



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT ASBURY
VICE PRESIDENT GIBIAN**

MS2026/1

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

**Application by Transport Workers' Union of Australia & Australian Road Transport
Industrial Organization re fuel cost recovery
(MS2026/1)**

Sydney

9.30 AM, MONDAY, 13 APRIL 2026

Continued from 10/04/2026

PN1699

JUSTICE HATCHER: All right. Just changes of appearances: Ms Kumar, you appear for Wesfarmers?

PN1700

MS KUMAR: I do - good morning, your Honour.

PN1701

JUSTICE HATCHER: And on Teams, Mr Garozzo, you appear for Amazon Commercial Services?

PN1702

MR GAROZZO: Yes, your Honour.

PN1703

JUSTICE HATCHER: Yes, all right. Thank you.

PN1704

MR N WARD: Sorry, your Honour: I now appear for Team Global Express as well.

PN1705

JUSTICE HATCHER: All right, thank you, that's noted. All right, so I think the plan is to start with your witnesses, Mr Ward?

PN1706

MR N WARD: It is, your Honour: I call Nicholas Ryder.

PN1707

THE ASSOCIATE: Please state your full name and address.

PN1708

MR RYDER: Nicholas Ryder, (address supplied).

<NICHOLAS RYDER, AFFIRMED

[9.37 AM]

EXAMINATION-IN-CHIEF BY MR N WARD

[9.37 AM]

PN1709

JUSTICE HATCHER: Mr Ward.

PN1710

MR N WARD: Mr Ryder, can you restate your full name and address for the record?---Yep, Nicholas Ryder, (address supplied).

PN1711

And you are employed by Holcim?---Yeah, Holcim Australia, yes.

*** NICHOLAS RYDER

XN MR N WARD

PN1712

Can you explain to the Commission what position you hold in Holcim?---Yes, I'm the general manager of logistics based here in Sydney.

PN1713

Could you explain to the Commission whether or not that's a national role?---Yep, it's a national role. It covers our ready-mix concrete business, aggregates and our Humes business.

PN1714

And could you explain to the Commission broadly what Holcim do?---Yeah, Holcim is a Swiss multinational building materials supplier throughout the industry.

PN1715

What products do you manufacture?---Yeah, we manufacture aggregates and (indistinct) aggregates, concrete - produce concretes and also precast from our Humes business.

PN1716

Does Holcim manufacture cement?---Yes, it does.

PN1717

Do you - if I use the phrase, 'owner/driver', are you comfortable with what that phrase means?---Yes, I am.

PN1718

Do you engage owner/drivers in Holcim?---Yes, we do.

PN1719

Explain to the Commission what you engage owner/drivers to do?---So we engage owner/drivers from our concrete plants to deliver concrete on behalf of our customers. So they collect it and then deliver it to sites that are nominated by our customers.

PN1720

Do you use owner/drivers - - -

PN1721

JUSTICE HATCHER: Can you move the microphone a bit closer?

PN1722

MR N WARD: My apologies, your Honour.

PN1723

JUSTICE HATCHER: Thank you.

PN1724

MR N WARD: Is that better, your Honour?

*** NICHOLAS RYDER

XN MR N WARD

PN1725

JUSTICE HATCHER: Yes.

PN1726

MR N WARD: Thank you. Mr Ryder, do you use owner/drivers to cart aggregates?---We do in some cases, yes.

PN1727

Do you have an understanding of how many concrete owner/drivers you engage?---Yeah, we do. It's in the order of about 700, give or take.

PN1728

That's nationally?---Nationally, yes.

PN1729

Do you operate in all capital cities?---Yeah, we operate in all capital cities; varying levels of density and (indistinct), but, yes, around the country.

PN1730

Do you operate in regional?---Yes.

PN1731

And in terms of aggregate LODs do you have an understanding of how many of those you engage?---I'd have to check, but, you know, it would be in the order of about 100 LODs.

PN1732

That's satisfactory. That's fine. You are obviously aware of the changes in fuel prices that have occurred in the last few weeks?---Yes.

PN1733

Are you able to inform the Commission what steps Holcim has taken to deal with fuel price increases for its concrete owner/drivers?---Yes. So we issued a letter back late March advising our owner/drivers and our drivers in general that we plan to review that. We plan - - -

PN1734

JUSTICE HATCHER: Sorry, I just missed that. Late March you did what, you issued a letter?---We issued the letter to advising them that we would be reviewing the fuel. We also noted in that that we would go to monthly. We were due to do a quarterly review. So we did - to do monthly. We're currently for concrete going through that process at the moment. We base our fuel off the AIP published rates. Then we did - still finishing it - the four week review of that fuel. So taking the averages of the last four weeks, as opposed to a 13 week review, and basically that goes into a model and then goes back out. It gets inputted, and for concrete that will be effective no later than 16 April.

PN1735

MR N WARD: You said there you use AIP?---Yes.

*** NICHOLAS RYDER

XN MR N WARD

PN1736

Can you explain to the Commission the mechanics of the calculus, how you do that?---Yes. So we take the average from the AIP, it's published, of their average pump prices or terminal gate prices via their website.

PN1737

JUSTICE HATCHER: Sorry, there's the average pump price?---Correct.

PN1738

You also have a terminal gate price?---And terminal gate price.

PN1739

This is for diesel we're talking about?---For diesel, yes.

PN1740

Yes, go on?---Yep. So we take those averages, put the differences into our model, and that's basically by state and by region. So it's not just a one model across the country. And then that gets put in with usages and volumes and then the rates come out and the per kilometre rate for the operators, and that gets uploaded into our systems and then gets paid on volumes carted.

PN1741

MR N WARD: When you said then, you talked about the usages and volumes, can you just explain to the Commission what you were referring to?---So we take into account utilisation of trucks, how much they actually cart. There's a load fee in that piece as well. So there's a fee paid to the owner/drivers just to be loaded, and then there's a fee paid per cubic metre of concrete over the kilometres that again as I mentioned from our batching plants, our bases, to the actual customer sites.

PN1742

And you mentioned earlier, I think you said you have a variety of models. Can you just explain where you might have a different model in place?---All the models have the same base, but New South Wales, New South Wales metro and New South Wales regional, Queensland metro, South East Queensland for example, WA regional, you know, the New South Wales metro model wouldn't apply for example to a regional WA in the Pilbara for example.

PN1743

Have you taken a similar approach with aggregates?---Yes, we have. Yeah.

PN1744

Again could you describe to the Commission the actual machinery of how you've done that for aggregates?---So for aggregates it's nearly exactly the same. The models are based on where there's load fees, kilometres paid per tonne, so slightly - the nuance there being where concrete is cubic metres aggregate would be tonnes carted, so (indistinct) tonnes in tippers, and then applied through the models that goes into our payments coordinator. She uploads those into SAP and then they just get paid based on the actual cartage, volumes carted.

*** NICHOLAS RYDER

XN MR N WARD

PN1745

If I use the term 'fleet owner' are you comfortable with that term?---Yep.

PN1746

Yes. Could you describe to the Commission what you've done for your fleet owners in concrete?---It's exactly the same as owner/drivers. From a rates calculation perspective it's no different. We don't create a variance for fleet owners to owner/drivers. From my perspective they're the same. They provide a truck, provide a service.

PN1747

JUSTICE HATCHER: When you refer to fleet owners what size fleets are we talking about?---Typically above four, four trucks in a fleet. So owner/drivers can have one or two, three in some cases, and without going to nuances of casuals and the like casual trucks that can be provided, but fleet owners have approximately four and four upwards.

PN1748

And what's the sort of upper limit of that?---Upper limit would be about - I know of one that has close to 30, 35.

PN1749

Thank you.

PN1750

MR N WARD: And could you tell the Commission what you've done with your aggregate fleet owners?---So aggregate fleet owners, again reviewed the fleet, the fuel prices and those rates are in place and they've been reviewed, and, yeah, they're in place.

PN1751

You said earlier that you've done this on a monthly basis. Can you explain to the Commission why you chose monthly?---It's the time to actually go about reviewing the fuel, the differences, and also the resources to do that. So to do it properly make sure, you know, each state has resources. So typically a regional logistics manager would be there. They need to go through and update the models, make sure they're correct, get the appropriate sign off. Then they go into, you know, to my team. For this case this single person would, you know, collate those, review them again, and then also upload them into SAP and then start the process of paying them. So that would be updated into the systems to be carted and the like.

PN1752

Mr Ryder, are you familiar with steps Holcim have taken to recover those increased costs in the market?---I'm aware that we've approached our customers. There is a letter that's been similar to what we did for the cartage operators, but the actual details, what we - I'm not sure, I'm not across that.

*** NICHOLAS RYDER

XN MR N WARD

PN1753

Are you aware of what costs have been considered by Holcim in relation to that price increase?---My understanding is the actual cartage cost increases, so again

fuel, but also fuel that goes into our production operations as well, so those additional production - additional costs from fuel increases for production.

PN1754

Could you just describe for the Commission's benefit what you mean by additional production costs?---Well, you know, the plants have other machinery on sites to operate, to other delivery costs. So raw material deliveries for example, additional diesel to run the site. Those sort of costs. Again I'm not - - -

PN1755

When you say site I take it you're referring to different types of sites?---Yeah, different types. So each site would have different costs.

PN1756

By site do you talk about quarries?---So quarries. Yeah, quarries, the concrete batching plants.

PN1757

Nothing further.

PN1758

JUSTICE HATCHER: You can ask the witness some questions about how owner/drivers pay for fuel. There was some evidence - - -

PN1759

MR N WARD: Sorry, I will do that now, your Honour, my apologies. We will start with concrete if we can and then we will come to aggregates. Could you explain how Holcim provides the option of a fuel card to your owner/drivers?---Yeah. So we have a national agreement with a major fuel distributor. They provide a card at a lower buy rate, so a lower than pump price. That is available to owner/drivers. There is limited take up of that across the fleet. Otherwise the owner/drivers would procure the fuel at their cost, and then we pay - in our models we have a fuel allowance. Again that's what gets reviewed from the four weekly API price. Yeah, and the owner/drivers would procure their fuel themselves if they didn't use our fuel card.

PN1760

Do you have any sense of the extent of the take up of your fuel card?---Yeah. So it's in - it's low. I would say it's about 20 per cent, as a nominal sort of figure. It's definitely very low.

PN1761

And was that introduced relatively recently?---No, it's been about for some time. Like, I've been at Holcim now for approximately seven months. It's been about - well before I - it was definitely in place before I started.

PN1762

Thank you.

*** NICHOLAS RYDER

XN MR N WARD

PN1763

VICE PRESIDENT ASBURY: Sorry, while you're answering questions, the fuel card: is there a different way of charging the drivers for the fuel than if it's all – it's in the rate itself? So is there a separate process for drivers who have a fuel card, from the ones who don't?---No. So if they bought – if they bought the fuel on the fuel card, they'd get – and, you know, I think your example being that the model was higher, they would actually get the benefit.

PN1764

JUSTICE HATCHER: Right, so do you simply deduct if cost run up on the fuel card from their direct pay cheque, as it were?---Correct, yes.

PN1765

Yes. Thank you.

PN1766

MR N WARD: No further questions.

PN1767

JUSTICE HATCHER: Thank you. Just to check, does any party, apart from the co-applicants, want to cross examine this witness?

PN1768

MR N WARD: Mr Boncardo is going to ask you some questions.

PN1769

JUSTICE HATCHER: All right. Mr Boncardo.

CROSS-EXAMINATION BY MR BONCARDO

[9.50 AM]

PN1770

MR BONCARDO: How many employees does Holcim have throughout Australia?---I'm not sure, off the top of my head, I'm sorry.

PN1771

Approximately?---I'd be guessing, completely.

PN1772

Please guess?---I'd say in the order of over 2,000 people, I would say.

PN1773

So 2,000 employees, about 800 owner/drivers?---Yep, sounds about right.

PN1774

How many fleet owners?---Number of fleet owners – I'd have to check that number. It varies fleet owners and casual operators as well, so I'd have to check. I don't have that number off the top of my head.

PN1775

Holcim is a multi-billion dollar business in Australia, isn't it?---Yes.

*** NICHOLAS RYDER

XXN MR BONCARDO

PN1776

And just tell me if you don't know, but last year, it had net sales of \$15.7 billion, correct?---I don't – don't know.

PN1777

Does that figure sound correct to you?---I honestly do not know. I focus on the logistics.

PN1778

Now, you mentioned that there were three elements to your role: ready mix, aggregate, and there was a third one, which I didn't quite catch?---Humes.

PN1779

Humes?---The Humes precast business.

PN1780

Thank you. That's H-u-m-e-s?---Correct.

PN1781

Right. And you said you issued a letter in March, advising owner/drivers that you plan to review their rates, is that correct?---Yeah. And just to be really specific, all drivers.

PN1782

All drivers?---So it wasn't directed to owner/drivers; it was directed to our driving fleet.

PN1783

That letter went out to fleet owners as well?---Yes.

PN1784

Do you have a copy of that letter available?---No, I don't have it on me, no.

PN1785

You'd be able to get one, though, wouldn't you?---I'm sure I'd be able to get one.

PN1786

Are you able to do that for us after you've finished evidence?---Yep.

PN1787

Thank you. I call for that letter. Now, that letter was sent by Holcim without any prior discussions with its workforce, is that right?---I wouldn't say any discussion. There were conversations had at local levels with other operators, communicating what we were doing and – yeah.

PN1788

So those discussions were, so far as you're aware, 'This is what Holcim intends to do; we're going to communicate that to you by way of letter'?---Yes.

*** NICHOLAS RYDER

XXN MR BONCARDO

PN1789

And there was certainly no consultation or discussion with your workforce about what an appropriate approach to fuel cost recovery may be?---No, there were – there were discussions, informed discussions with the workforce at site levels.

PN1790

Holcim made a decision and then rolled that decision out, correct?---No, I don't think we just rolled it out. There was – there were discussions.

PN1791

Did you participate in those discussions?---I participated – not with the direct workforce, no. I just – I had those discussions with the regional logistics managers that discuss and engage with the operators directly.

PN1792

When was this decision made, to implement changes in relation to fuel?---It was made before the letter, so I'd have to, again, check the date, the actual dates for you.

PN1793

And it's to be implemented on 16 April, so this week, is that right?---Correct.

PN1794

And you have also, you said, written to your clients about recovery for fuel costs?---Yes.

PN1795

When did that happen?---I'd have to talk to the team. I don't know what date that was issued out.

PN1796

So there's letter that was issued, is that right?---I believe so, yes.

PN1797

And you'd be able to obtain that letter for us after you finish giving evidence?---I could ask for it, yes.

PN1798

Thank you. I'll call for that letter. Now, I want to ask you some questions about Holcim's contractual chains. Holcim contracts with building and construction companies, does it, to provide materials to them?---Correct.

PN1799

And it will then subcontract the transport task to owner/drivers or fleet owners, is that right?---Or we provide it, in some cases, ourselves as well.

PN1800

Holcim has a directly employed fleet, is that correct?---Yes.

*** NICHOLAS RYDER

XXN MR BONCARDO

PN1801

JUSTICE HATCHER: So just to be clear, are we talking just about concrete, or more generally?

PN1802

MR BONCARDO: I should be more specific. Perhaps we'll take it one step at a time. In respect of Holcim's concrete business, does it have employee drivers?---The concrete – yes, has employee drivers.

PN1803

Can you tell the Commission approximately how many employee drivers it has?---Again, I'd have to confirm the exact figure, but it's probably in the order of about a hundred.

PN1804

And what about - - -?---Maybe not that – maybe not as many as a hundred.

PN1805

What about in its aggregate business?---Aggregate business, a lot less than that. So we probably have about – maybe about 20, but again, that's a bit of a guess.

PN1806

And in its Hume's business?---No.

PN1807

That is purely owner/driver?---That's – it's owner/driver and some fleets, so multi-truck operators.

PN1808

Thank you. So Holcim will have a contract to manufacture and deliver building products? Is that broadly correct?---Correct, yep.

PN1809

You'd contract with someone like Lendlease or John Holland, to provide precast materials for a construction project?---Yep, correct.

PN1810

And it would be of significant benefit to Holcim, would it not, if the amount Holcim had to pay for fuel, in relation to the transport aspect of that contract, were remunerated by Holcim's principal contractor?---Sorry, can you explain that again?

PN1811

Sorry. I didn't put that very well. It would be of benefit to Holcim, would it not, if the Lendleases and John Hollands of this world were required to pay Holcim an amount that ensured it recovered its costs for fuel?---From an – yeah, from an economic – to make sure – like, the short answer yes.

*** NICHOLAS RYDER

XXN MR BONCARDO

PN1812

And that would allow it to ensure that it was able to pay its owner/drivers and its fleet owners a rate that reflected cost recovery for fuel, correct?---Yes, but the review that we – we've done doesn't link the two.

PN1813

I understand, but it would be of benefit to Holcim, presuming that review is implemented, for it should be able to recover from the parties it contracts with an amount to fuel costs?---Yes.

PN1814

JUSTICE HATCHER: Mr Ryder, when you contract with a customer to provide ready mix concrete, does the price – do you simply create an all-up price, or do you quote separate prices for the concrete itself and the delivery cost?---To be honest, I – I don't get involved in that, so I couldn't really answer that with great detail.

PN1815

Thank you.

PN1816

MR BONCARDO: You gave some evidence about different models, depending on the location of a particular fleet of vehicles. What are the differences in those models?---It's purely due – predominantly due to geography. So we – we break up the concrete business, for example, by state and by regions.

PN1817

And does Holcim have cost models ready to hand and available in relation to its owner/drivers and fleet owners in each different region?---Sorry, do we have - - -

PN1818

Do you have cost models?---Yes, we have cost models.

PN1819

And fuel is a component of those cost models?---Yes, they are.

PN1820

And you're able to calculate readily the amount that fuel has increased or decreased, using those cost models, to produce an overall rate?---We use the difference in the average of API for the – to create the difference in fuel cost.

PN1821

That is, you plug those figures in, whatever they may be, into the cost model, and it spits out a number, which is a rate that reflects cost recovery for fuel?---Correct.

PN1822

And that's a fairly - - ?---Not just fuel. It's the delivery of – of concrete.

*** NICHOLAS RYDER

XXN MR BONCARDO

PN1823

Certainly. And that's a fairly simple and straightforward task?---No. It takes time to go through the model and – and update. It's not just a matter of just putting in a figure. So we – we review it, make sure it's correct. Yeah, it takes time.

PN1824

Who does that work?---The regional logistics managers and their regional teams.

PN1825

How many people are in those teams?---Four roughly, depending on - up to four people. Some are less.

PN1826

I suggest to you that that is work that could be done in a matter of hours, correct?---No, I don't believe it could be done in hours. It's - it does take them time to go through. They check the number of fleets, update records, plus the normal day-to-day business. So we don't just stop everything and, you know, day-to-day operations. We do this as well.

PN1827

Just focusing on costs for a moment: you've said that you utilise the AIP fuel data?---Mm-hm.

PN1828

And you - you'll have to answer yes for the record?---Yes, yes.

PN1829

That is a data point you're able to access online, correct?---Correct.

PN1830

And that is a data point you plug into your costs model?---Correct.

PN1831

And your costs model will then produce a figure?---Correct.

PN1832

Which reflects a costs recovery rate for fuel?---Correct.

PN1833

And I'm suggesting to you that that is a task that is simple and straightforward and is not going to take days?---No, it doesn't take days.

PN1834

That evidence is just correct, is it, sir?---That it doesn't take days?

PN1835

Yes?---Yeah, it doesn't take days to put it in to the model.

PN1836

Have you yourself engaged in that process?---I've reviewed it, yes.

*** NICHOLAS RYDER

XXN MR BONCARDO

PN1837

Have you yourself engaged in it?---No.

PN1838

Have you plugged in figures to a costs model?---No, I haven't punched in the figures to the costs model.

PN1839

I want to ask you some questions about your fleet owners. Do you know whether they engage employee drivers or whether they subcontract to owner/drivers?---Um some would subcontract to owner/drivers.

PN1840

And do you have any oversight of that?---Yes, we do.

PN1841

How does Holcim have oversight of that?---So we conduct audits and reviews. We keep data, the contract data, for example, insurances, things like that.

PN1842

You ensure that they are paying appropriate rates to their owner/drivers?---No, I don't review that.

PN1843

Does Holcim review that?---No.

PN1844

So Holcim doesn't know what rates the fleet owners (indistinct) are paying to its owner/drivers?---No.

PN1845

It's not a concern of Holcim?---No, it's not what I said.

PN1846

Can you answer my question? Is that not a concern of Holcim?---It would be a concern if it was different, yes.

PN1847

When you say it's different, different - - -?---By if they're not paying them correctly.

PN1848

You'd agree with me as a general proposition that it is imperative that owner/drivers and fleet owners are able to receive a rate that reflects cost recovery for fuel?---Yes.

PN1849

And that the increases in fuel would since the commencement of the war in Iran have been exceptional and unprecedented?---Yes.

*** NICHOLAS RYDER

XXN MR BONCARDO

PN1850

And that those increases have placed significant burdens on the fleet owners and owner/drivers that Holcim engages?---I'd say it definitely creates burdens. I don't run the business and so I can't say if it's significant or not.

PN1851

You'd agree it's also created a burden on Holcim?---Yes.

PN1852

And you'd agree with me, wouldn't you, that in order to ensure that those owner/drivers and fleet owners have sustainable and viable businesses it is necessary for them to be able to recover their fuel costs?---Yes.

PN1853

And that they need to be able to do so in a timely fashion?---Yes.

PN1854

And that is why Holcim has sought to amend its rate reviews, correct?---Correct.

PN1855

And it's also necessary for Holcim to receive fuel costs recovery from those it contracts with up the contractual chain to ensure the viability and sustainability of its business, correct?---I would have to - that'd be the business's decision. I don't - again, I don't review our financial outcome, what we get from our customers.

PN1856

Well, just as a general proposition you would agree with me that Holcim being able to recovery fuel costs from its clients would be of - - -

PN1857

MR N WARD: I object to the question. He's already answered it as best as he can terms of his capacity in the business. Asking a second time won't help.

PN1858

MR BONCARDO: The question hasn't been asked before the objection but the question was whether or not this gentleman would agree as a general proposition that it would be of benefit to Holcim's business that it recover its costs for fuel from its clients.

PN1859

JUSTICE HATCHER: I thought he'd already agreed with that.

PN1860

MR BONCARDO: Yes. If Your Honour would pardon me. Thank you, Mr Ryder.

PN1861

JUSTICE HATCHER: Any re-examination, Mr Ward?

RE-EXAMINATION BY MR N WARD

[10.03 AM]

*** NICHOLAS RYDER

RXN MR N WARD

PN1862

MR N WARD: Just one question: Mr Ryder, you were asked some questions about putting stuff into models. Do you remember that?---Yes.

PN1863

Can you just explain to the Commission after you've varied your models, what are the administrative processes to actually then pay somebody something different?---So it needs to go through a number of levels of review for its accuracy, receive sign-off, then it comes back to my team again, gets uploaded into our SAP or into our systems to link to the order and the ticketing system and then gets approved and uploaded for operation. So it goes through a number of levels of review and they're not sure and - - -

PN1864

Are you confident that the process you've got in place is accurate?

PN1865

MR BONCARDO: I object to that question: how does that arise?

PN1866

JUSTICE HATCHER: I don't think that's been disputed, has it?

PN1867

MR N WARD: I withdraw the question. (Indistinct) thank you, Mr Ryder.

PN1868

JUSTICE HATCHER: Just one further question.

PN1869

VICE PRESIDENT GIBIAN: Sorry: you said that the changes for the - would be effective from 16 April?---Yes.

PN1870

Is that just for payments for work done after 16 April?---Yes. I - I'd double check but - - -

PN1871

That is it's not proposed - - -?---Yep, it's - sorry - that our current contractual review was to be effective the 16th. That was the plan for our quarter review. We changed that to the monthly. That's why we kept the 16th.

PN1872

That is there won't be an adjustment to take into account increasing fuel costs from the start of March until 16 April?---Correct.

PN1873

JUSTICE HATCHER: All right, thank you for your evidence, Mr Ryder. You're excused and you can go.

<THE WITNESS WITHDREW

[10.05 AM]

*** NICHOLAS RYDER

RXN MR N WARD

PN1874

All right, Mr Ward, next witness.

PN1875

MR N WARD: I call Mr Kilgariff.

PN1876

JUSTICE HATCHER: How do you spell that?

PN1877

MR N WARD: K-i-l-g-a-r-i-f-f.

PN1878

VICE PRESIDENT GIBIAN: A-r?

PN1879

MR N WARD: A-r-i-f-f - sorry, your Honour.

PN1880

JUSTICE HATCHER: All right.

PN1881

THE ASSOCIATE: Please state your full name and address.

PN1882

MR KILGARIFF: Michael John Kilgariff. My address in Sydney is (address supplied).

<MICHAEL JOHN KILGARIFF, SWORN [10.06 AM]

EXAMINATION-IN-CHIEF BY MR N WARD [10.06 AM]

PN1883

MR N WARD: Mr Kilgariff, can you state your full name and address for the record?---Michael John Kilgariff, (address supplied).

PN1884

And could you explain to the Commission what position you hold?---I'm the CEO of Cement, Concrete and Aggregates Australia.

PN1885

And can you explain to the Commission what Cement, Concretes and Aggregates Australia is?---Sure: Cement, Concrete and Aggregates Australia is an industry association representing the heavy construction materials industry in Australia. We have five what we call foundation members, being Holcim, Heidelberg, Boral - - -

PN1886

JUSTICE HATCHER: Sorry, Holcim - what was the second one?---Holcim, Heidelberg - - -

*** MICHAEL JOHN KILGARIFF

XN MR N WARD

PN1887

Heidelberg?--- - - - Cement Australia, Boral and Adbri. We also have - - -

PN1888

What was the last one?---Adbri, Adelaide Brighton.

PN1889

How do you spell that?---It's A-d-b-r-i.

PN1890

Oh yes, yes?---That's the companies that - so we also have about another 80 members in Queensland that are more regionally based. In Queensland that can be Wagners or in Sydney it could be Gunlake, in Melbourne it could be Barro, in Adelaide, Hallett's. So we represent about 90 per cent of the industry.

PN1891

MR N WARD: Before you were the CEO of CCAA, what did you do?---I've held a number of CEO roles in industry associations that are related. Prior to this role I was CEO of Roads Australia for about five years. Prior to that I was the CEO of the Australian Logistics Council for nine years.

PN1892

And what sort of members would the Australian Logistics Council have?---Membership of ALC, then as now included companies like Coles and Woolworths, Toll, Linfox, Qube, many of the courts, Melbourne, NSW, Brisbane.

PN1893

Okay?---And companies like that. Generally the larger companies in the logistics and supply chain.

PN1894

Could I ask you to (indistinct) this for a minute on the construction of (indistinct) supply chain in your mind. Could you describe to the Commission how that supply chain operates from start to finish, as best as you can?---Well, it's – it's an incredibly complex supply chain and logistics is really at the core of it. At the beginning of the supply chain, you have cement manufacturing plants where you have large kilns that are turning limestone into something called clinker. The clinker is then ground down, it's either imported or ground down on the site vat. The cement is then transported in bulk tankers to its storage or – or batching plants with aggregates. You have couple of thousand quarries around Australia who are delivering aggregates to either a range of construction-related or other sites but generally, they're also taking it to batching plants in a fairly diverse range of vehicle configurations. From the batching plants, it's then basically batched into a concrete agitator and taken to a number of different construction or infrastructure sites, and that can be anything from housing, transport infrastructure, energy, commercial construction, very, very, varied but I mean, fundamentally, it has been said that this is a logistics industry that has a range of added things that effectively feed into it.

*** MICHAEL JOHN KILGARIFF

XN MR N WARD

PN1895

You gave some evidence there about potential customers. Could I just ask you to describe the types of customers in some more detail from small to large?---Well, it could be a small housing contractor needing to get one or more slabs put in place. It could be a major tier 1 contractor that has a major transport infrastructure job on the way, so it could be you know, it could be a breach, it could be a tunnel, it could be you know, laying new road, it could be in energy, it could be accompanied. It might be installing wind turbines which can take up to you know, 1000 cubic metres, just for one turbine. It could be a company that would be building a building pretty much like the one we're in now. (Indistinct) and basically that product just needs to be delivered when and as required. It can't be stored, it can't be – it can't be put aside for use later, it's very much a – a just-in-time industry.

PN1896

Can you just explain for the Commission's benefit why concrete is a just-in-time industry?---Well, because – a number of reasons, one is that concrete itself is a perishable product. Once it's batched, put into an agitator, legally, according to the procurement specs, it must be poured, generally, within the hour, otherwise it goes off and needs to be dumped, but even from a cement or an aggregates perspective, they're not generally products that can be stored, because this is an industry that is high volume and so it needs to be basically moved as quickly as possible.

PN1897

Now, you're aware, aren't you, of changes in fuel prices in Australia?---I'm very aware. That's something - - -

PN1898

Sorry, that sounded awfully - - -?---No, that's something I've been spending a bit of time in discussions with Government over the last few weeks.

PN1899

Can I just start with asking you to generally explain to the Commission your understanding of the impacts of the fuel cost changes on the industry? On your members?---Well, the main impact really has been two-fold. One is what the increase in fuel prices will mean for the products that need to be delivered and what that will mean for I guess, a number of the infrastructure housing and energy projects that are underway. But the other issue of course is a concern around supply. And while we know that the government is saying that this is actually a demand problem not a supply problem, the concern from this industry is that in any eventuality of rationing, the witness industry be regarded as an essential industry and be at the front of the queue when decisions have been made about where the allocation might go.

*** MICHAEL JOHN KILGARIFF

XN MR N WARD

PN1900

So there's been no problems with supplying yet?---Well, it again, going back to my previous comments about the industry being very diverse, it depends on where you are, what company you are, for example, we acknowledge that in many

regional areas, there have been some supply problems. Again, allegedly, driven by demand and people stocking up.

PN1901

Thank you. Do any of your members manufacture and deliver asphalt?---They do. That's not something we get involved in, as an association. We've got a particular policy remit, but companies like Adbri and Boral to varying degrees are in that industry, but it's not – it's not something that we would ever generally talk about at a board meeting or any of our policy meetings.

PN1902

Thank you. And can I ask, are you engaged with government on behalf of the industry in relation to fuel price increases?---We are. I mean, that's basically our role is to be engaged with government across a range of policy issues, but again, we don't tend to get involved in a specific price discussions. For us, it's more about ensuring that we're regarded as an essential industry in the event of any rationing. However, we certainly have had discussions with a number of state governments about rise and fall provisions in their contracts. And to varying degrees, those discussions are progressing long. I would say in Queensland for example, there's been moves to reimplement something called Annexure E which is an annexure to a contract that basically recognises rise and falling contracts. A number of other state governments have acknowledged the fact that it's an issue, but we get to see minimal issue – most of the action from state governments is revolved around consumer pricing. Not – not really industry concerns.

PN1903

Well, when you talk about state governments there – I'm just trying to understand. Are you talking about them as a customer or in some other way?---Well, sometimes they are, but generally, the – generally, the customer or the client if you like, of a state government is generally deconstructed and so generally, the arrangement is with so those tier 1 contractors or the housing builders or the energy companies, but of course, we do tend to get involved in State Government discussions around rise and fall provisions because that cascades down through the industry.

PN1904

Okay. I'm going to ask you a series of questions. If they're outside your scope of knowledge then just please say so?---Yes.

PN1905

Do you have any understanding of efforts from your members to recover fuel prices for (indistinct) customers?---Look, there has been, and I'll just prefix that by saying that price is not something that this organisation generally discusses with our members, because this is an industry that has a very healthy respect in regard for the ACCC in competition law. And so discussions around price are usually regarded as just skating a little bit too close to that, you know, to that line, however, I am aware, mainly because I read it in the (indistinct) that a couple of companies had actually issued letters to clients pushing for some recognition.

*** MICHAEL JOHN KILGARIFF

XN MR N WARD

PN1906

So have any members come to you asking for your help in regard to that?---No. What - not specifically. What they have requested is that (a) we continue our advocacy around the need for the industry to be regarded as an essential industry and (b), that state governments recognise I guess the issue at this time and implement or come up with similar rise and fall clauses in their current contracts.

PN1907

This might be outside your (indistinct), Mr Kilgariff, but are you aware of any steps your members have taken down the supply chain to assist fleets and owner/drivers with the fuel crisis?---Yes, I am, and of course this is an issue that the industry is paying some pretty close attention to at the moment. But yes, I am aware that some of our companies have moved to shorter review times or are examining other things: for example, you know, directly subsidising fuel or, you know, taking into account their contracts with some of the owner/drivers.

PN1908

His Honour the President asked a question of the previous witness. I'll see if you might answer it - if you might be able to: do you understand whether or not your members when they sell concrete charge a delivered price or do they separate transport costs out?---Well, there is no one model that applies in this industry and every company does it differently and it also depends on where you might be in Australia. It's an industry where yeah, there is no one size fits all.

PN1909

Do you have any knowledge as to the normal terms of payment for your members in terms of recovering prices in the market?---Sorry, could you just repeat that?

PN1910

Do you have any knowledge of the normal terms of payment in terms of 30 days, 45 days?---No, generally that's not the sort of discussion that I would ever have with our members. That's considered very much a commercial in confidence discussions that the members themselves would never discuss with each other.

