which businesses, including small residential builders who, as HIA has consistently argued, should not be subject to this Order at all, are required to bear the cost and administrative burden of fortnightly rate reviews and fuel levy adjustments. No consideration of that burden appears in the Statement by the Panel.
- 2.10 The Commission is proposing to vary an instrument with significant compliance costs on industry, without any analysis of the impact of that variation on the businesses bearing those costs. HIA again submits that is inconsistent with the Commission’s statutory obligations.
- 2.11 HIA also notes the internal tension in the Commission’s reasoning on clause 5.3: if the \$2.00 threshold has been distorted by ‘temporary changes to excise duties,’ the appropriate response is to adjust the benchmark, not to impose a durational compliance extension. The Commission’s preference for the latter suggests it is seeking to ensure

the Order remains operative regardless of whether the emergency that justified it has passed. That is not a proper exercise of the variation power.

Alternative approach proposed

- 2.12 If the Panel is genuinely concerned that a single week of the sub-\$2.00 threshold diesel pricing may not reliably signal the end of the emergency, despite this being the consulted and agreed approach by parties during the development of the Order, a more appropriate mechanism would be a triggered review and not an automatic four-week extension.
- 2.13 HIA proposes that in the event the diesel price falls below \$2.00 per litre for one week, the obligations in clause 4 should immediately cease, as per the current drafting of the Order, and the Commission should convene an expedited review within five business days to determine whether the emergency has in fact passed and whether obligations should be reinstated.
- 2.14 This is consistent with the Commission's review powers under ss536PT and 536QK, is responsive to the genuine concern about price volatility, while not imposing an arbitrary compliance extension on affected businesses.

3. Opposition to the Proposed Variations of Clauses 4.1 and 4.4

- 3.1 The Panel proposes to add the words 'or set' after 'adjust' in clauses 4.1 and 4.4 of the Order, to address uncertainty about the obligation's application to contracts entered into after 6 March 2026. The intent is to make clear that parties entering entirely new arrangements post-commencement must also set initial rates at a level that accounts for the increased cost of fuel, not merely adjust pre-existing rates.
- 3.2 This expansion is particularly damaging for the residential building sector. The project-based contracting model means that new contracts are continuously entered into as each new project commences. A builder commencing a new project today would be required not merely to adjust an existing rate, but to 'set' the initial rate in their new supply contracts at a level that satisfies the Order's ongoing fuel cost recovery requirement. This is a requirement that compounds the compliance burden already identified by HIA and that is wholly inconsistent with the way pricing is negotiated in the residential construction market
- 3.3 The variation also introduces a new interpretive problem as there is no guidance in the Draft as to what standard a newly set rate must meet. Adjusted rates have a baseline, being the pre-emergency rate plus the increased cost of fuel since 6 March 2026. A newly set rate has no such baseline. The Draft does not explain how compliance is to be assessed for new contracts, which will generate further uncertainty of the type the Commission acknowledged at the 1 May conference.
- 3.4 HIA submits that if the Panel is satisfied some clarification is needed for new contracts, the appropriate approach is to provide that the Order's obligations apply only where a party to a new contract is already party to a pre-existing contract covering the same or substantially similar transport services, such that a prior rate baseline exists against which adjustment can be measured. That would achieve the Commission's stated purpose without extending the obligation to genuinely new commercial arrangements

where no baseline exists and where the parties have presumably already priced prevailing fuel costs into the agreed rate.

