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21 May 2026

Expert Panel for the Road Transport Industry

President, Hon Justice Hatcher

Vice President Asbury

Vice President Gibian

Fair Work Commission

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Matter: MS2026/1 – One Month Review of the Road Transport Contractual Chain Supply Order

1. Introduction

- 1.1 The Housing Industry Association (HIA) makes this further submission to inform the Expert Panel's first review of the Road Transport Contracting Chain Order ("Order") made on 28 April 2026.
- 1.2 This submission is consistent with our previous submission to Vice President Asbury on 30 April prior to the engagement conference convened on 1 May 2026. It is filed pursuant to the mandatory review mechanism in the Order itself, which requires the Commission to review the Order's operation within one month of commencement and at three-monthly intervals thereafter.
- 1.3 This submission advances a number of propositions, namely:
 - HIA's responses to the matters raised at the 1 May conference;
 - HIA's position that the Commission has not, in making the Order, discharged its statutory obligations under s 536JX of the *Fair Work Act 2009* ("the Act"), specifically in its failure to tailor the Order to relevant industry sectors and business models;
 - The practical and commercial impact of the Order on the residential building sector is disproportionate, significant, demonstrable, and continuing; and
 - There should be a mechanism for the Fair Work Commission in the Order to rectify any errors or deficiencies, by way of its variation, suspension or revocation powers in sections 536PT, 536QB or 536QK of the Act, without the requirement for parties to separately fund and prosecute a fresh application due to the "novelty and urgency" that led to the RTCCO being developed and enacted. HIA contends that that the unintended consequences articulated in our submission need to be addressed on an expedited basis.

2. Response to Matters Raised at the 1 May Conference

2.1 Guidance Materials and Communication

2.2 At the 1 May conference, the Vice President noted the Commission's extensive publication efforts and queried what further communication HIA believes is required. HIA accepts that the Commission took appropriate steps within its ordinary framework. The submission is not directed to criticism of those efforts. However, the Order is not an ordinary instrument; with the Expert Panel itself categorising it as "novel" and "urgent."

2.3 To add clarity for the Panel, HIA submits that as the Order imposes legally enforceable obligations with significant civil penalties (of up to \$99,000 per contravention for body corporates for example) on hundreds of thousands of businesses across virtually every sector of the Australian economy, many of which have no relationship to or prior engagement with road transport regulation. The Order is among the most complex instruments the Commission has made in recent years in terms of its downstream operational effect on non-transport parties. This fact elevates the need for appropriately clear and sector specific guidance on compliance obligations.

2.4 For example, the Australian Chamber of Commerce and Industry (ACCI) has developed an Employer Guide, published on 6 May 2026 and funded by the Australian Government's Productivity, Education and Training Fund. The existence, length, and detail of that guide is itself evidence that the Order, as made, was not simple, accessible, or operationally clear, particularly for the small businesses who form the backbone of the residential building sector. That a dedicated, non-government-funded publication of that complexity was necessary within 15 days of commencement is itself indicative of the Order's implementation demands on businesses.

2.5 This is reinforced by the 2026–27 Federal Budget, which allocates \$1.3 million specifically for the Fair Work Commission to provide specialised supports to small businesses navigating Commission processes. This dedicated appropriation acknowledges both the Commission's obligation to support small business compliance and the practical reality that many affected businesses require more than website publications or animations to understand their obligations.

2.6 HIA submits that for an instrument of this breadth and complexity, the Commission's communication obligations extend beyond its standard practice, and that detailed and industry specific guidance on interpretation and compliance obligations, as discussed at the engagement hearing, would be appropriate.

2.7 Primary and Secondary Party Definitions

2.8 The Vice President acknowledged the consensus view that concrete, sector-specific practical guidance is required on what constitutes a primary party, a secondary party, and a road transport contractual chain. HIA endorses that view and notes the following sector-specific complications.

2.9 In the residential building sector, the project-based, multi-tier contractual structure means that a single project involves numerous simultaneous contractual relationships, each of which may independently constitute a primary arrangement for the purposes of the Order. A volume builder may simultaneously be the apex primary party on dozens of sites, the secondary party in arrangements with its materials suppliers, and potentially a primary party in wholly distinct supply chains for concrete, bricks, timber, framing and other building materials.

