



STATEMENT

Fair Work Act 2009

s.536PD—Commission may make a road transport contractual chain order

Application by Transport Workers’ Union of Australia and Australian Road Transport Industrial Organization

(MS2026/1)

VICE PRESIDENT ASBURY
VICE PRESIDENT GIBIAN
COMMISSIONER CONNOLLY

SYDNEY, 29 MAY 2026

Road transport contractual chain order made under Part 3B-2 of the Fair Work Act 2009 (Cth)— Time-sensitive contractual chain order – Review of order – Publication of notice of intent and draft variation under s 536PG(1) – Consideration of road transport objective and minimum standards objective.

Introduction

[1] On 20 April 2026, an Expert Panel of the Commission made a road transport contractual chain order under Part 3B-2 of the *Fair Work Act 2009* (Cth) (the **FW Act**) known as the *Road Transport Contractual Chain Order – Fuel Cost Recovery – 2026* (MS900102 [PR798817](#)) (the **Order**). The Order took effect on 21 April 2026. The Order was made as a result of an application made by the Transport Workers’ Union of Australia (the **TWU**) and the Australian Road Transport Industrial Organisation (**ARTIO**) which had been declared to be an ‘emergency application’ by the Minister in the *Fair Work (Emergency Application – MS2026/1) Determination 2026* (the **Determination**). In respect of the application, clause 5 of the Determination provides:

5 Emergency application determination

- (1) I hereby determine that the application is an emergency application.
- (2) The circumstance to which the application relates is the fuel supply chain disruption resulting from, or which continues to be affected by:
 - (a) the significant reduction in shipping through the Strait of Hormuz; and
 - (b) conflict in the Middle East.

[2] As a result of the application being declared to be an ‘emergency application’, the Order which was made is a ‘time-sensitive’ road transport contractual chain order: FW Act, s 12. In a broad sense, the Order is intended to address the consequences of the increases in fuel prices caused by the reduction of shipping through the Strait of Hormuz and the conflict in the Middle East which commenced in late February 2026.

[3] Clause 5.4 of the Order provides that the order would be subject of a review after the first month of its operation and then every three months thereafter. In its decision, the Expert Panel said in relation to clause 5.4 (*Application by the Transport Workers' Union of Australia and the Australian Road Transport Industrial Organisation* [\[2026\] FWCFB 95](#)):

[75] Clause 5.4 provides for the Commission to conduct a first review of the proposed RTCCO at an early stage and regular reviews thereafter. This recognises two things. The first is that the circumstances of the current Middle East conflict and the disruption to the supply of oil are evolving in a rapid and unpredictable way. The second is that the proposed RTCCO will represent the first time that the new powers in Part 3B-2 have been exercised, and the novelty of the RTCCO and the urgency with which it has been developed makes it possible, if not likely, that there will be unintended consequences which will need to be addressed on an expedited basis.

[4] On 28 April 2026, the Expert Panel released a statement in which it set out the process it proposed to adopt in relation to the initial review of the Order. As part of the review, an engagement conference was conducted by Vice President Asbury on 1 May 2026, interested parties were directed to file any witness statements, evidentiary material or written submissions by 21 May 2026 and the Expert Panel conducted a hearing on 25 May 2026. Submissions and/or evidentiary materials were received from a large number of interested parties and many also participated in the hearing on 25 May 2026.

[5] The purpose of this statement is to indicate that we have decided to publish a notice of intent and a draft determination in relation a proposed variation to the Order under s 536PG(1) of the FW Act. Interested parties will be provided with an opportunity to make written submissions in relation to the proposed variations set out in the draft determination before the Expert Panel makes any decision in relation to whether to vary the order or in what manner.

Statutory context

[6] As part of the review, a number of interested parties asked the Commission to vary the Order in specified ways on its own initiative or to clarify certain aspects of the operation of the Order. Other interested parties invited the Commission to revoke the Order or to vary the order so as to exempt certain business or entities from its operation.

[7] The capacity of the Commission to vary or revoke a road transport contractual chain order is found in s 536PT. The section provides for two powers to vary or revoke an order. Section 536PT(1) provides that the Commission may make a determination varying or revoking a road transport contractual chain order 'if satisfied that making the determination is consistent with the minimum standards objective and the road transport objective'. Section 536PT(3) permits the Commission to make a determination varying a road transport contractual chain order 'to remove an ambiguity or uncertainty or to correct an error'. Section 536PT(4) provides that the Commission can make a determination varying or revoking a road transport contractual chain order on its own initiative or on application under s 536PS. There is a distinct obligation to consider whether to vary or revoke an order under s 536QK following a deferral declaration or deferral determination which is not presently relevant.

