australian council of trade unions

ACTU RESPONSES TO EVIDENCE GIVEN AT THE HEARING

1. In response to the Chair and the AIG's reading of the 'public interest test'

- The Chair said that 'my clear reading of [the public interest test] is that where there is no pattern of lawbreaking by the merging organisations it is very likely to meet the public interest test'.

- Mr Stephen Smith, in evidence on behalf of Australian Industry Group (AIG), confirmed the Chair's reading (pp 60-61 of the Transcript).

- With respect, we do not agree with the Chair and the AIG's reading of proposed s 72D.

- We agree that, if the FWC does not consider that the organisation has a record of not complying with the law, the FWC may decide that the amalgamation is not against the public interest (s 72D(1)-(2)).

- However, the FWC must also consider whether the amalgamation is otherwise in the public interest, having regard to the impact the amalgamation is likely to have on employees and employers in the industry or industries concerned and any other matters the FWC considers relevant (s 72D(3)-(4)).

- There is nothing to suggest that where the organisations do not have a record of not complying with the law, the amalgamation is 'likely' to meet the public interest test. The FWC may find that the amalgamation is not otherwise in the public interest for any one of a number of reasons to which the organisations' compliance record is irrelevant.

2. In response to the AIG's reading of the 'public interest test'

- The AIG in its Submission (p 7) and in the evidence of Mr Smith on its behalf (pp 58 and 60 of the Transcript), submitted that, depending on the circumstances of a particular case, the FWC could decide that:

  - *It is not in the public interest for an amalgamation of two unions to occur because both organisations have a record of non-compliance with industrial laws and the amalgamated organisation would be likely to cause more harm and damage to businesses in the relevant industries, the economy and the community, than the two separate unions.*

  - *It is in the public interest for an amalgamation to occur because the larger organisation has a record of compliance with industrial laws (even though the smaller organisation does not), and the larger organisation's approach is likely to be the approach of the amalgamated organisation.*

  - *It is not in the public interest for an amalgamation to occur because the larger organisation has a record of non-compliance with industrial laws (even though the*

smaller organisation has a record of compliance), and the larger organisation's non-compliant approach is likely to be the approach of the amalgamated organisation.

- The AIG further notes that 'The FWC and its predecessors have a great deal of experience in weighing up relevant considerations and determining where the public interest lies.'

- With respect, we do not agree with the AIG's reading of proposed s 72D.

- Proposed s 72B requires that the FWC hold hearings about the public interest in two stages:

    - The first hearing deals with s 72D(1) and the organisations' record of compliance with the law. If the matter is concluded under s 72D(2), that is, if the FWC considers that one of the organisations has a record of not complying with the law, the FWC must decide that the amalgamation is not in the public interest. The FWC is not able to take into account or 'weigh up' any other matters.

    - If the matter is not concluded under s 72D, the FWC must hold a second hearing to consider whether the amalgamation is otherwise in the public interest.

- Arguably, the FWC cannot consider and weigh up the organisations' compliance record against any other matters, including those matters referred to by the AIG, being the relative size of the organisations and likely harm and damage to businesses in the relevant industries. If the FWC considers that one of the organisations has a record of not complying with the law, it *must* decide that the amalgamation is not in the public interest. Other relevant matters cannot be considered or taken into account, as would usually be the case in a public interest test and the tests that the FWC has 'a great deal of experience' in applying.

3. <u>In response to claims that the FWC is commonly required to apply a 'public interest test'</u>

- The AIG, in its Submission (pp 7-8) and the evidence of Mr Smith on its behalf (pp 58 and 61 of the Transcript), and Ms Amanda Mansini in evidence on behalf of the Australian Mines and Metals Association (AMMA) (p 43 of the Transcript), and Ms Rachel Volzke on behalf of the Department of Employment (p 68 of the Transcipt), submitted that requiring the FWC to apply a public interest test is 'an orthodox and fairly unremarkable approach' (Ms Mansini) consistent with other existing provisions of the Fair Work legislation.

- As can be seen in **Attachment 1**, which examines those references to the public interest test provided in the AIG's Submission, the so-called 'public interest test' proposed in respect of amalgamations is entirely different from the public interest test contained in existing provisions of the Fair Work legislation.

