



BRIEFING

Work Health and Safety Reform: defining critical risks, and further background information for reforms

Date:	1 May 2025	Priority:	High
Security classification:	In Confidence	Tracking number:	BRIEFING-REQ-0013325

Action sought		
Minister	Action sought	Deadline
Hon Brooke van Velden Minister for Workplace Relations and Safety	Agree to a definition of Critical Risk for inclusion in the May Cabinet paper	5 May 2025

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Hayden Fenwick	Manager, Health and Safety Policy	04 896 5479	Privacy of natural persons	✓

The following departments/agencies have been consulted
N/A

Minister's office to complete:

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

Comments



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Purpose

To seek your agreement to a definition of 'critical risk' for the Health and Safety at Work Act 2015 (HSW Act), and to provide information on offences and penalties and related issues raised in consultation.

Executive summary

Critical risk

The concept of critical risk is at the centre of the health and safety reforms. It is intended to drive a more proportional response to workplace health and safety with more focus on the most significant risks, and a reduction in over compliance.

To achieve this, it will need to be defined in the HSW Act. There is an inherent trade-off between empowering PCBUs to understand the risks in their operations (flexibility) and addressing the stakeholder feedback that they don't know what to do (certainty). There is also a trade-off between the costs of harm, and the costs of compliance.

There are three viable options to define critical risk.

It could be based on the activities undertaken, with critical risk activities defined as those identified in existing regulations made under the HSW Act. This is more certain but less flexible, and there will be some critical risks that are unregulated. This option does create an incentive for stakeholders to lobby for further regulation in the future in order to expand the definition of critical risks.

It could be based on an assessment of the seriousness of the harm that will result, by linking it to the notification requirements. This is much more flexible and empowering for business but will be less certain.

You could also take a hybrid approach, which would use activities in existing regulations as the primary guide to what are critical risks, but with a catch-all provision to encourage PCBUs to think about other critical risks in their operations. This is the Ministry of Business, Innovation and Employment's (MBIE's) preferred option.

Information on offences and penalties under the Health and Safety at Work Act 2015

Stakeholder feedback indicates that the drivers of concerns about enforcement, prosecutions and liabilities are not the penalties per se but rather the way WorkSafe New Zealand (WorkSafe) has been operating, which has created a climate of fear and uncertainty.

The HSW Act penalties appear to be both coherent across different aspects of business regulation and coherent within the Act.

You are already taking actions to rebalance WorkSafe's approach to enforcement and to improve the availability of ACOPs and guidance as you noted to Cabinet in April.

You are also taking actions to address officers' concerns about the extent of their liability and how far they need to go to meet their due diligence duty. You are reporting to Cabinet in May to seek detailed policy decisions on clarifying the HSW Act's application to officers, which will be included in your Health and Safety at Work Reform Bill.

In our view, these initiatives will address the penalty related issues identified in the consultation.

Constitutional conventions

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** the definition of "critical risk" is central to your health and safety reforms *Noted*

- b **Note** that there is a trade-off between flexibility and certainty, and compliance costs and costs of harm, and it is difficult to assess the optimal point *Noted*

- c **Agree** to one of:
 - i. a prescriptive definition based off the activities undertaken by the PCBU that have already been identified as risks in regulations *Agree / Disagree*

 - OR**
 - ii. a judgment-based definition based on the likelihood of serious harm from any activity *Agree / Disagree*

 - OR**
 - iii. a hybrid definition that uses risks identified in existing regulations supplemented with some ability for PCBUs to exercise judgment (MBIE recommended option) *Agree/Disagree*

- d **Note** the information in this briefing about the offences and penalties framework in the HSW Act *Noted*

- e **Note** our advice that your initiatives to change WorkSafe's enforcement culture and the legislative amendments to the officers' duty will address the penalty -related issues identified in the consultation *Noted*

f **Discuss** whether you wish to direct us to provide advice on penalty levels and sentencing guidance.

Yes / No



Hayden Fenwick
Manager, Health and Safety Policy
Labour, Science and Enterprise, MBIE

1 / 05 / 2024

Hon Brooke van Velden
Minister for Workplace Relations and Safety

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Background

Part 1: Defining critical risks

1. On 16 April 2025, we provided you with advice on detailed policy decisions for inclusion in your Health and Safety at Work Reform Bill, including limiting the health and safety duties for small businesses [BRIEFING-REQ-0012039 refers]. This proposal limits work health and safety duties for small PCBUs to enable them to focus on critical risks, as these businesses may have fewer resources to manage all risks.
2. Our previous advice noted that the term “critical risks” is fundamental to the overall work health and safety reforms, not just limiting duties for small businesses. It noted that we would provide you with further advice on defining critical risks.
3. This paper provides you with advice on options to define “critical risks” and seeks your decisions as soon as possible so that your preferred proposal can be included in your next Cabinet paper *Health and Safety Reform: Further legislative changes* (the third of five), scheduled for consideration by the Cabinet Economic Policy Committee on 21 May 2025.

