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Public Comment Response Form
Exposure Draft for Model Act and Stage 1 Model Regulations

You are invited to answer any and all of the questions listed below which have been taken from the Exposure Draft Discussion Paper:

Questions
Part 1 – Preliminary Matters
Q1. What is the best title for the model Act?
The Act should be known as the "Occupational Health and Safety Act". The Act operates to ensure health, so far as is reasonably practicable. This concept extends beyond merely ensuring work is safe. The title of the Act should reflect this position.
Q2. Does the definition of '*officer*' clearly capture those individuals who should have '*officer'* duties under the model Act?
The PFA generally supports the submissions of the ACTU in this regard.
Q3. There is some overlap between the definitions of 'plant' and 'structure', as many types of plant have structural attributes, and vice versa. Should 'plant' and 'structure' be defined in a way that removes this overlap?
The PFA generally supports the submissions of the ACTU in this regard.
Q4. Are there any other types of activities or undertakings that should be specifically included or excluded from application of the model Act? For example, should residential strata title body corporates be excluded?
We appreciate that the Crown and other public authorities are bound (s 9(1)), that the Crown and other public authorities are defined as a "body corporate" for the purposes of the Act (s 9(2)), and as such the Crown and other public authorities are a "person" for the purposes of the Act.

We appreciate that profit or gain is not an essential feature of any business or undertaking carried on.

However, a question remains as to whether the Crown can be said to be conducting the "business or undertaking" of policing.

The question arises because, at law a police officer including the Commissioner of Police exercise an original authority. The exercise of the authority is intended to be and at law has always been independent of the Crown (albeit the Commissioner of Police in most jurisdictions is, with some limitations, subject to the direction of the relevant Minister).

It appears to the PFA appropriate, for the avoidance of doubt, to include an additional sub-paragraph to s 11 of the proposed Safe Work Act to specifically state "This Act applies to the delivery of policing functions and services".

It is appropriate to include such a provision in the Model Law as it will itself operate over three policing jurisdictions and should be automatically embraced by each of the State counterparts.

Q5. Is the scope of the suppliers' duty appropriate?

The PFA generally supports the submissions of the ACTU in this regard.

Q6. Is the scope of the '*worker*' definition appropriate? Should it cover students gaining work experience?

The difficulty the PFA perceives with the definition of "worker", as with the difficulties expressed at Q&A 4 above, is that a police officer cannot be said to be carrying out work "in any capacity *for a person conducting a business or undertaking".* Police officers exercise an original authority required by their Oath of office: the work they perform is not "for" anyone. Other than judges and Ministers of the Crown, Police officers are the only other workers that readily come to mind that may not otherwise clearly contemplated by the definition of "worker".

Including an additional placita to subparagraph (1) of s 7 does not interfere with the remainder of the proposed Act. For the avoidance of doubt "a police officer" should be specifically included in the definition of "worker" in the model law.

It is appropriate to include a police officer in the definition of "workers" in s 7(1) of the model law. The Safe Work Act will have direct operation over three jurisdictions and as such it is appropriate that a police officer be specifically included in the model law and not merely in State counterparts.

Q7. Is the definition of '*workplace*' appropriate?

The PFA generally supports the submissions of the ACTU in this regard.

Part 2 – Safety Duties

Q8. Do the principles that apply to the duties of care give clear guidance on what is expected?

The PFA generally supports the submissions of the ACTU in this regard.

Q9. Is the definition of '*reasonably practicable*' appropriate in this context?

The PFA generally supports the submissions of the ACTU in this regard.

Q10. Should the definition of 'reasonably practicable' be exhaustive i.e. so only matters listed may be considered in determining compliance with the duty?

No. The PFA generally supports the submissions of the ACTU in this regard.

Q11. Is the proposed scope of the primary duty appropriate?

The PFA generally supports the submissions of the ACTU in this regard.