- Other than s 243 of the Fair Work Act, the proposed public interest test in respect of amalgamations is the only instance where the FWC is given a guided discretion in

determining whether or not a matter is in the public interest. In all other instances, the FWC is given a broad and unfettered discretion, as is orthodox in respect of public interest tests. Even in respect of s 243, the FWC is required to take into account and balance a broad range of matters in deciding whether it is in the public interest to make a low-paid authorisation.

- In contrast, proposed s 72D(1)-(2) requires the FWC to have regard to one matter only (the organisations' record of compliance with the law) and gives the FWC virtually no discretion in determining whether an amalgamation is in the public interest.

- Ms Volzke in her evidence said that the sorts of factors the courts and the FWC take into account in determining public interest issues can be very broad, noting that it can often be somewhat of an unfettered power, in the sense that the FWC is left a broad discretion to determine what is in the public interest in any particular circumstance (p 68 of the Transcript). As can be seen in Attachment 1 that is the case in respect of almost all public interest tests in the Fair Work legislation.

- Ms Volzke in her evidence further said that where there are particular factors that are set out in the legislation, 'which is obviously the case here, then that sets out an inclusive list only of the sorts of matters that could be taken into account…' (pp 68-69 of the Transcript).

- With respect, we do not agree with Ms Volzke's comment in respect of proposed s 72D(1)-(2). As discussed above, if the FWC considers that one of the organisations has a record of not complying with the law, the FWC must decide that the amalgamation is not in the public interest. That is not an inclusive list. The FWC is given virtually no discretion. It is not a true 'public interest test'.

- For further information, we refer the Committee to paragraphs 40 to 44 of the CFMEU's Submission.

4. <u>In response to questions about the extent to which the bill is based on the Heydon recommendations</u>

- Questions were asked of representatives of the AMMA, the Australian Chamber of Commerce and Industry (ACCI) and the Department of Employment as to the extent to which the bill is based on the Heydon recommendations.

- Mr Scott Barklamb, on behalf of the ACCI, said that the ACCI had not created a table comparing specific recommendations of Heydon to the bill. Such a table is provided at **Attachment 2**.

- In response to evidence from Ms Mansini, Mr Barklamb and Ms Alana Matheson on behalf of the ACCI (p 46 of the Transcript) and Ms Volzke and Ms Sharon Huender on behalf of the Department of Employment (pp 70-71 of the Transcript) that the bill addresses *findings* of widespread misconduct and lawlessness by the Heydon Commission (rather than *recommendations*), we submit:

- Firstly, the allegations (not findings) of 'lawlessness' in the Heydon report have not been substantiated in the number of resulting prosecutions or convictions.

- Secondly, notwithstanding those allegations, Heydon specifically (and in some instances, expressly) did not recommend the majority of the amendments proposed by the bill.

5. In response to claim that the bill does not permit officials to be disqualified 'if they don't break the law'

- The amendments to the disqualification regime in part effect the Coalition's election commitment to 'Legislate to allow the court's to ban officials of registered organisations from holding office where they repeatedly break the law'.

- Senator Lines asked Ms Volzke whether the bill permits officials to be disqualified 'even if they don't break the law'. Ms Volke answered 'Not that I'm aware of, no' (pp 64-65 of the Transcript). Senator Lines asked if Ms Volke's 'unequivocal answer is that a union official can't be disqualified' if there has not been a finding made against the official. Ms Volke answered 'That's correct' (p 65 of the Transcript).

- With respect, we disagree with Ms Volzke's answers:

  - Proposed s 223(3) provides for a ground if findings are made against the organisation, not the official;
  - Proposed s 223(4) provides for a ground if the person becomes disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001* (Cth), which may not result from a finding or conviction; and
  - Proposed s 223(5) provides a ground if the person is 'not a fit and proper person to hold office in an organisation', which may not result from a finding or conviction.

6. In response to claim that there is a public interest test that applies for alteration of eligibility rules

- Ms Volzke gave evidence that there is a public interest that applies to an alteration of the eligibility rules of registered organisations (p 66 of the Transcript).