- 2.10 Further, HIA notes that there remains genuine legal uncertainty as to where a chain commences and terminates, and in particular whether the Order applies to transport forming only an incidental component of a broader services arrangement. This is particularly acute for residential builders who receive delivered materials under standard supply contracts that make no express provision for transport.
- 2.11 *Downward Fuel Price Movement and Rate Adjustment in Practice*
- 2.12 At the conference, HIA drew attention to ACCC data indicating that retail diesel prices were falling rapidly as of 24 April 2026. This submission updates and strengthens that evidence, with the latest monitoring report indicating continued lowering of prices in the 15 May 2026 weekly report.
- 2.13 HIA's members are reporting – consistently and from multiple states – that the fuel surcharges and levies being imposed upon them have not reduced commensurately with the downward movement in diesel prices. For example, supply notifications of the type issued by major building materials suppliers in May 2026 have added fixed percentage or per-kilometre surcharges that were calculated on the basis of elevated fuel prices and have not been reviewed downward despite the Order's fortnightly review obligation.
- 2.14 HIA contends that this is a structural consequence of the Order's enforcement asymmetry: while primary parties bear a positive obligation to adjust rates upward, the practical incentive for secondary parties to initiate downward adjustments is lower and the mechanism for primary parties to enforce compliance in that direction is underdeveloped.
- 2.15 HIA submits this warrants specific attention in the review.
- 2.16 *Method of calculating fuel levies and surcharges*
- 2.17 The method of calculating fuel levies and surcharges was raised at the previous Conference, with HIA members expressing concern with the significant variance, lack of substantive evidence and formulae. These members are continuing to report that this practise is continuing exposing a lack of understanding and application of the Order by secondary parties, or more alarmingly the opportunistic imposition of fuel levies and surcharges that exceed actual costs.
- 2.18 HIA submits this aspect also warrants specific attention in the review.

3. The Commission's Statutory Obligations Under s536JX

- 3.1 Section 536JX of the Act imposes a mandatory obligation on the Commission before making a Road Transport Contractual Chain Order. The Commission must be satisfied that the terms of the Order are appropriately tailored to avoid, or minimise so far as practicable, adverse effects on parties other than those directly in the road transport contracting chain.
- 3.2 This is not a discretionary consideration. It is a mandatory precondition to validity. If the Commission was not satisfied of that matter, or if the evidence before it was insufficient to permit such satisfaction, the consequence is that the Order cannot stand in its current terms.
- 3.3 HIA continues to submit that the Order, as made, does not comply with the Commission's mandatory obligations under s536JX of the FW Act. In summary of our previous submission, HIA identifies three relevant subsections.

- 3.4 Section 536JX(a)(vi) requires the Commission to ‘tailor the minimum standards for the order to be relevant to industry sectors and business models.’ The Order applies in materially identical terms to major logistics operators, major retailers, digital platform operators, and small residential builders. No sector-specific calibration has been made in respect of:
- the project-based delivery model;
 - the role of small business employers in residential construction who may have no capacity to independently calculate fuel cost components embedded in materials supply contracts; or
 - the distinct position of trades contractors who are simultaneously secondary parties in construction chains and primary parties in their own material supply chains.
- 3.5 Section 536JX(c)(ii) requires consideration of the ‘impact of the standards on business, including small business.’ The residential building sector is disproportionately small-business dominated. HIA members who are residential builders typically employ fewer than 15 employees and would ordinarily qualify for the small business exemption to the additional obligations under clause 4.2 of the Order. However, many operate as road transport businesses within the meaning of s15R of the FW Act by reason of receiving transport services under services contracts, meaning the exemption is unavailable to them despite the policy intent that it apply to small businesses that are not transport operators.
- 3.6 HIA notes this aspect was discussed at the engagement conference, however, the Commission did not resolve that question and it remains live. HIA requests that the Commission provide a ruling on this interpretive question within the review proceedings. The absence of a clear answer is itself a compliance burden. Members and industry participants cannot assess their obligations without it, and the Commission's own funded obligation to support small businesses navigating its processes requires it to provide clarity.
- 3.7 Section 536JX(c)(iv) requires that the Commission have regard to ‘the need for flexibility in setting standards to accommodate different commercial arrangements.’ The fixed fortnightly review obligation, with no accommodation for the project-based billing and payment cycles common in residential construction, imposes an inflexible administrative burden that does not accommodate the sector’s commercial realities.
- 3.8 HIA contends that at the time the Order was made, the Commission had before it no downstream industry impact evidence of the kind produced in this submission. The TWU's application focused on the position of road transport contractors and owner-drivers. There was no evidence quantifying the cascading cost obligation imposed on residential builders operating under fixed-price contracts, and no analysis of the mechanism by which the Order's fuel levy and rate obligations would be transmitted through materials and product supply chains to builders who have no contractual relationship with the transport operators directly regulated.
- 3.9 The Commission was aware, through HIA's submissions, that this concern existed. But awareness of a concern is not the same as satisfaction that the Order has been tailored to address it.
- 3.10 Accordingly, HIA submits that the Commission’s failure to engage with these sector-specific characteristics amounts to a failure to discharge its statutory obligation in

making the Order. This is not intended to suggest that the Commission acted in bad faith or exceeded its jurisdiction in the broad sense; it is a submission that the Commission failed to satisfy a mandatory precondition to the valid exercise of the power conferred by s.536PD, specifically the obligation to tailor the Order to relevant industry sectors.