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Q12. The model Act requires the provision of, so far as is reasonably practicable, any information, training and instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work (Clause 18(4)(f)). Should this requirement expressly require that the information etc. be provided in an appropriate language or languages, or provided at a level that can be understood by the workers?
The PFA generally supports the submissions of the ACTU in this regard.
Q13. The model Act requires, so far as is reasonably practicable, the provision of adequate facilities for the welfare of workers at work (Clause 18(4)(e)). Should this provision be drafted to require 'access to' such facilities (e.g. to take account of requirements for mobile workplaces)?
The PFA generally supports the draft Bill.
Q14. Is the scope of the duties related to specific activities appropriate?
The PFA generally supports the submissions of the ACTU in this regard.
Q15. In determining whether a worker failed to take reasonable care, should regard be had to what the worker knew about the relevant circumstances?
The PFA generally supports the submissions of the ACTU in this regard.
Q16. Is the treatment of volunteers under the model Act appropriate?
The PFA generally supports the submissions of the ACTU in this regard.

Q17. Are the range and levels of penalties proposed above appropriate, taking account of the levels set for breaches of duties of care by the WRMC?
The PFA generally supports the submissions of the ACTU in this regard.
Q18. What should the maximum penalty be for a contravention of the model regulations?
The PFA generally supports the submissions of the ACTU in this regard.
Q19. The intention is that all contraventions of the model Act be criminal offences. Is this appropriate or should some non-duty of care offences be subject to civil sanctions e.g. failure to display a list of HSRs at the workplace, offences relating to right of entry?
The PFA generally supports the submissions of the ACTU in this regard.
Part 3 – Other Obligations
Q20. Is the list of notifiable incidents sufficiently clear and objective, so duty holders easily understand their obligations?
The PFA generally supports the submissions of the ACTU in this regard.
Part 4 – Consultation, participation and representation
Q21. Is the proposed scope of duty to consult workers appropriate?

The PFA generally supports the submissions of the ACTU in this regard.
Q22. Should the model Act include a procedure to follow if agreement on a consultation procedure cannot be reached?
The PFA generally supports the submissions of the ACTU in this regard.
Q23. Clause 49 allows work groups to be determined for workers engaged in 2 or more businesses or undertakings. Should such arrangements be by agreement only, i.e.with no prescribed procedure if negotiations fail?
The PFA generally supports the submissions of the ACTU in this regard.
Q24. Negotiations for work groups must be commenced within a '*reasonable time*'. Should a time limit be prescribed e.g. 14, 21 or 28 days?
The PFA generally supports the submissions of the ACTU in this regard however in respect to the election of HSR's or Deputy HSR's in the work place, employers should have no role in such elections. That role should be carried out by employees or their unions.
Q25. Elections for HSRs and possibly deputy HSRs must be conducted '*as soon as reasonably practicable*' after the relevant work groups are established, or after a request for an election is received if work groups are already established. Should a time limit be prescribed?
The PFA believes that the time limit for the election of HSR's should be totally under the control of employees.
Q26. The model Act requires that the HSR training must take place within a reasonable time, to accommodate a range of circumstances. For

	example, it may take longer for HSRs working in rural or remote regions to attend an approved course that may not be available in their area. Should a time limit be specified within which the training must be provided?
The PFA generally supports the submissions of the ACTU in this regard.	
Q27.	The model Act requires that a health and safety committee be established within 2 months of the request being made. Six of the current OHS Acts include such a timeframe, which varies across jurisdictions from 3 weeks to 3 months. Is the proposed time limit of 2 months appropriate?
The PFA generally supports the submissions of the ACTU in this regard.	
Q28.	The *Fair Work Act 2009* (Cth) (Fair Work Act) refers to ceasing work on the basis of a 'reasonable concern' of the employee about an imminent risk to his or her health and safety, while the model Act refers to 'reasonable grounds'. Should the terminology in clauses 75 and 76 be aligned with the Fair Work Act?
The PFA generally supports the submissions of the ACTU in this regard with the inclusion of Section 60 of the Occupational Health and Safety Act 2004 (VIC).	
Q29.	Should a health and safety representative be required to complete approved training before being able to direct that work cease under these provisions?
No. The PFA supports Section 60 of the Occupational Health and Safety Act 2004 (VIC)	
Q30.	Should a health and safety representative be required to complete approved training before being able to issue a PIN under these provisions?
The PFA generally supports the submissions of the ACTU in this regard.	