4. Opposition to the Proposed tightening of Clause 4.6(b)

- 4.1 The Panel proposes to add to clause 4.6(b) the words ‘so long as the adjustment is implemented each fortnight or twice per calendar month.’ The intent is to clarify that a rise-and-fall formula or cost benchmark in an existing collective agreement or contract will only satisfy the Order’s obligations if it is also applied at the Order’s mandated frequency, even if the underlying agreement provides for less frequent adjustment.
- 4.2 HIA opposes this variation. Clause 4.6(b) represents one of the few meaningful compliance pathways available to parties with existing commercial arrangements that already contain rise-and-fall mechanisms. The proposed addition narrows that pathway significantly by requiring fortnightly application of mechanisms that were negotiated and documented on a different frequency; typically quarterly, biannually, or annually.
- 4.3 For HIA’s members, where supply contracts in the residential building sector contain rise-and-fall provisions, they are typically tied to published indices that operate on a quarterly or project-milestone basis. These arrangements reflect the commercial reality that the cost of managing fortnightly price variations across a complex multi-tier build program is prohibitive for small builders. The proposed variation would require these businesses to depart from their negotiated contractual terms and apply their existing formulas fortnightly, which is a practical impossibility in many cases given that the underlying index data is not published at that frequency.
- 4.4 This variation effectively renders clause 4.6(b) of limited practical utility for a large section of the industry. The Commission should not adopt it without evidence that the change is necessary to protect regulated workers. HIA submits that the required evidence has not been provided to the Panel.
- 4.5 Accordingly, HIA submits the existing clause 4.6(b) language should be retained, and that the question of whether a rise-and-fall mechanism satisfies the Order’s requirements should remain a matter of fact and degree having regard to all the circumstances.

5. Opposition to the Proposed Variation to Clause 4.3

- 5.1 The Panel proposes to clarify the small business employer exception in clause 4.3 ‘in an attempt to avoid uncertainty that appears to have arisen in relation to the definition of a “road transport business” in s15R of the FW Act.’ This issue was raised specifically and at length in HIA’s earlier submissions, and HIA welcomes the Commission’s acknowledgment that uncertainty exists. However, the proposed drafting by the Panel does not resolve the issue that HIA and other parties identified.
- 5.2 The existing clause 4.3 exemption applies to a primary party that is a small business employer and “is not a road transport business.” The problem, as HIA has submitted, is the definition of “road transport business” in s15R of the FW Act is broad enough to capture businesses that merely receive transport services under service contracts. This means that small residential builders are brought within the definition and denied the exception, despite having no operational role in the road transport industry.

- 5.3 The proposed variation does not address the definitional overreach. Rather, it replaces the s15R road transport business concept with a new formulation that focuses on whether the primary party itself engages road transport contractors, road transport employee-like workers, or employees to perform road transport work. On its face, this change appears to narrow the definitional scope. In practice however, it has the potential to create significant compliance issues.
- 5.4 Many residential builders do not engage owner-drivers or gig workers directly, as they engage building supply companies who in turn engage transport operators. Under the current clause 4.3 drafting, those builders may nonetheless be denied the exception because they are characterised as road transport businesses under the Act by reason of receiving transport services.
- 5.5 Under the new drafting, the question shifts to whether they employ workers “to perform work in the road transport industry.” This introduces ambiguity and complexity. For example, a builder who employs a site delivery driver, even incidentally or indirectly as described above, could be brought within the definitional phrase “employ employees to perform work in the road transport industry and thereby excluded from the exception. This result is equally as unintended and unjust as the current position the Panel is seeking to resolve.
- 5.6 Critically, the variation does not address one of HIA’s core concerns in our previous submissions: that small residential building businesses that are neither transport operators nor transport engagers, and who do not have the operational capacity to do what the Order expects of them, should not be primary parties subject to the additional obligations that clause 4.2 provides for. These small businesses are caught at the apex of a supply chain that incidentally involves road transport further downstream; and they should not be unfairly or unjustly penalised for that fact.
- 5.7 HIA submits that the variation is directed at the wrong problem. It is adjusting the language of the exception without addressing the underlying definitional mismatch between the scope of “road transport business” and the evident policy intent of the exception to apply to small businesses that are not, in any meaningful operational sense, participants in the road transport industry.
- 5.8 HIA proposes that the Panel does not make the variation as proposed, but re-draft the variation to give effect to the evident policy intent by providing that the clause 4.3 exception applies to any primary party that is a small business employer whose principal business activity is not the performance or procurement of road transport services as a core commercial function – thereby effectively excluding those small business operators who are only incidentally or indirectly involved in the supply chain.