PN1911

Thank you. Mr Boncardo is going to ask you some questions.

PN1912

JUSTICE HATCHER: Just want to check: does any other party wish to ask this witness any questions? No, Mr Boncardo.

CROSS-EXAMINATION BY MR BONCARDO

[10.22 AM]

*** MICHAEL JOHN KILGARIFF

XXN MR BONCARDO

PN1913

MR BONCARDO: Mr Kilgariff, the industry that your organisation represents is, so far as you're concerned, an essential industry?---That's certainly how we would regard it and the reason being is that this industry is the beginning of the supply chain for a range of other industries, be it energy, housing, construction, transport

infrastructure and because this is a just in time industry, if concrete stops flowing to any of those other industries they all stop almost instantaneously.

PN1914

And essential to concrete flowing in the industries your members participate in, is the timely and effective logistics task. Is that right?---Very much so, yes.

PN1915

And your members employ directly their own employees?---It depends. Again, it depends on which company and also where you might be in Australia but as a rule - and this is a very rough, my own estimate - companies generally tend to have about 50 per cent company drivers and 50 per cent owner/drivers, many of whom may own a number of vehicles.

PN1916

And those owner/drivers who may own one or more vehicles are critical to the supply chain, correct?---They certainly are. Look, this is an industry that much like many other logistics industries is suffering a fairly acute driver shortage. So, you know, this industry does everything it can to make sure that they retain the drivers that they've got and attract others into the industry.

PN1917

And one of the critical means of attracting and retaining drivers, particularly owner/drivers, is ensuring that they receive a rate that compensates them for their fuel costs?---Yes, I would imagine so. Again, that's not a discussion I would have with my members but, you know, they like to encourage owner/drivers to stay with that company and also be loyal to that company.

PN1918

You'd agree that as a general proposition it would be of benefit to your members if the constructors that they contracted with afforded them rates that reflected your client's fuel costs - your members' fuel costs, I should say?---Well, I mean, as a general rule I would imagine that every client of a customer would hope to get a fair rate of return for the service that they're providing. But again, what that - what the cost of that product might be depends on where it is, what the project is, how much they need. It's impossible to put a one size fits all number in terms of what the fair price might be.

PN1919

Your organisation has acknowledged the significant pressure recent fuel price volatility has placed on transport operators, hasn't it?---Yes, we have, yes. We've made a number of statements to that effect.

PN1920

And recognised that there was a legitimate concern that parties at the end of a contractual chain should be able to recover fuel costs?---Yes, look, I think that would be a fair point.

PN1921

And that is why some of your members in the evidence you gave a moment ago taking steps to ensure that their owner/drivers receive timely and effective costs recovery for fuel?---I understand that to be the case, yes.

*** MICHAEL JOHN KILGARIFF

XXN MR BONCARDO

PN1922

And you'd agree with me as a general proposition that rising fuel costs are causing significant commercial strain on the owner/drivers your members engage?---Uh well we certainly recognise that in the current environment it's - it's a significant issue. Perhaps where we might not agree with that statement is that a one size fits all approach to remedying it is not necessarily going to be appropriate or even implementable.

PN1923

But you read the draft discussion document published by the Commission last Friday?---I have.

PN1924

Have you paid any attention to clause 4.5 of that document?---I have.

PN1925

And that clause provides, amongst other things, that where a contractual relationship is governed by state or territory law, industrial instrument, collective agreement or an individual contract, adjustment of rates under a rise and fall adjustment mechanism, so long as that takes into account increased fuel and provides for cost recovery discharge a party's obligations under clauses 1.4 and 1.3?---Um yeah look - - -

PN1926

In the first instance, you've read that and you've understood it?---I have, yes. I've read - - -

PN1927

And can I ask - - -?---Four point five I believe from memory has about four different points attached to it.

PN1928

Perhaps you haven't read 4.5. It's a single sentence?---Yes.

PN1929

I can show it to you if you like?---Look I have but if you could show it to me to refresh my memory - - -

PN1930

Certainly?---I mean, I have read it. Sorry, when I was talking about the fact that there were four points attached to it I was actually talking about .4 generally.

PN1931

I apologise, we may have been at cross purposes. If you could refamiliarize yourself with clause 4.5?---Yep, okay.

PN1932

That provision would address your concern, would it not, in relation to a one size fits all model?---Possibly - look, possibly. But I think that would be - I think that would be a bit speculative for me to actually claim on behalf of the industry that 4.5 would resolve all their issues because my observation of this industry is that it's incredibly diverse with different contract models that range across companies and across the country. So whether in fact 4.5 would resolve that issue I really couldn't say.

PN1933

You agree as a general proposition that it's important, given the current context in respect of fuel prices, that there be a rise and fall adjustment mechanism available to ensure owner/drivers receive cost recovery for fuel?---We participate in these fuel security round tables of both the Federal and State level, and that has been something that we have advocated time and time again.

PN1934

And it's also important for your members to have rise and fall formulas in their contracts. I think you gave some evidence to that effect?---Well, it's certainly - yes.

PN1935

If your members were able to discharge their obligations under 4.1 to 4.3 of this proposed order by varying their individual contracts with their owner/drivers to adjust rates in accordance with a rise and fall adjustment mechanism that was not prescriptive, but addressed in cost recovery, you'd have no difficulty with that, would you?---Well, it's difficult for me to answer that, for the very simple reason that I'm not intimately familiar with the contracts that my members currently have with their owner/drivers. So to vary a contract in a particular way that may take into account rise and fall I just don't think it's within my expertise to be able to say that that's necessarily a good or a bad thing.

PN1936

To presume it could happen you'd agree that would be a manifestly good thing?---Well, the industry is certainly looking for rise and full up the hill or down the supply chain, and so, you know, how they might deal with their owner/drivers at a company level would certainly reflect that, and to some degree already is.

PN1937

In relation to your members who engage employees those members would themselves have fuel costs in running the vehicles that those employees operate, correct?---That's absolutely correct, yes.

PN1938

And those fuel costs are currently being borne by your client, your members?---That's correct.

PN1939

And those fuel costs have increased exponentially since the commencement of the Iranian war?---Again that's - that statement can't really be applied across the industry, because various companies have different long term contracts with fuel suppliers, and to be frank whether in fact that takes into account price increases or even supply is not generally a discussion I would have with members.

*** MICHAEL JOHN KILGARIFF

XXN MR BONCARDO

PN1940

You just don't the answer?---I just don't know. No, that's correct.

PN1941

Thank you, sir?---Thank you.

PN1942

JUSTICE HATCHER: Anything further, Mr Ward?

PN1943

MR N WARD: No, your Honour.

PN1944

JUSTICE HATCHER: All right. Thanks for your evidence, Mr Kilgariff, you're free to go?---Thank you.

<THE WITNESS WITHDREW

[10.32 AM]

PN1945

MR N WARD: I call Mr Lloyd Wallace.

PN1946

THE ASSOCIATE: Please state your full name and address.

PN1947

MR WALLACE: My name is Lloyd Richard Wallace of Level 19, 1 O'Connell Street, Sydney, 2000.

<LLOYD RICHARD WALLACE, AFFIRMED

[10.32 AM]

EXAMINATION-IN-CHIEF BY MR N WARD

[10.32 AM]

PN1948

JUSTICE HATCHER: Mr Ward.

PN1949

MR N WARD: Thank you, your Honour. Mr Wallace, can you give your full name and address for the record?---Lloyd Richard Wallace, Level 19, 1 O'Connell Street, Sydney.

PN1950

Can you explain to the Commission what role you play in Adbri?---I am the executive general manager of strategy and performance. As part of that role I have responsibility for supply chain operations across the country.

PN1951

JUSTICE HATCHER: Sorry, can you just take that more slowly. So executive general manager?---Strategy and performance.

*** LLOYD RICHARD WALLACE

XN MR N WARD

PN1952

Strategy and performance. Yes?---And in that role I have responsibility for our supply chain operations nationally.

PN1953

Thank you.

PN1954

MR N WARD: Mr Wallace, it might be useful if you just get a little closer to the microphone. Thank you. Before I go any further can I just deal with a matter that was raised by the president earlier. Can you explain to the Commission where Hy-Tec fit into the Adbri world?---Hy-Tec is a brand that Adbri uses for its concrete operations in Brisbane, Sydney, Melbourne, and that's it.

PN1955

Could I ask you to explain to the Commission what Adbri essentially do?---Adbri is Australia's second largest cement manufacturer. It also runs concrete, quarry and masonry block production activities across the country.

PN1956

And just briefly if you could explain what cement manufacturing involves?---Cement manufacture is initially the production of clinker through heating calcium carbonate in a kiln and then grinding it into a cement powder with the addition of other minerals.

PN1957

Could you explain broadly how many quarries and what sort of materials you quarry?---Adbri operates approximately 18 large scale quarries across the country. Those quarries extract aggregates of various sorts. That is the hard rock in asphalt and concrete construction. We have a large number of smaller campaign bits, largely in regional areas that will operate on an as needs basis.

PN1958

I think the witness earlier today suggested you might be involved in the asphalt business. Could you explain whether or not you are?---We have one asphalt batching operation in Western Australia that we acquired on 1 October last year. That's the extent of our direct asphalt manufacturing operations. We do provide precoated aggregates. That is aggregates coated in bitumen products to some of our customers who will be more actively involved in road construction.

PN1959

Just for the benefit of the Commission can you just explain the asphalt manufacturing process in very simple terms?---Sure. Okay. Asphalt manufacture is taking aggregates of various sizes, coating them in bitumen, deliver into the back of a truck that would be taken to a construction job site, and then that hot mixed asphalt will be paved onto a road through a paving machine and produce a

smooth road surface. Precoat is used for spray seal, typically used in regional and low traffic areas, which will give you a bumpier surface.

*** LLOYD RICHARD WALLACE

XN MR N WARD

PN1960

How many concrete plants does the group operate?---It will be a number somewhere in the order of about 100 across the country under various brands.

PN1961

If you can, just as simply as you can, could you just explain the internal supply chain in Adbri?---Sure. Two upstream sources, aggregates and cement. I will describe aggregates first and then I will come back to cement. We extract raw material from the rock face, crush it down into a range of different sizes. We will then put that in the back of tip trucks to take to the concrete batch plant. In the concrete batch plant it will be mixed with powder in very crude ratios, three parts rock, two parts sand, one part cement with water into the back of a concrete agitator that will be then delivered to a customer job site. Cement manufacture I've talked about. Aggregate limestone brought across to a kiln, heated in the kiln, ground down to produce a powder, distributed in pneumatic tankers to a batching plant, and then a range of production process flows as described.

PN1962

Could you give a description to the Commission of the types of customers you deliver concrete to starting from small going up to large?---Sure. In broad terms our customer profile looks like the industry as a whole. In crude terms about 40 per cent is residential construction, either detached housing or vertical construction of apartment blocks outside the window here. Another 40 per cent will be non-residential construction, shops, schools, institutions and so forth, and about 20 per cent will be infrastructure projects, major roads, rail projects, bridges and so forth. A small customer will be a plumber often doing a footpath crossing. 'I'm replacing pipes, I've cut a trench, I need to reinstate the concrete over the top of that.' They may take a couple of cubic metres of concrete from us in a month. The largest customer might be taking hundreds of thousands of cubic metres of concrete either many detached houses or in a single major vertical construction project.

PN1963

If I use the phrase 'owner/driver' do you have some familiarity with that?---I do, yes.

PN1964

Does Adelaide Brighton engage owner/drivers?---We do, primarily in our concrete delivery business. We have approximately 430 owner/drivers across the country.

PN1965

Do you use owner/drivers for aggregates?---In very limited situations the vast majority are involved in the delivery of concrete.

*** LLOYD RICHARD WALLACE

XN MR N WARD

PN1966

I'll actually just pause there. I think you suggested earlier that there was a masonry site to the business. Can you just describe that?---That's right. So the masonry business batches concrete at manufacturing sites to produce pavers or bricks. Most people will be familiar with breezeblocks, large grey blocks of masonry. That's the most typical product, otherwise landscaping pavers.

PN1967

And in terms of the internal supply chain for that, could you just describe that?---It's the same processes I described for concrete manufacture up to the side of the manufacturing plant. Different to a concrete batch plant where we're delivering concrete in its liquid form, the masonry plant is being formed up into fixed products that are cured on-site and they are delivered using flat top trucks to the site, and (indistinct) to the customer site at a later point.

PN1968

And just so I understand what to ask you, the flat top trucks or masonry, are they owner/drivers?---Typically not, no. They are largely fleet owners.

PN1969

Okay, we'll come back to them. You're obviously aware that fuel prices have gone up significantly in the last month?---I had noticed.

PN1970

Yes. That's good to know. Could you explain to the Commission what steps you've taken to deal with fuel price increases for your owner/drivers and if you want to do that on the basis of concrete or whatever, I'm in your hands?---Given that the vast majority of owner/drives are concrete, I'm going to talk in terms of concrete. The primary response has been to increase the frequency of our fuel assessments, using existing contractual mechanisms. I can step through the time frames if that's helpful.

PN1971

Please do?---So the conflict commenced at the very end of February, market began trading on the 1 March. By the 6 March we were discussing internally that prices were likely to rise and we would need to take steps to respond both with our suppliers and our customers. Across the course of the next week we took the steps necessary to be able to increase the frequency of the adjustment such that my recollection is that by 13 March we had communicated to our owner/drivers that we would be adjusting their rates and those rates commenced the higher level on Monday 16 March. We subsequently took another review effective on Wednesday 1 April. Our - - -

PN1972

Sorry, just if you can slow down, Mr Wallace?---Sure.

PN1973

So the first date was 16 March?---Correct.

PN1974

Yes, and what was the next step?---So 16 March was the date in which we began paying the higher rate.

*** LLOYD RICHARD WALLACE

XN MR N WARD

PN1975

Yes?---1 April was the next point at which we began to pay a higher rate and I can quote the figures of that by way of illustration at the moment and we have committed to our owner/driver base that we will review every fortnight with an expectation that we will adjust rates every month. However, if there is a significant increase, we may readjust inside the month as well. So if I step through those first couple of increases, if we take the average in January and February as the baseline, when we undertook the first increase, notified on 13 March, the cost had risen approximately 23 per cent and by the time that we went with the second revision on 1 April there had been a further 50 per cent increase in fuel and those increases were then reflected both in the rates that we charge our LID, our owner/drivers for their fuel consumption and the rate at which we remunerate them for the services they undertake.

PN1976

It was 23 per cent plus a further 50 per cent, that is 50 per cent on top of - - - ?---Twenty-three per cent as of 13 March.

PN1977

Yes?---And then a further 50 per cent on top of that as of 1 April.

PN1978

Yes. You just said then, you talked about what you charge your owner/drivers. Can you just explain how you actually provide fuel or fuel cars to your owner/drivers?---Yes. So there are two separate concepts here, remuneration and charge. As it relates to charge, given that the vast majority of our owner/drivers are based in metropolitan areas working out of a single concrete plant, we provide them access to a fuel's tank at that plant and they will refuel at that time. To be clear, there is no money changing hands at the point that fuel is actually going into their vehicles. It's cleaned up in the pay cycle thereafter.

PN1979

Can you explain what you mean by 'cleaned up in the pay cycle'?---That is, so I might be sitting here using the dates I've just talked about, refuelling my vehicle on 3 April. I'll receive the fuel and it'll go into my vehicle and I'll conduct works. That amount will be noted against your account. We will pay you approximately two weeks after that in the cycle of this particular case settled in the week of 14 April. We will deduct an amount for the fuel that you loaded on 3 April. We will remunerate you for the amount of work that you did in that week at the same time. And the two will roughly net off, barring some time differences.

PN1980

Now, you gave some evidence earlier about, I think you talked about fuel reviews fortnightly, but then you said monthly?---Yes.

*** LLOYD RICHARD WALLACE

XN MR N WARD

PN1981

Can you just explain what you meant by that?---The practical issue here is the administrative burden. So we have been examining the fuel rates based on the Australian Institute of Petroleum's Terminal Bank Prices. We're looking at those over an average of a fortnightly period. We have adjusted the rate on the pay based on that fortnightly review. And simply trying to manage the Administrative workload in the business, unless there's been a marked change, our intention was not to readjust inside the month, but adjust the actual payments every month if we could. So far, we've been doing it every fortnight.

PN1982

Can you just explain what the pay periods are that you normally use?---Fortnightly?

PN1983

For the review or for the actual payment?---Both.

PN1984

Okay. And is that for concrete owner/drivers?---That's correct.

PN1985

Okay. And if I could turn your mind now, you've used the phrase fleet owner?---Yes.

PN1986

I might just get you to explain to the Commission, what you understand a fleet owner to be?---My understanding is that an owner/driver is a type of service provider covered by varying state legislation. So in some locations owner/drivers will essentially be covered regardless of the number of vehicles they operate. In other jurisdictions it may be constrained to a maximum of two or four vehicles that they can operate. Fleet operators then become anyone not otherwise covered by that legislation.

PN1987

And you operate fleets for concrete?---Concrete. We have fleet owners in Sydney and Melbourne for that activity. There's no concept of a fleet owner in Queensland, as far as I'm aware, and then we use them in other activities like quarry product, masonry and cement cartage.

PN1988

Well, we might do them one by one if I could ask you to focus on concrete, what would typically be the size of a fleet owner in concrete?---The largest fleet owners that I'm aware of that we have within Adbri operate around 10 to 12 vehicles.

PN1989

And as a percentage of the fleet, just generally, fleet owner to owner/driver, what would the mix be?---It would be quite small by count. I think we've got a total of five fleet owners out of 430 non-company-owned trucks in the concrete business.

PN1990

When you say five fleet owners, you mean five entities, not five vehicles, in effect?---Five entities. Correct. Correct, five entities.

*** LLOYD RICHARD WALLACE

XN MR N WARD

PN1991

Okay. And what steps have you taken, if any, to deal with fuel prices for concrete fleet owners?---The same basic philosophy. We have a contract in place with the rise and fall mechanism. We've shortened the period of that review.

PN1992

And what steps have you taken for your aggregate fleet owners?---Essentially the same mechanism. Our fleet owners operating quarry cartage are typically entitled to an annual review. We've brought that back into at least monthly with everyone if not fortnightly as per concrete.

PN1993

And could you explain where you've differentiated between monthly and fortnightly for aggregate carters?---In effect there has been no change; it's been the same fortnightly process up to this point.

PN1994

Okay. And what's the pay period for aggregate carters?---They are paid – they are paid monthly.

PN1995

And in relation to your masonry distribution?---Yes.

PN1996

Fleet owners are engaged in that?---Correct. Yes.

PN1997

And what have you done for them?---The same exercise. Same exercise. Where a rise and fall mechanism existed in their contract, we've used that and simply shortened the review period. Where a rise and fall mechanism does not exist. We've adjusted their rates based on our estimate of their exposure to fuel and our observation of the terminal bag price movement.

PN1998

And could you just explain for the Commission's benefit what you just said when you talked about estimating the exposure to fuel? What you mean by that?---So we have an understanding, given the vehicles that we operate ourselves; what are the various cost components? So typically for a masonry operator or a quarry operator, we would expect that fuel would represent in normal times about a third of their cost base. So if you took that as a simple starting point we'd say 30 per cent of our change in the terminal bag price would be the adjustment we would make to the fleet. Now, I'm talking here in proportions. We would be tracking it on a dollar-per-activity basis going forward.

PN1999

And you've already implemented these changes?---Yes.

PN2000

What is the response you've observed from your fleet owners?---In general, people have been appreciative of the support and the recognition of the need to do something proactively.

PN2001

Am I right that you've also addressed – I think you said earlier, you've addressed your customers?---Yes.

PN2002

Could you explain to the Commission what you've done with pricing with your customers?---We announced – I'll use concrete as the example here. The specifics might vary a little bit by line of business, but in the concrete business we sent out letters to our customers on 19 March, if my recollection is right, that, effective 23 March, we would begin charging an additional \$8.70 per cubic metre for concrete. That charge - - -

PN2003

JUSTICE HATCHER: Sorry, Mr Wallace, the letter was sent when?---19 March. My recollection is a little bit uncertain, as – specifically.

PN2004

And effective 23 March?---23 March. That is – my recollection is fairly clear on that.

PN2005

MR N WARD: And – sorry, if you could just - - -

PN2006

JUSTICE HATCHER: Sorry, just so I understand that - - -

PN2007

MR N WARD: Sorry, your Honour.

PN2008

JUSTICE HATCHER: When you said, 'our letter', that wasn't inviting a negotiation; it was simply a notice, saying, 'We will increase our prices'?---That's correct.

PN2009

Yes.

PN2010

MR N WARD: Sorry, could you just restate again the amount?---\$8.70 per cubic metre of concrete.

PN2011

And could you explain to the Commission – I don't want you to say anything that's commercially sensitive, but in general terms, can you explain what went into calculating that?---Sure. So we've talked about the supply chain in broad terms. I

think it is in the public domain that a number of suppliers in the industry have identified that cement costs have risen by approximately \$10 a cubic metre, so I'll talk in those general terms. There's approximately 300 grams per cubic metre of concrete – kilograms, per cubic metre of concrete. Take (indistinct) that's \$3 out of the \$8.70.

*** LLOYD RICHARD WALLACE

XN MR N WARD

PN2012

Of the remaining components, information that has been shared by the industry association broadly suggests, of the remaining diesel exposure, approximately 60 per cent of that relates to the crushing of rock at the quarry site and the transportation of that rock to the concrete batch plant. There is then about 25 per cent of the remaining diesel usage that goes in the delivery of the concrete, and the balance occurs in the batch plant activities themselves. So out of the remaining – if my maths is lining up so far, about \$5 to \$6, you would say about a \$1.50 if that would be the concrete delivery leg, with the remainder of it all being incurred upstream.

PN2013

And it might be too early to tell, but are you meeting any resistance from your customers?---It varies greatly. At the risk of being cheeky, I'll observe that government has probably been one of the more belligerent customer items here.

PN2014

Could you develop – put the government aside (indistinct), but - - - ?---Yes. Sure. The nature of the increase is, everyone is seeing it literally day to day. And so there's been a general recognition something was going to happen. The practicality arises in who our customer's customer is. So in a general pattern, if we're dealing with a customer who is themselves selling direct to a consumer, there is very little latitude to recover, and we typically found greater practical resistance there.

PN2015

The conversations more broadly have been a question of, how do we work through this issue? We have encountered a number of major contracts where property developers have got fixed forward sales, and very clearly, any increase in cost comes at their margin. That has tended to be a more contentious discussion. And then, we've noticed, you know, respecting my governmental customers, that they have to approach this sensibly, and they're – they're thinking in a considered way about whether they accept a variation going through.

PN2016

Does Adelaide Brighton believe it needs the assistance of the Commission to deal with its customers?---I don't expect so at this point.

PN2017

VICE PRESIDENT GIBIAN: Sorry, you said, 'I don't expect so'?---I don't expect so, yes. We'd appreciate all help that is available.

PN2018

MR N WARD: I will let that go. No further questions. Mr Boncardo is going to ask some questions.

PN2019

VICE PRESIDENT GIBIAN: I was just going to ask; you've discussed the fortnightly versus monthly review?---Yes.

*** LLOYD RICHARD WALLACE

XN MR N WARD

PN2020

Do I understand correctly that you're looking at the change in fuel price on a fortnightly basis, and then making a determination as to whether to adjust the rates paid to owner/drivers, either on a fortnightly or monthly basis?---That's exactly right. So we are very hopeful this is eventually going to come to an end, and we want our normal contractual structure to resume. That normal contractual structure works on a monthly cadence, so we would like to try and intersect that, to simplify the - - -

PN2021

And you'll make that decision based upon the – essentially the magnitude of the change that's occurred on a fortnightly basis?---That's – that's exactly right.

PN2022

Do you have in mind any parameters in that respect, or is that just something you'll decide on a case-by-case basis?---(Indistinct) we know the point that this matter kicked off from. When we see it return to something approaching that level, we would think that was the point that we would go back to the normal contractual arrangements.

PN2023

You mean back to the pricing that – pre-March, essentially?---That's right.

PN2024

All right. Maybe I was asking a slightly different question, that is, going forward, if, in the next fortnightly period, you look at the prices and you decide whether to adjust fortnightly or monthly, is there a degree of magnitude of change in fuel prices that would trigger the fortnightly as opposed to monthly, or is it just something you would need to think about when it happens?---It's something we would need to think about. It's really a case of – take the excise adjustment, for example. That led to a significant change at a point in time.

PN2025

Sadly, the market then overwhelmed that change, and in the end, there was negligible real change from where we already were, so we stayed neutral. Were there a similar step change, that would say, 'Okay, we're materially more or less expensive than we expected to be. We should make a change'. So far, we've been able to work on the – sorry, we've been required to work on a fortnightly basis. We haven't had the opportunity to extend it out to the month at this point.

PN2026

MR N WARD: Sorry, your Honour, if I can just – could you just explain, when you're doing your reviews, is it just up or is it down as well, if it goes down?---Both.

PN2027

Both?---Yep.

*** LLOYD RICHARD WALLACE

XN MR N WARD

PN2028

No further questions.

PN2029

JUSTICE HATCHER: All right. Mr Boncardo.

CROSS-EXAMINATION BY MR BONCARDO

[10.55 AM]

PN2030

MR BONCARDO: Thank you, your Honour. You referred, sir, to Adbri being the second-biggest concrete manufacturer in the country?---Cement manufacturer, yes.

PN2031

Cement. I do apologise.

PN2032

JUSTICE HATCHER: Mr Boncardo, can you move your microphone a bit closer, please?

PN2033

MR BONCARDO: Yes, your Honour. Adbri is the second biggest cement manufacturer in the country. How many employees does it have throughout Australia?---Approximately 3,000.

PN2034

And how many of those work in your team?---Nine.

PN2035

Does it have a particular industrial relations or employee relations team?---No. As in, my direct report, you mean?

PN2036

Adbri generally?---Yes. Yes, we do.

PN2037

And how many people are members of that team?---No, I couldn't tell you exactly. My guess would be, less than half a dozen.

PN2038

Now, you were asked some questions by Vice President Gibian about parameters around fuel increases. Do I understand your evidence to be that it's a matter for Adbri and its discretion as to whether or not any increase in price will trigger a

rate adjustment?---No. So we have a contractual – and I'm speaking here with respect to the owner/drivers, which are the vast majority, which are in concrete.

PN2039

Yes?---So we have a very clear contractual framework about how we determine the amount of rise and fall. Ordinarily, we would reference the actual rate that Adbri has paid to our fuel distributor. That information is not available below the time frames that we've been moving to, so we have used the Australian Institute of Petroleum figure. However, that figure is now what we're using in our cost model.

*** LLOYD RICHARD WALLACE

XXN MR BONCARDO

PN2040

And perhaps I wasn't as clear in my question as I should have been. You will look at that figure on a fortnightly basis?---Yes.

PN2041

And you'll make an assessment as to whether or not you adjust rates on a fortnightly basis or stick to a month?---Correct.

PN2042

What are the parameters, if any, as to whether or not you make an adjustment on a fortnightly basis?---So each month, it'll be the terminal gate price; it'll be our judgment if we need to make an out-of-cycle adjustment at the fortnightly basis within the month.

PN2043

Whether it increases 5 per cent, 10 per cent or 20 per cent, you exercise your discretion as to whether or not you afford the owner/drivers an increase?---And our behaviour would suggest that we act on figures above 5 per cent.

PN2044

Thank you. And am I right in understanding that there have been increases above 5 per cent since you implemented this measure on 13 March, that is, each fortnight?---Not on an average basis that I'm aware of, no.

PN2045

Can you tell the Commission how many adjustments have occurred since the 13 March?---One, being 1 April.

PN2046

No other adjustments have occurred to date?---No.

PN2047

And is that in the case of both owner/drivers and fleet owners?---Yes.

PN2048

And the same process applies in relation to fleet owners, that you've just described, is that right?---Yes.

PN2049

Does Adbri employ drivers directly to cart its concrete products - - -?---Yes.

PN2050

Its quarry materials, products - can you tell the Commission what proportion of its fleet are directly employed employees?---It's approximately 220.

PN2051

And can you tell the Commission how many owner/drivers are engaged?---Approximately 430.

*** LLOYD RICHARD WALLACE

XXN MR BONCARDO

PN2052

And fleet owners?---Ah in total numbers it must be another 50.

PN2053

And Adbri is obviously responsible for the fuel costs of the employee drivers it engages?---Yes.

PN2054

And in terms of the fleet owners it engages does Adbri have any oversight as to whether or not they engage owner/drivers or employ their own employees to perform the work that's subcontracted to them?---As far as I'm aware the fleet owners we operate are not entitled to engage uh subcontracting entities, only individual employees. I'm pretty sure that is - - -

PN2055

Thank you. And in terms of recovery of costs from Adbri's clients, you answered a question from the President that Adbri effectively issued a notice to its customers on 19 March?---Yes.

PN2056

Do we understand from that that Adbri has a provision in its contracts with its customers that allows it to increase rates based on fuel fluctuations?---Not uniform.

PN2057

So what was the mechanism by which you issued the notice to increase prices?---We just issued it. I'm unaware of any particular mechanism we rely on.

PN2058

You told your customers, 'There's been an increase in fuel prices. We are now going to be charging \$8.70 per cubic metre'?---That's correct.

PN2059

And that was essential for your business in order to recover fuel costs?---That's right.

PN2060

And you did say that there had been a general recognition that something had to happen, is that correct?---That's right.

PN2061

Have all your clients agreed to the \$8.70 per cubic metre?---No.

PN2062

That is they are refusing at the moment to compensate Adbri for the increased fuel costs it has incurred?---Various customers have taken various positions. Some have accepted, some have rejected. We've had interim solutions as well.

PN2063

What are those interim solutions?---Be a range of commercial outcomes - some have, instead of accepting our \$8.70 proposed a mechanism of their own.

*** LLOYD RICHARD WALLACE

XXN MR BONCARDO

PN2064

That is a rise and fall-style formula?---That's right.

PN2065

And in the case of those customers who might be described as recalcitrant, it would be of assistance, would it not, to Adbri, if there was a mechanism that required those customers to compensate Adbri for increased fuel costs?---Yes.

PN2066

Thank you. Thank you, Mr Wallace.

PN2067

JUSTICE HATCHER: Anything further?

PN2068

MR N WARD: No, Your Honour.

PN2069

JUSTICE HATCHER: Thank you for your evidence, Mr Wallace. You're excused and free to go.

<THE WITNESS WITHDREW

[11.01 AM]

PN2070

MR N WARD: Your Honour, I call Peter Gutsche.

PN2071

THE ASSOCIATE: Please state your full name and address.

PN2072

MR GUTSCHE: Peter Gutsche, (address supplied).

<PETER GUTSCHE, AFFIRMED

[11.02 AM]

EXAMINATION-IN-CHIEF BY MR N WARD

[11.02 AM]

PN2073

Mr Gutsche, could you state your full name and address for the record?---It's Peter Gutsche, (address supplied).

PN2074

And what position do you hold in FedEx?---I'm the national direct for ANZ of operations.

*** PETER GUTSCHE

XN MR N WARD

PN2075

Could you just explain to the Commission what you're responsible for in that role?---My role entails managing the full extent of the operations both within Australia and New Zealand: so looking after all of the station and warehouse activity along with the courier and fleet operations that we have here in Australia and extends into the international operation that we have where FedEx is both a global operator as well as a domestic operator in countries like Australia.

PN2076

And how long have you been engaged by FedEx?---A little over 40 years.

PN2077

I wonder if you could start by just explaining in general terms what FedEx does?---Ah so FedEx is an international air freight organisation operating in over 250 countries around the world. It's primarily involved in the international express parcel market. In America it has quite a large domestic market. In some other countries, in Europe also plays in both domestic and international space and here in Australia we're both a domestic and international parcel transport organisation.

PN2078

And can I ask you then to focus on what happens in Australia? Could you walk the Commission through the different parts of the business?---Sure. So in Australia primarily our business to a large extent is a domestic operation here in Australia. So about 90 per cent of our business is involved in the pickup and delivery of parcels, and (indistinct) freight generally on an express basis which we move throughout Australia and we're of course connected to the FedEx operation globally we also have about 10 per cent of our business in terms of volume is - is that of an international nature. So that's parcel pick up and delivery here in Australia and also around the world.

PN2079

Could I ask you to give the Commission some sense of the types of freight you deliver?---Sure: we're quite heavily involved in the retail space. So that's both bricks and mortar retail but also home delivery, V to C and B to B. We're quite heavily involved in the industrial sectors as well, agricultural sectors here in Australia, just about all markets.

PN2080

And if you could give a sense of the types of vehicles that FedEx operate in its fleet?---Yes, pretty much all: everything from a 2.5-ton small van through to the B-double road train combination operations.

PN2081

If I use the phrase, 'Owner/driver', you're comfortable and familiar with that phrase?---Familiar with owner/driver, yes.

PN2082

Okay. Does FedEx engage owner/drivers?---Yes, we do.

*** PETER GUTSCHE

XN MR N WARD

PN2083

Could you explain to the Commission where you engage owner/drivers?---Um we've got about 450 owner/drivers performing work for us in first and final miles: so that is in the pickup and delivery of packages within our core operation. We have about another 180 of those that are involved in point-to-point courier-related operations. So that's pick up within one base capital city and delivery within that same capital city. And we have about 130 agent operators, I guess I would call them, in regional locations as owner/drivers.