- With respect, we disagree with Ms Volzke's evidence. There is no public interest test that applies to an alteration of the rules of a registered organisation.

- The matters that the FWC must have regard to in respect of alteration of eligibility rules are dealt with in Division 5 of Part 2 of Chapter 5 of the RO Act. They pertain generally to issues regarding demarcation and overlapping coverage (for eg, s 157, 158(3)-(7)) and ensuring that the change is in accordance with the rules of the organisation (for eg, s 158(2)). There is no general 'public interest' consideration.

7. In response to evidence regarding potential increase in frivolous or vexatious claims

- The Chair asked Ms Volzke some questions regarding whether the bill will encourage more vexatious claims. Ms Volzke answered that there are provisions in the RO Act already that allow for dealing with frivolous or vexatious claims, and referred to s 329 of the RO Act (p 67 of the Transcript).

- Section 329 is the relevant provision. It provides that: 'A person who is a party to a proceeding (including an appeal) in a matter arising under this Act must not be ordered to pay costs incurred by any other party to the proceeding unless the person instituted the proceeding vexatiously or without reasonable cause.'

- Section 329 therefore deals with the allocation of legal costs for proceedings. Other than a potential deterrent effect, it does not safeguard against such proceedings being instituted in the first place. The defendant is still required to participate in the proceedings, and then seek costs after the fact.

- Section 329 can be contrasted to s 237 of the Corporations Act, which requires a member of a company to apply to the Court for leave to bring, or to intervene in, certain proceedings. The Court can refuse the application having regard to matters including whether the applicant is acting in good faith and whether there is a serious question to be tried.

- The Chair asked Ms Volzke whether such frivolous or vexatious claims already occur. Ms Volzke answered that she is not aware of the existing provisions for deregistration or administration being used in that way (p 67 of the Transcript).

- In response, we note that the current grounds for deregistration and administration, and the standing provisions through which they may be accessed, are narrower. The combination of expanded grounds and standing increase the opportunity for litigation.

- Notably, outside of the existing explicit right of the Minister to seek deregistration, the current standing provisions require the Court to make a judgement about whether a person external to a union has a sufficient legitimate interest to bring about a result that sees the suspension of democracy in a union, or the abolition of union. In making that judgement under the law as it is today, the Court would resort to principles distilled from the legislative schemes in which unions operate. The very fact that the Government has chosen to alter the standing requirements in the way it has exposes its own assessment that the persons who will become entitled to bring about these harsh outcomes are persons who would fail the current law's fundamental test as to the legitimacy of their interest in doing so. To suggest that such a fundamental shift will not open the gates to opportunism is clearly wrong when the current law would view such attempts as precisely that.

8. In response to evidence regarding s 28C(1)(d) and (e) of the bill

- The Chair asked Ms Volzke a question regarding the operation of s 28C(1)(d) and (e) of the bill. Ms Volzke's answer included: '… those actual provisions are adapted from the Corporations Act, which similarly uses those sorts of phrases … there's certainly no judicial authority that would suggest that it would be interpreted in the way that has been suggested by some other witnesses today' (p 68 of the Transcript).

- In response, we note that the formulation in the Corporations Act is different from that in the bill, and so the judicial authority on the formulation in the Corporations Act is of limited application. The Government is yet to explain why the formulation has been varied in the bill.

- The Chair responded to Ms Volzke: 'Probably the better outcome, then, for members would actually be to vote out their officials if they're dissatisfied with campaigns or things they're running – correct? That would probably be the normal course of action in a union, rather than taking this action?'

- We agree with the Chair's comment. That would be the better outcome and the normal course of action. This legislation is unnecessary. These matters are better dealt with via the union's democratic processes.

9. <u>In response to evidence about serious criminal conduct and grounds for disqualification</u>

- The Chair asked Ms Volzke for examples of serious crimes that would not currently constitute grounds for disqualification of an official under the current RO Act, but would if the bill were passed. Ms Volzke and Ms Alison Durbin, on behalf of the Department of Employment, cited blackmail, extortion and destruction of documents.