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Q31. A PIN cannot require compliance before 7 days from the date the PIN was issued. Is this time frame appropriate?
The PFA generally supports the submissions of the ACTU in this regard.
Part 5 – Protection from Discrimination
Q32. Should the model Act expressly protect persons from being coerced or induced to exercise their powers in a particular way?
The PFA generally supports the submissions of the ACTU in this regard.
Part 6 – Workplace entry by OHS entry permit holders
Q33. Are the notification requirements appropriate?
The PFA generally supports the submissions of the ACTU in this regard.
Q34. Should the model Act contain a specific authorisation process for an OHS entry permit or can it rely on authorisation obtained under other Acts such as the Fair Work Act?
The PFA generally supports the submissions of the ACTU in this regard.
Q35. Should contraventions of this Part attract criminal or civil sanctions? If civil sanctions are considered appropriate, should penalty levels reflect those that apply under the Fair Work Act?
Criminal sanctions. The PFA generally supports the submissions of the ACTU in this regard.

Q36. The right of entry provisions have been drafted to be generally consistent with the Fair Work Act. Do these provisions appropriately apply to the role of a union representative when entering the workplace in relation to OHS, rather than in relation to workplace relations?
The PFA generally supports the submissions of the ACTU in this regard.
Part 7 – The Regulator
Q37. Should guidelines have any other particular legal status under the Act?
The PFA generally supports the submissions of the ACTU in this regard.
Part 10 – Review of Decisions
Q38. Is the list of reviewable decisions appropriate?
The PFA generally supports the submissions of the ACTU in this regard.
Q39. Are the processes and timeframes prescribed for the internal review of decisions appropriate?
The PFA generally supports the submissions of the ACTU in this regard.
Q40. Are stay arrangements appropriate in relation to the issue of a prohibition or nondisturbance notices, having regard to the purposes of those notices?
The PFA generally supports the submissions of the ACTU in this regard.

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Exposure Draft of Key Administrative Regulations
Q41. Should the list of matters to be considered in negotiations for work groups be provided for in a Code of Practice rather than prescribed in regulation?
The PFA generally supports the submissions of the ACTU in this regard.
Do you have any other comments?
Please see Attached Schedule “A”

SCHEDULE "A"

1. The PFA supports generally the position expressed by the ACTU in response to the exposure draft of the Model Law. However, there are three areas which require specific comment in relation to the industry of policing. Two of those three areas are dealt with in answer to Questions 4 and 6 above. The final relates to a jurisdictional note to be found to the proposed s 11 entitled "Scope" which states:

   "**Jurisdictional note**: The Commonwealth may need to draft provisions to deal with matters relating to national security, defence and federal police operations."

2. We understand, through correspondence by the Deputy Prime Minister to the President of the Federation, that this is intended to reflect the current situation with respect to the Australian Federal Police.

3. The current provision within s 8 of the *Occupational Health and Safety Act* 1991 (Cth) is as follows:

"8 Act not to prejudice certain police operations

(1) Nothing in this Act requires or permits a person to take any action, or to refrain from taking any action, that would be, or could reasonably be expected to be, prejudicial to an existing or future covert operation or dangerous operation of the Australian Federal Police.

(2) In this section:

AFP employee has the same meaning as in the *Australian Federal Police Act 1979*.

covert operation means the performance of a function or service under section 8 of the *Australian Federal Police Act 1979* where knowledge of the operation by an unauthorised person, may:

(a) reduce the effectiveness of the performance of the function or service; or

(b) expose a person to the danger of physical harm or death arising from the actions of another person.

dangerous operation means the performance of a function or service under section 8 of the *Australian Federal Police Act 1979* in circumstances where exposure of the Commissioner of the Australian Federal Police, a Deputy Commissioner of the Australian Federal Police, or an AFP employee to the danger of serious physical harm or death, other than a danger arising from a cause within the control of the Australian Federal Police, is reasonably necessary for the effective performance of the function or the provision of the service.

unauthorised person in relation to a covert operation, means a person, including an AFP employee, who is not involved in the approval, planning or execution of the operation."

