

## IN THE FAIR WORK COMMISSION

**Matter:** MS2026/1

**Applicants:** Transport Workers' Union of Australia (**TWU**) and Australian Road Transport Industrial Organisation (**ARTIO**)

### WESFARMERS' OUTLINE OF SUBMISSIONS<sup>1</sup>

#### A. OVERVIEW

- 1 These submissions are made on behalf of Wesfarmers Limited (**Wesfarmers**) in response to: the joint application filed by the TWU and the ARTIO on 2 April 2026 for a proposed road transport contractual chain order (**RTCCO**) (the **Application**); the draft order for discussion promulgated by the Commission on 10 April 2026 (the **Draft Order**); and the question of whether the obligation for genuine engagement in s.536PF(2)(a) of the *Fair Work Act 2009* (Cth) (**FW Act**) applies and, if it does, whether that obligation has been satisfied by the conduct of this proceeding.
- 2 For the reasons set out herein, Wesfarmers opposes the issuing of a notice of intent and draft RTCCO in the form of the Draft Order or otherwise. Wesfarmers submits that the obligation in s.536PF(2)(a) is not satisfied by the conduct of this proceeding.

#### B. THE OPERATION OF THE DRAFT ORDER

- 3 Wesfarmers operate a diverse portfolio of national businesses across the retail, industrial, health and digital sectors, and in chemical, energy and fertiliser production. These various businesses would likely be "primary parties" within the meaning and for the purposes of the Draft Order.
- 4 A number of Wesfarmers' divisions including Kmart, Bunnings and Officeworks, already have or will shortly have weekly review mechanisms in place for certain contracts, and other review mechanisms for other contracts - those mechanisms have been adapted

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<sup>1</sup> Wesfarmers makes these submissions on a similar basis to the Allens Interested Parties – that is, without any waiver of its rights (including to challenge the proceedings, or any orders made arising from them, on the grounds of a denial of procedural fairness) and expressly noting that there is expert and lay evidence Wesfarmers could have led, had it been afforded reasonable time to do so.

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to suit the parties and their contractual terms, and are not subject to the administrative and logistical difficulties arising from the terms in the Application or Draft Order. The implementation of additional payments to take into account increased fuel costs has occurred without a need to formally vary all of the contracts. That such practices are occurring is consistent with the evidence, including evidence from a number of the applicants' witnesses.

- 5 To the extent that order 4 of the Draft Order requires "full" recovery of the increased cost of fuel, the operation of the Draft Order requires a 100% cost transfer ultimately to primary parties. Those costs, for many businesses within the Wesfarmers group, are likely to be significant. Many of those businesses are already exposed to broader uncertainty and increasing costs of inputs arising from the conflict in the Middle East not related exclusively to the price of fuel.

**C. A NOTICE OF INTENT AND DRAFT ORDER SHOULD NOT BE ISSUED**

- 6 Wesfarmers reasons for opposing the issuing of a notice of intent and draft RTCCO in the form of the Draft Order includes at least the following matters.

- 7 **(Displacement of agreed risk allocation.)** First, to the extent that order 4.5 of the Draft Order requires "full" recovery of the increased cost of fuel, the Draft Order overrides existing contractual arrangements and replaces them with a mandatory rule that fuel cost increases must be passed upstream. The evidence is that contracts in this industry already allocate fuel risk in different ways, which may or may not provide for full recovery. The Draft Order overrides those choices, made by sophisticated commercial parties (certainly in Wesfarmers' case), by requiring full recovery regardless. That strips parties of the benefit of contracts they negotiated and priced, and by reference to which they have organised their operations, including in relation to matters such as insurance. The Draft Order replaces agreed risk allocation with a mandatory term imposed after the contract has been priced and performed, and takes no account of which party may have obtained the benefit of that risk allocation in the past. The result is a one-direction system in which costs move up the chain regardless of how the parties agreed to allocate them.

- 8 **(Unwarranted protection for large secondary parties.)** Second, the concern underpinning the Application appears to be an intent to protect small operators who cannot absorb fuel increases, but the Draft Order requires primary parties to fund 100% of those increases. It is a rule that transfers the entire fuel risk to primary parties, regardless of the size, power, or conduct of the secondary party. It does not distinguish between a small owner-driver who may not be able absorb the increase and

a large, well-resourced transport operators who can. On the evidence, these large, well-resourced operators have no demonstrated difficulty managing fuel volatility, but would receive the same guaranteed recovery as a small owner-driver. The effect is that some of the strongest participants in the market are insulated from a risk they are ordinarily equipped to manage, and for which they have previously been prepared to allocate and price in a certain way.