- The Heydon report, in its consideration that founded the recommendation of a general category of serious offence in the definition of prescribed offence, noted that the definition does not currently include certain significant criminal offences and cited contempt of court, blackmail or extortion offences under State law and others as examples.

- The ILO Committee on Freedom of Association has said that a law which *generally* prohibits access to trade union office because of *any* conviction is incompatible with the principles of freedom of association.[1]

10. <u>In response to evidence about acting while disqualified</u>

- The Chair asked Ms Volzke about why the Heydon Commission recommended applying a new penalty for acting while disqualified and whether there is a disqualification for company directors in similar circumstances. Ms Volke answered that there is and that there is a comparable provision that is drafted in very similar terms under the

[1] ILO, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Geneva, Fifth (revised) Edition, 2006, paragraphs [421]-[424].

Corporations Act, which has been adopted and adapted in the bill (p 69 of the Transcript).

- It is correct that there is a similar provision to proposed s 226, which creates an offence for acting while disqualified, in the Corporations Act. However the penalty for the equivalent offence in the Corporations Act is 50 penalty units or imprisonment for one year, or both, whereas in the bill it is 100 penalty units or imprisonment for two years, or both. The penalty in the bill is *double* the penalty in the Corporations Act.

- As noted by Ms Volzke in her evidence, under proposed s 223 of the bill, conviction for this offence could ground a disqualification order because it is an offence against the RO Act. However Ms Volzke's evidence that there is a disqualification ground for company directors in similar circumstances is incorrect.

- Under s 206B(1)(b) of the Corporations Act, a person becomes disqualified from managing corporations if the person is convicted of an offence that is a contravention of the Corporations Act and *is punishable by imprisonment for a period greater than 12 months*, or involves dishonesty and is punishable by imprisonment for at least three months. Because the penalty for the offence in the Corporations Act is punishable by imprisonment of only one year, conviction for this offence cannot ground disqualification.

11. <u>In response to questions about the competition test for company mergers</u>

- Senator Ketter asked Ms Volzke in what way a corporation's record of compliance with the law is relevant, or taken into account, in relation to a merger involving that corporation. Ms Volzke took the question on notice.

- The sole consideration in the competition test is whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market. A non-exhaustive list of matters that must be taken into account in determining that is set out in s 50(3) of the *Competition and Consumer Act 2010* (Cth). The corporation's record of compliance with the law is not included in that list.

- Senator Ketter asked Ms Volzke which organisations or persons are granted standing to make submissions in respect of any relevant test involving the merger of corporations. Ms Volzke took the question on notice.

- No organisations or persons are granted standing. The Commission or Tribunal 'may consult with such persons as it considers reasonable and appropriate for the purposes of making its determination on the application' (ss 95AK(2) and 95AZD(2)).

ATTACHMENT 1

Fair Work Act	
Section	**Public interest test**
189	(2) The FWC may approve the agreement under this section if the FWC is satisfied that, because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest.
187	(5) If the agreement is a greenfields agreement, the FWC must be satisfied that: (a) the relevant employee organisations that will be covered by the agreement are (taken as a group) entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement, in relation to work to be performed under the agreement; and (b) it is in the public interest to approve the agreement.
211	(1) If an application for the approval of a variation of an enterprise agreement is made under section 210, the FWC must approve the variation if: (a) the FWC is satisfied that had an application been made under subsection 182(4) or section 185 for the approval of the agreement as proposed to be varied, the FWC would have been required to approve the agreement under section 186; and (b) the FWC is satisfied that the agreement as proposed to be varied would not specify a date as its nominal expiry date which is more than 4 years after the day on which the FWC approved the agreement; unless the FWC is satisfied that there are serious public interest grounds for not approving the variation.
226	If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if: (a) the FWC is satisfied that it is not contrary to the public interest to do so; and (b) the FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including: (i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and (ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.
243	(1) The FWC must make a low-paid authorisation in relation to a proposed multi-enterprise agreement if: (a) an application for the authorisation has been made; and (b) the FWC is satisfied that it is in the public interest to make the authorisation, *taking into account the matters specified in subsections (2) and (3).*
275	The factors that the FWC must take into account in deciding which terms to include in a workplace determination include the following: (a) the merits of the case; (b) for a low-paid workplace determination—the interests of the employers and employees who will be covered by the determination, including ensuring that the employers are able to remain competitive; (c) for a workplace determination other than a low-paid workplace determination—the interests of the employers and employees who will be covered by the determination; (d) the public interest; (e) how productivity might be improved in the enterprise or enterprises concerned; (f) the extent to which the conduct of the bargaining representatives for the proposed enterprise agreement concerned was reasonable during bargaining for the agreement;