4. The PFA is concerned that this provision:

    a. will be repeated in the Model Law at all (in short because it is entirely inappropriate and unnecessary); and

    b. that by including it in the model law a provision equivalent to this will consequently be adopted by those States and Territories that do not currently reflect this law.

5. There are two difficulties that immediately come to mind with respect to a provision such as this.

6. Firstly, it is difficult to see why police officers (or the public, noting the expanded definition of "occupational health and safety" in s 11(2)(c)), should *ever* expect their Commissioner of Police to be held to anything other than the "reasonable practicability" standard, including when undertaking covert or dangerous operations (as defined in the current legislation where such an exemption exists). One would reasonably think those are the circumstances where the Police Force *must* be compelled to do *all* that is reasonably practicable. Why does the Minister consider it is ever appropriate for the relevant Commissioner of Police to be released from the responsibility to ensure the health, safety and welfare of his/her police so far as is reasonably practicable, given the very definition of "reasonably practicable" is designed to permit a balancing exercise referable to "all relevant matters" (which would no doubt include the nature of the work and the environment in which it is performed).

7. Any concern about an officer refusing to carry out such an operation is entirely without foundation: unlike any other worker a police officer takes an Oath associated with their public office and each of the Statutes that regulate the respective police forces across the country *compel* officers to perform work consistent with that Oath. The duties and/or functions of each police force capture the inherently dangerous work contemplated by such a provision. The specific police responsibilities would override the general rights of refusal that exist under generally operable occupational health and safety laws.

8. Police officers *must* perform such work if directed. They *must* be able to take comfort in the fact the Commissioner's of Police are lawfully bound to do all that is reasonably practicable to protect them. The whole point of the Safe Work Act is compel an employer to risk assess and do what it can to ensure health and safety. That something is inherently dangerous should not be a basis for the removal of the Acts protections.

9. It is an inappropriate provision and should be removed from the statute books altogether. At the very least, references to a "dangerous operation" should be removed as this could contemplate almost *any* policing related activity.

10. Secondly, it is difficult to foreshadow how the expression "a danger arising from a cause within the control of the Australian Federal Police", operating as it does as an exemption from an exemption, will be interpreted. We are not aware of any judicial consideration of s 8 of the Commonwealth legislation or s 4A of the Western Australian legislation (noting this exemption does not exist in any other jurisdiction, including NSW which is the only jurisdiction in which there has been a prosecution, so far as we are aware).

11. One need not think long to identify the potential difficulties associated with identifying whether a particular operation was a "dangerous operation", and if so, drawing the connection contemplated between the "danger arising" and its "cause".

12. The quintessential example of the sorts of difficulties one would face can be found in the prosecution of the NSW Police Force (the first OH&S prosecution of the NSW Police Force), after the tragic shooting death of two police officers in Crescent Head in 1995. The detailed and learned judgment of *Hungerford* J in *Workcover Authority of New South Wales (Inspector Keelty) v Crown in the Right of the State of New South Wales (Police Service of New South Wales)(No.2)* (2001) 104 IR 268 stands as an excellent example of the difficulties that may arise.

13. The circumstances can be shortly stated: in a relatively isolated part of the New South Wales mid-North Coast in the early hours of July 9, 1995, two officers (Senior Constable Addison and Senior Constable Spears) were tasked to provide assistance to a woman who had been threatened with violence by her ex-partner. The police spoke to the woman, obtained some information, and then attended upon the residence of the ex-partner, a Mr McGowan.

