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RTCCO Review Hearing: What the 25 May proceedings mean for EPC Principals and Contractors

The Fair Work Commission's Expert Panel conducted the first formal review of the Road Transport Contractual Chain Order – Fuel Cost Recovery – 2026 (RTCCO) on 25 May 2026. The Expert Panel reserved its decision. The Order remains in force. No variation has been made.

The hearing traversed almost every issue we flagged in our earlier Insight, including scope, the meaning of "primary party" in construction and infrastructure supply chains, the interaction with rise-and-fall clauses, and the $2/litre cessation threshold. Some of those issues were substantially clarified through exchanges between the parties and the Panel. Others remain reserved for the Panel's written decision, expected in the coming weeks.

This update focuses on what EPC and D&C principals and head contractors need to know now.

The Order will not be revoked

The Australian Industry Group (AiG) sought revocation of the Order. The Australian Chamber of Commerce and Industry (ACCI) relied on its written submissions to similar effect. The Panel was plainly unsympathetic. Vice President Asbury repeatedly characterised the compliance mechanism as simple: you know the price of fuel before 6 March; you know the price now; the difference is the increase that must be passed through. Businesses should not plan on the basis that this Order will disappear.

It is worth noting that limited evidence was before the Panel on implementation difficulties. The AiG withdrew a witness statement after the Panel declined to make a confidentiality order over its entirety. Mr Ferguson submitted that "vast numbers of businesses" were not prepared to give evidence because doing so might reveal non-compliance. Businesses should not assume the Panel has a complete picture of industry confusion.

The construction sector: who is a "primary party"?

This was the most contested issue at the hearing and the one most directly relevant to our EPC and D&C clients.

The TWU's position (supported by the Australian Constructors Association) is that in a civil construction contract between a government and a constructor, both parties are primary parties at the top of the contractual chain. The TWU says this is "quite clear" and relies on section 15RA(5) of the Fair Work Act, which deems transport work performed within the chain to be work performed for every party above.

The AiG and Amazon's position is that a contract which does not "expressly contemplate the performance of transport services" should not bring the parties into the chain. Amazon proposed amending clause 4.1 so that its obligations apply only to the first party who directly engages the road transport contractor.

The Panel asked probing questions of both sides, appeared sceptical of the AiG's narrow reading of the statute, but did not determine the point. The AiG was given leave to take the statutory construction point on notice.

The Panel did, however, articulate a practical framework for how compliance would work if construction principals are captured: the principal asks the head contractor "What do you require for the transport component?" and pays it. The Panel treated the apex party's obligation as relational (ask, pay what is claimed, document) rather than as a duty to

independently calculate every truck movement across a project.

The "Nick and Olympia" distinction: buying goods versus engaging services

One practical outcome was agreed by consent: small businesses that merely purchase goods which happen to be delivered by truck (the example given was a chicken shop ordering chickens) will be carved out from the "reasonable steps" obligation under clause 4.2. This was moved by the TWU and Mr Ward (for Boral/Holcim).

However, this carve-out only addresses the "reasonable steps" obligation — not whether such parties are in the chain for rate adjustment purposes under clause 4.1. That question remains unresolved.

There is also an apparent inconsistency in the TWU's submissions. On the one hand, the TWU argued that purchasing chickens does not bring the chicken shop into the chain, because a contract to buy goods is not a "services contract" for road transport work. On the other hand, the TWU argued that if Surf Dive 'n Ski buys board shorts from Billabong, both the retailer and the supplier are primary parties in the chain if those goods are delivered by a road transport business.

Both examples involve purchasing goods that are delivered by truck. The TWU has not explained why the analysis differs. Size cannot be the answer. If a goods purchase contract does not bring the buyer into the chain, that should apply regardless of size. If it does bring them in, small businesses are still primary parties, just exempted from reasonable steps. The Panel's decision may need to reconcile this. Until then, the position for larger parties purchasing goods remains contested.

For EPC and D&C contracts, the chicken shop carve-out is unlikely to assist. These contracts are services contracts — they engage the contractor to perform construction work, not merely to supply goods. Road transport is an embedded and integral component of that work.

What can head contractors claim upstream?

For our clients, this is the central commercial question. After 25 May, the recommended approach is to pursue both tracks now and not wait for the reserved decision.

Track 1: Change in law under the EPC contract. The Fairer Fuel Act (commenced 2 April 2026) and the RTCCO (commenced 21 April 2026) are legislative/regulatory events that post-date existing EPC contracts. A change-in-law notification should be issued to the principal (if not already done) identifying these instruments as the qualifying event and quantifying the additional fuel cost attributable to road transport within the works. Observe your contractual notice periods. Late notification is a common basis for rejection of claims.