	(g) the extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements; (h) incentives to continue to bargain at a later time.
318 (see also 319, 320)	(1) In deciding whether to make the order, the FWC must take into account the following: (a) the views of: (i) the new employer or a person who is likely to be the new employer; and (ii) the employees who would be affected by the order; (b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment; (c) if the order relates to an enterprise agreement—the nominal expiry date of the agreement; (d) whether the transferable instrument would have a negative impact on the productivity of the new employer's workplace; (e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer; (f) the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer; (g) the public interest.
400 (see also 604)	(1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.
420	(3) However, the FWC must not make the interim order if the FWC is satisfied that it would be contrary to the public interest to do so.
425 (see also 426)	(1) The FWC must make an order suspending protected industrial action for a proposed enterprise agreement that is being engaged in if the FWC is satisfied that the suspension is appropriate taking into account the following matters: (a) whether the suspension would be beneficial to the bargaining representatives for the agreement because it would assist in resolving the matters at issue; (b) the duration of the protected industrial action; (c) whether the suspension would be contrary to the public interest or inconsistent with the objects of this Act; (d) any other matters that the FWC considers relevant.
532	(1) The FWC may make whatever orders it considers appropriate, in the public interest, to put: (a) the employees; and (b) each registered employee association referred to in paragraph 531(2)(a) or (3)(a); in the same position (as nearly as can be done) as if the employer had complied with subsections 531(2) and (3).
Fair Work (Registered Organisations) Act	
351A	(1) The Minister may intervene on behalf of the Commonwealth in proceedings before a court (including a court of a State or Territory) in relation to a matter arising under this Act if the Minister believes it is in the public interest to do so.

ATTACHMENT 2

Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017	**Hon John Dyson Heydon AC QC's Final Report of the Royal Commission into Trade Union Governance and Corruption**	**Analysis**
SCHEDULE 1		*Implements and goes beyond Recommendations 36-38*
As per Recommendation 36 Section 212(aa) is inserted into existing s 212 to expand the definition of 'prescribed offence' to include an offence under a law of the Commonwealth, a State or Territory, or another country, punishable upon conviction by imprisonment for life or a period of five years or more.	**Recommendation 36** The definition of 'prescribed offence' in s 212 of the *Fair Work (Registered Organisations) Act 2009* (Cth) be amended to include an offence under a law of the Commonwealth, a State or Territory, or another country, which is punishable on conviction by a maximum penalty of imprisonment for life or 5 years or more.	*Implemented as per Recommendation 36*
Arguably goes beyond Recommendation 37 Section 226 provides that a person commits an offence if the person is disqualified from holding office in an organisation or branch and the person: a) is a candidate for office in an organisation or branch (s 226(1)); b) continues to hold a position as an officer in an organisation or branch (s 226(2)); c) exercises the capacity to significantly affect the financial standing or other affairs of an organisation or branch (s 226(3)(b)(i)); d) gives directions to the committee of management of an organisation or branch, excluding advice	**Recommendation 37** The *Fair Work (Registered Organisations) Act 2009* (Cth) be amended to make it a criminal offence for a person who is disqualified from holding office in a registered organisation to continue to hold an office. The offence should be an offence of strict liability with a maximum penalty of 100 penalty units or imprisonment for two years, or both.	*Arguably goes beyond Recommendation 37. Section 226 makes it an offence not only to continue to hold an office but also to continue to influence an organisation. Neither paragraph 171 nor Recommendation 37 of the Heydon Report expressly dealt with or provided for the latter. However paragraph 171 did recommend that 'an equivalent provision' to s 206A(1) of the Corporations Act be introduced into the FW (RO) Act. Section 206A(1) deals with both continuing to hold office and continuing to influence.*