14. Upon arrival at McGowan's residence, the police reversed their police vehicle, a four wheel drive, into his driveway (presumably contemplating an arrest as such positioning would enable the easiest form of access to the rear of the vehicle). There was some form of altercation between the police and Mr McGowan: it would appear they were ultimately confronted at the front door of the premises by Mr McGowan wearing a hessian smock and carrying a Ruger self-loading rifle. The police officers retreated for safety to the front of the police vehicle (the furthest point from the house). Whilst sheltering behind the vehicle, Mr McGowan commenced to fire at police. The police returned fire. At some point in the melee, Senior Constable Addison was able to broadcast two scratchy and incomplete messages over the police radio: the first that there was trouble, the second that an officer was down. It was well known to the Police Service, and had been known for many years, that radio communications in the area generally and in particular in the Crescent Head area were manifestly deficient. After having discharged two rounds from his police revolver, Senior Constable Spears was shot in the head and killed.

15. Senior Constable Addison, it would appear unaware that any of his radio communications had been received and unable to further communicate, retreated across the road opposite McGowan's home to a neighbouring residence. He accessed the premises through the back door in an endeavour to find a telephone. Having been unsuccessful in that endeavour, he left the rear of the house and came down a passageway between that residence and the neighbouring house, towards the street and McGowan's location. He had his torch in his right hand (which was apparently on) and his police issue revolver in his left (and dominant) hand. Senior Constable Addison had not had any training in the use of the firearm he had on the night, had never been through a 'dry-fire' exercise using that firearm (noting he only received this firearm about five weeks prior to the incident), and he had not received any training in defensive tactics since approximately 1983 (he had transferred to criminal investigations at that time and not performed general duties policing since).

16. Mr McGowan, armed with a rifle, had taken up a shooting position crouched next to the door of the police vehicle. Shots were exchanged. Senior Constable Addison emptied his weapon and it would appear retreated back towards the rear of the house from which he had come: backwards, no doubt in significant distress, and in the dark.

17. Without any means of communication or knowing whether help was on its way, Senior Constable Addison had no option but to commit to a confrontation. For reasons that are not entirely clear, he came forward, torch in one hand, unloaded firearm in the other. McGowan shot him dead.

18. He was found with a revolver full of spent cartridges. The ammunition pouch on his police issue appointment belt was open and empty. The 'speedstrip' loading mechanism was found about six metres behind where his body lay on the ground towards the rear of the house.

19. McGowan shot himself in the head.

20. Following a coronial inquest, the Workcover Authority of New South Wales undertook an investigation. Originally, Workcover was not minded to prosecute. It took significant lobbying from the Federation's affiliate, the Police Association of New South Wales, including the threat of embarrassment caused by the Association itself commencing a prosecution, for Workcover to commence the prosecution.

21. The prosecution as ultimately pursued alleged a failure to ensure the health, safety and welfare of Senior Constable Addison and Senior Constable Spears in certain particularised respects:

    (a) a failure to provide appropriate equipment (namely, a failure to provide adequate radio communication facilities, a failure to provide the more efficient 'speedloader' as opposed to a 'speedstrip' for the revolver, and separately a failure to provide a self loading handgun with a magazine); and

    (b) a failure to provide appropriate training (separately charged as a failure to provide a system for the assessment of training needs before officers were placed on operational duties, failing to ensure that such training was undertaken before being placed on operational duties, and failing to provide sufficient training in the use of service issue firearms)

22. At trial, at the conclusion of the prosecution case and in the context of a 'no case to answer' submission, *Hungerford* J was called upon to consider whether there was evidence that was capable of making good the charge as particularised.

23. The contention for the Police Service was that *it was not responsible for creating the risk*: the risk was created by the unlawful and unpredictable actions of McGowan and as such there was no causal connection between the actions of the employer and the charges as particularised. In short, it was McGowan's fault, nothing to do with the Police Service. This is exactly the concern the Federation has with respect to the operation of this clause: it invites an argument of this kind. The Prosecutor on the other hand contended that such an approach erroneously focussed on the particular circumstances of the case and not the substantial issue to which the prosecution was directed: ie, the placing of officers in circumstances that created a risk to their health and safety without proper training and equipment.