PN2084

And just - could you just explain what you mean by, 'agent operators'?---These would be contractors that work for us in regional locations that perform pickup and delivery in those regional areas.

PN2085

I see.

PN2086

JUSTICE HATCHER: Is movement between states done by air or by road?---Both air and road.

PN2087

So who do you use for road operations there?---Our own - we have - we operate our own light operations between capital cities.

PN2088

With employees?---No, we also use about 60 fleet operators. They're slightly different to the owner/driver. We do have a very small number of owner/drivers that work in that space: literally only like five, I think it is.

PN2089

Thank you.

PN2090

MR N WARD: Why don't we turn to that now? You're comfortable with the use of the phrase, 'Fleet owner'?---Yes.

PN2091

And just so we understand, what is your understanding of what a fleet owner is in your fleet?---A fleet owner would be somebody with multiple vehicles and drivers that we would engage to perform work for us.

PN2092

Do you engage fleet owners?---We do engage fleet owners in that line of space that we're referring to just now, as I mentioned. And where we are engaging ad hoc support for outside hire within the local pickup and delivery, parcel pickup and delivery for a very small amount.

PN2093

And could you just explain to the Commission what you mean by ad hoc?---These would be people that we use temporarily to support our operation when our own resources aren't sufficient, so during peak period-type volume times we might engage some people on a short-term basis through a fleet operation.

*** PETER GUTSCHE

XN MR N WARD

PN2094

And in terms of your line haul fleet owners, what size typically are they in terms of their fleets?---They range. So we can have people who may operate you know, two, 300 line haul related vehicles, not necessarily all for us, but the size of the vehicle - their business would be in that space right down to a single one truck, one operator.

PN2095

And you talked then about very large operators; they're not working exclusively for you?---Not exclusively for us, no.

PN2096

Can I just - and I don't want you to say anything that's commercially sensitive, but could you give us a sense broadly of the sweep of customers you provide service to?---Sure. So as I mentioned earlier, we're quite heavily involved in the retail space, so we'll work with a lot of people who supply to all of the retail outlets, whether it's in fashion or electrical or any kind of retail commodity. We work with all of those customers, both locally and internationally. In an industrial sense, you know, it's largely manufacturing or engineering, agricultural type customers in the main. And that would include mining as well.

PN2097

If I could turn your mind now back to the owner/drivers, obviously you would understand that fuel prices have increased in the last little while?---Yes, I do.

PN2098

Thought you would. Could you explain to the Commission what steps you may have taken, if any, to address fuel price increases for your owner/drivers?---For the large proportion of our owner/drivers, we've addressed it through, I guess, a longstanding fuel surcharge mechanism that we've had in place for a long time. We've then, for those contractors, or owner/drivers that weren't part of any fuel surcharge mechanism, we introduced a fuel surcharge mechanism just recently to support them in that space and then we - we reviewed it and moved it from a monthly review cycle and engagement to a fortnightly review and engagement.

PN2099

Can I just deal with your two groups one by one. Can you cast your mind to the ones you said who had a long-standing fuel surcharge? How long have you had a fuel surcharge for them?---I'm going to say it goes back to, like, 2009 when the last fuel crisis, I think it was, hit us until we've been running one.

*** PETER GUTSCHE

XN MR N WARD

PN2100

Just focussing on those to begin with, can you explain to the Commission how that actually, the mechanics of that, work?---Generally, I will say it works for the vast majority where we have – we have a model that identifies the various cost components associated with operating the vehicle, both fixed and variable. A component of that will be fuel at a percentage of the total cost and we effectively use the AIP terminal bag price movement to provide us with the fuel movement that occurs in any period and we apply that movement to the fuel component of that cost to the operator. So that the operator is adequately remunerated for that increase in fuel.

PN2101

Is that fuel surcharge that the owner/driver gets, is that a separate payment?---It is - it definitely is in some. I'm pretty sure that it is in all but I – I can't be a 100 per cent sure on that.

PN2102

That's the long-standing group. You then said there was a group for whom there wasn't a fuel surcharge?---Correct.

PN2103

JUSTICE HATCHER: Sorry, just before we move on to that group.

PN2104

MR N WARD: Sorry, Your Honour.

PN2105

JUSTICE HATCHER: So in normal times how often is that cost model adjusted?---Monthly.

PN2106

Monthly.

PN2107

VICE PRESIDENT GIBIAN: And you said you use the AIP figure, is that just the national average?---Yes.

PN2108

Or do you try and you don't try and do it state by state or whatever?---No, it is, it's just the national average, yeah. No.

PN2109

JUSTICE HATCHER: And so, while we're on that, the owner/drivers in the first and final line up, would they usually use petrol rather than diesel?---No, they're – they're predominantly diesel.

PN2110

Diesel. And so it's the diesel price you're using?---Yes, it is.

PN2111

Thank you.

*** PETER GUTSCHE

XN MR N WARD

PN2112

MR N WARD: Thank you, Your Honour. If I could ask you to just explain what you've done for the group who don't have a long standing fuel surcharge?---Yes, so we introduced a fuel surcharge mechanism which is largely the same as the one that was already in play. So we effectively picked a period in time where we had stable fuel pricing and we indexed against that period of time, using the AIP again to provide fuel relief for those contractors that previously did not have any cost model - sorry, fuel surcharge model in play.

PN2113

When you described there, you picked a period of time where you had stable fuel pricing. What period was that?---I think it was August actually. I think it was August last year when - was the period of time that we found was the most stable and it had been for some time.

PN2114

And when did you – I withdraw that. For the people who have a long standing fuel surcharge, when did you make your first jump because of the fuel price changes?---It would have been in March, early March, I would have thought. We did jump a little earlier than that for some operators. We had some smaller operators who were definitely feeling the pinch early, and because at that point we were still monthly, we introduced some temporary relief for some of our smaller line haul operators in particular, who we knew were really going to struggle if we didn't, to support them.

PN2115

And when did you implement the new fuel surcharge for those who didn't historically have one?---I think we've just, I just signed off this morning, I think, on the next fortnight, and that will be the six weeks - so work backward from there – so that's - we're into our – we're into our - - -

PN2116

So six weeks back from today?---Yeah, six weeks back from that.

PN2117

And what pay periods did you operate for the owner/drivers for?---They're weekly. So we pay them weekly, inclusive of the fuel surcharge, and we adjust it fortnightly.

PN2118

Okay. I think you said you're now using the Australian Institute of Petroleum, National - - - ?---Correct. Yes.

PN2119

Is that what's in your models?---Yes.

PN2120

Okay. Now, in relation to fleet owners, has FedEx taken any steps to deal with fuel cost increases for them?---Yes. So, we apply the same approach for our fleet operators, using the same (indistinct) model to them.

*** PETER GUTSCHE

XN MR N WARD

PN2121

How have you determined for them what is the proportion attributable to fuel?---We – we have a – a - a model that allows us to understand what the various cost components are associated with operating those vehicles, inclusive of fuel, so similar to how I described earlier. And we apply the same approach with the increase in fuel as per the AIP to that fuel component of their total cost. (Indistinct).

PN2122

I don't want to say anything that's commercially sensitive, but is that the case that you're describing, that you have an understanding of proportion of costs that fuel represents for different vehicles?---We do have an understanding and we have that agreed with all of our contractors so that - yeah it's – it's understood what that - what the fuel component is along with other - other elements of their operating costs.

PN2123

Then if we can start with the owner/drivers, what has been the response from the owner/drivers about what you've done?---Well, I think they've been pleased, so, yeah, I think they're – they're pleased.

PN2124

VICE PRESIDENT GIBIAN: (Indistinct) ungrateful in my experience?---Yes. No, I think, look, I think definitely that's helped alleviate some of the pressure that they were feeling at that time. So yeah, definitely worthwhile.

PN2125

MR N WARD: What is the response you've seen from fleet owners?---The same. You know, I think - I think it was absolutely necessary. I don't think anybody is contesting that, you know, we can't recognise that the fuel cost has increased though. That did it, you know, we need to support them like if they – if they are to support us.

PN2126

Now, again I don't want you to say anything that's commercially sensitive but we could go to the other end of the scale. Are you taking steps to recover increasing your cost base?---Yes, yes, so we have a fuel surcharge that we apply to all of our customers. That's been in place for a long time and that also has been a recently moved. That was a three-monthly cycle and that's now been moved back to fortnightly.

PN2127

And you say that that's been in place for some time. Do you remember when that went into place?---Look, I don't. I'm going to say around the same time, 2009.

PN2128

Nine. Okay?---Yes.

PN2129

And again, I don't want to say anything that's commercially sensitive, but are you able to explain how that surcharge actually operates and is charged?---Yeah. That is charged as a percentage of the revenue that they trade with us. It's slightly different.

*** PETER GUTSCHE

XN MR N WARD

PN2130

And do I take it that because that pre-existed, it's just gone up?---It has, yes.

PN2131

Okay. And have you met any resistance from your customers?---No, we haven't, actually, and that's – that's moved quite a bit recently. So generally speaking, most customers understand. They see the bowser price, like we all do. And I think by moving at the fortnightly has helped a little in that space, because what they see, in terms of the surcharge that they're receiving from FedEx, aligns with what they see at the bowser, that is, there is no lag effect in that space.

PN2132

No further questions. Mr Boncardo is going to ask you some questions?---Sure.

PN2133

JUSTICE HATCHER: Mr Boncardo.

CROSS-EXAMINATION BY MR BONCARDO

[11.19 AM]

PN2134

MR BONCARDO: Thank you, your Honour. Mr Gutsche, does FedEx also engage employees to perform either first and last mile work, point-to-point courier work, or agent operations that you've described?---Definitely in the first and last mile. Not so much in the point-to-point, but in the first and last mile, we do engage – we have about 1,800 – over 1,800 first and last mile operators, and, as I mentioned, about 450 of them are owner/drivers.

PN2135

And you mentioned a fuel surcharge that applies to customers. Is that described as the diminished fuel surcharge?---Yes, it is.

PN2136

And is its effective rate, from 12 April to 25 April, about 44.6 per cent?---No, I don't believe so.

PN2137

Can I show you a document?---Thank you.

PN2138

Can I ask you, sir, whether you recognise this as a page from the FedEx website?---Yeah, it is, and it's 38.1. So the number that I know it to be is 38.1 per cent.

PN2139

That is in the period 29 March 2026 to 11 April - - -?---It may have just moved. I may not be aware of the 44, but, yeah, it was 38. The number that I know – I'm more involved in the operations, in the commercial side, but I understood it to be 38.

*** PETER GUTSCHE

XXN MR BONCARDO

PN2140

And you have no reason to doubt that it may have increased, as of yesterday, to 44.6 per cent?---No reason.

PN2141

Thank you. I seek to tender that document, your Honour.

PN2142

JUSTICE HATCHER: Yes. All right. Sorry. Just give me a second.

**EXHIBIT #22 DOCUMENT FROM FEDEX WEBSITE, ENTITLED
'DOMESTIC FUEL SURCHARGE'**

PN2143

MR BONCARDO: Can I ask you some general (indistinct). You'd agree with me that fuel is a significant cost component of FedEx's business?---It is a cost component of our business, yes.

PN2144

And it's important for both FedEx and the owner/drivers and fleet owners it engages to achieve cost recovery for fuel?---Yes, agreed.

PN2145

And absent the achievement of cost recovery, FedEx's business will be at risk of not being sustainable?---Correct.

PN2146

Ditto with the owner/drivers and the fleet owners you engage?---Correct.

PN2147

Can you tell the Commission who FedEx's competitors are?---Our main top-tier competitors will be TGE, Toll, StarTrack, Australia Post.

PN2148

Would you agree with me that it is important for there to be a level playing field as between FedEx and its competitors in relation to fuel costs?---I think the basis – yes, I think the basis needs to be fair. I think it's difficult to say that they will always be the same, because we introduce them different at stages in time. For commercial reasons, companies will make adjustments to their fuel surcharge, and

potentially roll it into base pricing and things along those lines, so do a reset. FedEx hasn't done that for some time.

PN2149

As a general proposition, you'd agree that it's in the interest of FedEx's business and the part of the industry in which it operates that there's a level playing field in relation to fuel costs?---Yes.

*** PETER GUTSCHE

XXN MR BONCARDO

PN2150

Thank you. You mentioned, I think, that there had been six reviews. Have I recollected your evidence correctly?---We're into our – no, we're into our six weeks. So we're doing it every fortnight, so that's three reviews. That's for the new – that was for the new model that we just introduced, yep.

PN2151

And in relation to the old model, or the existing model for your owner/drivers, how many reviews have occurred?---Since the fuel increase?

PN2152

Yes?---Same.

PN2153

Thank you. And those reviews are based upon your personnel looking at the relevant AIP prices, working out any deviations, increases or decreases, and plugging those figures into a cost model?---Correct.

PN2154

And that's a relatively straightforward process, correct?---It's relatively straightforward. It's quite manual. I suspect most organisations operate relatively manual systems to do this. So it might sound straightforward, but actually, it's manual. It's Excel-based. And then, as we make those adjustments, we need to apply those adjustments to all the payment systems that we use within our organisation. So there's – there's a bit of work in doing it, but, yeah, it's – definitely, we're able to do it, obviously.

PN2155

Certainly. And that's been able to be done 450 owner/drivers, 180 point-to-point couriers, and 130 agent operators?---And 60 linehaul operators.

PN2156

Thank you. Can I ask you about those linehaul operators? They're the fleet owners that are engaged?---Generally, they're fleet owners, yes.

PN2157

And how many trucks do those fleet owners usually operate?---It really varies. I think I mentioned that earlier, they – they can be anything from, you know, one owner vehicle operator, up to, you know, 250 trucks.

PN2158

And do you know whether they engage owner/drivers themselves or they have a directly employed workforce?---They generally – they do engage owner/drivers themselves. We certainly look to work directly with their – their fleet operator.

PN2159

When you say you look to work directly with their fleet operator - - -?---The – the vehicles that they own and operate and employ.

PN2160

And does FedEx seek to ensure that if those fleet owners do engage an owner/driver, that they are paying them an appropriate rate that achieves cost recovery?---Yeah, that's – that is part of the review that we do with them.

*** PETER GUTSCHE

XXN MR BONCARDIO

PN2161

Thank you. Just bear with me a moment, sir. Thank you, Mr Gutsche.

PN2162

JUSTICE HATCHER: Anything else, Mr Ward?

PN2163

MR N WARD: Just one question, your Honour, if I can.

RE-EXAMINATION BY MR N WARD

[11.26 AM]

PN2164

MR N WARD: In response to a question, you talked about, when you've done the calculus for the fuel surcharge, you said, 'We apply it to all payment systems'. Can you explain what was meant by all payment systems?---So depending on the system that we're paying our people through, our contractors through – so there's two mechanisms: there's the accounts payable system, so we're – we're paying them through them either submitting an invoice to us, or on a reverse account arrangement that we would have with that.

PN2165

Then, that system needs to be updated with the new payment, and that, we need to – we need to inform them of the change in the fuel surcharge, so that they can apply it to their invoices back to us, so we can pay them appropriately. And then, there are some contractors that are paid through our payroll system, so we need to update the payroll system as well. So they're generally the two.

PN2166

No further questions.

PN2167

JUSTICE HATCHER: All right. Thank you for your evidence. You're excused. You're free to go?---Thank you.

<THE WITNESS WITHDREW

[11.27 AM]

PN2168

JUSTICE HATCHER: All right. So is that all your evidence, Mr Ward?

PN2169

MR N WARD: It is, your Honour, yes.

PN2170

JUSTICE HATCHER: All right. So Mr Meehan, you're the other party that's – well you've filed witness a statement?

PN2171

MR MEEHAN: Yes.

PETER GUTSCHE

RXN MR N WARD

PN2172

JUSTICE HATCHER: Mr Boncardo, have you had a chance to look at that?

PN2173

MR BONCARDI: I've just been handed it, your Honour. If it's convenient, if I could have 10 to 15 minutes to review it, that would be greatly appreciated.

PN2174

JUSTICE HATCHER: All right. Well, we'll take a morning tea adjournment, and we'll resume in approximately - - -

PN2175

MR MEEHAN: Before Your Honour does that, may I just indicate, in light of the proposed amended order sought by the TWU, will be many paragraphs of this witness statement I don't read. I can either let Mr Boncardo know during the adjournment, or I can indicate to the Bench now what those - - -

PN2176

JUSTICE HATCHER: It might be more convenient if you can tell Mr Boncardo that during the adjournment, but also if you can just send us a note or something – I don't care if it's handwritten – just telling us what paragraphs aren't being read.

PN2177

MR MEEHAN: (Indistinct).

PN2178

JUSTICE HATCHER: All right. We'll adjourn for approximately 15 to 20 minutes.

SHORT ADJOURNMENT

[11.28 AM]

RESUMED

[12.02 PM]

PN2179

JUSTICE HATCHER: All right. Mr Meehan.

PN2180

MR MEEHAN: May it please the Commission, I call Nicolas Saunders.

PN2181

JUSTICE HATCHER: All right.

PN2182

MR TAMVAKOLOGOS: Your Honours, sorry to interrupt, and I don't want to interrupt the natural flow of things. I wonder if I might just be heard very briefly on the terms of the draft order that the Commission published on Friday.

PN2183

JUSTICE HATCHER: No, no, we're having submissions in due course. We're dealing with the evidence first.

PN2184

DR STAMBOULAKIS: Okay. Thank you, your Honour.

PN2185

JUSTICE HATCHER: So we'll hear Mr Saunders' evidence.

PN2186

THE ASSOCIATE: Please state your full name, and address.

PN2187

MR SAUNDERS: Nicolas Saunders, care of 219 Cleveland Street in Redfern.

<NICOLAS SAUNDERS, AFFIRMED [12.03 PM]

EXAMINATION-IN-CHIEF BY MR MEEHAN [12.03 PM]

PN2188

MR MEEHAN: Mr Saunders, you're employed by Australia Post as general manager, industrial relations and reform?---Yes.

PN2189

And you have prepared a witness statement for the purpose of these proceedings, which you have signed today, correct?---Yes.

PN2190

Now, your Honour, as I've indicated, numerous paragraphs that I don't read. If it's convenient, I'll read those onto the transcript now.

PN2191

JUSTICE HATCHER: Yes.

PN2192

MR MEEHAN: I think we have sent some form of note to your Honour's associate.

PN2193

JUSTICE HATCHER: Yes, just hold on a sec. All right. Well, we now have a version of the statement.

PN2194

MR MEEHAN: Thank you.

PN2195

JUSTICE HATCHER: With the clauses struck out. But, perhaps, you just quickly confirm them, I suppose.

PN2196

MR MEEHAN: Yes. I don't read paragraphs 6, 7, 8, 11 to 16, 26 to 28, 31, 32, 35, 36 to 42, 47, 49, and 50.

PN2197

JUSTICE HATCHER: All right, thank you.

*** NICOLAS SAUNDERS

XN MR MEEHAN

PN2198

MR MEEHAN: Mr Saunders, is the content of your witness statement true and correct to the best of your knowledge and belief?---It is.

PN2199

Thank you. Now, might I ask one further question. You make reference in paragraph 4 to network operations, parcel post and eCommerce services; could you just tell the Commission, at a summary level, in respect of those parts of Australia Post's operations, how do they interact with the road transport industry?---So within the Australia Post group, for both Australia Post and subsidiary, StarTrack, the parcel post and eCommerce services teams, if I have to use a laymen's description for that, which slightly undercooks it, is really the sales area. So they're the client facing team that look at the commercial arrangements for customers who wish to send items through the post, or through StarTrack's network, and they would work with those teams to set prices, understand the scope of the services being provided, design the products that are being sold. The network operations team, the operational arm of the business, that collect parcels from customers, distribute those throughout the network, and deliver them on to their final destination. They all – the network operations team also, within that scope, either engage employees directly, or have carriage of the contracting arrangements, to give effect to the actual delivery of the items.

PN2200

Now, one of the paragraphs, that has not been read in its totality, dealt with the number of delivery partners. So I will ask you to indicate to the Commission approximately how many delivery partners does Australia Post have?---So within the Australia Post side of the business, there are 2000, or thereabouts, delivery partners, which then engage – the small or medium businesses, they would engage somewhere 10 and 12,000 individuals as either employees or on a contract basis to effect the deliveries as drivers.

PN2201

Thank you. That's the evidence-in-chief.

PN2202

JUSTICE HATCHER: Do you tender that statement?

PN2203

MR MEEHAN: I tender it. Thank you, your Honour.

PN2204

JUSTICE HATCHER: Yes, all right.

**EXHIBIT #23 STATEMENT OF NICOLAS SAUNDERS DATED
13/04/2026**

PN2205

MR N WARD: There's no cross-examination, your Honour.

*** NICOLAS SAUNDERS

XN MR MEEHAN

PN2206

JUSTICE HATCHER: All right. Thank you for your evidence,
Mr Saunders. You're excused and you're free to go?---Thank you.

<THE WITNESS WITHDREW

[12.08 PM]

PN2207

JUSTICE HATCHER: All right. Does any other party wish to call any other
witnesses? No, all right. So are we in a position to proceed with submissions?

PN2208

MR BONCARDO: We are, Your Honour. I'm in your Honour's hands as to
whether that commences immediately or we take a luncheon adjournment
now. There are matters that are passing as between the parties which have the
potential to narrow things to an extent. It may be useful if those discussions can
occur over a luncheon adjournment, whether your Honour considers we should
have the usual hour or some lesser period. That would be I think productive.

PN2209

JUSTICE HATCHER: All right, unless anyone objects we'll adjourn now and
resume at about 1.15 for final submissions.

PN2210

MR BONCARDO: If the Commission pleases.

LUNCHEON ADJOURNMENT

[12.09 PM]

RESUMED

[1.20 PM]

PN2211

JUSTICE HATCHER: Yes, Mr Anderson.

PN2212

MR ANDERSON: If it please your Honour, Peter Anderson. I would like to
make a statement if I could.

PN2213

JUSTICE HATCHER: Yes.

PN2214

MR ANDERSON: I'm Peter Anderson, national secretary of the Australian Road Transport Industrial Organisation which is a federated organisation representing the road transport industry for employers.

PN2215

JUSTICE HATCHER: Yes, we know who they are.

PN2216

MR ANDERSON: Thank you. I'm not quite sure whether you'd know the extent of our membership in terms of - our membership has over \$30 million in individual turnover and over 140,000 employees within those organisations.

PN2217

JUSTICE HATCHER: Thirty million?

PN2218

MR ANDERSON: Thirty billion dollars.

PN2219

JUSTICE HATCHER: Thirty billion.

PN2220

MR ANDERSON: I'm sorry, my apologies: 140,000 employees in those organisations, 110,000 truck drivers and over 40,000 subcontractors in those organisations. We're not speaking today just on behalf of our members but also we feel that we represent an industry as a whole and what we'd like to impress upon - - -

PN2221

JUSTICE HATCHER: On what basis do you say that?

PN2222

MR ANDERSON: Well, we have a variety of different organisations or people that attune to what we're doing and listen and read our - our reports and our um - our information that we put out. It's not just restricted to our membership. Whether it be the whole industry - I don't know if it's the whole industry, your Honour, but it is broader - broader scale. The importance though of the urgency of - of this order that we're looking for is in context of the fact that the industry is a very broad church. It has over 40 different sectors that we could identify if you please but I won't right now. But they all have different - different ways to interact, whether it be on their contracts, whether it be conditions or their payment structures. And what we're worried about is the large-scale disruption (indistinct) this fuel crisis that we have and that's what we'd like to ensure that we get across to all parties that there's an ability for us to be able to fairly treat this to ensure that we don't have that disruption, that our supply chains remain strong and that our - our um businesses remain sustainable because that's the fears that we have.

PN2223

Keeping in mind that we've already established that direct costs of fuel is - is between 20 and 30 per cent of direct costs of any transport business and of that it's risen by 100 per cent, or 50 to 60 per cent in some instances and of course if you look at that as a total cost of goods sold, the value of total goods sold, keeping in mind that the supply chain represents 12 to 13 per cent of that and any, any supply chain study will come back with that sort of figure. I don't have a direct reference to it here, I'm sorry.

PN2224

But that in its true algorithmic form represents around about a 5 per cent increase in the cost of goods sold and really, that's about the net effect that we would think that the addressing this issue the way we're trying to would have right now with the price of fuel where it sits. But it is about being as urgent as we can because we're worried about the trucks stopping, we're worried that the business is becoming unsustainable. We're worried about businesses do not have the funds to be able to purchase fuel. We're worried about businesses not being able to maintain their lifestyles that they do in the industry they work in and once we lose them we will lose them out of the industry completely.

PN2225

We already suffer from a shortage of drivers now around the country and we know that going forward if we were not to address this quickly as what we are we would have a major crisis in our industry from which we wouldn't be able to recover. We're not trying to disrupt the overall contract conditions that people enjoy within their relationship with their suppliers and customers. We're not trying to disrupt that at all. What we're trying to do is be fair in trying to find a way for a fuel cost recovery mechanism that will actually ensure that we have that sustainability. It's about keeping the goods being delivered.

PN2226

We now have those emergency powers upon which we can refer to and relate to and we thank very much your Honour for taking us on as seriously as you have and we look forward to the - to the outcome that hopefully will ensure that our industry remains sustainable and that people of Australia enjoy the standard of living they currently do for a long period to come. So with that I'll say thank you very much.

PN2227

JUSTICE HATCHER: Mr Boncardo.

PN2228

MR BONCARDI: I think another representative might want to say something before me, Your Honour.

PN2229

JUSTICE HATCHER: Yes, come to the lectern, please.

PN2230

MR BROWN: Thank you, your Honour and honourable members of the Bench. My name is Mark Brown. I'm a current board member of the National Road Freight Association. I have 20 years' experience as both transport

owner/operator fleet driver and more recently have accumulated 19 years' experience as a specialised transport insurance broker. Through my own business I ensure transport operators ranging from couriers with a single van to single truck owner/operators to fleet operators with 350-plus trucks. I think you for providing the opportunity for us to speak on behalf of the National Road Freight Association, its membership and the broader community.

PN2231

Thank you also so all who have contributed to discussion around this unprecedented fuel emergency that our country is currently facing. The (indistinct) of the various industry bodies and their respective legal advisors is a clear indication of the sheer gravity of this situation in which the entire transport supply chain, through no fault of their own, is now faced with a pending catastrophic situation that is looming within eight days from today.

PN2232

Well, 21 April, the full impact of the fuel crisis will be felt in every State and Territory across Australia when fuel accounts, that most transport businesses operate within a monthly basis, will become due and payable, and, if not paid in full, their fuel credit will be stopped.

PN2233

Unfortunately, due to the sudden and unprecedent doubling of the fuel price within a matter of weeks, most operators, not having the opportunity, or the option to recover the cost of fuel from their customers, just as many businesses would, and do, this has effectively created a credit crunch that most small business operators do not have the ability to manage, pay, or absorb, the given amount of small profit margins that they operate on with 1 to 3 per cent across the broader transport community.

PN2234

Unfortunately, whilst we have been busy debating the fuel shortage, and the fuel price, we have lost sight of one very legitimate, very real, risk that will have a far greater impact, and more catastrophic impact, than the price of fuel or a shortage of fuel. If we cannot agree to implement a 14 day weekly fuel excise review immediately to keep the already financially disadvantaged transport operators afloat, we, as a nation, could very well be facing a national fuel emergency before we even run out of fuel.

PN2235

We are in a national emergency, we need to act quickly, and do what we need to do to get through this. It may mean a lot of work for me. However, it is for the good of the nation that we all work together to get this done. The NRTA believe we have no time to waste. We, as national road freighters, ask the Fair Work Commission to implement 14 day fuel excise, review in the interim until such time the volatility and the current fuel price has subsided. Thank you for your time.

PN2236

JUSTICE HATCHER: Thank you, Mr Brown. Mr Boncardo.

PN2237

MR BONCARDO: If the Commission pleases, by way of oral address, and in supplementation on the written submissions filed this morning, I propose to deal with five broad topics. Firstly, I wanted to say something briefly about the proposed amendments to clause 4 of the order. Then I want to deal with some contextual matters, being the crisis in the road transport industry that precipitated this application, and the minister's determination on Friday.

PN2238

I then want to deal with the particular characteristics of the road transport industry that, in our respectful submission, entail that this order is not only appropriate, but necessary in the circumstances; and then say something further about the significance of the astronomical increase in fuel price that has been experienced since 28 February.

PN2239

I then want to detail some matters relating to the statutory scheme, and respond to some of the submissions that have been put to date. And, finally, I want to deal with exception to the carve outs that my client proposes, and the time limitations set out in the Commission's discussion paper in respect of clause 5. Can I deal, first of all, with amendments that my client proposes to clause 4 of the Commission's proposed draft. And can I say that my client is broadly supportive of the document that was produced by the Commission on Friday. We say that it is an appropriate, and cogent, document that deals with the determination that the minister made.

PN2240

By way of clause 4.1, the Commission included the timeframe within which primary parties must adjust rates to pay secondary parties as being every fortnight, or within every fortnight. We have proposed the addition of 'or twice per calendar month'. The reason for that addition, which the Full Bench will see replicated in both 4.2 and 4.3, is that we understand, and have been instructed, that entities like Coles and Woolworths, whose position no doubt will be informed of in due course, do implement twice calendar monthly reviews.

PN2241

We think it is appropriate that there be, at least, twice calendar monthly reviews to ensure cost recovery rates are provided for fuel, and we think, by providing primary parties and secondary parties the capacity to review rates twice per calendar month, that will afford an additional level of flexibility, rather than the prescriptive requirement of twice – I withdraw that – of requiring reviews occur within each fortnight.

PN2242

JUSTICE HATCHER: Well, while we're at clause 4.1, Mr Boncardo.

PN2243

MR BONCARDO: Yes.

PN2244

JUSTICE HATCHER: And this is reflected in 4.2 and 4.3, it occurs to me, since, as I understand it, the application's not intended to have any direct or indirect retrospective effect that we should clarify that we're talking about cost recovery on and from the date any order would take effect.

PN2245

MR BONCARDO: Yes, your Honour. We accept that. And we wouldn't stand in the way of an amendment to that effect.

PN2246

JUSTICE HATCHER: Thank you.

PN2247

MR BONCARDO: So far as clause 2 is concerned, we do not take any issue with the way that it is framed. We think it is essential that, in order for the benefits of this order to flow down the supply chain, that all reasonable steps need to be taken by a primary party to ensure secondary parties who engage other participants in the supply chain adjust rates that they pay their workers, to use a loose expression, for the performance of work, we have proposed adding the words 'or other secondary parties'. That is to capture road transport businesses, and a situation where, for example, a secondary party, like your Tolls or your Woolworths, might engage a smaller operator, for example, a fleet owner, who, in our respectful submission, would be in the road transport contractual chain.

PN2248

And, in that regard, we note that a secondary party is defined in section 15RA(2)(b) to be:

PN2249

A party to a subsequent contract or arrangement in the chain', under which work is performed for that secondary party by a host of persons including road transport contractor, employee-like workers, or employees.

PN2250

In our respectful submission, a secondary party that engages a road transport business remains in the contractual chain, and can be the subject of the provision of appropriate standards.

PN2251

JUSTICE HATCHER: While we're talking about the subject of cost recovery.

PN2252

MR BONCARDO: Yes.

PN2253

JUSTICE HATCHER: There was a point made in the recently filed Wesfarmers' submission, which I don't think was touched upon in the evidence, and that is the impact of the reduction in the heavy vehicle road user charge.

PN2254

MR BONCARDO: Yes.

PN2255

JUSTICE HATCHER: That is, I presume that won't show up in any adjustment to the price of fuel, but there might be a question about whether that should, in some way, work as a cost offset in the way cost recovery works.

PN2256

MR BONCARDO: Potentially. Your Honour's quite right, we didn't deal with it in our submissions. I've just seen the Wesfarmers' submissions. That perhaps is a matter that I'll address with your Honour, and the Members of the Full Bench, in reply.

PN2257

JUSTICE HATCHER: Thank you.

PN2258

MR BONCARDO: The next amendment, which isn't apparent on the face of the document, is one which has been the subject of half-productive discussions with Mr Meehan of senior counsel's client, is that the provision in clause 4.5 should, in our respectful submission, have added to it after the words 'individual contracts', the words, 'or arrangements'.

PN2259

And if the Full Bench looks to the words 'for which any such instrument, agreement, or contract', the Full Bench would also include the words, 'or arrangement' there as well.

PN2260

JUSTICE HATCHER: So these are arrangements without contractual force?

PN2261

MR BONCARDO: These are arrangements in the sense of seeking to do two things, your Honour. Firstly, pick up situations where, for instance, there may not be a contract that is clear and apparent. It is certainly the case in the road transport industry that a lot of arrangements are engaged orally. That doesn't mean of course that they don't have contractual force. The purpose of referring to arrangements is to ensure that there is clarity, that those kind of perhaps more informal measures would be picked up. We also think it is appropriate in light of the definition of road transport contractual chain in 15RA, which captures a chain or series of contracts or arrangements.

PN2262

It also could be the case, your Honour, that the words or arrangement are necessary to pick up a circumstance where a secondary party, for example, provides an additional amount of pay for costs which may be extra-contractual and we think it's appropriate to attend to that circumstance.

PN2263

VICE PRESIDENT GIBIAN: Do you mean either or both that the arrangement whereby the driver performs work, as it were, is perhaps loose?