given in a professional capacity, knowing the committee of management is accustomed to acting in accordance with the person's wishes or intends that the committee of management will do so (s 226(3)(b)(ii)).		
Goes beyond Recommendation 38 <u>Standing</u> given not only to Registered Organisations Commissioner but also to the Minister and a person with sufficient interest.	**Recommendation 38** The *Fair Work (Registered Organisations) Act 2009* (Cth) be amended by inserting a new provision giving the Federal Court jurisdiction, upon the application of the registered organisations regulator, to disqualify a person from holding any office in a registered organisation for a period of time the court considers appropriate. The court should be permitted to make such an order if the conditions set out in paragraph 190 are satisfied.	*Goes beyond Recommendation 38:* *Standing is given to regulator per Recommendation 38 but is also given to:* • *Minister* • *person with sufficient interest.*
<u>Grounds</u>	**Paragraph 190** …The Federal Court should be permitted to make an order disqualifying a person from holding an office within a registered organisation or branch if:	*Grounds for disqualification are far broader than those in Recommendation 38.*
a person has had a 'designated finding' made against them:	a) the person has or has been found to have contravened:	*Extends beyond Recommendation 38 to also include:* • *criminal offences against a range of*

a) in criminal proceedings, that a person has committed an offence against: i) The RO Act; ii) the FW Act; iii) the Building and Construction Industry (Improving Productivity) Act 2016; iv) the Fair Work (Building Industry) Act 2012 as in force at any time before its repeal; v) Part IV of the Competition and Consumer Act 2010 (and any other provision of the Act so far as it applies in relation to Part IV) and the Competition Code of each State and Territory; vi) the Work Health and Safety Act 2011; vii) each State or Territory OHS law (within the meaning of the Fair Work Act); viii) Part 7.8 of the Criminal Code (causing harm to, and impersonation and obstruction of, Commonwealth public officials) and any other provision of the Code so far as it applies in relation to that Part. b) in any civil proceedings against a person—that the person has contravened, or been involved in a contravention of: i) a civil penalty provision of the RO Act; or ii) a civil remedy provision of the FW Act; or iii) a civil remedy provision of the Building and Construction Industry (Improving Productivity) Act 2016; or iv) a civil penalty provision of the Fair Work (Building Industry) Act 2012 as in force at any time before its repeal; or v) a provision of Part IV of the Competition and Consumer Act 2010, or a provision of the Competition Code of a State or Territory, other than an offence; or vi) a WHS civil penalty provision of the Work Health and Safety Act 2011; or vii) a provision of a State or Territory OHS law (within the meaning of the Fair Work Act), other than an offence.	i) a civil remedy provision of the FW Act; ii) a civil penalty provision of the FW(RO) Act; or iii) a civil penalty provision of the Work Health and Safety Act 2011 (Cth); b) has, or has been found to have, <u>at least twice</u> contravened a provision of the FW Act or the FW(RO) Act; or	*legislation* • *contraventions of civil remedy or civil penalty provisions of a range of legislation not contemplated by Recommendation 38* • *no requirement for 2 contraventions of provisions of the FW Act or FW(RO) Act – 1 offence, civil penalty or civil remedy contravention is sufficient.*

c) in any criminal proceedings against a person (other than those listed above) that the person has committed an offence against any law of the Commonwealth or a State or Territory and the person engaged in the conduct to which the finding relates in the course of (or purportedly in the course of) performing functions in relation to any organisation.		
a) has been found to be in contempt of court in relation to an order or injunction made under: i) The RO Act; ii) the FW Act; iii) the Building and Construction Industry (Improving Productivity) Act 2016; iv) the Fair Work (Building Industry) Act 2012 as in force at any time before its repeal; v) Part IV of the Competition and Consumer Act 2010 (and any other provision of the Act so far as it applies in relation to Part IV) and the Competition Code of each State and Territory; vi) the Work Health and Safety Act 2011; vii) each State or Territory OHS law (within the meaning of the Fair Work Act); viii) Part 7.8 of the Criminal Code (causing harm to, and impersonation and obstruction of, Commonwealth public officials) and any other provision of the Code so far as it applies in relation to that Part. b) the person is found to be in contempt of court under any law of the Commonwealth, a State or Territory (other than those laws listed above) and the person engaged in the conduct to which the finding relates in the course of (or purportedly in the course of) performing functions in relation to any organisation.	a) has been found liable for contempt;	*More limited than Recommendation 38 – contempt only relevant if in relation to an order or injunction made under certain legislation or if in course of performing functions of organisation.*
if two of any of the following finds are made against an organisation whilst that person was an officer of that organisation:	has been at least twice an officer of a registered organisation that: i) has, or has been found to have, contravened a provision of:	*Extends beyond Recommendation 38 to include:* • *criminal offences* • *contraventions of civil remedy or civil*