24. The submission caused his Honour to examine in detail the 'absolute' nature of the offences contemplated by the then *Occupational Health and Safety Act* 1983 (NSW) in a context of inherently highly dangerous work and then to examine, on the facts there presented, the 'causal connection' required in order to make out a prosecution.

25. In the context of the instant case, his Honour's reasoning as to the general proposition was dealt with in this way (at [22] – [26]):

> 22 The general submission made by Mr *Hastings* [Queen's Counsel for the Defendant] on which his no-case application was based as to all charges was that the relevant risk to safety here was Mr McGowan over whose unpredictable and unlawful conduct the defendant had no control; and, so senior counsel submitted, there was no causal nexus of the defendant to the detriment to safety of the two officers. In my view, that submission cannot be sustained. Mr *Hastings* went further and submitted that the significance of Mr McGowan's role was such that there was nothing the defendant could have done to obviate the risk caused by Mr McGowan; as senior counsel said - "There is nothing to provide the employees with safety in those circumstances". Even given, which I think clearly was the case, that Mr McGowan presented as a risk to the officers' safety, that is not what any of the charges were directed to. The charges identified what were alleged to be risks existing to the safety of the two officers apart from the ultimate actions of Mr McGowan in causing their deaths. The answer to Mr *Hastings'* submission in this respect is simply that it concentrated on the incident itself, that is the fatal shooting of the two officers by Mr McGowan, rather than the situation in which the officers were placed while performing operational duties at the time and place of the incident in terms of risks to their health and safety occasioned by the particular detriments identified in each of the charges. In other words, the defendant's submission fell into the same vice by concentrating on the incident itself as the Full Court in *Haynes v C I & D Manufacturing* found occurred there at first instance.
>
> 23 I do not doubt, and neither do I think does the defendant, that police officers engaged on operational duties will be faced with risks to their safety. However, it is no answer to say, but as did Mr *Hastings*, that "the objective facts causing the detriment to safety were not the absence of speed loaders or a pistol or any deficiencies in the radio communication system or training, but the actions of McGowan, with which there was no causal connection to the employer" and:

"it is impossible to guarantee or to ensure the health and safety of police officers, and you can provide them with all the equipment under the sun short of an armoured vehicle and they will always be exposed to risk. Even if you did all the things that the prosecution has alleged were not done here … those things had absolutely no bearing on the safety of Senior Constable Spears because he was simply surprised and ambushed before any of these factors had any capacity to come into play".

Workplaces in very many industries have the potential to be unsafe and, to meet that situation in the interests of the well-being of employees, the legislature has created the absolute duty on employers in s 15, subject to the s 53 defence, to ensure the health, safety and welfare of those employees at their place of work. …"

24 Although the defendant may not be able to "control", or otherwise affect, the conduct of persons such as Mr McGowan who confront police officers from time-to-time in the performance of their duties, *the defendant is able to directly control and dictate the measures which should properly be made in preparing and equipping police officers to perform operational duties which are of such a nature as will ensure the health, safety and welfare of those officers.* (our emphasis)…

25 …

26 It follows, I would conclude, that Mr *Hastings*' general submission in avoidance of all of the charges, namely, that the relevant risk here was created externally from the defendant by the unpredictable and criminal conduct of Mr McGowan over which the defendant had no control, must fail. I accept as the correct approach that as stated by Mr *Crawshaw* [Senior Counsel for the Prosecutor] to the effect that *any failure by the defendant here was its acts or omissions as alleged in each charge in circumstances where the relevant risks to the two officers' safety were not created by Mr McGowan but by the officers being required by the defendant to work in an environment where they were at risk of being shot or otherwise suffering physical harm. In other words, the risks faced by officers engaged on operational type duties were well known to the defendant, even though the specific risk of Mr McGowan may not have been known, and who was therefore responsible under s 15 for its failures in ensuring against those risks.* I accept too the submission of Mr *Crawshaw* that there was no basis for Mr *Hastings*' submission that the *Occupational Health and Safety Act* was not directed to risks created by the unlawful actions of a third party. After all, and as Mr *Crawshaw* said, that was especially the case with police officers whose main role was to deal with unlawful activity: see mission and functions of the Police Service of New South Wales in s 6 of the *Police Service Act* 1990. (our emphasis)

26. Under the NSW legislation, the issue was the causal connection between the "risk" and the capacity to control the "risk": the "risk" was, generally stated, putting officers in a dangerous situation without doing all that was reasonably practicable by way of supplying communications equipment, training and the like. Under the proposed Safe Work Act the situation is not so clear.