Part 2: Information on offences and penalties under the Health and Safety at Work Act 2015

4. You have asked for advice on the offences and penalties framework of the HSW Act, any issues that this raises, and options to address these issues.
5. This paper sets out the existing provisions and reviews these for:
 - a. coherence with other business law
 - b. internal coherence, and
 - c. anecdotal evidence of problems.

Part 1: Defining critical risks

Defining critical risk is fundamental to the work health and safety reform

6. You have signalled to Cabinet, and publicly, that the intent of the overall reform is to refocus the system on critical risks from work. Most of your proposals are designed to achieve this key shift, including sharpening the purpose of the HSW Act so that the *principal* purpose is managing the critical risks from work. This will be supported by ensuring that WorkSafe’s main regulatory objective, guidance, support and compliance and enforcement action are focused on critical risk.
7. The limiting of duties for small business is also intended to make clear that they only need to focus on critical risks. The distinction between small and large PCBUs arises as there will be non-critical risks that still cause harm and add costs to society, ACC, and individuals, that larger PCBUs should have to manage. Larger PCBUs can manage these because of their increased scale.
8. It is expected that over time, this will contribute to a shift in mindset on work health and safety duties to focus people’s efforts on critical risk and not on actions that don’t prevent workplace harm. As such, we would expect the system to be more efficient.
9. Given this, we consider it paramount that you define “critical risks” in the HSW Act. Not doing so would only add to the ambiguity that both small and large businesses raised concerns about.

10. The key high-level choice is where to set the balance between flexibility and certainty, which applies to both PCBUs and the regulator, and the impact of this on safety and compliance costs. Too much flexibility can leave businesses uncertain on what to do, but equally owners, managers and workers in businesses are better placed than government to understand the risks of any given task. The general thrust of health and safety in New Zealand and comparator countries for decades has been to empower businesses and workers to make good judgments rather than waiting for government to set rules.
11. While a definition of critical risk will never be able to specify all possible risks that may arise in all workplaces, we consider that there are options to provide a definition of critical risk that will provide adequate coverage across the work health and safety system.
12. We note that as agreed by Cabinet in March, the small PCBUs will still be responsible for the general duties applying to all PCBUs (s36 the primary duty of care, s37 the duty of a PCBU who manages or controls a workplace, and s38 the duty of a PCBU who manages or controls fixtures, fittings or plant at workplaces), but only as they apply to “critical risks”.
13. The March Cabinet decision also confirmed the duty of the small PCBUs to provide basic workplace facilities to maintain worker welfare such as the provision of drinking water, suitable lighting and ventilation, and first aid and emergency plans, as well as supervision, training, and personal protective equipment as necessary to manage critical risks. These duties are set in Part 1 of the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016.

Option One – Prescriptive: Using activity as a proxy for risk

14. Option one proposes to define critical risks as those that are referenced in the existing work health and safety regulations. This would mean that only when small PCBUs engage in the types of activities covered by regulations will the primary duty of care apply to them.
15. Currently, there are 18 sets of health and safety regulations, with risk-focused regulations typically covering higher risk activities, hazards, and sectors such as work with asbestos or hazardous substances. The full list of risk-focused regulations we recommend are drawn upon for the definition of critical risk is provided in **Annex One**.
16. This approach is the simplest to ensure PCBUs understand the types of risks they should be focused on. This approach leverages the existing regulations that cover activities with known risks. It also provides the broadest coverage as the regulations manage risks across a wide range of activities, hazards and sectors.
17. For small business (i.e. 97% of businesses in New Zealand) it effectively narrows their health and safety duties to only those activities identified in regulations.
18. The key limitation associated with option one is that it will inevitably result in gaps in coverage. There will be some activities or sectors that have critical risks but are not currently covered by regulations. A practical example of this is that quad bikes are not specifically regulated under the Health and Safety at Work Act but there are clearly critical risks associated with their use (see **Annex Two**).

Free and frank opinions

20. We do know from consultation that some of the existing regulatory stock is outdated and unwieldy.

21. Additionally, Cabinet previously agreed to your proposal to amend the purpose of the HSW Act to focus on critical risk, and this approach is different from how business tend to use the term “critical risk”. This approach to define critical risk would risk the principal purpose of the HSW Act becoming focused on activities or industries (which are static) rather than encouraging an ongoing assessment of risk (which can vary depending on how a job is being carried out).