Track 2: Notice under the RTCCO. Put the principal on notice, outside the contractual claims process, that the RTCCO may impose obligations on it as a primary party; that the head contractor is incurring increased fuel costs that must be recovered under the Order; and that the contractor invites the principal to adjust the rate to account for the fuel increase since 6 March. This preserves the RTCCO-based claim if the reserved decision confirms principals in construction chains are captured. It also constitutes evidence of "reasonable steps" under clause 4.2, because the head contractor is itself a primary party with flow-down obligations. Note that the same logic applies to transport subcontracts entered after 6 March 2026: the TWU's position is that the adjustment obligation is measured by reference to the 6 March baseline, not the contract date, so subcontracts entered with knowledge of elevated fuel prices may still attract adjustment obligations.

If the Panel confirms the broad "primary party" interpretation, the RTCCO will provide a statutory entitlement that sits independently of the contract, enforceable through the Fair Work Commission, not limited by narrow change-in-law definitions, which would operate independently of any contractual caps or exclusions.

If the Panel narrows the scope, head contractors will rely on their contractual remedies alone.

Either way, the downstream obligation is clear: the head contractor must adjust rates paid to transport subcontractors and take reasonable steps to ensure the fuel increase flows to the bottom of the chain. That obligation is not contingent on upstream recovery.

Matters now clarified versus matters still uncertain

Issue	Guidance and status after 25 May
Single contract with a carrier using its own employees = contractual chain?	Effectively resolved: yes. TWU, Mr Ward (Boral/Holcim), and the Panel all agreed that section 15RA(5) captures this.

Government entities as primary parties	Resolved: yes. Governments are “persons” per the Acts Interpretation Act s 2C. A clarification to the Order may follow.
Head contractor in construction chain: primary party with downstream obligations?	Resolved: yes. Not disputed. The ACA contended in its submissions that construction clients at the apex of the chain are primary parties, which necessarily accepts that head contractors below them are also bound.
Principal at the apex of a construction chain: primary party with upstream payment obligation?	Key issue not resolved. Decision reserved. TWU and ACA say yes. AiG and Amazon say no. The Panel’s questions suggest sympathy to the broad reading but the decision is pending.
Contract for purchase of goods (no transport services component) brings buyer into chain?	Not resolved. The clause 4.3 amendment (by consent) exempts small businesses from the “reasonable steps” obligation only. Whether a goods purchase contract brings the buyer into the chain for clause 4.1 rate adjustment remains contested (TWU says yes for larger parties; AiG says no). The TWU has not clearly articulated why a retailer buying board shorts is in the chain but a chicken shop buying chickens is not, when both involve purchasing goods delivered by road.
How to comply where transport rate is not separately identified in the contract price	Substantially clarified. Even where no transport rate is separately identified, the adjustment obligation still applies. The pre-6 March contract price is deemed to incorporate transport. The adjustment is simply the publicly known per-litre fuel increase since 6 March — no need to identify or unpick a historic transport component. Not formally determined, but the Panel appeared sympathetic to this approach.
Rise-and-fall clauses / double-dipping	Substantially clarified. TWU and the Panel indicated payments under the Order can satisfy contractual obligations for the same purpose (fuel cost), so there should be no double recovery. No formal determination. Separately, the TWU and Mr Ward (Boral/Holcim) agreed that clause 4.6 was only ever intended to address the machinery of rate adjustment — it was never intended to satisfy the “reasonable steps” obligation in clause 4.2. Removing the reference to clause 4.2 from clause 4.6 was moved as a clarifying amendment.
Clause 4.2: “reasonable steps” to ensure flow-down	Retained. The Panel drew an analogy to WHS obligations. Mr Ward (Boral/Holcim) submitted it is “working quite well.” The Panel noted the FWO is “the regulator and we’re not” and that its published guidance is the practical reference point.
Clause 5.3: $2/litre cessation threshold	Not resolved. Decision reserved. The Panel appeared sympathetic to amendment (either a multi-week averaging mechanism or removal of the threshold entirely). Current diesel TGP is $2.08/L, only 8 cents above the threshold. Fuel excise relief expires 30 June.

Duration of the Order	Not resolved. Decision reserved. The Order continues until varied or revoked. Clause 5.3 provides that the clause 4 obligations cease if diesel falls below $2/litre, but the Order itself does not expire — it would need to be revoked by the Commission.

What principals and contractors must do now

Our earlier Insight identified three things. They remain correct:

First, adjust rates on a single, documented cadence (either fortnightly or twice per calendar month) so that the party performing road transport work recovers the increased cost of fuel since 6 March 2026.

Second, record the "reasonable steps" you take to ensure those adjustments flow down the chain.

Third, review your change-in-law, force majeure or other change event clauses under your EPC and D&C contracts to determine whether, and to what extent, you can recover time and/or cost from the principal.

To those three, we now add a fourth:

Fourth, if you are a head contractor, consider issuing a separate RTCCO-based notice to the principal in addition to the contractual change-in-law claim. Doing so now, before the Panel's decision, may result in an adjustment and preserves your position under the Order if the broad "primary party" interpretation is confirmed.

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