6. Panel’s Failure to Engage Substantively with HIA’s Submissions

- 6.1 At [12] of the Statement, the Commission disposes of HIA’s substantive submissions in three sentences: it notes that HIA submitted for ‘a partial or complete exclusion of residential building businesses from the application of the Order’, states that it is ‘also unpersuaded that this step should be taken’, and promises reasons in a later decision. This is procedurally and legally inadequate.

6.2 HIA's submission was not a bare assertion. It identified specific failures by the Commission to discharge mandatory statutory obligations under ss 536JX(a)(vi), (c)(ii) and (c)(iv) of the FW Act, principally the obligation to:

- a) tailor the Order to relevant industry sectors and business models;
- b) consider the impact on small business; and/or
- c) to allow for flexibility in commercial arrangements.

HIA respectfully submits to the Panel that the submissions on statutory obligations raised required engagement and response. The statement that the Panel is 'unpersuaded' provides no insight into whether the Commission considered these arguments, whether it identified any error in them, or on what basis it rejected them.

6.3 Section 536PF(2)(a) requires that the Commission not make or vary an RTCCO 'unless there has been genuine engagement with the parties to be covered.' At [20] of the Statement, the Commission finds that the engagement conferences, submissions process and hearing constitute the requisite genuine engagement. HIA does not challenge that finding in respect of the order making or variation process. However, genuine engagement cannot be satisfied by providing an opportunity to be heard, and then disposing of the submissions made without reasons. Genuine engagement requires genuine consideration, which must in turn be demonstrable from the Panel's reasoning.

6.4 This is especially so where HIA's submissions are directed to the Commission's own compliance with its enabling legislation. A decision-maker cannot 'genuinely engage' with a submission that it has acted outside power by providing no reasons for rejecting that submission. HIA repeats that the Commission's obligations under s536JX are mandatory preconditions to a valid exercise of the power in s536PD, and that an unreasoned rejection of HIA's tailoring argument leaves the Commission's decision on this point vulnerable to challenge.

6.5 Nothing in the Statement or the Draft addresses the substance of HIA's legal argument that the Order as made does not comply with the tailoring obligation in s536JX(a)(vi). HIA maintains that the residential building sector has characteristics that distinguish it materially from the logistics, freight and road transport industries at which the Order is principally directed:

- a project-based, multi-tiered contractual structure that makes it structurally impossible to identify stable fortnightly 'rates' for the purpose of clause 4.1 compliance;
- a predominance of small business operators who, through no fault of their own, are brought within the definition of 'road transport business' under s15R and thereby denied the small business exemption in clause 4.3;
- continuing evidence from HIA's membership that fuel surcharges are being imposed upward but not reviewed downward as required by the Order, with no practical mechanism for primary parties in the residential building sector to enforce compliance further down the chain; and
- the absence of any sector-specific guidance, despite the Commission's acknowledgment at the 1 May conference that concrete practical examples are required.

6.6 HIA reiterates its request that the Commission, in its final decision on the review, either vary the Order to provide sectoral relief for the residential building industry, or provide sufficiently detailed reasons for its refusal to do so to enable HIA to assess its further options.

7. Conclusion

7.1 The proposed variations to clauses 4.1, 4.3, 4.4, 4.6 and 5.3 each impose additional or extended burdens on industry without adequate evidentiary justification and without the analysis of industry impact required by ss536JX(c)(ii) and (c)(iii). Each should be rejected or substantially modified in the terms HIA has proposed.

7.2 The Panel's bare statement of being 'unpersuaded' of HIA's sectoral case and claims that the Commission has failed in adhering to its statutory obligations in making the order are inadequate and does not discharge the Commission's obligation to provide reasons responsive to the seriousness of the submissions made.

7.3 The impact by this Order is compounding and represents another layer of cost pressure to a residential building sector already under significant strain arising from the Middle East conflict and the cumulative impact of significant regulatory reform, risking further delays and reductions in housing supply.

Yours sincerely

HOUSING INDUSTRY ASSOCIATION LIMITED



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