4. Proposed options for the Commission to act and remedy HIA concerns

4.1 At the 1 May conference, the Vice President indicated that the Commission could not limit enforcement or vary the Order absent a formal application, and queried whether HIA's submission constituted an application to vary or revoke the Order. HIA respectfully submits in response that a separate, standalone application is neither necessary nor appropriate in these circumstances, for the following reasons.

4.2 Statutory review mechanism

4.3 HIA acknowledges the force of the Vice President's observation that the Commission cannot simply exempt a sector without a formal process. HIA's submission is not that the Commission should act without process; it is that the existing review process is the appropriate process, and that HIA's written submission within that process is sufficient to enliven the Commission's review jurisdiction.

4.4 The Order expressly provides for review by an expert panel after one month and then every three months, at clause 5.4. That review is not contingent on the filing of a fresh application. It is a mandatory supervisory mechanism through which the Commission exercises ongoing oversight of the Order's operation.

4.5 HIA's participation in that review, including by filing this and our previous submission identifying the ways in which the Order does not comply with s536JX, is the appropriate procedural vehicle through which these issues should be addressed.

4.6 Where the Commission identifies, through the review process, that the Order does not comply with its enabling legislation, either because it was not tailored as required, or where unintended consequences have emerged, the Commission has both the power and the obligation to remedy that defect of its own motion. Section 536PT expressly empowers the Commission to vary or revoke an RTCCO on its own initiative. HIA submits that the Commission's obligation to act is triggered by the review process itself, not by the filing of a separate application.

4.7 Requirement for separate application

4.8 Requiring HIA to separately fund and prosecute a standalone application under s536PS would effectively penalise HIA and the residential building sector for the Commission's failure to satisfy its s536JX obligations when making the Order. It would impose additional time, cost, and procedural complexity on an industry body that has already been required to absorb the cost of interpreting and communicating the Order to its members; costs HIA has submitted should have been borne by the relevant Government agencies, the FWO as regulator and the Commission. HIA submits this would be an outcome inconsistent with the legislative scheme and with the objects of the FW Act.

4.9 HIA acknowledges one area of genuine complexity in its own position. There is a distinction between the Commission varying the Order of its own motion to correct a generalised compliance deficiency, which is clearly within the review jurisdiction, and the

Commission granting specific relief in the form of an industry-specific exemption, which may engage the procedural fairness rights of transport contractors and worker representatives who are the Order's intended beneficiaries.

- 4.10 HIA does not contend that those parties' interests are irrelevant. HIA's submission is that the mandatory review mechanism provides a process within which those interests can be heard. The TWU and other interested parties can respond to this submission within the review, as was the intent of HIA providing details of our concerns at the engagement conference on 1 May 2026.
- 4.11 If the Commission considers that additional procedural steps are required before it can vary the Order to address the residential building sector's position, HIA requests that those steps be identified and facilitated within the review proceedings and not deflected to a separate application process that would require HIA to establish standing, serve documents, and fund further proceedings to address a problem created by the Commission in making the Order.

5. Relief Sought

5.1 HIA calls on the Commission to:

- Accept this submission as filed within the mandatory review proceedings, without requiring HIA to file a separate application under s536PS;
- Rule on the interpretive question raised regarding the scope of the small business exemption in clause 4.3 and its application to residential builders;
- Find that the Order as made does not comply with the s536JX tailoring obligation, having regard to the evidence of adverse impacts on the residential building sector now before the Commission;
- Exercise the power under s536PT to vary the Order to expressly address the downstream impact on residential building businesses, including through:
 - (a) an express exclusion for downstream principals who are not parties to road transport contracts; or
 - (b) a sector-specific carve-out for residential building businesses operating under fixed-price consumer contracts with no mechanism to pass through mandated cost increases; or
 - (c) such other variation as the Commission considers appropriate to give effect to the tailoring obligation; and
- Direct the Commission's small business support function to provide targeted guidance to residential building businesses regarding their obligations under the Order and any variation;

5.2 HIA reserves the right to provide further evidence at subsequent three-monthly reviews and to supplement this submission in response to any material filed by other parties within the review proceedings.

6. Conclusion

- 6.1 The Order was made urgently, and HIA understands and accepts the policy rationale for its making. HIA does not seek to frustrate the Order's purpose of protecting vulnerable owner-drivers and regulated workers in the road transport industry. HIA's submissions are directed to the disproportionate and unintended burden the Order, as made, places upon the residential building sector – a sector of small businesses that had no prior engagement with road transport regulation and no capacity to anticipate or prepare for obligations of this scope and complexity.
- 6.2 The Commission has the power, and in HIA's submission the obligation, to rectify this within the review process. HIA respectfully urges the Expert Panel to do so.

Yours sincerely

HOUSING INDUSTRY ASSOCIATION LIMITED

A handwritten signature in cursive script that reads "Stuart Collins".

Stuart Collins

Senior Executive Director

Compliance and Workplace Relations