PN2264

MR BONCARDO: Yes.

PN2265

VICE PRESIDENT GIBIAN: And also a circumstance in which there is a clear contractual arrangement for the performance of work but there is a separate arrangement for the payment of - a payment with respect to fuel costs or which may be of less clear contractual force, as it were?

PN2266

MR BONCARDO: Yes, your Honour, and the evidence - - -

PN2267

VICE PRESIDENT GIBIAN: You mean both of those.

PN2268

MR BONCARDO: Indeed. We're seeking to pick up both of those circumstances. The evidence your Honours heard this morning from Mr Gutsche from FedEx would necessarily encompass a contractual payment insofar as they're existing contracts that he made reference to were concerned with the fleet owners and those owner/drivers who did not have a contractual right to a field surcharge. It may be - although it's potentially unlikely - that those extra payments for fuel would be captured by the concept of an arrangement in a more loose sense than being purely contractual.

PN2269

VICE PRESIDENT GIBIAN: Yes, I think - was it Mr (indistinct) said they have monthly contractual right but they were increasing the frequency?

PN2270

MR BONCARDO: Yes.

PN2271

JUSTICE HATCHER: Pursuant to a presumably extra-contractual arrangement.

PN2272

MR BONCARDO: And that's also what we're seeking to pick up by way of that further amendment, your Honour.

PN2273

JUSTICE HATCHER: It says in the second reference: 'Such instrument, agreement or contract'. I think the surgery might have to be more significant.

PN2274

MR BONCARDO: Yes, it may.

PN2275

JUSTICE HATCHER: To capture an arrangement which is made separately from the existing contract.

PN2276

MR BONCARDO: Yes. And I'll return in due course to the proposed exceptions and clause 5 and the temporal limitations that are proposed in the discussion

paper. I wanted to say something briefly about the context in which this application is brought because that context answers a number of the complaints which are made most recently by Wesfarmers that there hasn't been genuine engagement or that the parties here at the bar table who have been here since last Wednesday haven't had a fair and appropriate opportunity to be heard. The Minister's determination on Friday makes clear what is in our respectful submission unarguable, that there is a fuel supply chain disruption which is causing and has caused serious, significant nationally encompassing adverse effects on the road transport industry.

PN2277

That frames, in our respectful submission, both the context for this application and the context for the Commission's decision-making process in relation to it. This is an application that needs to be and has appropriately in our respectful submission been progressed quickly and with alacrity because of the nature of the crisis that is affecting the road transport industry. And the Full Bench heard from a number of - this in including witnesses called by the NRFA - about the dire circumstances of a number of road transport businesses and road transport contractors. We have recorded some of that evidence in our written submissions but by way of example, the Commission will recall Mr Arcidiaco's evidence which we have extracted at paragraphs 57 and 59 of the written submissions, that he has been forced to park up his truck and he has been doing that as a matter of necessity because he cannot recover his costs for a number of weeks.

PN2278

And his evidence, which really in our respectful submission captures the nub of the problem that this application seeks to deal with, is that no one can go to work where they've got to pay to be there. They're supposed to go to work to earn a living, not to pay for the pleasure of working. Mr Arcidiaco's evidence together with a number of the witnesses called and a whole raft of the material filed by the NRFA makes clear that road transport businesses and contractors are in a precarious position. That is why in our respectful submission it is plain as day that the Minister has reached the state of satisfaction that she has and that this application, now being an emergency application, has progressed with due dispatch.

PN2279

The parties who are here have had ample opportunity to put on evidence and to cross-examine witnesses. Mr Ward has been able to avail himself of that opportunity. If any other parties wish to do so they had the opportunity to do that today. If they needed to do that today and tomorrow they could have asked. They have elected not to take an opportunity that was well available to them. They have elected - with the exception of Mr Ward and Mr Follett - not to cross-examine any of the witnesses called by my client in circumstances where that evidence was served on them on Wednesday and they heard oral evidence from those witnesses on Wednesday as well.

PN2280

The complaints about procedure in my submission are arid. They are complaints entirely bereft of substance and they are complaints that the Commission should give short shrift to. As the presiding member said in your Honour's reasons for

decision in relation to the progress of this matter, the requirements of procedural fairness as flexible. They depend on the nature of the proceedings and the urgency with which the proceedings need to be determined. The requirements of procedural fairness have been well and truly attended to in this hearing and any complaints by those who follow me in respect of a denial of the opportunity to be heard in the proceedings should be rejected out of hand.

PN2281

Most significantly, the minister's determination does frame the Commission's task because it makes very clear that the Commission in framing an appropriate order if it's convinced to do that, is required amongst other things to ensure - and this is the effect we say of 536PQA - that any terms in that order relate to - that is in our respectful submission have a sufficient connection with - the event or circumstance or series of events or circumstances to which the order relates. In our respectful submission the provisions of the order as amended are plainly connected to the circumstance which satisfied the Minister that it was appropriate that this matter progress as an emergency application. They are directed to timely payment reviews and cost recovery and fall squarely within, in our respectful submission, section 536PQA(3)(c) and subsection (2)(c) and (2)(e). In our respectful submission, the terms of the order are ones which are permissible under 536PQA and they are ones which are appropriate in light of the emergency identified by the Minister. Your Honours, I've collected the evidence in the submissions in relation to the characteristics of the road transport industry that we say are material to the Commission's determination of the application from paragraphs 31 to 42.

PN2282

In precis and in reliance in particular on Dr Rawling's evidence, Professor Peetz's evidence and Dr Hassall's evidence, this is an industry which has, the Minister recognised when he introduced the closing the loopholes bill and as Minister Rishworth recognised when she introduced the Fairer Fuel bill is characterised by hierarchical contractual chains, where it is clear that the party or parties with the power to determine the price for the transport task sit at the apex of the contractual chains.

PN2283

That is the, in our respectful submission, relatively unchallenged evidence of Dr Rawling and Professor Peetz, and that evidence makes abundantly clear that the further the contractual chain one goes, the less the bargaining power is of the party performing work. And that is particularly the case with small operators, for example, smaller fleet owners or owner/drivers, who are persons who will have to attend on a regular basis to payments for their operating costs and their capital costs and their maintenance costs.

PN2284

Those workers have little, if any, capacity to set prices, and they are, as the evidence made abundantly clear, price takers rather than price makers. And Professor Peetz explained very clearly, in our respectful submission - we've quoted this in paragraph 37 of the written submissions - that the industry is highly competitive, that is, there is significant competition between owner/drivers, and those higher up the food chain are able to increase and put pressure on those

further down the contractual chain, to underbid and accept prices for the performance of work that do not achieve cost recovery.

PN2285

As Dr Hassall put it, clients that have the freight to be transported can often play hardball. That entails the consequences that we heard evidence about, that is, that this is an industry affected by very low profit rates. Dr Rawling's evidence and Professor Peetz's evidence was that there are very low margins in the industry. Small operators in particular have very low profits, and the profit ratio in transport was 2.6 percent in the period 2012 to 2023. And there's a correction that needs to be made to paragraph 39 of our submissions. We've referred to the period 2012 to 2013; that should be 2012 to 2023.

PN2286

It is also an industry that is characterised by a high rate of insolvencies, which have increased dramatically post-COVID. It is now the case, in 2024 to 2025, there were 440 insolvencies in the industry. That is, in our respectful submission, a reflection of the road transport industry being one that is not being undertaken in a sustainable and a viable way, and it is a circumstance that, in our respectful submission, points to the need, in these dire times, for an order of the kind that we seek here, to address the escalating cost of fuel.

PN2287

JUSTICE HATCHER: Mr Boncardo, what implications does that analysis of contractual chains have in respect of major transport companies that contract to primary parties, that is, what is it that would require an order to cover those sort of major entities? (Indistinct) in mind my brief perusal of the submissions made, the proposal I think that's made by Mr Follett's clients in that respect, that there should be some sort of carveout for large transport businesses.

PN2288

MR BONCARDI: In our respectful submission, there shouldn't be a carveout for such large transport businesses. It is essential that those transport businesses are remunerated for the costs that they incur, and that their owner/drivers and fleet owners or small transport operators that they engage incur, to ensure that the price of fuel is paid to and by every participant in the supply chain, in the absence of the Tolls and Linfoxes of this world not receiving, from those that engage them, a rate that compensates them for their fuel costs, bearing in mind that they will themselves engage drivers directly, and that those employee drivers are themselves in a contractual chain.

PN2289

That is the effect of section 15RA(1)(a). It is, in our submission, essential that those businesses, notwithstanding that they are large and substantial entities in their own right, themselves achieve cost recovery in respect of the price of fuel. And your Honour heard evidence this morning, from some of the witnesses called by Mr Ward, who perhaps may not be operating businesses as large as Toll and Linfox, but are operating substantial businesses, businesses worth billions of dollars, that they are having difficulty obtaining cost recovery from fuel from their clients up the contractual chain.

PN2290

JUSTICE HATCHER: Yes, but so what? As you say, it's essential for these large corporations to recover. I mean, I'm sure it's desirable from their perspective, but I anticipate the submission will be made that, for example, major clients will say, 'Well, why shouldn't businesses of that share some of the pain and swallow some of the cost'?

PN2291

MR BONCARDO: Because that will have implications, in our respectful submission, down the supply chain. It will put pressure on Linfox or Toll, or Mr Ward's clients who were called this morning, to not pass on – notwithstanding the Commission's order, because of the commercial pressures that afflict this industry, not pass on rates of pay to those further down the chain that attend to cost recovery from fuel.

PN2292

And in the circumstance here, we are not seeking anything radical. There are submissions made which, in our respectful submission, are hyperbolic, about this being a shocking affront to freedom of contract and an interference with the contractual relationships up and down the supply chain. This is a targeted, direct and specific requirement imposed upon primary parties like your Woolworths and Coles of this world to make sure that they pay those who they engage to perform a transport task a cost recovery rate for fuel.

PN2293

And in the absence of them paying that rate, that will increase pressure on them to – and those in the chain below them to not pay cost recovery rates to those who fall towards the base of the chain. The purpose of this legislation, in our respectful submission, and the amendments that have been made are to ensure that it is not just those at the base of the chain who are obtaining the benefit of a contractual chain order. It is to ensure that the entire chain is maintained in a sustainable and a viable way.

PN2294

That is, in our respectful submission, core to the road transport objective, which makes reference to the imperative for an appropriate safety and minimum standards for regulated workers and employees in the industry, that has regard to standards that ensure that the industry itself – this is section 40D(1)(a) – is safe, sustainable and viable. That would encompass, in our respectful submission, placing obligations on the Coles and Woolworths of this world to pay rates to those they engage that attend to cost recovery.

PN2295

In our submission, the provisions of Part 3B-2 are directed and geared to imposing obligations on secondary parties to regulate the entirety of the road transport contractual chain, for the benefit of each of the participants in that chain. So far as fuel generally is concerned, the evidence was, in our respectful submission, clear, that fuel is the cost component that is the most variable, that road transport businesses and contractors face. It varies, of course, by way of vehicle size, but it is one of those cost components that, because of its fluctuating nature, is apt to impact the viability and sustainability of a business.

PN2296

The amounts by which fuel has increased from 28 February, when the war with Iran commenced, are notorious. We've recorded the most recent AIP prices, as of last Sunday, at paragraph 47. I understand that the next tranche of figures will be out today in respect of retail and wholesale diesel, and retail and wholesale petrol.

PN2297

The evidence of Dr Hassall was that prices had increased in the vicinity in respect of diesel at about 88 per cent, and the evidence of some of the workers called, your Honours will remember, was that they had never, in their time in the industry, witnessed price increases of such a magnitude. Mr Arcidiaco, by way of example, has been in the industry for 40 years, and this is the largest cost increase of fuel, or any other component, that he has come across.

PN2298

The impact of those increased costs has been that, in the case of industry participants, who have not been able to recover costs, they have had to absorb those costs. That has led to, as Mr Arcidiaco explained, him having to park up his truck. And as Dr Rawling explained that in the event that costs have to be absorbed, the road transport businesses and contractors, who would benefit from this order, will be faced with an invidious choice. They either park up their vehicles, and don't do work because that work is not remunerative for them, or they skimp on costs like vehicle maintenance, to continue operating, or they are incentivised to, as Mr Rasmussen explained, work faster and harder, and potentially take risks they otherwise wouldn't take.

PN2299

The evidence, in relation to the significance of the changes in fuel prices, is summarised in our written submission from paragraphs 52 through to paragraph 97. Some of that evidence, your Honours will see, includes the evidence of the witnesses called by ARTIO, and your Honours will recall that that evidence was broadly to the effect that those smaller transport businesses had, in large part, entered into arrangements with their owner/drivers to compensate them for increasing their costs on a weekly or a fortnightly basis, and that they had, with varying levels of success, managed to have their clients increase the amount, that was paid by those clients, for fuel. The evidence was, in our respectful submission, significant insofar as it underscored, in our respectful submission, a need for primary parties, up the contractual chain, to be required to remunerate the secondary parties they engage for amounts that achieve cost recovery.

PN2300

Your Honours heard this morning, additional to that evidence, the evidence from Mr Ward's witnesses that it is essential, to the businesses that they conduct, that those businesses themselves receive cost recovery from fuel. The evidence of Mr Pantou, who was one of the witnesses who was not cross-examined, who stated and was tendered as exhibit 21, was that his business, which is Metropolitan Express, a business based in Victoria, that transports building products, and the like, manufactured by its clients to construction sites, had lost customers who refused to pay a cost recovery fuel level; that's paragraphs 10 to 12 of his statement.

PN2301

Some of the customers of that business did have rise and fall formally in their contracts; others did not. The upshot for Mr Pantou's business is, with the customers who refused to pay and pass on increased fuel costs, that he lost those customers presumably to businesses who were not paying fuel cost recovery rates, and he says this:

PN2302

That was bad for our business, and for the job security of our employees, and subcontractor owner/drivers.

PN2303

That is a good example, in our respectful submission, of the need for clause 4.1 of the proposed order. Because it is not just the Woolworths and the Coles of this world that will be subjected to that order, it is the manufacturers who engage relatively smallish businesses, like Mr Pantou, and those businesses need as much as, if not more than, the larger transport companies' cost recovery for fuel.

PN2304

Your Honours also heard evidence from Dr Hassall about the relative incidents of what he described as 'escalation clauses' as between small fleet operators and owner/drivers, and their principals. And his evidence, which we've cited at paragraph 94, was that the majority of smaller fleet operators and owner/drivers do not have such clauses in their agreements. That is, they are the mercy of those that engage them, to use one of Dr Hassall's various evocative terms, in terms of seeking to achieve cost recovery.

PN2305

Dr Hassall also confirmed that the evidence of the witnesses from ARTIO, who Mr Ward asked him about, which indicated that the relatively small companies had been able to negotiate cost recovery-type formally with those that engage them, was a typical. They were – and we've cited this at paragraph 93 – in the minority. And he opined that those persons may well have been members of Mr Anderson's organisation, and have received advice from that organisation.

PN2306

The evidence, in our respectful submission, establishes the propositions that timely and effect cost recovery mechanisms are essential for parties, up and down the contractual chain, (indistinct) the current crisis. And that the viability and sustainability of the businesses operated by each of those persons is dependent, in large part, on cost recovery measures being appropriately provided.

PN2307

In our respectful submission, your Honours would conclude that the draft amended order, which we have proposed, is an appropriate one to address the particular circumstances afflicting the industry. And, in our submission, it is facilitative of, and does promote, the road transport objective. Your Honour, the president, asked me whether the objective applies at the state of the proceedings, rather than perhaps after a draft order, or a notice, has been issued. In our respectful submission, the better construction is that it does given that the Commission is performing a function under part 3B-2.

PN2308

In our respectful submission, when one looks at section 40D, it establishes, in the first instance, an overarching consideration that there is a need, that is, in our submission, an imperative, for an appropriate safety net of minimum standards. That is something which, in our submission, the legislature has erected as a touchstone or a baseline what the Commission should be seeking to achieve in exercising its functions and powers under part 3B-2, and that is an appropriate safety net of minimum standards for regulated road transport workers and employees in the industry, having regard to the format as set out there.

PN2309

Can I start with the fourth one, and then perhaps we'll work backwards. That fourth one is, 'The need for minimum standards in road transport contractual chains'. The legislature itself, by that consideration, is, in our submission, making clear that, as a general proposition, given the circumstances of the asymmetry of power between those at the top of the chain and those at the bottom, which the Commission has copious evidence about, that there is an imperative for minimum baseline standards that flow through the contractual chain. That is, in our submission, what this proposed order achieves, and what it is directed to doing.

PN2310

Moving up to (c), (c) deals with:

PN2311

The need to avoid adverse impacts on sustainability, performance and competitiveness of supply chains in the national economy.

PN2312

The evidence, in our submission, establishes that this order will facilitate the sustainability of the businesses and the contractors that work in these supply chains. It will not have an adverse impact on the sustainability of their businesses, nor is there evidence, in our respectful submission, that competition will be undermined or that the performance of working these supply chains will be adversely affected. In our respectful submission if that contention is advanced by those who oppose the order, it is in our submission not borne out by the evidence and the evidence was in that respect to the contrary: that is that an order of this nature would in fact allow small transport operators and owner/drivers to continue operating during this crisis.

PN2313

So far as (b) is concerned, that refers to the need to avoid unreasonable adverse impacts on the three criteria that are set out. The need there referred to is not the need to avoid any adverse impact. It is the need to avoid an impact that can be characterised as unreasonable and in our respectful submission - and there is a degree of overlap between a number of these factors, particularly (b) and (c) - none of the three criteria will be unreasonably adversely impacted by the order as proposed by my client. In our respectful submission the order will to the contrary enhance business viability, innovation and productivity by creating a level playing field insofar as fuel costs are concerned.

PN2314

Your Honour has heard evidence this morning from Mr Gutsche about the importance of a level playing field in relation to fuel so that FedEx doesn't have its rates of pay, its cost-recovering rates of pay to its drivers, undermined by a competitor that comes along and wants to skimp on costs - I mean skimp on fuel costs in particular. The administrative and client's costs associated with this order, they will no doubt exist but there is no evidence before the Commission of any substance that those costs will be unreasonable and that they will unreasonably impact compliance costs for road transport industry participants.

PN2315

There was some evidence this morning from the first witness called by Mr Ward who worked for Holcim that Holcim were engaging in monthly rate reviews. Anything more than that he thought might be somewhat difficult for Holcim. That evidence is difficult to fathom in circumstances where Holcim is a billion-dollar business with a whole host of employees and owner/drivers but it doesn't much matter because in Holcim's case, Holcim will be captured by clause 4.5. Its monthly reviews which on the evidence before the Commission are pursuant to a rise and fall mechanism and take into account the increased costs of fuel and provide for cost recovery will fall within clause 4.5 and that in our submission puts to bed any assertions about compliance costs. The real benefit of clause 4.5 as it's being framed respectfully by the Commission is that it allows parties to reach agreements contractually or by an extra-contractual arrangement that ensure cost recovery for increased fuel which may be weekly costs adjustments. They might be fortnightly, they might be monthly but so long as they are directed to ensuring increased fuel costs are passed on to road transport contractors, road transport businesses and higher up the train secondary parties that will discharge the obligations under 4.1 and 4.3.

PN2316

So the complaints - and they're just bald complaints, in our respectful submission; there's no evidence of any substance that would bear out those complaints about this order having unreasonable adverse impacts on administrative and compliance costs - need to be viewed through the prism of clause 4.5. Section 40D(a) - - -

PN2317

VICE PRESIDENT GIBIAN: Just with (b) and (c) - - -

PN2318

MR BONCARDO: Yes.

PN2319

VICE PRESIDENT GIBIAN: - - - the adverse impacts that are referred to in those are the potential adverse impacts of the exercise of the powers under the Act.

PN2320

MR BONCARDO: Yes, your Honour, I accept that: (a) as I think I mentioned some time back is directed to the industry more generally. It is directed to the imperative for standards that ensure that the industry itself is safe, sustainable and viable and by sustainable and viable here we have an order that is directed to costs for fuel being passed throughout the supply chain that ensure recovery by

everyone in the contractual chain of their fuel costs. So far as safety is concerned, it is trite but it's true that here is a nexus between safety and the economic circumstances of those towards the bottom of the supply chain.

PN2321

We have included evidence - we've included references to evidence about that in the written submissions. Your Honours will see this in particular at paragraph 41 where we site Dr Rawling's evidence, Professor Peetz's evidence and indeed Mr Rasmussen's evidence that there is a well-recognised - been recognised for over two decades in our respectful submission - the link between low pay and safety given that drivers who are lowly paid have an incentive to drive faster and take risks and particularly where they're remunerated on a piece work basis and this highly competitive industry does lend itself unfortunately to unsafe work practices being incentivised. An order that provides for costs recovery in the circumstances of the crisis affecting the industry is one which in our submission is directed to achievement of the need for a standard that ensures the industry is safe as well as sustainable and viable. Those concepts are in our respectful submission inextricably linked.

PN2322

Your Honours were alerted by Mr Follett, correctly, with respect, to the minimum standards objective which as I think I acknowledged also constitutes by virtue of section 536NN a relevant consideration when your Honours come to - or a relevant objective - perform a function or exercised power under part 3B-2. We've addressed that in the written submissions. Your Honours will see our submissions in respect to that at paragraphs 108 through to 109. Again the concepts set out in the minimum standards objective do overlap with those in the road transport objectives to some extent.

PN2323

Can I give your Honours a couple of references to 536JX which are germane to the present application? If your Honours go to the objective itself, your Honours will see that in a manner (indistinct) under section 40D the Commission is required to take into account the need for an appropriate safety net of minimum standards for regulated workers, a somewhat different objective given that it is referring to regulated workers rather than those in their contractual chain and then there are a series of what we say are considerations which are mandatory in nature, that the Commission must take into account.

PN2324

Some are matters of form. Others are of substance. In A(i) the standards being clear and simple goes in our respectful submission to the drafting of the terms of the proposed order here. In our respectful submission this order has the benefit of both simplicity and lucidity. Fairness and relevance is a substantive obligation. The orders here in our respectful submission by ensuring each party in the chain is responsible for fuel costs recovery are plainly fair and they're plainly relevant to the circumstances the application responds to.

PN2325

Perspectives of regulated workers: your Honours have heard from a number of workers who have given evidence about the difficulties they have in running their businesses given the increase in fuel costs.

PN2326

(iv), (v) and (vii) are, in my respectful submission, of no moment for the purposes of these proceedings. This order has no potential to change the terms of engagement or the nature of the engagement of any of the workers who it seeks to benefit.

PN2327

(vi), in our respectful submission, is attended to by reason of the fact that it is uncontroversial that the fuel crises has impacted the industry as a whole. That is implicit from the Minister's determination.

PN2328

(viii) and (ix), in our respectful submission, are of little moment for the purposes of the present proceedings. (b) is important. It overlaps with section 40D(d) to some extent.

PN2329

JUSTICE HATCHER: Is (b) relevant in the sense that if we make some form of order is that one that deals with minimum rates of pay?

PN2330

MR BONCARDO: No, it doesn't deal with minimum - I will take that a step back. It deals with a minimum rate in relation to fuel. So to that extent it could be said to deal with the minimum rate of pay. But it doesn't deal with a minimum rate of pay in a broad sense. It doesn't prescribe a threshold below which someone cannot be paid. What the order does, as your Honour knows, is require that whatever rates are paid to secondary parties or those down the chain, ensure that increased costs of fuel are attended to.

PN2331

JUSTICE HATCHER: So is (b) a relevant consideration here or not?

PN2332

MR BONCARDO: In our respectful submission it is relevant insofar as if your Honour looks to (i), the taking into account of costs necessarily incurred directly arising from the performance of a services contract would be relevant, but the prescription for minimum rate of pay is, we say, of little relevance for the purposes of the present proceedings.

PN2333

(c) which deals with unreasonable adverse impacts I have addressed in the context of section 40D(b) and (c). In our respectful submission the minimum standards' objective is facilitated and assisted by the proposed order that is sought.

PN2334

Section 536PF has been the subject of some significant attention in the Wesfarmers' submissions and in the AiG submissions. We have dealt with that at

paragraph 108 through to 109. I withdraw that. I do apologise, your Honours. We have dealt with that from paragraph 117 through to 129.

PN2335

Can I deal with (2)(a) first of all. That is framed as prescribing in a Commission from making a CCO unless there's been genuine engagement with the parties to be covered. We emphasise that the requirement to provide genuine engagement is one that is directed to parties that may be covered by the order. That is primary parties, secondary parties, road transport businesses, road transport contractors and employee-like workers.

PN2336

In our submission the concept of genuine engagement requires genuine engagement in a substantive sense. It can be attended to and addressed by a number of factors, including participation in this hearing, including the conciliation conferences that occurred under the auspices of Vice President Gibian in relation to this fuel crisis preceding the making of this application.

PN2337

It can also be addressed by the engagement that is required to occur in the event that the Commission is convinced to prepare and publish a notice of intent in a draft order. Finally, it can be attended by whatever the RTAG process might involve. That RTAG process may involve consultation with parties affected by the orders, it may not. If it does that can also address the requirement for genuine engagement. But in our respectful submission what genuine engagement will entail will be circumstance specific.

PN2338

Genuine engagement for an emergency application which addresses a crisis of the kind that we're dealing with here will necessarily be different to genuine engagement in relation to a matter that doesn't have any particular urgency to it and may have been on foot for a year or 18 months.

PN2339

JUSTICE HATCHER: Subsection (2) suggests by reference to (a), (b) and (c) the genuine engagement is something distinct from the RTAG process and the consultation process, doesn't it?

PN2340

MR BONCARDO: It does, but it does not - so if I can answer your Honour this way. Those matters in our submission would bear upon whether there has been genuine engagement. We would say the genuine engagement clearly is not limited to and can't be limited to those processes, but the fact of those processes is logically relevant to whether genuine engagement has occurred.

PN2341

VICE PRESIDENT GIBIAN: That is whether it would be context specific as to what is required, if anything, to engage in genuine engagement, in addition to the submission process or the RTAG consultation.

PN2342

MR BONCARDO: Indeed. In a particular case a full blown hearing such as the one we have had here could suffice.

PN2343

VICE PRESIDENT GIBIAN: Entirely sufficient without more to be genuine engagement.

PN2344

MR BONCARDO: Yes, and in our respectful submission in the context of this particular matter this hearing itself is ample genuine engagement. But of course there are a number of steps in the event that the Commission is minded to issue a notice to occur prior to any order being made and coming into effect, which would, in our submission, rationally bear upon whether genuine engagement has occurred.

PN2345

(b) is obviously a matter of significance, and the RTAG does need to be consulted. That is a precondition to the making of the order sought. The consultation process also must be followed as your Honours are well aware. Your Honours also under (d) need to take into account as a relevant mandatory consideration the commercial realities of the industry, including particular commercial practices relating to part load, mixed load, no load, multi leg and return trips. In our respectful submission your Honours are required to and should take that into account, but that is of little if any salience to the present matter.

PN2346

No party has adduced evidence in relation to the impact, if any, of the proposed order on the matters there spelt out, and the commercial realities of the industry are those exposed in the expert evidence that my client has filed. That is that those at the top of the contractual chain are able to and do exert principal power in determining the rates of pay for those towards the bottom of the chain.

PN2347

(e) is prescriptive in the sense that the Commission must be satisfied that making the order will not unduly affect viability and competitiveness of businesses, owner/drivers or similar persons. If it is not so satisfied the order cannot be made. Here, in our respectful submission, (1) there can be no suggestion of undue affectation of the viability and competitiveness of businesses, owner/drivers or similar persons. To the contrary the order sought as proposed now by my client would enhance viability and competitiveness, particularly for smaller road transport businesses, owner/drivers and persons akin to owner/drivers.

PN2348

Your Honours are also required under (f) to take into account extant minimum standards orders or applications. Your Honours are well aware of the applications which are on foot at the moment. We have summarised when in our submissions at paragraph 126, and I will come back to the significance of those factors when addressing the carve out. The upshot, in our submission, of those matters is that those matters, whilst there is a hearing scheduled for 10 May in relation to on-demand delivery work, are unlikely to, and will not, with the exception of the on-

demand delivery hearing resulting in minimum standards for the vast majority of the road transport industry, at least any time soon.

PN2349

And finally, your Honours must take reasonable steps – this is, in our submission, a matter of form rather than substance – to ensure the coverage of the chain order is clear. In our submission, the coverage, as expressed by the draft discussion order, is an improvement from that which have been drafted previously, and makes it pellucidly clear as to who is covered. Your Honours, can I turn then to the proposals as to the carveouts to the proposed order.

PN2350

Firstly, in relation to cash-in-transit, it is proposed by my client that a definition of cash-in-transit be included in clause 2 and in clause 3.3; the order be expressed – and your Honours will see that in (c) – to not cover cash-in-transit work. The reasons for that exception are described in our written submissions, at paragraphs 22 through to 25, that is, there's an extant minimum standards order application on foot. There has been positive progress in that application, under the auspices of the Commission, towards an independent pricing model for work in that particular chain.

PN2351

That matter is presently before the RTAG. There are ongoing discussions, and so far as my client is aware, Linfox Armaguard, which is the primary, to a significant extent, secondary party in that industry supports cash-in-transit being excised from the order. But those are the reasons which we commend to the Commission for excepting cash-in-transit from the ambit of the order. So far as on-demand delivery work is concerned, we've set out our submissions, your Honours, in relation to that at paragraphs 11 through to paragraph 17.

PN2352

Can I make two points. Firstly, we do not accept for a moment that the employee-like workers – we say they are road transport employee-like workers who are engaged by Uber – could not be the subject of a road transport contractual chain. We don't understand that submission, with respect, and we've seen – I've seen come through a written submission addressing it, which I'll have a look at and deal with in reply, but the premise of that submission is, in our respectful submission, unavailable when one looks at the analysis in *Gupta v Portier Pacific*, the upshot of which was that it is Uber, not a customer of Uber, such as a rider, in the case of rideshare, or an eater, in the case of on-demand Uber work, that engages the relevant driver.

PN2353

And that appears to be the premise of Uber's so-called jurisdictional objection, that is, Uber isn't in the road transport industry; Uber is just a payment collection agency that allows drivers to meet with, online, persons who, as the Full Bench expose in *Gupta v Portier Pacific*, they don't otherwise and wouldn't otherwise have any knowledge of. In our submission, it's not, in truth, a jurisdictional objection. If Uber is right, and they're not in the road transport industry, then, however the order is expressed, as wouldn't apply to them.

PN2354

But in our submission, it is clear that Uber is in the road transport industry; they can be part of a road transport contractual chain, and they are, in relation to the rideshare and on-demand delivery drivers that they engage. It is, however, because of the peculiar circumstances which we have set out at paragraphs 13 through to 16, appropriate for the Commission to excise the on-demand delivery work sector from this order, and Uber and DoorDash are to be commended from taking action to address rising fuel costs.

PN2355

Your Honours will see attachment B to the order – to the submissions, I should say – that the Uber entity, operating in on-demand delivery – Portier Pacific – has implemented fuel cost recovery mechanisms from 7 April. DoorDash implemented those increased rates to attend to increased fuel costs a number of weeks before that. More importantly, perhaps, or as importantly, your Honours know that Uber and DoorDash – the primary players in that sector – have agreed to an MSO, and that - - -

PN2356

JUSTICE HATCHER: But why is there a need to exempt them, having regard to the proposed clause 4.5 in the discussion document?

PN2357

MR BONCARDO: Your Honour may direct that question perhaps more pointedly to Uber, but in our submission, it makes clear – the exception makes clear that the orders and the obligations set out don't apply to Uber and other on-demand delivery work. Your Honour is - - -

PN2358

JUSTICE HATCHER: I mean, particularly with on-demand delivery work, the submission assumes that Uber and DoorDash represent the totality of that.

PN2359

MR BONCARDO: Well, they represent the vast majority, as we understand it, but I take your Honour's point. And I'm reminded, that's as per the definition.

PN2360

JUSTICE HATCHER: As per what?

PN2361

MR BONCARDO: As per the definition of, 'on-demand delivery work', that they represent the vast bulk of those workers. So far as rideshare is concerned, effective from Wednesday this week – your Honours see this at paragraph 18 and attachment D to these submissions – there will be a 5-cent-per-kilometre payment to Uber's road transport employee-like workers. Didi did implement such a surcharge, effective on 18 March. Your Honours will also see, at paragraph 18, that Uber has committed to engaging in intense discussions with my client to expedite the current rideshare minimum standards order that is on foot. For those reasons, our submission is that it is appropriate that rideshare also be carved out.

PN2362

Your Honours, I am also reminded, the representative of Uber – I don't think there will be any difficulties with this, but the representative of Uber Eats – that is, I think, the Portier Pacific entity – has left and is coming back, and will address your Honours I think at about 3.30. I think he may be appearing online. If your Honours would pardon me.

PN2363

Your Honours, we otherwise rely on the written submissions, and – I apologise, your Honour. And Your Honour the presiding member raised the road user charge me. If we could have until 10 o'clock tomorrow morning to file a short submission on that, because it's not a matter that we've turned our minds to – perhaps we should have – we'd be grateful for that. Otherwise, I can address it in reply.

PN2364

JUSTICE HATCHER: Well, perhaps we'll try and reply, and then we'll see who we go.

PN2365

MR BONCARDO: If Your Honour pleases.

PN2366

JUSTICE HATCHER: All right. Ms Bhatt.