[8] Part 3B-2 of the FW Act sets out procedural requirements in the event that the Commission is considering making or varying a road transport contractual chain order. Section

536PF(1)(b) indicates that the section applies if the Commission is considering varying a road transport contractual chain order. Section 536PF(1)(b) must be understood to refer to the Commission considering exercising the power in s 536PT(4)(a) to make a determination varying an order on its own initiative. If s 536PT applies, s 536PF(2) sets out a number of procedural preconditions and matters to be considered before the Commission makes or varies a road transport contractual chain order. Relevantly, s 536PF(2)(a) to (c) provide:

- (2) The FWC:
- (a) must not make or vary the road transport contractual chain order unless there has been genuine engagement with the parties to be covered; and
 - (b) must not make or vary the road transport contractual chain order unless the Road Transport Advisory Group has been consulted; and
 - (c) must not make or vary the road transport contractual chain order unless the consultation process set out in Subdivision C of this Division has been followed; and

...

[9] Section 536PF(2)(c) provides that the Commission must not make or vary a road transport contractual chain order unless the consultation process in subdivision C is followed. That process is found in ss 536PG to 536PK. The application of those provisions to consideration of whether to vary a road transport contractual chain order is somewhat inapt as the provisions refer, in terms, to ‘making’ a road transport contractual chain order. The parties generally agreed, and we accept, that the plain terms of s 536(2)(c) must mean that the consultation process in ss 536PG to 536PK must be applied where an application is made to vary an order or the Commission is considering varying a road transport contractual chain order. Those procedures do not appear to apply if the Commission is considering revoking a road transport contractual chain order.

[10] The consequence is that the Commission is required, by s 536PG(1), to publish a notice of intent that it proposes to vary a road transport contractual chain order and a draft of the proposed variation to the order before it makes a variation determination. Section 536PH(1) requires that affected entities have a reasonable opportunity to make written submissions in relation to the draft variation determination. Section 536PH(1A) makes clear that that if the draft is of a time-sensitive road transport contractual chain order, a short period to make written submissions may be a reasonable opportunity. That subsection is expressly said to be ‘[t]o avoid doubt’. We consider that the better view is that this provision also applies to a proposed variation to a time-sensitive order. In any event, whether in the circumstance of making or varying an order, the period that is reasonable to provide an opportunity to make written submissions will depend on the circumstances, the nature of the order and the type of the provisions or variations proposed.

[11] If we propose to vary the Order in the manner proposed by interested parties or otherwise, it is necessary that we publish a notice of intent and draft order.

Notice of intent

[12] As we have observed, the Australian Industry Group and some other interested parties submitted that the Commission should revoke the Order entirely. Having considered the evidence and submissions, we are not persuaded that the Commission should revoke the Order.

We will provide reasons in relation to that matter in our decision in relation to the review. We also note that the Housing Industry Association submitted, at least as one option, that there be a partial or complete exclusion of residential building businesses from the application of the Order. We are also unpersuaded that this step should be taken.

[13] A number of other interested parties invited the Commission to vary the Order or raised issues in relation to the interpretation or application of the Order. After considering the evidence and submissions advanced by interested parties, the Expert Panel has determined to publish a notice of intent under s 536PG(1) of the FW Act stating to it proposes to make a determination varying the Order and to publish a draft of the variation determination that we propose to make. The notice of intent and draft variation determination will be published together with this Statement, and written submissions will be invited from affected entities.

[14] In summary, the variations we are considering making in the draft variation determination are as follows:

- (a) The words ‘or set’ be added after the word ‘adjust’ in clause 4.1 and 4.4 of the Order to address uncertainty said to exist as to how the obligation in those clauses should apply in circumstances in which an entirely new contract or arrangement is entered into after 6 March 2026.
- (b) The operation of the exception for a ‘small business employer’ in clause 4.3 of the Order be clarified in an attempt to avoid uncertainty that appears to have arisen in relation to the definition of a ‘road transport business’ in s 15R of the FW Act and to reflect our understanding of that provision.
- (c) The reference in clause 4.6 of the Order to the arrangements contemplated by subclauses (a), (b) or (c) constituting satisfaction of the rate adjustment obligation in clause 4.2 be deleted to reflect the fact that clause 4.2 does not itself contain a rate adjustment obligation. We also propose to add, within clause 4.2, the words ‘or satisfy the obligations in clause 4.1 or 4.4 in one of the ways set out in clause 4.6’.
- (d) Clause 4.6(a) be varied to make clear that the rate adjustment obligations in clause 4.1 or 4.4 can be satisfied by the adjustment of a rate ‘in accordance with and at the times or intervals determined’ by a State or Territory industrial instrument.
- (e) Clause 4.6(b) be varied to add, at the end of the subclause, the words ‘so long as the adjustment is implemented each fortnight or twice per calendar month’ to avoid uncertainty as to whether a provision of a collective agreement or contract which provides for less regular adjustments would be sufficient.
- (f) Clause 5.3 be varied to provide that the obligations in clause 4 will cease to apply only if the weekly average national terminal gate price for diesel fall below \$2.00 per litre for four consecutive weeks and to make clear that the obligations in clause 4 will cease if that threshold is met.