- 9 **(Adverse effect on commercial discipline.)** Third, where fuel increases must be reimbursed in full, the commercial discipline that underpins existing contracts is removed. A party who knows it will recover 100% of fuel increases has no incentive to hedge, no incentive to control fuel usage, and no incentive to negotiate price to account for risk.
- 10 **(Likely inflationary effects throughout the national economy, about which the Commission has received no evidence.)** Fourth, the cost imposed by the Draft Order does not stop with primary parties. Primary parties may be forced to recover these mandated increases in the price of retail goods and services. The Draft Order therefore does not “share” the shock through the supply chain - it redistributes it to primary parties and/or the broader public, while preserving the margins of operators who would otherwise bear or share that risk. Section 40D of the FW Act requires the Commission to consider the impact of a contractual chain order on the national economy. There is no evidence before the Commission, in light of the compressed timetable, addressing that impact. Such evidence would necessarily be expert in nature, and such evidence is not amenable to being led orally on the run.
- 11 **(Inadequate opportunity for parties to engage with the Application.)** Fifth, the process did not allow affected parties to properly meet the case. A measure that alters pricing across an entire industry was advanced on effectively one business day’s notice (in circumstances where the applicant parties had a week to prepare their case). For a group such as Wesfarmers with diversified business operations, that precludes any meaningful opportunity for evidence gathering. Wesfarmers requires input from multiple businesses, analysis of existing contractual arrangements, and potentially expert evidence on pricing and downstream effects, including inflationary effects. That material cannot be assembled within one business day. The result is that the Commission is being asked to impose a market-wide rule without tested evidence from those who bear its cost.
- 12 **(Inadequate engagement with commercial realities.)** Sixth, the Draft Order is not suitably adapted to the commercial realities of the road transport industry, including commercial practices in relation to part-load, mixed load, no load, multi-leg and return

trips, being a matter to which the Commission must have regard pursuant to s.536PF(2)(d) of the FW Act. For example, the Draft Order does not provide a system by which cost recovery is apportioned amongst primary parties or secondary parties where freight is consolidated. This in itself demonstrates the impractical and unworkable nature of the Draft Order.

- 13 **(Inadequate engagement with broader context.)** Seventh, the Draft Order does not take into account broader changes to the economy, including as a result of Government intervention (such as the temporary fuel excise decrease and the reduction in the Heavy Vehicle Road User Charge), which have already occurred or which may occur in the future. The Draft Order contemplates participants receiving those benefits as well as full “cost recovery” which is borne by the primary parties.
- 14 **(Inappropriate operation dates.)** Eighth, the Draft Order will be applicable less than one week from the time it is made, which does not provide sufficient opportunity for parties to implement required arrangements. The end date of the Draft Order has not been the subject of evidence and waiting until the average diesel price returns to \$2.00 per litre means it would be applicable well outside of what could be considered to be an ‘emergency’ situation.
- 15 These concerns are not matters that can or should be worked out after the notice of intent and draft RTCCO have been published. They are substantive concerns that weigh significantly against the making of the proposed RTCCO sought by the applicants or in the form of the Draft Order. Accordingly, they should be the subject of significant and detailed consideration before any notice of intent and draft CCO are published.

#### **D. THERE HAS NOT BEEN GENUINE ENGAGEMENT**

- 16 There is nothing in the *Fair Work Amendment (Fairer Fuel) Act 2026* (Cth) to suggest that the obligation in s.536PF(2)(a) has been displaced or otherwise varied, including where the Commission is considering whether to make a time-sensitive RTCCO. It follows that the obligation applies to the Application.
- 17 Plainly that the obligation is not satisfied having regard to the procedural course of this matter, including those matters set out in paragraph 11 of these submissions.
- 18 A finding that s.536PF(2)(a) was satisfied by the conduct of an expedited hearing, which numerous parties have objected to, would leave the provision with no meaningful work to do. The inclusion of s.536PF(2)(a) as a mandatory precondition to the Commission’s exercise of power is clearly intended to require it to do more than hold a

hearing in the usual course (noting that Wesfarmers does not accept that this hearing has afforded it and other parties procedural fairness).

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13 April 2026