27. If a provision of the kind contemplated by s 8 of the current *Occupational Health and Safety Act* 1991 (Cth) were included in the model law, it invites exactly the sort of debate expressed in the Crescent Head example. The officers were clearly exposed to a "danger of

serious physical harm or death", but no-one could have known that until the officers arrived on scene. The "danger" was posed by the man with the gun: not by the fact the officers were sent in there without sufficient training or inadequate equipment. Under the proposed Safe Work Act, not only would the prosecutor have to make out the causal connection to establish the breach of duty (under, for example, proposed s 18) as they would with any other inherently dangerous industry, but would *also* need to show that there was a causal connection between "the danger" and the capacity of the Commissioner of Police to control "the danger".

28. That the Model Law would contemplate *both* issues, that is the usual causal connection necessary to enliven the general duties *and* the specific and different causal connection contemplated by the foreshadowed equivalent of s 8 of the *Occupational Health and Safety Act* 1991 (Cth), suggests something different is contemplated by the two provisions. How the Court would interpret the causal connection between "the danger" and the capacity of the Commissioner to control that "danger" is far too uncertain for the Federation to have any real comfort from the statutory language.

29. In any event, the sorts of balancing inherent in the usual issues of "causal connection" and "forseeability" driven by the general duties are exactly the sorts of considerations that are relevant to the "reasonably practicable" test. They should be left to be had in that context, not as independent elements that govern whether the general duties imposed by the legislation *have any operation at all* (which is ultimately the effect of the exemption).

30. Again using the Crescent Head matter as the example, how his Honour dealt with the causal connection reinforces the appropriateness of removing a specific exemption and leaving issues of control to the general operation of the "reasonable practicability" test. Returning then to the substantive judgment from where we left it above, his Honour then dealt with the particular charges. Whilst satisfied on the evidence that the provision of a speedloader and a self-loading handgun would have provided certain safety benefits as a general proposition (see for example at [31] and [33]), *his Honour was not satisfied that there was a relevant causal connection between these deficiencies in the provision of some of the equipment and the charges as particularised*. Similarly, in the absence of more specific evidence of a causal connection, the charge alleging failures in the 'system' of training and assessment also failed. The Police Service was found to have a case to answer in relation to communications related charges and the failure to provide training (in relation to weapons handling, tactics in high-risk situations, method of approach to buildings, concealment and the use of lights and torches). For obvious reasons on the facts of that case (which we need not discuss here) they ran no "reasonable practicability" defence on those issues.

31. The concept of "reasonable practicability" provides a sufficient limitation on the exposure of the relevant police forces to prosecution. The respective police forces *must* be compelled to do what is reasonably practicable in *every* circumstance, including covert and dangerous operations. The exemption has no place on the statute books and should be removed. At the very least, references to a "dangerous operation" should be removed as this could contemplate almost *any* policing related activity.

32. Leaving aside the substantive issues of law that would arise, and looking at this simply as a practical matter (emphasising that neither the Federation, their State counterparts, or any private individual will have the capacity to prosecute) a prosecutor would first have to be satisfied that the general duties arose, leaving aside entirely issues of practicability of control. As a practicable matter, it is unlikely that they are *ever* going to get *any* judicial guidance on how the foreshadowed exemption will operate, because it is unlikely that there would ever be a prosecution arising out of anything that came remotely close to a "covert" or "dangerous operation". Again, the general issue of "reasonable practicability" should be a sufficient limitation on the exposure of the relevant police forces to liability, just as it is in any other inherently dangerous industry.