a) in criminal proceedings, that a person has committed an offence against: ix) The RO Act; x) the FW Act; xi) the Building and Construction Industry (Improving Productivity) Act 2016; xii) the Fair Work (Building Industry) Act 2012 as in force at any time before its repeal; xiii) Part IV of the Competition and Consumer Act 2010 (and any other provision of the Act so far as it applies in relation to Part IV) and the Competition Code of each State and Territory; xiv) the Work Health and Safety Act 2011; xv) each State or Territory OHS law (within the meaning of the Fair Work Act); xvi) Part 7.8 of the Criminal Code (causing harm to, and impersonation and obstruction of, Commonwealth public officials) and any other provision of the Code so far as it applies in relation to that Part. b) in any civil proceedings against a person—that the person has contravened, or been involved in a contravention of: viii) a civil penalty provision of the RO Act; or ix) a civil remedy provision of the FW Act; or x) a civil remedy provision of the Building and Construction Industry (Improving Productivity) Act 2016; or xi) a civil penalty provision of the Fair Work (Building Industry) Act 2012 as in force at any time before its repeal; or xii) a provision of Part IV of the Competition and Consumer Act 2010, or a provision of the Competition Code of a State or Territory, other than an offence; or xiii) a WHS civil penalty provision of the Work Health and Safety Act 2011; or xiv) a provision of a State or Territory OHS law (within the meaning of the Fair Work Act), other than an offence.	• the FW Act; or • the FW(RO) Act; or ii) has been found liable for contempt while the person was an officer and each time the person failed to take reasonable steps to prevent the contravention or the contempt.	*penalty provisions of a range of legislation not contemplated by Recommendation 38.*

c) a finding (other than those findings listed above) in any criminal proceedings against a person that the person has committed an offence against any law of the Commonwealth or a State or Territory. d) the organisation was found to be in contempt of court under any law of the Commonwealth, a State or Territory. If the person failed to take reasonable steps to prevent that conduct.		
If, having regard to: a) refusal, revocation or suspension of a right of entry or WHS entry permit; b) certain criminal or civil findings, whether or not a conviction was recorded; and c) any other event the Court considers relevant a person is not a fit and proper person to hold office in an organisation.	is otherwise not a fit and proper person to hold office within a registered organisation or branch; and	*Implements Recommendation 38 (which did not give any suggestions as to the content of the fit and proper person test).*
if: a) the person is found to have committed an offence under, or contravened a provision of, Division 1 of Part 2D.1 of the Corporations Act 2001 (Cth) (Corporations Act); or b) the person becomes disqualified from managing corporations under Part 2D.6 of the Corporations Act.		*No relevant recommendation.*
The Court does not consider that it would be unjust to disqualify the person, having regard to: i) the nature of the matters constituting the ground; ii) the circumstances and the nature of the person's involvement in the matters constituting the ground; and iii) any other matters the Court considers relevant.	The Court is satisfied that the disqualification is justified.	*Arguably goes beyond Recommendation 38, because will have the practical effect of effectively shifting the 'onus' (in a practical, not legal sense) onto the defendant to convince the Court it would be unjust (rather than the applicant to convince the Court it is*

		justified).
SCHEDULE 2		*No relevant recommendation.*
SCHEDULE 3		*No relevant recommendation.*
SCHEDULE 4		*No relevant recommendation.*