PN2367

MS BHATT: Thank you, your Honour and Vice Presidents. The submissions we advance today are supported and adopted by the National Road Transport Association, NatRoad; Road Freight New South Wales; the South Australian Road Transport Association; as well as Master Builders Australia. We've filed two written submissions in this matter to date, on 7 and then 9 April. The latter related specifically to the evidence filed by the TWU.

PN2368

We continue to rely on those written submissions (indistinct) today intended to supplement them. I propose to deal with the following matters: (1) the process that has been adopted to date in relation to this matter; (2) the requirement for genuine engagement, in section 536PF(2)(a). I'll then deal with the draft clause that was contained in the discussion document provided by the Commission on Friday, and that will be the primary focus of the submissions we make today.

PN2369

I'll then deal very briefly with the potential impact of the proposed order, and then the relevant statutory considerations. It bears knowing from the outset that the proposed order, both that which has been advanced by the applicant and the draft contained in the discussion document, are of exceptionally broad application. They will cover all work in the road transport industry and they would cover supply chain participants in a raft of other sectors including - to name just a few - manufacturing, food manufacturing, construction, mining, agriculture, retail, fast food, wholesale; of course a large number of subsectors therein.

PN2370

In turn, our organisation and those others that we speak for have a significant and wide-ranging interest in this matter but those that we represent include road transport businesses but also businesses in a number of the other sectors and all of the other sectors that I've named. If I can deal first with - as I indicated - the process that has been adopted in relation to this matter so far: the conflict in the Middle East undoubtedly has given rise to substantial increases in fuel and various challenges associated with the supply of fuel and that has given rise to significant challenges for road transport businesses and those in many other sectors too.

PN2371

And we refer there in particular to the submissions we've advanced at section B of the first written submission we filed last week. We recognise that the application has been brought in an effort to propose measures to support regulated work (indistinct) and road transport businesses. We acknowledge the Commission's desire to facilitate these (indistinct) in a timely manner. These objectives though must be balanced with the need to ensure that the Commission's processes are fair. We make this submission with respect but to date, that has not been so. The matter has been dealt with with great haste.

PN2372

JUSTICE HATCHER: That's because it's an urgent application given the urgent circumstances, Ms (indistinct).

PN2373

MR BHATT: Yes.

PN2374

JUSTICE HATCHER: As the Commission often does in a variety of contexts.

PN2375

MR BHATT: Of course.

PN2376

JUSTICE HATCHER: And in those circumstances the times for doing things are necessarily abridged and sometimes applications of those nature are made by employers and sometimes they've made by unions.

PN2377

MR BHATT: Yes, and again we acknowledge that the amendments that were made to the Act by the Fairer Fuel amending legislation were designed specifically to enable the Commission to deal with an application of this very nature swiftly and certainly in shorter timeframes than what were otherwise contemplated by the Act. What that legislation did not do is remove the obligation for the Commission's processes to be conducted in a manner that is fair. As we ventilated on the first occasion that we appeared before you we had a number of concerns about the limited time that was available to us between the application being filed and the first occasion on which we appeared.

PN2378

It would be generous to say that we have read all of the material filed by the TWU which exceeded some 2000 pages on the second occasion that we appeared before

you on 10 April. The expert evidence was detailed and dense. It included a number of references and annexures. It was clearly certainly not practicable in the time allowed to for example engage an expert witness of our own to deal with the material that was advanced. Now, the union asserted on - I think it was the 8th, the first time we appeared before you, that it had managed to file a substantial amount of material in a short timeframe.

PN2379

With respect, that submission needs to be seen in its context. Much of the material that was filed was prepared much earlier and for separate proceedings. The most obvious example of that is the report of Professor Peetz. It cites different matter numbers. It was prepared some time ago. At least two of the lay witness statements that have been filed contain substantial content that is also included in witness statements that were filed in February and March in respect of other applications that have been made by the TWU. Now, we're - -
-

PN2380

JUSTICE HATCHER: What steps has the entities you represent taken to endeavour whether it can call expert evidence?

PN2381

MS BHATT: Well - - -

PN2382

JUSTICE HATCHER: I mean, you've said it's not possible. I'd put that to the test. What have you done in that respect?

PN2383

MS BHATT: Your Honour, it has not been practicable to take steps to engage an expert because in the one business day that was available to us, that being 9 April, we barely had enough time to read and digest and consider the matter, let alone identify an appropriate expert witness and engage them and prepare them to appear in the proceedings on either the Friday that just passed or today.

PN2384

JUSTICE HATCHER: So the answer is - to my question - no steps?

PN2385

MR BHATT: It was not practicable to take any steps.

PN2386

JUSTICE HATCHER: All right.

PN2387

MS BHATT: Now, ultimately in terms of what falls from this, it is in our submission as a consequence at least in large part of the timeline within which these proceedings have been conducted that there is no evidence before the Commission about how the proposed order would operate in a number of sectors that would be affected about the nature of road transport contractual chains that

exist in those sectors. There is limited evidence before you about the practical or feasible for employers to in fact comply with the order.

PN2388

Now, predictably in a written submission that's been filed by the TWU earlier today there are a number of assertions that have been made where they have pointed to the absence of evidence about matters such as the impact on business, the impact on costs, regulatory burden and the like and gone on to submit that in the absence of evidence the Commission should conclude that there would be no adverse impact. And it's our submission that in the circumstances the Commission should not draw any such conclusion. It would not be appropriate for it to make such findings.

PN2389

It's also a matter that we say is relevant to the question of genuine engagement, which is the second issue that I propose to address you on and in particular on Friday your Honour Hatcher J invited submissions about whether the conduct of this hearing itself constitutes genuine engagement or whether more is required. Now, in our submission genuine engagement requires real, authentic and sincere interaction. It certainly requires something more than a cursory opportunity to participate in the Commission's processes. The conduct of the proceedings to date in our submission do not constitute genuine engagement.

PN2390

The breadth of the order that has been proposed is such that it will apply - it would apply if made - to hundreds of thousands of businesses in a huge number of sectors. We anticipate that the very, very vast majority of them are not so much as aware that an application has been made, much less the detail of what has been proposed. To some degree, the capacity of organisations like ours to inform and educate and consult our members has also been curtailed by the need to dedicate resources to appearing in these proceedings. We have nonetheless taken various steps. We've issued member circulars, we've held meetings with members.

PN2391

Overwhelmingly it has been clear that until we provided the relevant information to members they were not aware of these proceedings for the application. They are still grappling with how the order would operate, what its consequences would be and certainly at this stage they have more questions than answers. Now - - -

PN2392

JUSTICE HATCHER: What is the further engagement that you seek?

PN2393

MS BHATT: I'm sorry, your Honour, I - - -

PN2394

JUSTICE HATCHER: What is the further engagement that you seek?

PN2395

MS BHATT: Well, we think that the appropriate course for the Commission to take if it issues a draft order is to subsequently list the matter for a directions

hearing and allow the parties an opportunity to be heard at that stage about what those further steps should be.

PN2396

JUSTICE HATCHER: So will we be hearing about what you need to do to attend a hearing, is that it?

PN2397

MS BHATT: No.

PN2398

JUSTICE HATCHER: Then why can't we simply list the matter for further hearing?

PN2399

MS BHATT: Well, I understood Your Honour to be asking me what further steps should be taken in order to ensure that there has been genuine engagement.

PN2400

JUSTICE HATCHER: No, what further steps should be taken to provide the entities you represent with genuine engagement?

PN2401

MS BHATT: Well - - -

PN2402

JUSTICE HATCHER: I mean, we can bring you back here if that's what you want.

PN2403

MS BHATT: I think our position, in relation to that issue, will turn in part on the specific terms of any draft order that the Commission publishes, and that is why I've advanced the submission I've just advanced, that is, if the Commission decides to issue a draft order - I mean, it might be, Your Honour, that in doing so, many of the issues that we have sought to ventilate are addressed or allayed, but they might not be.

PN2404

And if they are not, and, as I say, having regard to the manner in which the proceedings have been conducted to date, we might have a view that there is a certain type of evidence that we seek an opportunity to call. And at that stage, we expect to be in a position to indicate to the Commission how long we might need to be able to do so. It's for that reason, because the terms of any draft order might be a relevant part of our assessment in that regard.

PN2405

JUSTICE HATCHER: I think the difficulty in this part is that none of this engages realistically with the urgent circumstances that we're dealing with.

PN2406

MS BHATT: No. Your Honour, we understand the need - we acknowledge the Commission's desire to move quickly. And we are, of course, prepared to, ourselves, move as quickly as is reasonably practicable. But the - - -

PN2407

VICE PRESIDENT ASBURY: Ms Bhatt, we're not moving quickly because we desire to move quickly. We're moving quickly because that's what the legislation requires, because it's urgent.

PN2408

MS BHATT: Well, ultimately, the reason for seeking a fair and reasonable period of time to respond to any draft order or any application is to ensure that the Commission is able to make its decision having regard to information, evidence, submissions that point to a raft of issues and indeed, potentially unintended consequences that might arise from the proposal.

PN2409

Now, perhaps I can cut to the chase and just deal with the draft order. There's a number of issues that I will raise today that overlap to a significant degree with the written submissions that we filed last week, because they were issued but also arise from the proposal that has been advanced by the union.

PN2410

Now, since that time, the union has filed a written submission and made a mail submission today. There has been no attempt, no attempt to grapple with many of the practical issues that we have raised. If we turn to the Commission's discussion document.

PN2411

VICE PRESIDENT GIBIAN: Were you able to tell us anything about what genuine engagement would require on the TWU's current proposal?

PN2412

MS BHATT: Not on the TWU's proposal without obtaining instructions. I understand the Vice President to be referring to the proposal that has been filed today.

PN2413

VICE PRESIDENT GIBIAN: What do you say? Would further steps be required?

PN2414

MS BHATT: Yes.

PN2415

VICE PRESIDENT GIBIAN: Well, it's the discussion document with some changes proposed to it.

PN2416

MS BHATT: Yes. So if I turn to the discussion document. The substantive obligations commence at clause 4. One of the issues that we've raised in our

written submission is that there will be circumstances in which a primary party does not know who all of the secondary parties are.

PN2417

So a transport task might involve multiple secondary parties, freight might be initially transported in a consolidated way, it's then further subcontracted, broken down, it's then subcontracted again. That's part of the delivery task, the last mile. The primary party might not know precisely how that work is going to be undertaken, how precisely it's going to get to its final destination, and more to the point, who all the secondary parties are going to be. That's not clear to us how, in those circumstances, a primary party could comply with the obligations that are set out in clause 4.

PN2418

VICE PRESIDENT GIBIAN: So just to be clear, is this submission that an order containing 4.1 should not be made or are you proposing some modification to 4.1?

PN2419

MS BHATT: Well, we haven't proposed a modification. This is a – I mean, it's a fundamental issue that arises. It arises in part because of the breadth of the order. I mean, it might be, Your Honour, that if you're looking at a proposal for a road transport contractual chain that operates in a particular sector or subsector, that it is easier to answer some of these questions. But the questions arise in part, as I say, because of the sheer breadth and, in the time, a workable solution has not been obvious to us.

PN2420

JUSTICE HATCHER: So is it the former?

PN2421

MS BHATT: The submission is that an order should not be made in this form.

PN2422

JUSTICE HATCHER: Do you have any proposal for an alternative order?

PN2423

MS BHATT: Yes. It was set out in the initial submission that we filed. And we proposed at the time of filing that submission that the Commission ought to conduct some sort of conference or similar process to facilitate discussion about that proposal.

PN2424

I indicated on the first occasion that we appeared before you that the intention underpinning that proposal was genuinely to try to engage with the issues underpinning the application that has been brought. There's been no engagement with that proposal by any of the parties appearing in these proceedings.

PN2425

VICE PRESIDENT GIBIAN: In the the conferences I conducted, Mr Ferguson told me that there wasn't utility in conferences being conducted by the Commission.

PN2426

MS BHATT: Well, but that was in a different context. That was at a time when the Commission did not yet have power to issue an order that would be of utility. And what I mean by that is, meeting a timeframe, that would have application relatively quickly.

PN2427

VICE PRESIDENT ASBURY: Ms Bhatt, stepping back to the point you first made, that primary parties may not know, with respect to 4.1, primary parties may not know all of the secondary parties, 4.1 requires them to adjust a rate to any secondary party that they pay to the secondary party. Why wouldn't they know who the secondary party they're paying a rate to is?

PN2428

MS BHATT: My submission was not, my submission was not – and perhaps I've misspoken, my submission was not confined to clause 4.1. There are various other provisions, particularly in light of the amendments that have been proposed by the TWU, that would require a primary party to know who all of the secondary parties are in the chain.

PN2429

VICE PRESIDENT ASBURY: Well, reasonably, it would require them to know.

PN2430

MS BHATT: Well, it would require them to take all reasonable steps.

PN2431

VICE PRESIDENT ASBURY: But they couldn't have taken reasonable steps if they didn't know who they were taking them in respect of.

PN2432

MS BHATT: And it's not clear whether that means that they are not required to comply with clause 4.2. I mean, this is just one of the many issues we expect will arise from the cause. There are a number of fundamental issues that arise from the concept of needing to ensure fuel cost recovery.

PN2433

As we understand it, that exercise would require one to assess the specific cost of fuel and whether or not specific measures implemented or an adjustment to the rate ensures actual fuel cost recovery. Now, there are a number of circumstances in which an organisation simply would not have visibility over that matter. Courier companies are a good example. They don't determine or dictate a specific route that needs to be taken by the relevant drivers, that's the matter that they determine. There's no obligation for them to communicate that information back. It's not clear how these assessments can practicably be made. And as I say, there has been no sensible engagement from the union about any of these issues.

PN2434

JUSTICE HATCHER: Every company typically pay a kilometre rate, don't they? A pick-up rate and a kilometre rate, from memory.

PN2435

MS BHATT: Well, whatever the form of remuneration, if the order is requiring cost recovery for fuel, the point is that there are a number of variables that can influence the cost of fuel; time of day, the route that is taken, the type of vehicle that is used.

PN2436

JUSTICE HATCHER: Well, the route doesn't matter, because it's a per kilometre rate.

PN2437

MS BHATT: I'd need to take that on notice, your Honour. That's not how I understand the concern that's been raised with us about the application of the order to that particular sector.

PN2438

VICE PRESIDENT ASBURY: Assuming they pay them a per kilometre rate, or they pay them some other way, they either separately identify, or they incorporate, an amount for fuel; why don't they know what that is?

PN2439

MS BHATT: Well, I mean, I think this is part of the difficulty is that we don't have a complete picture of the nature of the arrangements that are in place. There might be circumstances in which a business provides an integrated service. You pay an amount for a road transport service, and something else. It might be the purchase of books. The primary party does not necessarily pay a separate amount for the transport task. And, in those circumstances, they might not have visibility over the costs of the transport task, or what the fuel component is more particularly, and then, in turn, what the costs of fuel has been, and what adjustment is required to ensure actual fuel cost recovery.

PN2440

VICE PRESIDENT ASBURY: Well, Ms Bhatt, most employers, or most obligations, that are paying an amount to somebody to do something, generally know what they're paying for. To me, I can't understand how one organisation, that's paying an amount, doesn't know what they're paying it for. They don't know what it's comprised of, what it's – it just seems counterintuitive to me that they'd be paying an amount that they didn't know what it was comprised of.

PN2441

MS BHATT: But these are commercial arrangements that have been struck based on a number of factors.

PN2442

VICE PRESIDENT ASBURY: Which they must know what they are.

PN2443

MS BHATT: They won't necessarily have visibility of the specific cost components of the transport task. As I think I've already alluded to briefly, in respect of clause 4.2, which requires a primary party to take all reasonable steps. And obvious questions arise as to precisely what that encompasses, and

how far must one go to ensure that all reasonable steps have been taken is what is required, an examination of the rates that are paid by a secondary party to the other party to ensure that fuel cost recovery has been achieved. And if yes, the burden is, indeed, quite significant.

PN2444

JUSTICE HATCHER: Do you say the phrase 'all reasonable steps' should be changed, should it be a different standard?

PN2445

MS BHATT: Well, if, for instance, we're to require reasonable steps, as opposed to 'all' reasonable steps, that is a different standard, and one about which we would certainly have fewer concerns. In relation to the proposed date of implementation, which we understand, from the document that's been published, to be 20 April, that assumes that a final order would be published by the Commission by the end of this week. That is another matter about which we have substantial concerns.

PN2446

Now, putting to one side the fact that the Commission needs to first provide a reasonable opportunity to make submissions stating a process involving RTAG, and the like, businesses will need a period of time to implement necessary measures to ensure that they are able to comply with the order, particularly in the context of small and medium operators, that is expected to take some time. They are not necessarily going to have the systems that are in place, or, indeed, the human resources, that are required in order to ensure that they will be able to comply within the timeframe that is contemplated by the Commission.

PN2447

JUSTICE HATCHER: Well, they'd effectively have a fortnight, because requirement is to make an adjustment within a fortnight, albeit it would have to allow for cost recovery on the date of operation.

PN2448

MS BHATT: Yes, I understand. I think real questions arise as to whether a fortnight will be enough. I propose then to deal with, very briefly, the potential impact of the order, and the relevant statutory considerations in combination. And it's our submission that the following aspects of the minimum standards objective weigh against the grant of the order. They include the need for minimum standards to be clear and simple, fair and relevant, tailored to the relevant industry, occupational sector and business models, tailored to the type of work and working arrangements, and the need for the standards to have regard to the ability of regulated workers to perform work under service contracts for multiple businesses, and the fact that work may be performed simultaneously, and the need to award unreasonable adverse impacts on business costs, regulatory burden, viability, industry and compliance costs, the national economy, the persons or bodies that use or align the work performed by regulated workers, and similar matters arise from the road transport objective. Those are the submissions.

PN2449

JUSTICE HATCHER: Thank you. Mr Ward.

PN2450

MR N WARD: Thank you, your Honour. If the expert panel pleases, we are going to make an opening submission as to our position. I'd like to then comment on the evidence. I'd like to then address a small number of issues about the form of the order. I intend to do that by way of providing a marked-up version of your discussion paper, in part, to prompt genuine engagement with the expert panel. And, lastly, I'll make some submissions on 536PF(2)(a), and, if I don't forget, make some observations about the attempt by the Transport Workers' Union to carve out various competitors of some of my clients.

PN2451

Can I start by indicating to the expert panel that we do not oppose the issuing of a notice of intent, or the making of a draft order. As I indicated from day one, we preferred, in these proceedings, given the urgency of them, to focus on the application of any such order, rather than outright opposition.

PN2452

In terms of the evidence, it's perhaps not surprising that we might take a slightly more balanced approach to the evidence than the Transport Workers' Union. We would make the following comments about the evidence: there is clearly one thing that is entirely uncontroversial, and that is the rapid rise in the price of fuel and, in particular, diesel, since March 2026. And I, over the weekend, traversed through some of the evidence, but it seems clear that at least an increase in the order of 60 to 70 per cent, during that period, seems to be a not unreasonable conclusion to reach.

PN2453

That increase, by its nature, necessitates something to be done differently to what normally is done, and I think that has to be accepted as a proposition. Now, how that impacts individual owner/drivers or individual fleet operators will be a matter of degree, because it will relate to which vehicles are used, their fuel burn, what proportion of their total costs or total revenue represents fuel.

PN2454

There seems to be some general sense as to the proportionality of fuel. Professor Hassall mentioned 25 per cent of total costs on a number of occasions. Mr Wallace this morning talked about a third of costs. Mr Barnaville, in his evidence, talked about the fact that it moved, in his cost model, from 15 per cent, I think he said, to 28, 29 per cent. So I just want to indicate that we accept that there is a materiality to the increase in fuel prices, and what it means for an impact on total costs, both for owner/drivers and for fleet operators.

PN2455

VICE PRESIDENT GIBIAN: It may not be necessary to compare with other industries or businesses, but it would be relatively unusual for a business to have a cost component of that magnitude change by the types of dimensions that you've mentioned, in such a short period of time.

PN2456

MR N WARD: Your Honour, that's the point we make. It would be very hard to believe that labour would change without - - -

PN2457

VICE PRESIDENT GIBIAN: Or a retail shop is unlikely to change in – overnight.

PN2458

MR N WARD: Indeed, or the lease costs on an asset.

PN2459

VICE PRESIDENT GIBIAN: Yes.

PN2460

MR N WARD: Nothing of the type. It does remain unclear, the extent to which fuel prices may have stabilised. One might have had some hope when the notion of a ceasefire was announced. I think I put to Professor Hassall the Brent crude price after the announcement – I think it was in the order of \$95, \$96 – and he immediately retorted that, in the very day, it had already gone back up to a hundred. So, the fact of the matter is that I think the evidence indicates that, as we sit here today, there is no likely indication of it going back down, or when.

PN2461

Having said that, the worst-case scenario that Professor Hassall identified – of USD\$200 for Brent crude a barrel – obviously, we are not in that worst-case world. I do want to indicate that I think the evidence, while not conclusive, probably suggested that different owner/drivers, depending on their circumstance, might be in a slightly different position. Professor Hassall concentrated on – under cross-examination, he described it – what I might reasonably describe as this kind of – the freelance owner/driver doing general freight, the one who waits for the SMS or the phone call, whereas, as the evidence from my clients this morning indicates, we're talking about a very different beast; somebody doing local work, who's a tied carter.

PN2462

The reason why we draw that distinction is simply to indicate that there may very well be different classes of owner/driver, who are facing different degrees of vulnerability. We do say that it is clear that industry is moving to address the fuel price challenge with owner/drivers, but we acknowledge that that cannot be said to be uniform or universal. And we had no evidence to contest Professor Hassall's concern, which, again, was very much targeted on general freight and owner/drivers who invoiced the work, rather than operated on RCTIs.

PN2463

We then come to the academic hypothesis, and there's obviously a general academic hypothesis in the work of all three of the academics called, that advances the notion of exploitative power being exercised by big versus small. Now, I appreciate that's a gross generalisation, but the essence of their academic hypothesis is that. We would ask the Commission to be cautious of glibly embracing that academic hypothesis, for this reason: there is a variety of practical evidence in these proceedings that suggests that that's not the case.

PN2464

My clients this morning gave evidence about how they effectively moved unilaterally to ensure that owner/drivers are recompensed, and further, that their fleet operators are recompensed for increases in fuel prices. The notion of that would seem to fly in the face that big exercises some exploitative role over small. We also saw evidence this morning from FedEx about their fuel surcharge arrangements operating well before this crisis, and continuing, and also evidence of where they implemented fuel surcharges unilaterally to support their fleet owners in their linehaul business, even though they didn't have them there in the first place.

PN2465

We also saw evidence – although I accept Professor Hassall suggested it was the exception – of the ARTIO witnesses Dunn, Ryan and Dickenson indicating that they had operated with fuel surcharges both going down and going up for some years, without any issue from their clients. Mr Kilgariff this morning I think aptly indicated that in the construction materials sector, there is currently a driver shortage, and that the focus was on securing service rather than, in any sense, exploiting anybody. So we would just ask the Commission to be somewhat balanced about how it approaches the academic hypothesis.

PN2466

What is largely clear is, those that have moved to do something are moving, with some exceptions, which I'll come to, using modelling assumptions. If one looks at the evidence from Holcim this morning, their evidence essentially is, they have a pre-existing model, they have brought forward the application of that model, and they're using that model now to address fuel price increases. There is some relevance to that, which I want to come to when I hand up my document, in that those models allow a party to understand the pre-existing fuel rate that's agreed, and to understand the pre-existing proportionality of fuel in a cost basket.

PN2467

Mr Wallace, this morning, when he talked about what they have done for their fleet owners, when I asked him questions about the mechanics, essentially answered by saying, 'We kind of understand it's about a third of the cost, and we've told them what the process will be, based on that'. Again, I want to come back to that. He should be commended for that approach, but given what I'm going to say in a little while, there might be some concern around language, as to whether or not that is sufficiently precise.

PN2468

We think it is, but we need to make sure that the language in any draft order encompasses that. Those are the observations I – I withdraw that. We think that it's evident from Mr Kilgariff's example today, purely of the construction materials supply chain, that supply chains are, by their nature, complex, and therefore the Commission should be conscious that addressing owner/driver issues, addressing fleet issues, and addressing client or customer issues in a supply chain in relation to this issue is not a simple administrative exercise.

PN2469

We're not suggesting that would assuage you from making a draft order, but we want to come back to the value in the simplicity of the order in due course. On

that basis, we want to make these statements: (1) we don't take any issue with owner/drivers being protected from fuel price increases in principle. We do not take any issue with fleet operators being engaged by our clients being protected from fuel price increases in principle. The clients we represent are large, and frankly, they can pretty much take care of themselves with their customers and they have not asked the Commission to help them with their customers but they accept as a general proposition that if an order was in place and they were struggling with their customers, that an order might have some utility to help them.

PN2470

The concerns we want to raise in the context of any order, and this is about the form of order, are about these matters. (1) I want to engage with the Bench on the question of protecting arrangements already in place. I appreciate that the Bench had moved already in the discussion paper about that, but I want to engage the Bench further on that matter.

PN2471

(2) I want to engage the Bench on the notion of cost recovery and full cost recovery. It may be a question of nomenclature, but I want to raise with the Bench an issue in the hope that language doesn't create an unforeseen problem. I, not surprisingly, want to briefly talk about the review period from a practical issue and, apart from some issues around simplicity and operative date, I do want to engage the Bench around the possibility, particularly when we're dealing with big businesses, that they may choose not to seek price recovery from their clients, going up, or partially see price recovery from their clients going up, or adopt some alternative approach in terms of their pricing issues.

PN2472

Those are the issues that I want to address as to the form. Now, the best way I can do that is to hand up the discussion paper but I've had a play with it and it might come to pass after I've engaged an expert panel of at least some of these things might be phrased as proposals or they might just be attempts to be provocative to see where the conversation takes us.

PN2473

Can I indicate this to the Commission? I've handed up two documents, 1A and 1B. Now, for present purposes, could I ask you to just put B aside for a minute? I'm going to concentrate on A.

PN2474

In fairness, can I indicate this: versions of these documents were exchanged with the Transport Workers' Union over the weekend on Sunday, on a without-prejudice basis. The Australian Industry Group also saw versions of these on Sunday, as did the Australian Chamber of Commerce and Industry. I think they saw them this morning. That's no offence to Mr Schmitke, I think I just had so many people to talk to over the weekend, he was the last one.

PN2475

Can I start by saying this. The Commission, if we look at A, the Commission will see that there's absolutely no rancour from my clients about the first page. We

leave that alone completely, and as to the coverage of the order, there's no issue there in terms of the coverage of the order.

PN2476

I want to deal with the amendments we've made at 4.1. One deals with timing, and I'm going to come back to that if I can. I want to deal firstly with the inclusion of approaches to calculating recovery of increased cost of fuel. Now, I could do this in relation to 4.1. I've also included the language in 4.3. I could have this conversation with the Bench in either one. But I want to do this to raise a concern, so that we don't get to an unintended consequence.

PN2477

It seems to us that all of the discussions to date in the proceedings about fuel cost recovery have been predicated with one exception, which I'll come to, on the notion of changing a rate or introducing a fuel levy. And the increase of a rate or the introduction of a fuel levy appears to us to be requiring some calculus. That is, you would need to have a starting price, you would need to have a price for the period you're reviewing and you would need to understand the proportionality of your cost.

PN2478

Now, unlike others in these proceedings, I'm not saying that you need some scientific degree to work all of that out or some witchcraft. I think if you're good in logistics, you have a rough sense of it. However, those forms of calculus will get you close. What I mean by they get you close is, I'll give you an example of where they might not actually pay an owner/driver full cost recovery.

PN2479

So if we take Mr Barnaville as a case in point, if we can, you'll recall that he buys his petrol from a particular petrol station. You'll recall that he's declined to take the Holcim discount card. There is a reasonable possibility that what he actually pays for his fuel is different to the model that is being used to recalculate what is required to cover him and all the other owner/drivers in that fleet for the increases in fuel price.

PN2480

Now, I might be being pedantic to a point of inconvenience with this proposition, but I wouldn't want the language of the order to be such that Mr Barnaville could come along later on and say, 'Hang on a minute, my actual fuel bill for the last fortnight or the last whatever that I actually paid was Y and you've only paid me X based on the formula.'

PN2481

So I just want to raise that as a point of engagement with the Bench. And we suggest that that could be remedied in two ways. One is removing the reference to the word 'fully', but also possibly by directing parties to use pre-existing contractual fuel benchmarks. In the absence of those, the Australian Institute of Petroleum or some other agreed method.

PN2482

That might be a very poor attempt to solve a problem. It might be the Bench don't think my problem exists or it might be that the Bench believe that problem could arise depending on the drafting and therefore it needs some form of resolution.

PN2483

JUSTICE HATCHER: Well, we could do it by an analogue of what is 4.5 in the discussion document. That is 4.5 provides, where you've done it already. Where you haven't, it mightn't - might nonetheless do it in accordance with any existing rate formula, or rise and fall formula that exists in the same range of documents.

PN2484

MR N WARD: Your Honour, that's, in a very primitive way, that's what we've attempted to do in this suggested amendment. I'm going to come later - when I talk about preservation of existing arrangements - I'll come later and talk about respectfully how you've drafted 4.5 and how it's been proposed to be amended.

PN2485

As to whether or not it captures everything we would like it to capture, well, I'll come back to it. I think Your Honour understands the point I'm trying to make in that regard.

PN2486

JUSTICE HATCHER: I mean, I suppose the only absolute precise way to do it is to try to make reimbursement.

PN2487

MR N WARD: Well, and if you think about when I said somebody, this one example that's different, the Boral example, it is classically different, in that in the Boral case, Mr Rasmussen's evidence went to this, and it's not, I don't think it's in any sense an issue. In the Boral case, they put an amount - they put their fuel price in the model and because everybody's on an RCTI, everybody uses the fuel card. At the end of the month they just simply work out how much more they spent on fuel in excess of the model rate and no payback for them.

PN2488

Now, your draft paper went to that, it suggested that's one way it can be done. That's fine. But I'm not - I suppose the concern I had was, was that if we're really talking about paying the individual's bill, we actually have to end up with a very different scheme of arrangement ready where the individual renders the bill, almost; the party receiving it gets to validate and check it.

PN2489

I didn't think we were heading down that path. I just want to say, as a matter of caution, the Commission might be careful as to the language it uses, so we don't have somebody putting their hand up saying, 'No, these words mean that'.

PN2490

That's what I wanted to say.

PN2491

VICE PRESIDENT GIBIAN: The reference to the Institute of Petroleum Index is intended to be a proxy for the increase?

PN2492

MR N WARD: Absolutely.

PN2493

VICE PRESIDENT GIBIAN: In the event that there's not, at least in the event that there's not an existing formula that is, or benchmark that is used?

PN2494

MR N WARD: Your Honour, very, very warmly embraced that proposition. I think that's fine. As I say - - -

PN2495

VICE PRESIDENT GIBIAN: It would still require attributing in a particular case the amount that - the amount of the costs that are attributable to petroleum to work out the increase.

PN2496

MR N WARD: If you take the - let's just stay with the primary pay obligation in 4.1. Now, I'll come - I've said my clients don't claim for fuel help. No disrespect. Not clamouring for your help.

PN2497

VICE PRESIDENT GIBIAN: Mr Wallace said he'd like it.

PN2498

MR N WARD: Well, I think when you're in the witness box you could be excited by almost anything when it comes to these things. In Mr Wallace's case, if you take Mr Wallace's case, he like everybody else sells concrete on a delivered basis. I think that was agreed to some time ago. The primary party there I assume would actually engage with Adbri as to well, what actually represents the transport component, to understand what its obligation might or might not be. The alternative approach is the one Mr Wallace used with his (indistinct) which is, you know, 'Hey, folks, we think it's about 30 per cent. We're going to use the Australian Institute of Petroleum benchmark. How do people feel about that'? Probably (indistinct) quite happy and relieved that we did it.

PN2499

But that's part of the exercise that the party above will have to do for the party below. So that's the first point we wanted to make about the potential unintended consequence of the notion of costs recovery. Is it actual individual, 'I spent this on my fuel bill', or is it something else? I think from our exchanges the answer is it's something else and let's try and find the right words to make that clear. The second point we wanted to make was the around period. I appreciate that the Transport Workers' Union haven't resiled from a week: that is to review the price of fuel each week. I think it's very evident from the evidence that people are adopting a fortnight or a month. I think that's very clear.

PN2500

And we just would ask the Commission, as we've done in this redrafting, that they might adopt an approach that gives industry that flexibility: that is it might be fortnightly or in the case of some of the aggregate examples to date from my clients, it might be monthly to align with pay periods. There is obviously a challenge if you pay somebody on a monthly basis of changing their cartage rate mid-cycle. And there needs to be a little bit of give and take in this in terms of how it's applied and we'd ask the Commission to give that some consideration. We clearly are opposed to the notion of reviewing fuel price every week. We think that is unduly onerous in the extreme and also assumes that people will have the ability to do all the other things they have to do, having reviewed the price and that is translate that through their business systems into all of their various rate structures and ensure they're correct.

PN2501

So in our view weekly is an unacceptable proposition. We are content in large part with fortnightly but we do believe that where people are paid monthly the Commission could find some flexibility to provide people them with the opportunity to continue monthly. Mr Barnaville at Holcim, a delegate of some 40 years, a man not be taken lightly, is comfortable with it being done that way. Mr Andrich has indicated in his cross-examination he understands it's being done monthly. He's comfortable with being done that way as well.