[15] With respect to clause 5.3, we note that in paragraph [74] of this earlier decision, the Expert Panel anticipated that \$2.00 per litre for the national average terminal gate price of diesel would be ‘a suitable benchmark for signalling when the emergency situation identified in the Determination has passed’. The Expert Panel also noted that clause 5.3 ‘may be varied if circumstances pertaining to the price of fuel that we currently cannot foresee occur’. 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.

[16] The road transport objective is set out in s 40D which provides that, ‘[i]n performing a function or exercising a power under this Act’, the Expert Panel for the road transport industry must take into account the need for an appropriate safety net of minimum standards for regulated road transport workers and employees in the road transport industry having regard to the matters specified in that section. Further, s 536NN provides that the Commission must have regard to the minimum standards objective ‘in performing a function or exercising a power’ under Chapter 3B — Minimum standards for persons in a road transport contractual chain. The minimum standards objective is set out in s 536JX and requires the Commission, in performing a function or exercising a power under Part 3A-2, to take into account the need for an appropriate safety net of minimum standards for regulated workers having regard to the matters specified in paragraphs (a)–(d).

[17] There may be a question as to whether, by merely publishing a notice of intent and draft order under s 536PG(1), the Expert Panel is ‘performing a function or exercising a power’ under the Act generally or Chapter 3B: see *Application by the Transport Workers’ Union of Australia* [2026] FWCFB 83 at [15]. For the avoidance of doubt, we have considered the road transport objective and the minimum standards objective in deciding to publish the notice of intent and draft variation determination. We consider that publishing a notice of intent and the draft is an appropriate step taking into account the need for an appropriate safety net of minimum standards for regulated road transport workers and employees in the road transport industry having regard to the matters set out in s 40D and are also satisfied that taking this step is appropriate having regard to the need for an appropriate safety net of minimum standards for regulated workers having regard to the matters set out in s 536JX.

[18] We make clear that the Expert Panel has reached no concluded view as to whether a variation should be made or in what terms. The Expert Panel will give further consideration to the submissions and evidence it has already received, and any further submissions, feedback or other responses it receives in relation to the draft variation determination, before determining whether to vary the Order based on the draft or the terms of any variation. We will further consider the road transport objective and the minimum standards objective in deciding whether to vary the Order and, if we make a variation, the terms to be included in the variation, and provide more fulsome reasons for our consideration at that time. If, after considering the submissions, we make significant changes to the draft variation determination, we will follow the process in s 536PJ.

Further steps

[19] Section 536PH(1) requires the Commission to ensure that affected entities have a reasonable opportunity to make written submissions to the Commission for its consideration in

relation to a draft variation determination published under s 536PG(1)(b). Having regard to the circumstances pertaining to this matter, and to ensure that the Commission is able respond in a timely way to the issues that have been raised in relation to the Order, the Commission directs that any written submissions by affected parties are to be lodged by **4:00 pm (AEST) on Thursday, 4 June 2026**. Submissions may be lodged by email to rws@fwc.gov.au or by using the online submissions form on the webpage for this matter. Submissions will be published to that webpage.

[20] Section 536PF(2)(a) provides that the Commission must not make or vary a road transport contractual chain order ‘unless there has been genuine engagement with the parties to be covered’. Given the nature of the variations we are considering making to the Order, the engagement conferences, opportunity to make submissions and file evidence and the hearing we have conducted constitutes, in our view, the requisite ‘genuine engagement’ in that any party to be covered by the Order or likely to be affected by the Order has been given an opportunity to adduce evidence and make submissions. Any interested party or affected entity can make submissions in relation to whether any further step should be taken to undertake engagement in relation to the variation determination in their further submissions.

[21] Section 536PF(2)(b) provides that the Commission must not make or vary a road transport contractual chain order unless the Road Transport Advisory Group (RTAG) has been consulted. A copy of this statement, the Notice of Intent and the draft variation determination will be sent to the members of the RTAG. Pursuant to s 40F(5), the Expert Panel requests the RTAG to advise the Commission of its views concerning the draft variation determination, including whether it should be made and its proposed terms, in writing by **4:00 pm (AEST) on Thursday, 4 June 2026**. The Expert Panel further requests the RTAG to seek the views of its Owner Drivers Subcommittee and to advise those views, in writing, by **4.00 pm (AEST) on Thursday, 4 June 2026**. It is noted that s 40G(3) is applicable in the present circumstances. A member of the Commission other than those constituting this Expert Panel will be made available to facilitate the conduct of any RTAG or Owner Driver Subcommittee meetings.



VICE PRESIDENT

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