PN2502

I then want to just a comment about 4.2. I don't want to steal the Australian (indistinct) thunder in its opposition to 4.2. Can I just say this: my client - I suspect some of my client's members, my member organisation clients, will have primary - do have primary parties as members. But to the extent that the other clients we appear for in the proceedings are going to be largely secondary parties, we're not asking our primary party clients to take on this burden. That might sound strange but we don't ask them to take on this burden. Our concerns is probably this: it's more for us about - - -

PN2503

JUSTICE HATCHER: So when you say, 'We don't ask our primary parties', so that's the acceptance for example in the concrete sector the clients - well, the entities you're representing are secondary parties and not primary parties. We had a discussion about this with Mr Boncardo last week.

PN2504

MR N WARD: Well, my assumption - and again, you might get into trouble here because I might be travelling into the AiG's group about nobody where they sit in the chain - but in relation to construction materials if you take the evidence from this morning from Mr Kilgariff, I think it was very clear that the concrete company sits in the supply chain, not at the apex of the supply chain. It's very clear that a very large builder, construction company, consortium, whatever, would be the apex and possibly - and I hadn't thought this through in great detail - it might well be that in some cases the government might actually be at the apex of the supply chain. It might be. It might be.

PN2505

JUSTICE HATCHER: In any event, when the construction company buys a load of ready-mix concrete it's buying a transport service as well as the actual product.

PN2506

MR N WARD: There's no doubt - the phrase I would use, your Honour - and I appreciate you probably know as much about concrete as I do from past lives - we would describe it as - it's delivered product in that nobody buys the concrete other than a delivered form. Aggregates is obviously slightly different. You can actually buy aggregates (indistinct) but it's in a delivered form. There's no separation of the transport price in that it's \$230 a cubic metre or whatever it might be but it's understood it's delivered as required, yes. What we say about 4.2 is proposition no.1 was to the extent that my clients sit below the primary party. We're not wishing this obligation on the primary parties. We make that very clear.

PN2507

Two: our anxiety about 4.2 outside of that is just simply its breadth against the timetable. What we mean by that is this: given the constraint but necessary constraint of timing - and we understand the motivations in terms of urgency - we would have thought that the simpler or the shorter this order was or the fewer the obligations this order imposed would actually be good sense and the idea that we're now going to layer - having determined the primary parties have to make good payment for those below, having determined that secondary parties have to make good for people below them, be they other secondary parties, owner/drivers, or employee-like workers.

PN2508

We're just not sure whether or not in the timeframe 4.2 is actually of any great moment or utility. If the Bench was inclined to keep it in some form we would be asking the Bench to materially reduce the nature of the obligation to one of a primary party informing parties below of the obligation rather than ensuring compliance because as a matter of sheer practicality how they ensure compliance in such a short time period is a little beyond us. I then want to turn to, if I can, the Commission's proposed 4.5. I don't want to sound in any way ungrateful for the inclusion of this proposition. We think it's a movement in the right direction.

PN2509

I want to make two comments about it. I think the inclusion of the language that Mr Boncardo has identified, the inclusion of the phrase arrangement is very, very useful and necessary. It's actually a term that is very, very common when dealing with both fleet owners and owner/drivers. It would be very useful. Two things though I would ask the Bench to consider. One is it does also include this reference to costs recovery (indistinct) for costs recovery and I come back to my earlier point about that not in - I don't want that confused, this language, with actually paying somebody's specific bill, and secondly, this - and I might do this by way of reference to the evidence from FedEx this morning.

PN2510

You'll recall that FedEx indicated this morning that they'd had a fuel surcharge in place for quite a while for parts of their fleet. But then they said, for their linehaul fleet, they've just put one in place. It's worrying me that those types of

arrangements, which should be commended and supported, might not necessarily fall specifically under the concept of any rise-and-fall rate adjustment mechanism. It may well be, when you look at what FedEx have done, that they've worked something out that is not associated with a broader rise-and-fall mechanism.

PN2511

And I don't have – subject to me putting one proposition to you, which you might embrace or rail from, we would be keen to make sure that where people have put arrangements in place that are adequate, that, if this is the cause that we rely on, that it has sufficient breadth to contemplate not just the Adelaide Brighton example this morning, but other types of examples as well.

PN2512

VICE PRESIDENT ASBURY: But wouldn't it be, really, better to just say, perhaps for my part anyway, that, rather than being very specific, just saying, with respect to any rate adjustment mechanism for which the arrangement - - -

PN2513

MR N WARD: Again, your Honour, I would be entirely comfortable with some - - -

PN2514

VICE PRESIDENT ASBURY: - - - for which it provides – or including – or other rate adjust mechanism.

PN2515

MR N WARD: Yes, or the inclusion of an appropriate fuel levy or fuel surcharge.

PN2516

VICE PRESIDENT ASBURY: And Mr Boncardo this morning – correct me if I'm wrong – mentioned something about putting the word, 'arrangement' in.

PN2517

MR N WARD: He did.

PN2518

VICE PRESIDENT ASBURY: So broadening it like that might also address some of those concerns, because that seems, again, for my part, like a worthwhile proposal, that you talk about a contract or an arrangement, because it might be a contract, but it has a different arrangement for fuel, or it has – I don't know, but you're as broad as possible.

PN2519

MR N WARD: I appreciate, your Honour, that – that's the very issue we're trying to search for. Now, in the draft I've handed up, perhaps somewhat provocatively, I've included 4.6, which basically deals with that in a more brutal way, which is, if you have an arrangement in place before commencement of the order, then the order doesn't apply. Now, the Bench might say that's a bridge too far. I accept that.

PN2520

VICE PRESIDENT ASBURY: Or that arrangement, if it delivers the same outcome, is sufficient to meet your obligations.

PN2521

MR N WARD: Exactly. What we're searching for here is – the Bench, in the discussion document, I think are trying to find a way to protect and save arrangements that are working effectively. We embrace that. We just want to make sure that the language that's adopted is sufficiently broad enough that somebody who has done or is doing the right thing before the order comes in looks at it and goes, 'Well, it just doesn't capture me'.

PN2522

Now, that might, again, not be a problem, because they might say, 'It doesn't matter, because my arrangement complies anyway', or, again, it might be, 'Well, hang on a minute. My arrangement is slightly different from how it was ultimately finished in the language'. I just sort of raise that as a proposition of concern.

PN2523

VICE PRESIDENT ASBURY: It's not unusual to have terms, for example, in modern awards that say, 'This is your obligation, and you can meet it this way or that way'.

PN2524

MR N WARD: Quite. Indeed, your Honour, yes.

PN2525

VICE PRESIDENT GIBIAN: You're proposing to take out the cost – reference to cost recovery in 4.5. What does, 'takes into account the increased cost of fuel' mean without that?

PN2526

MR N WARD: Can I put it this way - - -

PN2527

VICE PRESIDENT GIBIAN: That is, does it mean, 'sufficiently', at least by reference to some proxy arrangement?

PN2528

MR N WARD: Model or arrangement. Yes. I think what I'm sort of groping for with this is this: I have no problem with the inclusion of the language, as long as it could not be said in any way to mean that I actually have to pay an individual's fuel bill when I'm using some proxy mechanism to work out how I actually pay for fuel increases. That's my very simple concern, about - - -

PN2529

VICE PRESIDENT GIBIAN: Is there any assessment at all of the adequacy of the proxy mechanism? Mr Arcidiaco said he was offered a job, and he said the fuel has gone up, and they said they'll pay him \$200 more, and he said, 'Well, it would cost 6 or \$700 to more'.

PN2530

MR N WARD: Your Honour, I don't think we're actually at odds. I really don't think we're at odds.

PN2531

VICE PRESIDENT GIBIAN: It may be a wording matter, but it's just a question of, how is that - - -

PN2532

MR N WARD: Yes. Well, I would be expecting that, for any arrangement to be valid, it would need to be predicated on a proper understanding of the delta of the fuel price from A to B. It would have to be predicated on some proper understanding of the proportionality of fuel in terms of total cost, total revenue or whatever. There'd have to be some effective calculus involved, for it to validly deal with that. But as I say, even though you might apply that, as Mr Wallace said today, and others said today, it might be that, for different reasons, your personal fuel bill - - -

PN2533

VICE PRESIDENT GIBIAN: No, I understand that. I mean, I think Mr Wallace accepted that their existing contractual arrangements were not sufficient for the current circumstances, because they were doing it fortnightly instead of monthly for the last little bit.

PN2534

MR N WARD: Indeed, and he also indicated in his evidence that with his fleet owners, there was no ability – there was nothing in their contract to require an earlier trigger. They brought that forward, and they've effectively unilaterally told their contractors what the fuel proportionality is, and therefore, what they're doing.

PN2535

VICE PRESIDENT GIBIAN: So is there anything in the words that you've proposed for 4.5 that make it clear it has to be adequate, in an appropriate way?

PN2536

MR N WARD: No, no. We dealt with this in a very brutal – we dealt – I apologise. We dealt with this far more – in the time available, I dealt with this far more brutally, by basically putting a carveout in 4.6. And if I'm not helping the Bench in regard to this, I apologise. And I suspect a total carveout might be of some anxiety to the Bench – I get that – in which case, we would just ask that 4.5 will need to deal with – your Honour, I could, if I'm given leave, play with that tonight and provide something tomorrow morning, if that's of assistance.

PN2537

VICE PRESIDENT ASBURY: Because it doesn't necessarily have to carve it out. It still creates an obligation. It says, 'You've got an obligation, and you need to address it. And here's the options, or here's the mechanisms by which you can' – again, for my part, there has to be an obligation. We're really talking about how you meet it, rather than carving it out.

PN2538

MR N WARD: That's exactly right, your Honour. Quite.

PN2539

VICE PRESIDENT GIBIAN: I mean, I'm only reading this now, but isn't the second half of what you're drafting in 4.6 cut on to the 4.5, really, what you're proposing, that is, so long as it's adequate to meet the obligations in 4.1 and 4.3?

PN2540

MR N WARD: I think so, Your Honour, yes.

PN2541

VICE PRESIDENT GIBIAN: Not as a carveout, but as – you can satisfy it by some other mechanism.

PN2542

MR N WARD: This satisfies those obligations, yes. 'Carveout' is perhaps a brutal – inappropriate use of length.

PN2543

VICE PRESIDENT GIBIAN: Well, there's no need to carve out if it's satisfying the obligation.

PN2544

MR N WARD: Exactly right. It's another way of satisfying the primary obligation. Yes, your Honour. My apologies, your Honour. Yes.

PN2545

VICE PRESIDENT GIBIAN: Because 4.6, as you've drafted it, kind of begs the question: is it just – well, this doesn't apply if you've already done it anyway, which is kind of beside the point.

PN2546

MR N WARD: Quite. And frankly, people who've done it already should be commended. The last issue is, before I come on to genuine engagement, et cetera, is this – sorry, I withdraw that. The other reason why we're concerned about the breadth of language in the Commission's (indistinct), again, we want to make sure it captures not just the owner/driver model arrangement, but the fleet as well, which could be a modelled arrangement.

PN2547

It might actually be just an unmodelled rate, where a surcharge is being provided, which was the evidence of some of the ARTIO witnesses. That leaves us with this issue – and I don't want this to sound as if there's any mischief in it, but it is the case that particularly larger companies may very well form a view that it's in their long-term interest with their customers to carry the cost of fuel, or to carry a portion of the cost of fuel, and share the pain with their customers. And in those circumstances, we're concerned that that customer might have an absolute obligation or a mandatory obligation to actually pay them to cover something they're not asking to have covered.

PN2548

Now, I know that might be an unusual submission to make, but we are concerned that there will be circumstances where persons who, under this order are secondary parties will reach commercial deals with their customers that might in effect lead to their customers not complying with this order, even though both parties have to do it.

PN2549

And in a world where those parties might be pretty big and pretty capable of looking after themselves, we think there needs to be something in this in order to make sure that if those circumstances do arise, and I'm talking about going up here, not going down, that we don't end up with somebody technically being in breach of the order because they and their client have agreed to some alternative.

PN2550

It could very well be said that some of the things, some of my clients that they gave evidence about how they're approaching pricing, may, in a way fall into that, in that they're trying to deal with the total cost of pricing across their supply chain, rather than seeking to go to the customer and say, 'Hey guess what, we now have to pay our owner/drivers, why? Can you pay us X?'

PN2551

I just don't want - in a world where a party that I represent might not actually seek full cost or any cost of recovery from his client, I wouldn't want his clients to inadvertently be in breach, even though it's my client who's actually said, 'Don't worry about it, we'll come to some other arrangement.'

PN2552

Now, we - - -

PN2553

JUSTICE HATCHER: That's attractive in principle but how do you give a (indistinct) in a way which doesn't sweep up more vulnerable secondary parties? Because there will be some cases where a smaller primary party engages a small fleet out as a secondary party and - - -

PN2554

VICE PRESIDENT GIBIAN: They decline to do so because they don't think they can get away with it.

PN2555

MR N WARD: I think that's a very good question and I've been listening today, and I listened carefully on Friday around some of these issues. That is a legitimate thing. I could not - I'm not going to stand here and boldly suggest that that's misplaced. Now, that might, and I haven't thought much about this in terms of outcome, but that might suggest, perhaps as Wesfarmers or others have, that you might want to limit how far this goes up because when people get big enough and ugly enough to look after themselves, you'd leave them to their own.

PN2556

I don't say that that would have to be grappled with somehow. You are right, in that I wouldn't want a party down the chain looking up. And I think one - this - I'm not talking about their supplying to owner/drivers. I'm not talking about this applying owner/drivers in any sense. I'm really talking about their supplying to people like my clients who might sit down and have a very sensible long term commercial discussion about how this works, because they're capable of having those discussions and they reach an agreement that's different to the primary obligation their client holds.

PN2557

I'm sorry if I haven't assisted the Commission anymore in solving that problem but that is a real possibility as you get higher up the supply chain.

PN2558

VICE PRESIDENT ASBURY: Okay. But the difficulty is when you're at the top of the supply chain you have to have some obligation. Again, for my part to make sure that what you're paying the next tier in the chain is sufficient to address - - -

PN2559

MR N WARD: Well, you say that - - -

PN2560

VICE PRESIDENT ASBURY: - - - their obligations and then to make sure that if they are going to push their obligations further down the chain.

PN2561

MR N WARD: Well, you say that, Your Honour, but respectfully, I'm not as convinced as you are for this reason. If you take some of my clients that Mr Boncardo appropriately identified as billion dollar businesses, my clients are able to make decisions about what pricing they absorb and what pricing they pass on.

PN2562

And that does not have any impact on how they pay their owner/drivers. Never has, never will. They make those decisions every day.

PN2563

VICE PRESIDENT GIBIAN: But if the delineation is purely upon agreement or the secondary party declining to enforce, then we don't separate out those that are not in a position to refuse at all.

PN2564

MR N WARD: Your Honour, as I say, I raise it as a concern. I don't - I apologise if I haven't offered the solution.

PN2565

VICE PRESIDENT GIBIAN: I mean, there might be a solution, which is some assessment of turnover or something. It would be entirely arbitrary, but okay, that's fine. I suppose.

PN2566

But the other way of looking at it is, what you say about commercial decisions about where the share costs or whatever may have some general authority to it, I mean, credence to it, but maybe aren't we in a particular emergency circumstance, where maybe just passing it on is the appropriate, if one can't work out how to delineate those who need it from those who don't in a sense.

PN2567

Maybe just passing on the cost here is the way in which it should work in this emergency circumstance and just - just that part of the cost, which is the increase, as it were.

PN2568

MR N WARD: Respectfully, I'm going to say no. I don't - I don't rancour - and now we're getting into matters of degree. You'll have no rancour from me about owner/drivers. You'll have no rancour from me about small fleet operators.

PN2569

But if I am engaging somebody who operates 400 vehicles across Australia, now that is a very, very big business and they probably have long term contracts with me about the provision of that transporter and if I want to sit down and have a conversation about what we do today versus what we do in a year's time when we come to what - I think there's a point at which you have to accept that invading certain types of commercial relationship, you have to have some anxiety about that.

PN2570

And all I'm indicating is that when you've got very big companies in play, I would be concerned that those big companies might come up with their own ways of dealing with this with their customers that they're both satisfied with that I wouldn't want inadvertently after they've made that genuine agreement for one of them to be in breach. That's all I'm offering.

PN2571

I accept that you cannot play with that proposition as you move down the supply chain. I accept that. That's all we wanted to put on that then.

PN2572

VICE PRESIDENT ASBURY: Then it might be that those two entities accept that the secondary party is not going to do that. They're going to do the work themselves.

PN2573

MR N WARD: You're absolutely right in that, they both might sit there and go, 'Gosh, let's not worry, we think this is a good arrangement, but we all agree we're in breach of the order.'

PN2574

I'm not sure in the modern world that we live in, that that's a very good thing to be agreeing to as a matter of corporate governance, that's all. That's all.

PN2575

And again, if I haven't offered you a solution, I apologise, but we think there is some legitimacy to being concerned about that as a proposition.

PN2576

Can I then - those are all the matters we wanted to address on the notion of the order, and I appreciate we've largely based our views on the discussion paper. I don't seek to address you on B. I'd be happy for you to set B aside. I think what I've been able to achieve in the engagement with the Bench on A, which would be sufficient.

PN2577

Can I deal with two matters remaining? Can I deal with 536PF2A, and then can I just deal with Mr Boncardo's client's attempts to approbate and reprobate around level playing fields while they attempt to carve out various people from a level playing field.

PN2578

In relation to 536FP2A, the Bench asked us to give some consideration. I think the precise question that was posed was whether hearings would satisfy the requirement under section 536PF2A in that the Commission must not make or vary the road transport contracts or trade or unless there has been genuine engagement with the parties to be covered.

PN2579

Contrary to my normal love in these matters, I do not intend to spend an hour talking about what works for me in - the Vice President's relieved, I can see immediately - apart from very briefly touch on them. Can I just start with the first proposition about parties to be covered?

PN2580

It seems to us that there needs to be some scattering of practicality about that. Parties to be covered cannot, in and of itself, be a reference to any and all owner/drivers and any and all secondary parties and road transport businesses.

PN2581

I think the Commission can be comfortable that - and I'll come to the notion of this hearing and genuine engagement - but to the extent that the Commission in this process is engaging with the parties to be covered, we think you are engaging with the parties to be covered. I'll come to (indistinct) unique threshold in a minute.

PN2582

Why do we say you're engagement with the parties be covered? You have before you an extraordinary array of organisations purporting to represent the parties to be covered by the draft order if one is made. In fact, it would be difficult to recall a proceeding where you didn't have the benefit of such diverse parts of industry before you. I mean, it is quite profound, what you have before you. If I think about my constituency, be they major companies, ABI, New South Wales Business Chamber, you've got the Australian Chamber of Commerce and Industry here, representing a whole raft of affiliated associations; Australian Industry Group.

PN2583

We seem to have brought almost every transport organisation out of the proverbial woodwork. And then we have a variety of organisations with very particular interests up and down the supply chain. So I think to the extent that 'are you engaging in this process with persons to be covered?' Yes, you are, handsomely, through the bevy of representative organisations here.

PN2584

I want to say a couple things about genuine engagement. The first one is we looked in the extrinsic material to see if there's anything that would help you and there is one simple, fleeting reference somewhere, which I suspect some lawyers going to explain to - - -

PN2585

I was just saying, which I expect one of the lawyers in the room is going to challenge me for even talking about – perhaps Mr Meehan will be the one.

PN2586

But just for present purposes, the phrase 'genuine engagement' doesn't appear in the explanatory memorandum, but it does appear mysteriously at page 452 of the annexure to the explanatory memorandum. That's the only place we can find it. It's not in the context of a disposition of section 536PF but it seems to be in the context of an explanation about the consultation engagement of the expert panel generally. And the paragraph that it's used in, is - it says as follows, and I quote:

PN2587

This gradual consultative and evidence-based approach to standard setting,

PN2588

I'll pause there, it says standard setting, largely because it referred earlier to minimum standards. Returning to the quote:

PN2589

with industry views taken into account at each stage of the process will minimise the risk of potential negative outcomes where minimum standards are not informed by genuine engagement with owner/drivers or do not reflect the commercial realities of the sectors of the industry to which they apply. These were key criticisms of the former Road Safety Remuneration Tribunal.

PN2590

I'll leave the quote there. That's the only reference we can see to the phrase 'genuine engagement' in any of the extrinsic material, which clearly is not of any particularly great help.

PN2591

VICE PRESIDENT GIBIAN: Sorry, that's the Closing Loophole's Bill expansion.

PN2592

MR N WARD: It was, it was, Your Honour, yes. It was, Your Honour. Yes. The word 'engagement' should be given its ordinary meaning. It's

clearly different to 'consult'. It seems to suggest a deeper form of exchange and I suspect the inclusion of the phrase genuine is in distinction to the notion of perhaps doing it superficially. That is, one is required to engage with parties to understand deeper motivations, deeper positions, deeper concerns.

PN2593

VICE PRESIDENT GIBIAN: Maybe we should hang out at some truck stops for the rest of the week.

PN2594

MR N WARD: Well, Your Honour, I'm going to tell you not to do that. Okay. Somebody did do that in a past life. I won't go there. I'm still seeing treatment for that experience. So I don't want to go back there in my mind.

PN2595

VICE PRESIDENT ASBURY: I've still got my hi-vis vest, Mr Ward. If that's any - - -

PN2596

MR N WARD: I bet you have. I bet you have. Late in the evening, its (indistinct), as I recall. I guess, about midnight. But, no, we don't think you'd have to go to that length.

PN2597

One, I think the observations, Your Honour, your presence made during these proceedings are pertinent. That is that the very nature of the proceedings are urgent. Urgent proceedings normally involve some slightly rougher approach to process than would normally be the case in a major case. That might involve evidence on the fly, it might involve the Commission taking a looser approach to the evidence, not being as strict as it might normally would be. And also a looser approach to granting leave to parties to do things they normally might not do in a more lengthy process.

PN2598

For our part, we would say this. We believe that the Bench, if we combine the process that the Vice President Gibian engaged himself in, and we look at the process that we participated in here, while in all candour, brutally vast, we believe that the Bench have engaged with the interests of my clients and so we would say that, at least as my clients are concerned, we believe that this process, along with the process undertaken by the Vice President, would represent genuine engagement sufficient to satisfy the requirements of 536PF. We would say that.

PN2599

We are not particularly excited by the notion that a party may have decided to take a more removed approach to the proceedings as a defence against that. We often, on behalf of our clients, ask this Commission to move with amazing speed in matters and that involves an approach to preparation of cases that is not the norm. We're in such a proceeding.

PN2600

We do not believe we have been unduly disadvantaged. We would have loved more time. Don't get me wrong, we would have loved more time. Had we had more time, we would have probably put more before you. But we think when we consider the discussion document the Commission provided on Friday, that is clear to us the Commission is engaging with the parties in relation to the issues in the matter. And that's been affirmed again by the dialogue I've had with the Bench this afternoon, while I've been on my feet.

PN2601

I want to finish just lastly by my ongoing anxiety of the love affair between the Transport Workers' Union and Uber and DoorDash. And I say that with the utmost love and respect for the TWU. If we're carving people out, let's carve my people out as well, please. Okay? Let's carve my people out as well. Let's have FedEx out. Let's have that light brighten out. I'll be happy to have - give me another hearing day and I'll bring some more evidence to carve some more people out. Please do that.

PN2602

There is everything in what Mr Boncardo said earlier today about a level playing field. And the obvious level playing field is simply this, if they're in, they're in, if they're not, they're not. There's no reason why your clause 4.5 cannot be drafted in such a way to comprehend arrangements that Uber and DoorDash have put in place. There's no reason. And that being the case, there's no reason why they should get some uniquely special treatment that my clients are not getting. That would just be manifestly unfair. Particularly in light of this: (1) it's very clear that the proceedings that Mr Boncardo referred to about agreement are in contest between my clients, TGE and FedEx and Aramex will be appearing to oppose that agreement. And the basis of our opposition to that agreement is because we say the rates they've agreed to are substandard.

PN2603

So the idea that Uber and DoorDash respectfully have done something for their people, that's good. But we want to have an argument about the fact that we say the basis upon which they start isn't right to begin with. Now, they shouldn't be let out just because they've done some agreement with TWU somewhere else and there's some goodwill between them.

PN2604

It's also the case that the on-demand exclusion brings us into an area which, I must say, we didn't lead any evidence, so I acknowledge it. But there is a contest as the, I think Vice President Gibian's well aware and perhaps President Justice Hatcher's aware of it as well, there's a whole question about the NS2024(3) and its scope creeping into general deliveries that my clients definitely do.

PN2605

So we don't ask the Commission to embrace the proposal to give special treatment to Uber and DoorDash. If you're going to give special treatment, we'd ask you to give it to our clients, and as I say, happy to bring some more evidence forward, for other people to get special treatment. We think all of that should be dealt with in the context of 4.5, and/or as redrafted from our discussion today, or our proposed 4.6. If Commission pleases, those are our submissions in the matter.

PN2606

VICE PRESIDENT GIBIAN: Just with the reference to the annexure to the explanatory memorandum, can someone – you can do it by way of a message, but just tell us which explanatory memorandum that – because there are a number of different ones, to the - - -

PN2607

MR N WARD: Your Honour, Ms Rafter is on that matter as we speak. Would we provide it to your Honour's associate?

PN2608

VICE PRESIDENT GIBIAN: Yes, or the President's associate, perhaps.

PN2609

MR N WARD: We'll provide it to the President's associate. If the Commission pleases, those are our submissions in the matter.

PN2610

JUSTICE HATCHER: All right. We might take a short 15-minute break, and then we'll resume.

SHORT ADJOURNMENT

[4.07 PM]

RESUMED

[4.29 PM]

PN2611

JUSTICE HATCHER: So, Mr Ward, could I just ask you one question about the exemption situation. In relation to cash in transit, I think we know that there's only a very limited number of participants; that is, the banks, Linfox, and Linfox employs drivers. So that's a situation where there's a very close category. And if all the parties, to that particular contract change, say they don't need this, why wouldn't we need the - - -

PN2612

MR N WARD: Your Honour, that is a – I'll be careful of my language – but that's almost a monopoly, that industry. That's as careful as I could be, your Honour. It's a very contained little fish pond, but we have no issue with that.

PN2613

JUSTICE HATCHER: All right, thank you. Ms Tinsley.

PN2614

MS TINSLEY: Your Honour, I was originally going to make one very discrete submission with respect to - - -

PN2615

JUSTICE HATCHER: Can you get near the microphone, please, Ms Tinsley.

PN2616

MS TINSLEY: Yes, sorry. I won't need it for very long, your Honour. We were originally going to put forward a submission around the definition of 'the primary party', but noting that the Commission is proposing to – well, at least in the

discussion paper on Friday - to confine it to the statutory definition, and, in the interest of time, I don't have any further submissions to make.

PN2617

JUSTICE HATCHER: Thank you.

PN2618

MS TINSLEY: Thank you.

PN2619

JUSTICE HATCHER: Right. Mr Meehan, are you next?

PN2620

MR MEEHAN: I have four points. May we work off the TWU amended proposal, attachment A to the submission. I agree with the submission made earlier that there is some force in not having, in the order, clause 4.2, in that there are primary obligations focused upon adjusting the rates of pay enforceable pursuant to civil remedy provisions, and, in that context, strictly there is no need to supplement that using the model in 4.2, that is, to take all reasonable steps to ensure that other parties comply with that obligation.

PN2621

Now, if the Commission was otherwise minded to retain clause 4.2, my submission is the language of 'all reasonable steps' would not be deployed, and an appropriate alternative is just 'reasonable' steps. One can, quite readily, give an illustration of the vice of having all reasonable steps in the context of, in this case, a civil penalty regime. But one can draw on prosecutions in the work, health and safety space, where, notwithstanding that a defendant in a prosecution may have taken a number of reasonably tactical steps to ensure safety in that case, they might, nonetheless, have committed an offence, because they hadn't taken 'all' reasonably practical steps.

PN2622

It seems there is, by analogy here, the possibility that there would be, in my submission, unnecessary exposure to the possibility of civil penalties, notwithstanding that a party may have taken reasonable steps to ensure, but not taken all reasonable steps, and that's an outcome that should be avoided, and can readily be avoided.

PN2623

In respect of clause 4.2, there is also, in my submission, a need, just grammatically, to add some further words after 'secondary party' in the second last line, there should be a repetition of the words 'regulated road transport contractors or road transport-like workers'. I think, indeed, Mr Ward may have dealt with that.

PN2624

JUSTICE HATCHER: Is it possible you can just shoot us a note setting out what you think it should say?

PN2625

MR MEEHAN: Yes, I can do that. As to clause 4.5, my clients embrace the inclusion of the word 'arrangements', in the way that Mr Boncardo has advocated. It may be that, if the Bench was minded to do that, then the introductory words, namely, 'In respect of contractual relationships', might be better articulated without the word 'contractual'. But, ultimately, nothing might turn on that. Because the sort of arrangements one could readily mooredly contemplate as being relevant here would be arrangements that are collateral, or related arrangements to a contract that has the necessary constitutional connection.

PN2626

In my submission, there would not be any need, if those changes were made, to an additional clause of the kind advocated by Mr Ward in his draft, which is clause 4.6. In my submission, the matters that he had intended to be accommodated, in that proposed clause, would be adequately covered by clause 4.5. That's all I wish to say in respect of the principle, and secondary obligation.

PN2627

May I turn to the carve-out issue. I make no submission about whether, in respect of ride-share, or Uber in its on-demand business, whether those businesses form part of a road transport contractual chain. One might think that some light will be thrown on that, perhaps indirectly, by the High Court in *Uber v Chief Commissioner of State Revenue*, which is presently reserved, in my understanding, and that will, as I say, perhaps indirectly, throw light upon whether the workers engaged by Uber in that case, that ride-share drivers are performing a service, or providing work, for Uber.

PN2628

And that seems to be at the heartland of why, in my clients' understanding, Uber is taking a jurisdictional objection, however one labels it. And so my submission does not engage on that question, it engages on this: if the Commission were persuaded that it could make an order engaging upon those entities, it would not carve Uber out, or DoorDash for that matter, in the on-demand sector of the industry.

PN2629

Having regard to what Mr Boncardo has described as 'the need for a little playing field, it is not the case that, as I think Mr Boncardo accepts, that Uber Eats or DoorDash represent the totality of on-demand delivery work, they do not. And there has been no case, meritorious case, made out for excluding those entities, assuming, as I say, the Commission had jurisdiction to make an order engaging on those businesses.

PN2630

The last point I wish to make is the genuine engagement point. We don't wish to be heard as a contradictor in respect of whether that requirement has been satisfied in respect of my clients. They are the submissions.

PN2631

JUSTICE HATCHER: Thank you. Ms Kumar.

PN2632

MS KUMAR: Your Honours, my client operates an extremely diverse range of businesses throughout Australia. In response to the fuel price volatility, and increases arising as a result of the conflict in the middle east, a number of our divisions, including Kmart, Bunnings, and Officeworks, have either increased the frequency of existing fuel review mechanisms, or will shortly adopt fuel review mechanisms where they did not previously exist. These may or may not be the subject of a contract; these may not uniformly involve a rise and fall formula; and these may not involve full or 100 per cent recovery, the actual costs of secondary parties engaged by my clients' businesses.

PN2633

It follows from that that we accept, of course, that the increase in fuel prices is having an impact on the cashflow and operations of road transport businesses to varying degrees, and those at the end of the supply chain are particularly vulnerable, we're not here to be obstructive. With that said, my clients' position is that neither the draft order for discussion, circulated by the Commission on Friday, nor the TWU's revisions to that form of order, is a necessary, appropriate, or workable solution to the problems identified on the evidence.

PN2634

We point to eight reasons which are set out in our written submissions, which were filed shortly before the end of the luncheon adjournment. We apologise for the lateness of the filing. I don't expect the Commission to have considered those written submissions in any great detail, but propose to address the Commission by reference to them.

PN2635

JUSTICE HATCHER: Sorry, I thought we got a submission this morning?

PN2636

MS KUMAR: From my client, your Honour?

PN2637

JUSTICE HATCHER: Yes. Is this a different submission?

PN2638

MS KUMAR: My instructor informed me that it was filed about 1 pm today. That might not be quite right.

PN2639

JUSTICE HATCHER: Anyway, at least I can say I've read it.

PN2640

MS KUMAR: Yes. Thank you, your Honour. If I can start with paragraph – yes, I'm instructed that it was about 1 pm that we filed that document. As we have set out in paragraph 3, the diverse businesses operated by Wesfarmers would, we anticipate, be the primary parties for the purposes of the applicant's proposed contractual chain order, or the Commission's draft order for discussion.

PN2641

The draft order for discussion contemplates fuel recovery by road transport businesses, the increased cost of fuel from primary parties, and we understand that to mean 100 per cent of the actual cost. As we have set out in paragraph 5, that is going to lead to increased cost for businesses within the Wesfarmers group at a time when those businesses are exposed to increases in the costs of other inputs arising from the conflict in the middle east.

PN2642

From paragraph 6, we have set out the reasons we oppose the issuing the notice of intent, and a draft contractual chain order in the form of the draft order for discussion. As we have set out in paragraph 7, the evidence before the Commission is that many parties, within the road transport industry, have contracts in which they allocate fuel risk in different ways, including levies and indexation clauses, rise and fall formulas, which might, or which might not, provide for 100 per cent recovery of the actual cost of fuel increases.

PN2643

As Mr Kilgariff, Mr Ward's witness, said this morning, 'The industry is incredibly diverse, and has different contract models'. Many of those contracts have been, at least for businesses within the Wesfarmers group, have been negotiated by sophisticated commercial parties, in particular between primary parties and tier-one road transport businesses like Toll or Linfox, just to take some examples.

PN2644

Primary parties have arranged their businesses, including in relation to matters such as insurance, on the basis of those agreements. Likewise, these tier-one operators may have had the benefit of falling fuel prices on the past, which were not recovered, or recouped, by the primary parties.

PN2645

The draft order overrides the agreed allocation of fuel risk in those contracts, and mandates the primary parties to bear 100 per cent of the actual cost of fuel increases, and we say that the result is to deprive primary parties of what it is that they've bargained for. In my submission, your Honours, this submission is almost a corollary of the submission that was put by Mr Ward earlier. His concern was that secondary parties may have agreed, in some circumstances, to absorb all of the cost of the fuel increases, or have some other mechanisms that don't provide the 100 per cent fuel recovery, and we, of course, coming at this from the perspective of the primary parties.

PN2646

There may be instances in which that is something that we have negotiated for with sophisticated counterparties. And, in my submission, the Commission ought not intervene in those agreed commercial arrangements, having regard to a sophisticated, well-resourced, nature of those parties.

PN2647

JUSTICE HATCHER: How do we know if such an arrangement has been negotiated? The secondary party then doesn't force somebody further down the chain to bear the cost?

PN2648

MS KUMAR: So, your Honour, to the extent that the draft order is concerned, the draft order imposes obligations on secondary parties to provide fuel recovery to downstream parties. What we're interested in is the relationship between a primary party and a well-resourced large sophisticated secondary party. And, in that circumstance, where that secondary party is subject to obligations under a contractual chain order that the Commission might make to provide fuel recovery of costs for downstream parties, we can't see why those contractual arrangements between primary parties and larger well-resourced secondary parties, should not be honoured.

PN2649

JUSTICE HATCHER: So, Ms Kumar – I'm probably repeating what I said to Ward – I mean, what you've said sounds, at a higher level of generality, to be attractive, but I think we need a drafting solution to put that into effect. That doesn't expose secondary parties who are not tier-one companies to more exploitative arrangements.

PN2650

MS KUMAR: Yes, your Honour. And we can certainly attend to that. I note that Mr Follett's client has submitted some amendments to the - - -

PN2651

JUSTICE HATCHER: This is the \$1m threshold. I mean, he may as well just say Toll and Linfox, though.

PN2652

MS KUMAR: Yes. They have been in that form of order, or proposed form of order. Some attempt to clarify which would be the secondary parties that would be, essentially, excluded or not be the subject of a mandatory pass-through obligation - - -

PN2653

VICE PRESIDENT ASBURY: Ms Kumar, leaving aside the question of the relationship between your client and the Linfox/Toll major secondary party.

PN2654

MS KUMAR: Yes.

PN2655

VICE PRESIDENT ASBURY: Why should your client be exempt from having to say to its major secondary party that, 'If you're going to subcontract this work further, ensure that whoever you do that with is going to be passing on meeting the obligations under this order'?

PN2656

MS KUMAR: Well, your Honour, I think the answer to that is, under what is being considered, and the various orders that have been considered by the Commission, secondary parties will be subject to that obligation anyway by reason of the operation of the order. Why a primary party then needs to take steps to ensure, or to tell, secondary parties that any downstream participants need to be

given fuel recovery, we just don't see why that is necessary in circumstances where there would be a primary obligation on a secondary party.

PN2657

JUSTICE HATCHER: All right.

PN2658

MS KUMAR: And just in terms of how we would go about defining a large secondary party, of the kind that we're talking about, I note that His Honour Gibian VP raised the idea of, for example, a turnover threshold, that's something that we could explore, and, as I've indicated, we might be in a position to provide a draft form of order perhaps tomorrow morning.

PN2659

As we have set out in paragraph 8, the draft order for discussion doesn't appear to differentiate between the large resourced road transport businesses and small operators with small margins, so this ties into the first point. Professor Hassall's report accepted that these businesses are often price-setters. So contrary to Mr Boncardo's submissions about there being necessarily hierarchical structures that go top down, that is not always the case.

PN2660

Professor Hassall accepted in cross-examination that these large operators are price-settlers, and Dr Rawling also accepted in cross-examination that these businesses have a great capacity to influence price. And there's no evidence before the Commission that businesses of that kind are having any difficulty managing the recent fuel volatility in shops, yet the draft order requires primary parties to, effectively, underwrite 100 per cent of their costs. And this, in my submission, is not a fair result. Why should they be immunised to adopt, your Honour, the President's language, 'Why should they not be sharing the pain given their position?'

PN2661

At paragraph 9, we point out that 100 per cent recovery of actual costs disincentivises downstream parties from hedging, controlling fuel use, or seeking out the best available prices. Now, that could be addressed in the language of the order, or in the form of the order, and perhaps that could be an additional thing that we include in a draft form of order. We don't say it's fatal to the making of an order.

PN2662

At paragraph 10, we set out the likely inflationary effects of the draft order for discussion. So if primary parties are bearing 100 per cent of the cost of fuel increase, the inherent logic of events tells us that these increases are likely to be passed through to the end consumer, would pass through to the prices of goods, and commodities, paid for by the end consumer, which will drive inflation. And that's not conjecture. There is, for example, already in the material before the Commission, a letter on behalf of, for example, AUSVEG, which indicates that many growers, who typically have thin margins, and who are experiencing cost increases across all areas of their business, may not have the ability to absorb 100 per cent of the cost of fuel increases.

PN2663

Mr Wallace, another of Mr Ward's witnesses, gave evidence this morning that their clients, who retail to end consumers, are particularly sensitive to fuel price increases being passed through, and that, in my submission, is consistent with the fact that where 100 per cent of costs are passed through to primary parties, that is very likely to be passed through to end consumers.

PN2664

Section 40D of the Fair Work Act, and, in particular, paragraph (c), requires the expert panel to have regard to, 'The need to avoid adverse impacts on, amongst other things, the national economy'. Now, there is no expert evidence before the Commission of the inflationary impacts of the draft order for discussion. Dr Rawling accepted in cross-examination that one effect of at least the applicant's proposed contractual chain order is that primary parties may consolidate the number of road transport businesses that they use, leading to less work for downstream parties.

PN2665

Mr Wallace this morning gave evidence that some clients may be operating on fixed cost sales, and so any passing on of fuel costs cuts into their margins, which may affect their viability. And there's no evidence about the likelihood, or the economic impact, of all of these various economic issues, arising from the draft order before the Commission. And that is, respectfully, a function of the way this matter was brought on for hearing.

PN2666

It's telling, for example, that Dr Belzer, one of the witnesses for the TWU, in his report dated 7 April, says:

PN2667

I do not have enough time between the submission of this application...

PN2668

That, presumably, is on 2 April, and the 7th, when his report was submitted, and the hearing date, 8 April:

PN2669

...to provide a full evaluation of this order.

PN2670

And, as my friend, Ms Bhatt, has pointed out, there is various expert evidence relied upon by the TWU, which appears to have been prepared before the commencement of the proceeding on 2 April.

PN2671

JUSTICE HATCHER: Has your client taken any steps to explore the possibility of engaging an expert?

PN2672

MS KUMAR: I did anticipate your Honour would grill me on that. For my part, I had suggested a particular expert who might be appropriate. He was not

available. He was on leave on 9 and 10 April. I have to admit that no further steps have been taken other than that enquiry, and my client's not necessarily comfortable with the idea of leading viva voce expert evidence on the run.

PN2673

JUSTICE HATCHER: Why not?

PN2674

MS KUMAR: Well, because - - -

PN2675

JUSTICE HATCHER: Well, you mean to settle the report first, is that what you mean?

PN2676

MS KUMAR: Not quite, your Honour. We would need, of course, to at least have a letter of instruction. We'd need to be comfortable with, and across all of, the material filed by the TWU. The Peetz report, for example, is some 66 substantive pages. I mean, I was briefed in the matter at 4 pm on 9 April, but my solicitors received it early on the morning of 8 April, and then spent the day in hearing.

PN2677

So it's for those reasons that my instructions were, well, we're just not comfortable in the time that we've got available trying to get somebody who may or may not have the appropriate expertise, who may or may not be available on 10 and 13 April, to come and give evidence in response to expert evidence that is – I won't say voluminous, but lengthy and extensive, and requires some consideration before an expert should be expected to, on the run, respond to it.

PN2678

VICE PRESIDENT GIBIAN: The matter that you've referred to in paragraph 10 is, in a sense, a different subject matter than was dealt with by Professor Peetz, or Dr Rawling. He was talking about economic impact. Wesfarmers couldn't find an economist to come and tell us about it?

PN2679

MS KUMAR: So, your Honour, as I've indicated, we had a particular person in mind who wasn't available. As to my client not being comfortable leading evidence viva voce from an expert on one business days' notice, those are my instructions. And my submission is that it's not an unreasonable position to have taken in the circumstances.

PN2680

JUSTICE HATCHER: Speaking for myself, I'm not sure I need an economist to tell me that passing price increases up the chain will have an inflationary effect. There might be an issue of quantification.

PN2681

MS KUMAR: Yes. I accept, your Honour, that is, as a general proposition, a matter of which your Honours could take judicial notice. And, we do say, it is a

potential effect, but your Honours don't have any information about what the magnitude of that is going to be.

PN2682

I mean, the concern underpinning this application, so far as we can tell, is to protect brawler fleets, and owner operators who are particularly vulnerable in the circumstances, and here we have an order that may potentially have inflationary effects that are going to affect everybody in the economy, including mums and dads. I mean, that is something that should be the subject of evidence before the Commission before making such a substantive order.

PN2683

VICE PRESIDENT GIBIAN: Well, the application was filed on 2 April.

PN2684

MS KUMAR: It was, your Honour.

PN2685

VICE PRESIDENT GIBIAN: So you're having till today to find an expert who could give evidence about that issue.

PN2686

MS KUMAR: And we haven't, your Honour. We haven't been able to do that. And I'm reminded by my instructor that the determination was not issued until Friday. And so far as I understand it, I wasn't here on the 8th, the Wednesday. But, as I understood it, it wasn't until the 8th that it was determined that this matter would proceed in this way with, essentially, a final hearing on 10 and 13 April.

PN2687

Now, with some trepidation, I turn to paragraph 11. We accept, of course, that the matters underlying the application are deserving of urgent consideration, and that this is now a time sensitive application by reason of the minister's determine. We accept, of course as we must, that procedural fairness is an inherently malleable concept adduct to the circumstances of each case. However, what is ultimately required is fair opportunity for a party to present its case.

PN2688

Now, we say in paragraph 11 that, unfortunately, we have not had that opportunity, and we say that respectfully. Importantly, it's not just objecting parties, such as Wesfarmers, that have raised this concern. The material before the Commission includes, for example, a letter from the Bus Industry Federation and the Australian Public Transport Industrial Association. Those parties support the making of a contractual chain order. But they say, at paragraphs 29 to 30, that:

PN2689

Due to the truncated timeframes, in which to support for this application, we have been unable to obtain witness statements or further evidence. However, should the matter proceed past the initial hearing dates of 10 and 13 April, it is

expected that we would be able to furnish further evidence supporting the submission, including witness statements.

PN2690

And, as I've indicated, we didn't have time in the one business day available to us to seek input from our diverse businesses, nor to raise appropriate lay and expert witnesses who could talk to the impacts on them, and the corresponding economic impacts of making the order.

PN2691

Now, the Commission would be assisted by evidence about those matters. This is in circumstances where it is primary parties, such as businesses within the Wesfarmers group, who will ultimately bear, if the order is made in this form, 100 per cent of the fuel cost increases. They are the parties whose rights are most affected by the operation of the draft order in this form, and they should not be shut out, in my submission, from a meaningful opportunity to be heard against the making of the draft order.

PN2692

At paragraph 12, we've identified the - - -

PN2693

JUSTICE HATCHER: Sorry, just to be clear, is your position that you pose the making of an order in any circumstances?

PN2694

MS KUMAR: No, I don't think that that's the position.

PN2695

JUSTICE HATCHER: So if that's not the position, you've been given an opportunity to say what the terms of the order should be. So how are you being shut out?

PN2696

MS KUMAR: Well, for the reasons that I've said - - -

PN2697

JUSTICE HATCHER: I mean, that's a very strong expression.

PN2698

MS KUMAR: Well, for the reasons that I've said, your Honour, we haven't been able to raise the lay and expert evidence in response to this application. So far as we can tell, no primary party has put on evidence, other than Mr Meehan's client, and it's unclear whether they're a primary party or a secondary party for the purposes of the order. No primary party, who would have to bear 100 per cent of the cost of the fuel increases, has put on evidence.

PN2699

JUSTICE HATCHER: That's true.

PN2700

MS KUMAR: Yes.

PN2701

JUSTICE HATCHER: But, so what?

PN2702

MS KUMAR: Well, insofar - - -

PN2703

JUSTICE HATCHER: I mean, other parties have managed to do it today.

PN2704

MS KUMAR: Well, the other parties include the moving parties who certainly had longer than one business day. It includes Mr Ward, who appears for, respectfully, a handful of businesses, or interests, and Mr Meehan, who represents two clients.

PN2705

JUSTICE HATCHER: Yes. Why couldn't you have done that?

PN2706

MS KUMAR: Well, as I've indicated, your Honour, we have a diverse range of businesses, I think in the order of 200 plus. They all have different arrangements. They're all going to have different contractual arrangements with secondary parties. They're all going to have different impacts if they suffer, if they have to be the subject of a 100 per cent fuel recovery mechanism. And, I guess, I accept we had a business day, we had Friday, although we were in hearing, we had the weekend. In that time, my instructors have not been able to get the instructions that we need from my client.

PN2707

JUSTICE HATCHER: And are you still working on that? Because you (indistinct), seeing you won't get another opportunity, we might give you a special fixture if that's really what you want.

PN2708

MS KUMAR: Well, yes, we would like a special fixture. And if the Commission were prepared to entertain that, I mean, as I understood it, having read the transcript, that was the position that my client adopted on the 8th, that we wanted further time to put on some material. If that were available to us, we would embrace that.

PN2709

JUSTICE HATCHER: No, you don't need to put on material. You can simply bring witnesses to the hearing to give evidence.

PN2710

MS KUMAR: Yes, of course.

PN2711

JUSTICE HATCHER: So you can do that later this week?

PN2712

MS KUMAR: I am taking instructions remotely, your Honour. I'm being told we need to get instructions. But, certainly, we would be willing to embrace any opportunity, including an expedited opportunity, having regard to the urgency of the case, to do what your Honour has suggested, and come along, bring witnesses who could give evidence about these matters.

PN2713

JUSTICE HATCHER: All right. But will they say anything different from what's in your submission?

PN2714

MS KUMAR: I don't know. I don't have complete instructions about the matters that I'm referring to your Honour as to what the contractual arrangements across these 200-odd businesses are, how they're going to be impacted if they have to bear 100 per cent of the fuel cost increase, what an expert is going to say about the inflationary effect of this order; I don't know.

PN2715

JUSTICE HATCHER: All right, thank you.

PN2716

VICE PRESIDENT GIBIAN: What's the one business day you keep on referring to?

PN2717

MS KUMAR: This is 9 April, your Honour. This is the Thursday. So, as I understand it, I was not present for the hearing on 8 April.

PN2718

VICE PRESIDENT GIBIAN: Well, other than you raising the name of an expert who is apparently away, what steps do Wesfarmers take, after the receipt of the application by the TWU on 2 April, to prepare evidence to put before us?

PN2719

MS KUMAR: So we have sought information from a number of businesses within the group. Some of them have responded. I have some very brief abbreviated instructions from some of them, not all of them. I'm told that the persons, within Wesfarmers who were instructing my instructors, have been tied up as well in a regulatory matter. I don't have further information about that. But, for that reason, their ability to participate extensively in any evidence gathering process has been limited as well, in the time available.

PN2720

JUSTICE HATCHER: All right. Anything further?

PN2721

MS KUMAR: No, your Honour. There were some further points that we have raised in our written submissions, but I think I can rely on the written submissions for that.

PN2722

JUSTICE HATCHER: All right. If you wish to propose any textual modifications to the discussion paper version, can you do that by 10 am in the morning, please.

PN2723

MS KUMAR: Yes, we can do that.

PN2724

JUSTICE HATCHER: All right.

PN2725

VICE PRESIDENT ASBURY: Ms Kumar, at the risk of oversimplifying your submission, are you really saying that Wesfarmers thinks that whoever is its secondary contractor should be the primary contractor in pushing things down? You know, because, effectively, you're saying that the secondary contractor will have an obligation if it subcontracts the work from Wesfarmers. So, essentially, what you're saying is the chain will operate according to the order, but just without Wesfarmers in it, aren't you?

PN2726

MS KUMAR: No, your Honour. So the secondary parties would be subject to the obligation in clause 4.3 of the draft order. As to order 4.1, which imports the obligation on primary parties, we don't say, as a blanket proposition, Wesfarmers should be excluded. What we're saying is a few things: (1) we shouldn't have that obligation in relation to large well-resourced sophisticated secondary providers; (2) it should be any exemption, for example, that which is set out in 4.5 should extend beyond a rise and fall rate adjustment mechanism.

PN2727

So I think your Honour Vice President Asbury suggested, in an exchange with Mr Ward, deleting the words 'rise and fall' and just 'rate adjustment mechanism', that might capture the point. And Mr Boncardo raised the idea of adding the word 'arrangements' after individual contracts, and that might also capture the point.

PN2728

VICE PRESIDENT ASBURY: So you could consider that overnight with some drafting?

PN2729

MS KUMAR: Yes. Yes, we could do that.

PN2730

VICE PRESIDENT ASBURY: Great, thank you.

PN2731

MS KUMAR: We could do that. And we've said all we need to say in writing as to the genuine engagement point.

PN2732

JUSTICE HATCHER: All right, thank you. We might go to your clients next, Mr Follett. But before I do that, Mr Boncardo, Mr Anderson, in relation to the

proposed exemption of cash in transit, I'm reminded that we received a submission from Linfox Armguard, which, as I read it, presses for their inclusion in the order. Can someone tell me that that submission is withdrawn?

PN2733

MR BONCARDO: That submission involves the position of Linfox last week.

PN2734

JUSTICE HATCHER: Yes.

PN2735

MR BONCARDO: And I don't act for Linfox, your Honour, and I don't have instructions from Linfox, but I am told by my clients, including the national secretary of my client, that Linfox's position is now changed, and it does consent to cash in transit being removed from the order.

PN2736

JUSTICE HATCHER: Mr Anderson, can you assist with this? Are you in a position to confirm that?

PN2737

MR ANDERSON: Yes. I can, your Honour.

PN2738

JUSTICE HATCHER: All right, thank you. All right. Mr Follett.

PN2739

MR FOLLETT: Thank you, your Honour.

PN2740

JUSTICE HATCHER: Well, if we cut to the chase, does the cash in transit exemption satisfy your banking clients, or not?

PN2741

MR FOLLETT: It satisfies my banking clients, yes.

PN2742

JUSTICE HATCHER: Yes. All right, thank you.

PN2743

MR FOLLETT: I simply intend to deal with our proposed draft of the order, which I understand had made its way to the Commission today, and to go through the changes, and justify them, and we endorse some of the comments made by Mr Ward, and some of the submissions inherent of those others appearing on the application, about being very cautious given the rushed circumstances of this particular application of ensuring that we're not throwing the baby out with the bath water in terms of addressing the issues.

PN2744

Can I start with the easy issues first, and they are the body of the document, other than the primary obligations in clause 4. We've adopted some amendments to the definitions, including in relation to regulated road transport contractors, and

employer-like workers, just to make it clear that those persons are in the relevant contractual chain as was the case for the primary and secondary parties. We've inserted a definition of 'large road transport business and group of company', which I'll return to.

PN2745

Can I skip then over 'coverage', and clause 4, and deal with clauses 5, 6, and 7. 5.1 doesn't propose a date. As we see things in terms of the draft, if a draft were to issue, the Commission need not identify a date because that date assumes a rate of variables about what follows, including, first and foremost, the time it takes the expert panel to decide the application, and the 20 April date almost assumes that the application would be decided today, or perhaps tomorrow.

PN2746

JUSTICE HATCHER: I understand that, Mr Follett. But if we are considering a fairly early date of operation, should we put parties on notice about that?

PN2747

MR FOLLETT: Well, I guess it just begs a question, your Honour, whether you put a date in now simply for the sake of it, and hear the parties subsequent to the draft as to the difficulties with that clause. We, for our part, don't think April is feasible, for reasons I'll address directly now. And that's because of the obligations in 536PF(2), and also PH.

PN2748

Now, these processes are truncated to an extent by the Fairer Fuel Act amendments. But they aren't, of course, eviscerated. There needs to be a consultation process with RTAG, and there needs to be genuine engagement. There are several things we say about that. Firstly, on the concept of engagement, it's different from, and in our respectful submission as a matter of simple grammar and language, something more extensive than consultation.

PN2749

Consultation is used elsewhere in related context, including in 536PF(2)(b), consultation with RTAG, and also 536PJ(3). We know all the cases on consultation, and genuine consultation, and the emphasis placed, not only by this Commission, but the courts, on the genuineness of an opportunity to persuade that it's no empty term, and that there needs to be a genuine consideration of concerns, and alternative proposals. This is not genuine consultation. This is genuine engagement. The word 'engagement' in context means to occupy the intention or efforts of someone else. That, in our submission, requires some form of back and forth process, not merely a hearing, nor not merely an opportunity to make submissions. And, of course, that can be contrasted with section 536PH(1), which, after a draft already published, provides an opportunity to make written submissions.

PN2750

Secondly – and this is a significant issue – section 536PF(2)(a), being the genuine engagement clause, is expressed in mandatory terms. That is, you must not make an order, and it is not hedged by a requirement such as reasonable opportunity to engage compared to other provisions. And it is given extreme breadth, via the

scope of the application here, and the genuine engagement not only must occur, but it must occur with the parties covered (indistinct) have the displeasure to depart from the submission Mr Ward made about how one would read those words. I understood his submission to, essentially, be 'parties covered' doesn't mean 'parties covered'.

PN2751

There are literally hundreds of thousands of parties covered by this document. This statutory provision, as difficult as it is, which could have dealt with better drafting or, perhaps, in the context of applications of this kind, better amending legislation with the Fairer Fuel Act. This provision requires the Commission must not do something unless it genuinely engages with hundreds of thousands of people

PN2752

It's not entirely clear to us how the Commission discharges that obligation. But holding hearings where a selection of individuals appear, in our respectful submission, doesn't quite go far enough. And creating a special important page on the Commission's website doesn't do it either. Because there is a distinct difference between giving someone an opportunity to be heard or giving someone an opportunity to know that a proceeding is on, and you can make submissions, or turn up and provide some evidence. And, actually, genuinely engaging with those persons.

PN2753

As I said, I don't know entirely what the solution is. It could be some sort of publication exercise in major newspaper and print media, or TV media. It could be some process, even on the assumption that this was satisfying the obligation, to notify and give a proper opportunity for people to respond so that genuine engagement has been satisfied with those individuals. But I think it stands to reason, as I think Ms Bhatt submitted, there would be very, very, large numbers of people who would be covered by this order, who simply don't even know of the existence of these proceedings.

PN2754

Now, that, in our respectful submission, makes it somewhat difficult to contemplate that an order would be published and then finalised in a matter of six or seven days, whilst genuinely complying with that particular obligation.

PN2755

JUSTICE HATCHER: Well, (indistinct) we couldn't do it in six or seven months, let alone six or seven days.

PN2756

MR FOLLETT: Well, that's an interesting observation, your Honour, because that leads me to my next submission, which is these provisions were drafted on the basis that things would take 12 months, at least, in every case. And it was only in urgent cases that it would take at least six months. Now, they are very lengthy periods of time, and it gives you some sense of what the parliament had in mind about opportunity to make written submissions after the publication of a draft order, and indeed the genuine engagement process, and the consultation with

RTAG. Plainly enough, parliament thought that this process would be intensive, and extensive.

PN2757

And the parliament, interestingly enough, in the Fairer Fuel Act, hasn't actually changed anything other than providing somewhat of a carve out. The 12 month requirement is still there, and the six month requirement for urgent cases is still there, and there's an additional carve out where the Commission thinks it is reasonable to adopt what apparently is any other timeframe. But that provision, and the assessment of the reasonableness by the Commission, obviously has to be read in context. And you're looking at a default position. The default position for time sensitive applications is 12 months. And urgent cases get six months.

PN2758

It's not entirely clear to us how this case – I think it was described earlier as 'urgent' (indistinct) get six months. Labelling it as an emergency, or an exception, or extreme, doesn't really add a lot. The point being that the time parliament assumed it would take has to be read in the context of the provisions. Now, I'm not talking six months, I'm not talking 12 months, I'm not talking anything of the sort. I am saying that a week, or 10 days, or two weeks, seems quite an extreme proposition in the circumstances. Can I then move to clause – I'm sorry?

PN2759

JUSTICE HATCHER: No, no one said anything. Go ahead.

PN2760

MR FOLLETT: Sorry. Can I then move to clause 5.3, and you'll see we've proposed two amendments. The first is the price production suggested of \$2 at or about 6 March. It doesn't seem to us that that provision will have any work to do set at \$2. It's difficult to conceive of a circumstance where diesel prices were at or about \$2 at that time, that they would revert to that price after events - - -

PN2761

JUSTICE HATCHER: Perhaps we were more optimistic on Friday than we are today, but.

PN2762

MR FOLLETT: Yes. Well, you heard the evidence today that the excise reduction has been effectively wholly consumed, and it's now priced in. That will, no doubt, come back on at some point in time, and that's a matter of 20-something to 30 cents. So the suggestion that even if the Strait of Hormuz was open completely tomorrow, that prices would all of a sudden go back to \$2, seems somewhat unrealistic. So we've put in a provision that we think might actually have some work to do.

PN2763

We've also added (b), and we think the obligations should cease if one or other of the circumstances, which justified the emergency determination, cease. And we think that is consistent with section 536PQ(1), which specifies that the terms included in a time sensitive order must relate to the event at all circumstance. It

seems to us that it's difficult to say those terms would relate to an event or circumstance if the event or circumstance itself had ceased to exist.

PN2764

VICE PRESIDENT GIBIAN: Doesn't that govern the making of it? Once it's made, it's made, and it's in force?

PN2765

MR FOLLETT: Well, this is a constructional issue - - -

PN2766

VICE PRESIDENT GIBIAN: Subject to variation or revocation.

PN2767

MR FOLLETT: Yes. But this is a constructional issue, your Honour. That's one way to construe it. But the argument against that is that you could have a very short term emergency issue, which warranted the making of an order quickly in a particular narrow set of circumstances very shortly thereafter, and that order continues in operation until revoked. And it could be an extraordinary intervention in the market, and it would require, thereafter, someone to come back to the Commission and prove, through the filing of an application, and the bringing of evidence, et cetera, why the order should be terminated, and - - -

PN2768

VICE PRESIDENT GIBIAN: I mean, well, we can do that of our own motion as well, I think, under the provisions. But it might be a good reason as to why we would revoke an order if it was obvious that the circumstances have changed. But if it operates, as you suggested, then road transport businesses would have to make some assessment as to whether there ceased to be a significant reduction in shipping through the Strait of Hormuz.

PN2769

MR FOLLETT: I think that is a - - -

PN2770

VICE PRESIDENT GIBIAN: That can't be right, can it? That is, if on their face there's an order that applies to them, and someone's supposed to assess whether or not those circumstances have ceased to exist or not.

PN2771

MR FOLLETT: It wouldn't be the first time that someone has to make an assessment of what (indistinct) - - -

PN2772

VICE PRESIDENT GIBIAN: So every road transport business is required to read the paper, and work out whether there's a significant reduction in shipping in the Strait of Hormuz, are they, to know whether they have to comply?

PN2773

MR FOLLETT: Or read the paper, and work out whether the price of diesel is reduced to \$2 or not.

PN2774

VICE PRESIDENT GIBIAN: Well, everyone seems to be able to work that out. But anyway, all right.

PN2775

MR FOLLETT: We then propose clauses 5.4 to 5.6, which we think are entirely sensible and reasonable in light of the far-reaching interventions that this order would have coupled with the somewhat extraordinary nature of the hearing environment. There is every chance that this order could have wide breaching and serious impacts that have not been quite fully ventilated in the limited time available. It could lead to devastation for small contractors, or some small contractors. It could lead to insolvencies.

PN2776

Given the speed of the hearing, it's very difficult to see how the Commission could be satisfied of the negative in section 536PF(2)(e), which is the provision that the order 'will not unduly affect the viability and competitiveness of road transport contractors'. And in the face of those risks, I think it was Professor Peetz's evidence that if one was to step in and regulate, notwithstanding those risks, that a sensible course was to revisit, after several weeks or several months, and hear from the parties, and I think he used the terminology where the parties would indicate, 'This is what's happening in practice'. That's at transcript 1488 and 1489. So we think a review mechanism is important and appropriate. It doesn't, of course, determine what the outcome of that process might be.

PN2777

The dispute settlement, we've made some very minor amendments to that, which are all self-explanatory. The only one of any significance is clause 6.6 where we proposed to broaden representation beyond industrial associations. That provision seriously disadvantages entities who are not members of such associations, including many primary and secondary parties, and, most obviously, a very large wave of individual road contractors or employee-like workers.

PN2778

Can I now move to the obligations in clause 4, the principal obligations. And this will be, unfortunately, jumping out of some order. We second the submissions, I think, of both Mr Ward and also Mr Meehan, and also Ms Kumar, about the necessity for what was clause 4.2, but now in our draft sits as clause 4.3. If there is a principal obligation on a primary party, and a principal obligation on a secondary party, then it doesn't add a lot other than a compliance risk for no ultimate benefit to require the primary party to, in addition, meet fuel costs of secondary parties, but to take reasonable steps to ensure that those secondary parties comply with their primary obligation to road transport contractors and employee-like workers.

PN2779

If such a clause, nevertheless, is to be retained, you will see us pre-suaging the submissions on a number of parties today that the use of the word 'all' before 'reasonable steps' is highly likely to create difficulties in a practical real world with compliance. And I think Mr Meehan made a submission about what words should be in place of 'secondary party fully recovers',. And, again, we had picked

up the same issue, and think that those form of words, if this clause is to be retained, should say that.

PN2780

Beyond that, the other change that we've made, firstly, we propose a monthly review process, rather than a fortnightly process. And in 4.7, in aid of that, we provide for a provision of relevant information, which we say is absolutely critical and necessary. Plainly enough, we say, on the basis of not only some of the evidence before the Commission, but common sense, a review process on a fortnightly basis will, for some entities, not all, but for some entities, create very difficult compliance risks unless everyone, essentially, spends their whole time devoted to the review process.

PN2781

Based on the evidence of Dr Hassall, supported to an extent by Professor Peetz, it is clear that there are differing arrangements across differing entities, and there are different consequences for fuel consumption, depending upon the nature of the fleet engaged, and in use by a particular operator. We submit, respectfully, that the Commission could not have any confidence that an order with fortnightly requirements could be adequately complied with by the parties to whom those obligations are imposed.

PN2782

Primary and secondary parties cannot adjust payments to each other, and road transport contractors, until they know what those requirements are, and, in many cases, that's not all, but in any cases they will not know what the actual fuel recovery will be until the contractor or employee-like worker tells them. That's particularly the case in respect of mixed loads, and issues of that kind, and we deal with this, to an extent, in clause 4.7(b). But there is a great risk of double recovery for road transport contractors, and employee-like workers.

PN2783

If fuel consumption, on a particular trip, is allocated to two to three separate jobs, or secondary parties because part of the load is carrying that secondary parties' goods, these people, who are at the end of the chain, are in, very large part, individuals or small fleets with one or a very small number of trucks with very limited, if any, administrative support. And for some of them, who have very poor, if any, adequate recordkeeping, particularly on a timely basis such as fortnightly or monthly, and you heard all of the evidence about that from Dr Hassall, and just some of the references at transcript 272, 280, 286, 287, 1583 to 1588, 1589 to 1591.

PN2784

Also, much of the so-called compliance, in a fortnightly environment, assumes that the individual road transport contractors will know of the existence of this order, and what their entitlements under it are. And for those reasons, we say a fortnightly review process is, in some cases, simply impossible. And the evidence is much more consistent with a time process of either monthly, and, again, the evidence in support of that, from Mr Hassall, 286, 1587, 1644, 1658 to 1661, where I think a month was identified as 'good and practical'. And Mr Andrich

spoke of a monthly review, PN365 to 368, and Mr Barnaville, a monthly process, PN516.

PN2785

Associated not only with this, but the extreme speed of these proceedings, coupled with the consequence of non-compliance, and the very great difficulty that most respondents had in preparing and presenting a strong coherent evidentiary case, we say the Commission should hasten very slowly in imposing quite sweeping obligations in absolute terms.

PN2786

And that then leads into the caveat we have around the principal obligations at 4.1 and 4.4 of our draft, and, indeed, 4.3, that best endeavours, whilst acting in good faith, is a better measure of compliance than the draft, which supposes absolute compliance. Practically, in the real world, imposing these sorts of obligations, certainly on primary parties, and where one would hope on secondary parties, is functionally equivalent to absolute compliance in the sense that these entities will do everything reasonable in their power, acting in good faith, to ensure and see to it that there is full pass through, and full cost recovery, without suffering the consequences in the event that someone slips through the cracks, or there is information asymmetry, or there is simply an issue with getting necessary information out of, say for example, a road transport contractor, to enable absolute guaranteed full cost recovery to be achieved.

PN2787

For example, taking our draft clause as an example, if a contractor defaulted on their obligations to provide information under clause 4.7, there needs to be a safeguard for the secondary party, and the primary party, let's say are in contravention of the order because of the actions of other persons, all 4.2 provides a caveat for large transport businesses, we've heard a lot from other parties today about the similar idea. The TWU's opposition to this appeared to be opposition to a different form of provision, which somehow carved out the obligations of these entities.

PN2788

We don't seek to carve out, or alter, the obligation of secondary parties to ensure full cost recovery, or best endeavours to ensure full cost recovery, for a smaller person at the end of the line, what we are saying, more consistently with the submissions of Mr Ward, and to borrow his language, those entities who are big enough and ugly enough to look after themselves, and engage in genuine commercial negotiations, should be entitled to do that. And if they can reach agreement as to how the particular cost consequences, as between them, will be borne, then that should be enough, and we don't really understand what purpose is to be served in ensuring that the relationship at that level, provided, of course, the secondary party is large enough, and there is no exploitation down the line, ensuring that a primary party in every single case, and in every single context, must be a full cost recovery for everyone.

PN2789

The evidence makes it plain that there are sophisticated secondary parties, and it can still be unfair and uncommercial that every primary party in every situation

should bear 100 per cent of the recovery. And, indeed, as Mr Ward submitted, there will be some secondary parties who actually do not want that to occur. I don't need to traverse the evidence, but both Dr Hassall and Professor Peetz repeatedly identified that there are large secondary parties.

PN2790

The president asked questions about a drafting mechanism to achieve what sounded in principle like an idea that had some merit. We've attempted to do that in our clause 4.2. At some point in time, there has to be a line drawn. We've drawn that line, and revenue for the individual entity, or the group, with gross revenue of \$1b, whether that be described as 'arbitrary' or otherwise, it certainly addresses the primary concern about ensuring that a carve out of this nature, which enables very large entities to negotiate with each other, is not going to be capable of being used to exploit, obviously enough, any road transport contractors, let alone any smaller secondary parties.

PN2791

And the very last sentence of our draft clause 4.5, much weight in the discussions appears to have been put on clause 4.5 as some general panacea. And 4.5 of the original draft, which now appears in clause 4.6 of our draft, can I just deal with our final sentence of clause 4.5. It's just a backstop to ensure that there's no double-dipping in the event certain payments of adjustments already been paid. But we noted this morning the exchange from the president that we were talking about in future payments only, our clause 4.6, 4.5 in the draft, we don't say anything about the changes that have been proposed, and the use of the word 'arrangement', and things of that kind. The difficulty with the clause, as we have it, is it still requires satisfaction of the principal obligation, which is fuel cost recovery.

PN2792

And, as we understand it, it's not a defence to say, 'We made these adjustments, and they were pursuant to these review or rise and fall mechanisms'. One has to go further and say, 'And those adjustments, although through review processes, actually achieved full fuel cost recovery', and the cause doesn't assist, in a great sense, because it still requires everyone, even those who have engaged in those processes, to undertake the next step, and satisfy themselves that what they have done, or propose to do, to achieve full cost recovery.

PN2793

Just very briefly, just on that point, Mr Ward, in his submission, referred to some of the evidence given this morning from his clients about modelling, some modelling assumptions. Now, those models guesstimate, perhaps closely, actual fuel cost increases. But they are not actually dollar and cent fuel cost increase amounts. So the modelling process, and how complex or easy that is, still doesn't achieve the drafting of clause 4.5, or 4.6 in our document, because it still doesn't achieve full fuel cost recovery. I think they are all the matters that we wish to submit.

PN2794

JUSTICE HATCHER: Thank you. Ms Cameron.

PN2795

MS CAMERON: Thank you, your Honours. I will be extremely brief this afternoon. I don't believe that I have anything substantively to add to the submissions that it has already filed on 10 April. We think that you've got quite enough to consider for your submissions that have already been made today.

PN2796

JUSTICE HATCHER: Thank you. Ms Jongsma.

PN2797

MS JONGSMA: Yes. Thank you, your Honour. I just wanted to make a few key points. But before I get to that, I would like to note that our submission, with respect to witness and evidence, was mainly to flag that if there was a further opportunity to put forward supporting evidence, that we would do so. Not to be a criticism of the process, Wesfarmers, who are considerably more well-resourced than what we are, should respectfully not be using it as a way to explain their own lack of evidence.

PN2798

So, firstly, we would like to note and support the ATA's latest submission that the government, and government entities, should be clearly listed as a primary party for the purposes of a contractual chain order. And, secondly, with respect to a regulated road transport contractor, and its interface as a primary or secondary party, we submit that there should be sufficient clarity in the contractual chain order to clearly identify who is a primary and a secondary party.

PN2799

I did have the pleasure of being surrounded by many a lawyer at the weekend, who advanced the argument that the contractual chain order, as it stands, does not provide any relief for the first party to a contract with a client, in particular, if they are the only regulated road transport business or contractor in the chain. They would argue that both the client and other party to that first contract, are the primary parties even where one of those parties is a regulated road transport contractor. So whilst we have heard, through these proceedings, that it is generally accepted that that's not the case, and it is, indeed, the case that a road transport operator is a secondary party, and we have been talking about Coles and Toll, there does remain sufficient ambiguity in a contractual chain order as it stands, with respect to which entity is a first regulated road transport business contractor in the chain. And we can make some submissions tot MS HATCHER; However, we just wish to note that this ambiguity is a live issue, and I'm not aware of any decision, or authorisation, providing more clarity on that position.

PN2800

So we do accept that if that uncertainty exists, then we would seek that the proposed order would take this one step further by identifying obligations between the first two parties in a contractual chain, especially where one party is the client at the top of the apex, as it were, and the other party is a regulated road transport business or contractor for the purposes of the Act.

PN2801

We also note, and support, the proposed amendments by the Transport Workers' Union with respect to obligations on secondary parties to other secondary parties. And I note that they did attempt to address the issue, that I raise at the moment, on Wednesday last week, but to my mind it's not been satisfactorily resolved.

PN2802

Finally, I just want to note that despite what we've been hearing with respect to the size of businesses, this does not always result in an ability to negotiate a beneficial commercial term, especially so when the government is your client. And this is the case for a vast majority of businesses in the bus and coach industry. For example, we still do not have any word from the Queensland government, and departments like TMR, as to what process they're going to proceed with with respect to fuel reviews.

PN2803

As mentioned in previous submissions, some contracts have 90 day reviews (indistinct) clauses, and we are, essentially, being the bank for the state treasury in that case. I'd just like to reiterate the point that Dr Peetz made on Friday when he said 'It's not really about the size of the contracting party, but rather about the asymmetry of power'. And contrary to the general exceptions that a large business has the ability to cover costs, we respectfully submit that the size of the business does not always correlate with their ability to absorb costs.

PN2804

Finally, we do not make any submissions with respect to the process that this application has taken. Thank you.

PN2805

JUSTICE HATCHER: All right, thank you. Mr Munro.

PN2806

MR MUNRO: Thank you, your Honour. I will not take long. I might start by drawing your attention to the Australia Trucking Association's written submission lodged yesterday. In that submission, we continue to support the making of a road transport contractual chain order for fuel cost recovery, and we support the changes proposed in the discussion draft released on Friday. In particular, we support the inclusion of a sunset at clause 5.3. It's fair and logical to end an emergency order when the emergency conditions that required it have ended.

PN2807

In our recent submission, at paragraph 42, we also proposed several amendments. Given the time of day, I'll respectfully take those as largely read by the Commission, and participants. I would, however, like to take a moment to make a short statement about two issues, because these have been the focus of some discussion today. Firstly, we're concerned, like others, that clause 4.2 of the discussion draft order will impose a significant and unnecessary regulatory burden on the supply chain. It obliges primary parties to take all reasonable steps to ensure that secondary parties, in the same road transport contractual chain, adjust their rates to cover the increased cost of fuel.

PN2808

There is a possibility that primary parties may not know all the secondary parties in the chain, or that the arrangements made between other secondary parties, with whom they do not deal directly. Primary parties may, therefore, consider that the only way to comply with clause 4.2 is to insist on auditing all contracts throughout the chain, which, from our view, would be costly, time consuming, and will create an additional dispute resolution burden for the Commission.

PN2809

Clause 4.3 already requires secondary parties to adjust their rates to ensure that the other secondary parties they deal with can recover their increased fuel costs. So given the order separately has a dispute settlement clause, we believe that there is no requirement for primary parties to police the operation of clause 4.3 throughout the contractual chain; it would be more of a nuisance than anything else. Beyond the secondary parties that they deal with directly. And so, from our perspective, removal of clause 4.2 would address that concern.

PN2810

The second issue I'd like to address is the very broad application of the proposed order, and, more specifically, whether large operators should be exempt. Yes, the proposal is broad. And, yes, it may apply to some who do not need it, or they do not want it. But, respectfully, we say the needs of large operators, or individual sectors, is not the primary concern when considering exemptions. The primary concern relates to fair competition or, as others have put it, a level playing field, and we have some experience in this regard.

PN2811

The previously made Road Safety Remuneration Tribunal minimum rates order applied to some operators, but not to others. Namely, it applied to owner/drivers, and no others. The supply chain simply avoided that order by preferring the services of operators not covered by it. As a result, the order was not just ineffective, it actually harmed those it was meant to protect. So with this experience in mind, we'd now argue that the order, currently under consideration, must necessarily be brought, and simply cannot exclude any group of operators that may then compete with the operators that are covered or, indeed, we might expect the same result.

PN2812

And to give an example of something that's been talked about today. If we had a large primary party that engaged, say, Toll or Linfox was doing 80 per cent of their work, and 20 per cent of that work was undertaken by others, if Toll or Linfox were excluded or agreed to absorb that fuel cost, but the others could not, why would the primary parties not give 100 per cent of their work to Toll or Linfox to a negative impact of those other 20 per cent that could not avoid the cost. And, to my mind, that's not a level playing field. And there's more detail about that issue contained in our written submission. So thank you, your Honour. That concludes our supplementary oral submission.

PN2813

JUSTICE HATCHER: All right, thank you. Mr Garozzo.

PN2814

MR GAROZZO: Thanks, your Honour. I act for Amazon. I only propose to address the issue that Mr Munro was just talking about, about the TWU's proposed exclusion of on-demand delivery work from any draft order. I can short-circuit my submission, in the interests of time, by echoing basically everything Mr Ward submitted about this issue. As he said, and as my learned friend, Mr Meehan, and also Mr Munro just now submitted, a proposal to exclude Uber and DoorDash from the order is discordant with the (indistinct) thrust of the TWU's submissions about the need to create a level playing field in the industry, which you've heard a number of times.

PN2815

Now, what the TWU's proposal would do is to create, in effect, a competitive advantage for Uber and DoorDash, vis-a-vis its market competitors. That consideration is no more pronounced in respect of my client, Amazon, which actually performs on-demand delivery, and your Honours will have seen that in the definition of that phrase, TWU has proposed as an exclusion, Roman numerals (i) and (ii) of which related to deliveries from stand-alone distribution centres, not open to the public obviously enough, distinctly descriptive and no doubt intentionally so of my client's business and there were exchanges between - both on Friday and today - between your Honour Hatcher J and my learned friend about the absence or any principle rationale between businesses to whom the order would apply differentially in this way or the absence of such a rationale and (indistinct) there was no meaningful responsive submissions that were made by my learned friend in that regard and on Friday I think he even said that he couldn't cavil with the proposition that you were putting to him, your Honour, and nor could he, in my respectful submission.

PN2816

Just finally, on that issue as sort of a second - I'm not even sure, actually, the purpose for which it's raised but the TWU refers to a fact there's an application for a minimum standards order on foot in relation to Uber and DoorDash. That's MS2024-3. Whatever the relevance of that is supposed to be to the exclusion of those businesses from this draft order, it should be just as applicable to Amazon because as your Honours know, Amazon contests the coverage of that proposed MSO, which it said should also cover it. And aside from that, as you know as well the TWU has specific application for an MSO that would expressly cover Amazon. That's MS2024-1, which is proceeding to a hearing in July so there shouldn't be any special treatment for Uber and DoorDash for those reasons and the TWU's proposal to exclude them from the draft order should be rejected. Those are my submissions. Thank you.

PN2817

JUSTICE HATCHER: All right, thank you. Ms Fung.

PN2818

MS FUNG: Thank you, your Honour. I appear on behalf of DoorDash Technologies Australia Pty Ltd. I only have a very short submission to make and that is that DoorDash has approached these proceedings on the basis that the application proposed not to cover on-demand delivery work. DoorDash has noted the reservations regarding the proposed approach to the exclusion of on-demand

delivery work from the proposed order expressed in the course of the hearing. DoorDash supports and joins in the submissions at paragraphs 13 to 17 of the written submissions filed by the Transport Workers' Union this morning and the oral submissions made by counsel for the union building on those points today.

PN2819

DoorDash otherwise reserves its right to make further submissions should the Commission determine to publish a notice of intent and draft order which does cover on-demand deliver work, contrary to the union's application. Thank you.

PN2820

JUSTICE HATCHER: All right, and Mr Tamvakologos.

PN2821

MR TAMVAKOLOGOS: Your Honours, thank you. Portier relies on the material that we put in writing and filed this morning at 7.45 am. I just wish to make a few short points about that. The first is that like DoorDash, we are proceeding on the basis since 2 April that orders sought by the co-applicants was an order that contained an exemption for on-demand work. That position was taken by the co-applicants and particularly the TWU based on an informed assessment of essentially the problem in different parts of the road transport industry and in particular in the on-demand sector and I'll mention specifically the measures that are referred to in paragraphs 13 and 14 of the TWU's submissions filed this morning and what is said at paragraph 15 which is that these measures are in the TWU's view and in light of feedback received from its members timely and appropriate.

PN2822

So this is not just a matter of the applicants themselves having an opinion about whether what has been done in the on-demand sector is appropriate. It has been a view taken with the benefit of consultation from their members. The second point I would make concerns clause 4.5 of the draft order that was published by the Commission on Friday: that is the rise and fall adjustment provision. Whilst we understand the concept that informs that provision, it isn't germane to the types of contracts that feature in the on-demand sector at least as far as Uber Eats is concerned. That is there are no such terms in the contracts that are concerned and whilst we appreciate the efforts that are being made in the clause to resolve the issue, it simply doesn't accommodate the kind of arrangements that feature in the on-demand sector, including all the affairs where there are no rise and fall provisions that could trigger the operation of the clause or alternatively (indistinct) pricing (indistinct) where there will be adequate recovery by employee-like workers but again, no rise and fall or similar mechanism that would trigger the activation of a clause.

PN2823

And so it's for those reasons that we say it's not appropriate to make an order that would cover Portier Pacific and that the exemption is appropriate. I would, if I could, your Honours, mention that Ms Millen will make independent submissions on behalf of Rasier, which is Uber ride share.

PN2824

JUSTICE HATCHER: Yes, all right - Ms Millen.

PN2825

MS MILLEN: Sorry, your Honour, Mr Ward had to leave for a personal commitment.

PN2826

JUSTICE HATCHER: Sorry, can you move the microphone next to you, please?

PN2827

MS MILLEN: My submissions will be very short, your Honour. My client, that is Rasier Pacific Pty Ltd, supports the ride share exemption included in the TWU's amended draft order. My client agrees with the TWU that the exemption/carve-out - it's been described in both ways today - is the appropriate course. It does so having regard to the discrete nature of ride share work that is arranged or facilitated through or by means of a digital labour platform and that's specifically captured in the definition of ride share in the amended order which is then lifted up in the coverage clause in the exemption and also in light of today's arrangement that has been reached that is annexed to the TWU's submissions in relation to (indistinct) in terms of the - - -

PN2828

JUSTICE HATCHER: Sorry, I missed that - in relation to what?

PN2829

MS MILLEN: The fuel surcharge that is directly passed on to drivers.

PN2830

JUSTICE HATCHER: Can you just give me a second?

PN2831

MS MILLEN: That is annexure D to the TWU's submissions this morning and you'll see the second paragraph, effective 15 (indistinct) 8 June.

PN2832

JUSTICE HATCHER: Does your client constitute the totality of the ride share sector as defined in the TWU's proposal?

PN2833

MS MILLEN: It does not, your Honour. As I understand it also includes DD.

PN2834

JUSTICE HATCHER: Includes who?

PN2835

MS MILLEN: DD.

PN2836

JUSTICE HATCHER: What do we know about them?

PN2837

MS MILLEN: I don't have instructions. I don't understand them to be objecting.

PN2838

JUSTICE HATCHER: So that's annexure E, is that newspaper. All right.

PN2839

MS MILLEN: The exemption, your Honour, also removes scope for argument as to whether the current wording in clause 4.4 or 4.5 of the amended draft order or any amended wording is sufficient to capture the arrangements that have been reached with my client and DD to the extent it's recorded in the TWU's submissions as well. So we say put simply, the exemption actually promotes and enhances clarity in the order in respect of the ride share sector and is appropriate in all of the circumstances. In terms of making these submissions, your Honour, it should not be taken as accepting the union's submissions at paragraph 12. We just don't press them in light of the proposed exemption course being proposed by the union, and supported by my client.

PN2840

JUSTICE HATCHER: Right, thank you. So that leaves you in reply, Mr Boncardo, unless there's somebody else?

PN2841

MR BONCARDO: Your Honour, can I deal at the outset with the submissions repeated - - -

PN2842

JUSTICE HATCHER: Actually can you deal at the outset with what Ms Jongsma said, because I'm now troubled by it. If you have the scenario - there is probably referable to Mr Follett's clients - where you have a Coles and then you have a Linfox and then you have various subcontractors. So Linfox is both a primary party with respect to the first contract and second party with respect to any further contracts. Is that right?

PN2843

MR BONCARDO: No.

PN2844

JUSTICE HATCHER: It's not right? Can you just - - -

PN2845

MR BONCARDO: If the Full Bench goes to 15RA subsection (1) in the first instance which defines a contractual chain - and I think your Honour and I have an exchange about this on the first day - implicit in that definition is that there be a chain or a (indistinct) of contracts. Subsection (2) in respect of a primary party refers to the first contract or arrangement in the chain.

PN2846

JUSTICE HATCHER: Yes.

PN2847

MR BONCARDO: Now, that would in a case of the retail sector, be the retailers, your Woolworths or Coles. In the case of the manufacturing and businesses - concrete manufacturing businesses - we heard from today, it would be a person who has purchased the concrete or - - -

PN2848

JUSTICE HATCHER: Let's just stay with retail. The first contract is between Coles and Linfox in my example. So a party to that contract is a primary party.

PN2849

MR BONCARDO: Yes, Your Honour.

PN2850

JUSTICE HATCHER: So Linfox is a primary party?

PN2851

MR BONCARDO: That's what it says.

PN2852

JUSTICE HATCHER: And then Linfox - - -

PN2853

MR BONCARDO: That's what it says, your Honour, yes.

PN2854

JUSTICE HATCHER: And then Linfox would also be a secondary party to the extent that it then enters into a further contract for the next step down the chain.

PN2855

MR BONCARDO: That would follow as a matter of logic.

PN2856

JUSTICE HATCHER: So I'm just worried now that whether the drafting is adequately capturing that position.

PN2857

MR BONCARDO: One can see Linfox as a primary party then clause 4.1 would impose upon the obligations in relation to road transport business or contractor that it engaged. Clause 4.3 in a scenario where Linfox was a secondary party could impose the same obligation in effect on it in respect of the parties that it engaged.

PN2858

JUSTICE HATCHER: That is 4.1 the way it's currently drafted - - -

PN2859

MR BONCARDO: Yes.

PN2860

JUSTICE HATCHER: - - - would not apply to the retail because they don't engage - unless you clarify Linfox as a secondary party. But for the purpose of the contract its dealing with, Linfox is a primary party.

PN2861

MR BONCARDO: Your Honour's point is, with respect, a good one.

PN2862

JUSTICE HATCHER: All right, so we'll have to do some drafting with this so can you think about that overnight, as to how that might be solved?

PN2863

MR BONCARDO: I will, your Honour.

PN2864

VICE PRESIDENT ASBURY: And then if you've got the situation where you have two secondary parties and no primary party, how does that work?

PN2865

MR BONCARDO: That's attended to in 4.3, your Honour, I think. I think the issue is in the scenario the President postulated - I think 4.3 attends to the situation that your Honour has raised with me: that is it deals with secondary parties engaging other secondary parties.

PN2866

VICE PRESIDENT GIBIAN: I mean, Linfox is also a secondary party to the extent that it subcontracts the transport task itself.

PN2867

MR BONCARDO: Yes.

PN2868

VICE PRESIDENT GIBIAN: So it's a matter of the language - that is what 4.1 is intended (indistinct) the primary party contracting with the other primary party, that is subcontracting the transport task.

PN2869

MR BONCARDO: Yes, yes, and that will need - for the reasons Ms Jongsma picked up, which no one else had picked up - to be attended to.

PN2870

JUSTICE HATCHER: That's what happens when you hang around lawyers all weekend.

PN2871

MR BONCARDO: Sorry, your Honour, when you have a hearing till 10 past 6 on a Monday night - but, your Honour, if it's convenient, I know that your Honour's receiving or the Full Bench is receiving a number of notes, if we could have until 10 or 11 o'clock tomorrow morning to send - - -

PN2872

JUSTICE HATCHER: Ten o'clock.

PN2873

MR BONCARDO: I'm sorry, your Honour?

PN2874

JUSTICE HATCHER: Ten o'clock.

PN2875

MR BONCARDO: If your Honour pleases - that will occur. More substantively, your Honour, we do not concur with this notion that the AiG and Wesfarmers, Wesfarmers being a business with a revenue according to their annual report last year of \$45.7 billion, couldn't get their act together from 2 April when this application was filed: 2 April, the date your Honour issued your Honour's statement and set the matter down for hearing last Wednesday, could not find a single witness, could not find a single expert to give evidence. It is a nonsense, with respect. The AiG's position appears to be they didn't even look for an expert. They didn't raise a finger to seek to engage with the evidence in this case.

PN2876

The same position applies, in our respectful submission, to Wesfarmers. The highest the submissions of my learned friend went was: 'We thought we had one expert who might be able to assist. They weren't able to assist. We put pens down after that'. There has been a real reasonable opportunity for Wesfarmers and for the AiG to lead evidence, to test evidence and they have determined not to avail themselves of that opportunity. We are not dealing with a local fish and chip shop here. We're dealing with substantial, well-resourced organisations and their cries of a denial of procedural fairness are in our respectful submission without any merit whatsoever. And the notion that Mr Ward is only representing a handful of clients is with respect both disrespectful and a nonsense. And Wesfarmers if it wanted to could have cross-examined witnesses on Friday. It could have led evidence today and your Honours still have not been told what further or additional evidence Wesfarmers wishes to put on or when it would put that evidence on.

PN2877

The complaint is, in our respectful submission, an entirely hollow one. So far as genuine engagement is concerned, your Honours would not accept the submissions made by Mr Follett that the act of genuine engagement is some sort of difficult, protracted or complex process. In our respectful submission engagement is distinct from consultation. Engagement imposes a lower threshold than consultation which connotes something that is formal and something that involves a structured process of decision making. If the verb, 'engage', means to occupy the attention or efforts of a person that is the Commission is required - is obliged - to hear from, parties who may be affected by the order to genuinely do so and no doubt to take those matters into account.

PN2878

That is what has happened in this hearing. It is what is going to happen in the event that a notice is published and an order is - a draft order - is published. In our respectful submission the contention that was put, that the Act contemplates a default position of 12 months does not grapple with the context of the amendments affected by the fairer fuels bill. The fact that that was directed to a particular mischief of the kind that this application is directed to addressing and a more truncated process is (indistinct) that is capable in the circumstances of constituting genuine engagement.

PN2879

Whilst we're dealing with or I'm dealing with Mr Follett's submissions, can I make a few comments about those submissions? Firstly as we apprehend it the submissions were made on behalf of Woolworths and Coles, given that the banks are now by consent no longer to be covered by this order. Most of the submissions appear to be, as we understood them, directed to entities further on down the road transport contractual chain. There was no dissent from the proposition that I put at the outset, but we understood that Woolworths and Coles are presently, and have for some time, been providing twice monthly adjustments to rates.

PN2880

So the submissions took us by some surprise in that respect but in terms of the amendments that are proposed, we start with the timing proposition, that is clause 5.3.

PN2881

So, 5.3(b), which is Coles and Woolworths proposed amendment to when the order is to cease having effect, that is its sunset clause. It is with respect utterly impractical and implausible for an order to cease to have effect in the event that either there no longer is a significant reduction in shipping through the Strait of Hormuz. How someone could possibly measure what a significant reduction in shipping through the Strait of Hormuz is, is unclear, or there's a cessation in conflict in the Middle East.

PN2882

Now, the problem with that proposed time limitation is not only the amorphous nature of 1.1 and 1.2, which are the matters the Minister relied upon, in part, but the fact that the determination is in fact dependent upon the circumstance of fuel supply chain disruption, that is fuel supply chain disruption which stems from the two matters set out. It is not those two matters set out which in and of themselves form the basis for the audit. It is their effect. And that there may be an increase in shipping through the Strait of Hormuz and conflict in the Middle East continue, does not necessarily mean that fuel supply chain disruption will cease. What is the relevant circumstance that the order is directed to is fuel supply chain disruption.

PN2883

So 5.3(b) is bad for that reason alone. In any event, we think the better way to address the issue as to whether or not the order should continue in effect for any protracted period is to have a review. That is what we have suggested. We don't think that any automatic sunset date on the triggering of a particular contingency is appropriate. We certainly do not think that \$2.50, which appears to have been plucked out of the air, is an appropriate rate and if the Commission were minded, contrary to our submissions, to accept the level of Diesel price as a flaw for the application of the order then we would respectfully submit that \$2 rather than \$2.50 would be appropriate.

PN2884

Your Honours, on a more positive note, we don't have any issue with Mr Follett's amendments to clause 6. We think they are appropriate. So far as clause 4.2 is

concerned, that is clause 4.2 of the Commission's proposed order, firstly we don't cavil with the word 'or' being removed. We think that that is sensible in the circumstances but we do press the inclusion of clause 4.2.

PN2885

It is in our respectful submission imperative for parties down the chain to receive the benefit of the order that reasonable steps be taken by secondary parties to ensure that those that may engage and those that are engaged by those that may engage are subject to contractual terms or terms or arrangements that provide for rate adjustments that conform to the order. That is, a mechanism to ensure that the order travels down through the supply chain.

PN2886

We also note and no doubt this will be on the subject of Mr Meehan's note that the word 'employee' is missing from the third last line in respect of 'road transport-like workers', that should be 'road transport-like employee-like workers'.

PN2887

JUSTICE HATCHER: So can you incorporate those concessions and corrections in your note tomorrow, please?

PN2888

MR BONCARDO: We shall. We shall. In relation to the more substantive submissions made by Wesfarmers, so far as the inflationary impact is concerned. We refer the Commission respectfully to paragraph number 680 to 681 of Dr Rawling's evidence where he seriously doubted the order if complied with would have any sort of appreciable - any appreciable inflationary impact. So far as consolidation was concerned, Mister or Dr Rawling, I should say, accepted that was a possibility.

PN2889

There was no evidence with respect that the consolidation wasn't likely or that there would be any appreciable reduction in road transport businesses or road transport contractors being afforded work. We've summarised the evidence in that regard in our written submissions from paragraphs 110 through to 113. It was suggested, I think, by my learned friend acting for Wesfarmers that Dr Belzer was a witness called by my client; he was not. He was an independent third party who wrote a submission.

PN2890

It was also, Your Honour, contended by Wesfarmers that it has already, that is its entities - Kmart, Bunnings and Officeworks, I think, were posited - have arrangements with those who they contract transport tasks to, that may not provide cost recovery for fuel. That was a submission that was put by Wesfarmers and that is this billion - multi-billion dollar organisations contracting with transport providers in a manner that does not involve the provision of cost recovery for fuel in relation to those entities.

PN2891

That, as we understood it, was a submission that, in aid of, this contention put also by Mr Ward and Mr Follett that there is no need for larger businesses, larger transport companies to be subjected to obligations in relation to primary parties.

PN2892

In our respectful submission, Mr Munro made a cogent and clear submission as to why it is imperative for those larger entities to also have the benefit of the order. In our respectful submission, what is proposed by way of either a carve-out or a dilution of the obligation, such as is provided or advanced by Mr Follett's clients, is apt to be productive of mischief. It is apt to incentivise those parties, such as Linfox, such as Toll, to bid for work at a lower rate than someone who may have a turnover of less than a billion dollars and therefore be apt to not pass on the costs for fuel down the transport supply chain.

PN2893

That will be productive in our respectful submission of pressure in the road transport chains that this order is directed to addressing and in our submission it is, in the circumstances of this matter, which as the Vice President pointed out, is an emergency application dealing with acute rises in fuel prices entirely appropriate for significant businesses like Toll and Woolworths to be subject to or/and the beneficiaries of obligations to receive cost recovery rates for fuel, which they are then obliged to pass on down the supply chain.

PN2894

Your Honour, the President asked me a question about the road user charge. In our respectful submission, that matter need not trouble the Commission. It is (indistinct) my instructions, wholly, if not largely, consumed and already taken up by the excise cut and the interchange of the road user charge as compared to the excise cut.

PN2895

If Your Honour requires it, I can put on a very short note about that by 10 o'clock tomorrow morning.

PN2896

JUSTICE HATCHER: All right. Thank you.

PN2897

MR BONCARDO: Unless your Honours have any questions, those were (indistinct) submissions.

PN2898

VICE PRESIDENT GIBIAN: Just on the primary/secondary party issue, in the Coles/Linfox example, if Coles contracts Linfox and Linfox uses as an employee driver, then there's not a chain, because there's only one contract, is that right?

PN2899

MR BONCARDO: I don't think so, your Honour. If your Honour turns back to -
- -

PN2900

VICE PRESIDENT GIBIAN: It's only if Linfox then stopped sub-contracts for a fleet operator or owner/driver that you then have a chain, is that right?

PN2901

VICE PRESIDENT ASBURY: An employee can be in the chain, but just not - - -

PN2902

VICE PRESIDENT GIBIAN: Not in it - - -

PN2903

VICE PRESIDENT ASBURY: In it, but not caught by the requirements.

PN2904

VICE PRESIDENT GIBIAN: So it's a bit like the trinity, isn't it?

PN2905

MR BONCARDO: The answer, I think, to your Honour Vice President Gibian's question is, if, in a scenario where Woolworths engages Linfox, and Linfox has an employee perform the work, that is a contractual chain when one looks at 15RA(1)(a). Your Honours will see that a contractual chain is a contract or a series of contracts or arrangements under which work is performed for the party to the first contract in the chain or series, by, amongst other things, an employee.

PN2906

VICE PRESIDENT GIBIAN: So the employees of the chain, but not in the chain.

PN2907

MR BONCARDO: The employee is, in our respectful submission, still in the chain. But in answer to Vice President Asbury's question, a contractual chain order cannot - - -

PN2908

VICE PRESIDENT ASBURY: Turn them into a contractor.

PN2909

MR BONCARDO: It can't do that, but it also can't confer rights upon them. And that is the effect of two provisions, the first of which perhaps indirectly provides for that result, and that is section 536PL – I'm sorry, I withdraw that; 536 - - -

PN2910

VICE PRESIDENT GIBIAN: So if you look at 15RA(3)(c), the employee is not in the chain, is that right?

PN2911

MR BONCARDO: In relation to work that they perform.

PN2912

VICE PRESIDENT GIBIAN: Yes.

PN2913

MR BONCARDO: That doesn't mean that they're not themselves in the chain. They - - -

PN2914

VICE PRESIDENT GIBIAN: Well, there is a chain, but they (indistinct) by definition, not in it, as it were.

PN2915

MR BONCARDO: Yes.

PN2916

VICE PRESIDENT GIBIAN: Well, they're in it in a general sense, but they're not a person in it, as defined.

PN2917

MR BONCARDO: And to complete the picture – and I apologise, there are too many letters now in these new provisions – 536PD(2) provides that a road transport contractual chain order can't confer rights or impose obligations on an employee. I'm not sure that answered your Honour's question at all.

PN2918

VICE PRESIDENT GIBIAN: All right. Anything further?

PN2919

MR BONCARDO: Nothing further, your Honour.

PN2920

JUSTICE HATCHER: All right. We thank all the parties for their very useful submissions and for their forbearance in participating in this very extended hearing. We intend to consider what's been put. We give an indication that if we decide to issue a notice of intent and a draft order, it is likely that we will do so sometime tomorrow. I just wish to thank the court staff for working so hard in running today's hearing, and we will now adjourn.

ADJOURNED TO A DATE TO BE FIXED

[6.28 PM]

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