Option Two – Judgment based: The possible outcome defines risk

22. Option two proposes to define “critical risks” as those that are likely to cause death, or serious injury or illness:
- 1 injuries or illness set out in section 23 of the HSW Act as notifiable to the regulator – such as amputations, serious burns or lacerations, serious head, brain, spinal or eye injuries, or serious illnesses requiring hospital admission.
 - 2 incidents that could expose a worker or any other person to a serious risk to their health and safety as set out in section 24 of the HSW Act as notifiable to the regulator – such as explosions, escape of gas, steam, or pressurised substances, fall from heights, or the collapse of a structure, plant, or excavation.
 - 3 the occupational diseases set out in Schedule 2 of the Accident Compensation Act 2001 (the AC Act) – such as cancers that are caused by work.
23. This was your proposed approach to defining critical risks in your March Cabinet paper, although you did not seek a Cabinet decision in relation to this.
24. Option two proposes to leverage the notification requirements (ss23–25 in the HSW Act) which are intended to capture the types of events that cause the most serious harm. These are the events that require the regulator to respond urgently/immediately. Notification requirements support the regulator to put out safety alerts to prevent wider harm from occurring, or near misses that could result in catastrophic failure. This approach is more aligned with industry practice for identifying critical risk associated with their business.
25. The key limitation associated with option two is that it would require PCBUs to use their judgment to assess the potential likelihood of their risks resulting in any of the notifiable events listed in the HSW Act or occupational diseases listed in the AC Act. As an example, they would need to assess whether the task is likely to cause ‘serious’ burns as opposed to minor burns. Therefore, this approach may not provide the level of clarity that small PCBUs are seeking regarding their work health and safety duties. Additionally, a judgment-based approach provides less certainty for the regulator.
26. The main consideration in this option is risk rather than the activity or hazard, so while there is less certainty, this option is more likely to accurately identify risks, but it may leave some small PCBUs seeking more clarity

Option Three – a Hybrid: based on activities identified in regulations but with a provision to enable PCBUs to exercise judgment

27. MBIE’s recommended option is a hybrid approach of options one and two. To give effect to this, PCBUs should be primarily focused on activities that are most likely to cause serious harm, as defined by activities in specific regulations. In addition, PCBUs should consider whether they have any other risks that may result in serious harm in the workplace, where serious harm is as defined by s23-25 of the HSW Act and Schedule 2 of the AC Act.
28. This option provides certainty to small PCBUs by creating a list of identified risk activities to guide their focus but manages the risk that some critical risks may not be covered by the regulations through the added judgment-based test.

29. **Annex Three** lays out comparisons between the three options in terms of impacts on duty holders and worker safety.

You could take a sectoral approach, but we don't recommend it

30. You could choose to include/exclude particular sectors are unlikely/likely to have any critical risks they need to manage. For example, small retail stores or office-based services. We have previously provided advice on this approach, and do not recommend this because there is a poor match between sectors and harm, and many otherwise low-risk PCBUs can have a critical risk [BRIEFING-REQ-0012036 and BRIEFING-REQ-0012039 refer].
31. This option would be both inflexible and increase uncertainty for many PCBUs.

Part 2: Information on offences and penalties under the Health and Safety at Work Act 2015

32. Feedback from the roadshows and the consultation included concerns about enforcement and prosecutions. The concerns raised were part of the general sense of a climate of fear and uncertainty stemming from the way WorkSafe New Zealand (WorkSafe) has been operating, with a combination of reluctance to provide clear guidance and what has been described as an overly punitive approach after something goes wrong. This is exacerbated by the long wait people can have while WorkSafe investigates and decides whether to charge. The few references to penalties for offences were made within this wider context.

Offences and penalties framework

33. The most frequently charged offences relate to the general duties as set out below in Table One. The most serious offence, section 47 reckless conduct appears to be very infrequently used. It is the only one with a maximum penalty of a term of imprisonment for an individual, either as an alternative to a fine or in addition to a fine. We have not found any instance of a sentence of imprisonment imposed under HSWA.¹
34. Most prosecutions are taken under section 48, failing to comply with a duty where the failure exposes an individual to risk of death, serious injury or serious illness.

¹ In August 2023 sentences of imprisonment were imposed on a health and safety officer and a managing director under the Crimes Act for offences of making false statements and perverting the course of justice, that followed a serious workplace incident where an apprentice suffered brain damage from toxic fumes. In 2016, a sentence of four months home detention was imposed on an individual (Rodney Stephen Bishop) under the previous Health and Safety in Employment Act 1992, after a worker was killed by excavation had not been protected from collapse by shoring, sloping or battering.

Table One: Offences and penalties relating to the general duties

Offence	Penalties	
<p>s47 reckless conduct in respect of duty</p> <ul style="list-style-type: none"> Reckless conduct that exposes an individual to a risk of death, serious injury or serious illness without reasonable excuse The duty holder is reckless as to this risk to the person(s). 	individual who is not a PCBU or an officer of a PCBU, ie a worker or other person (customer, visitor)	Prison - maximum 5 years OR Fine – maximum \$300,000, OR BOTH
	individual who is a PCBU or an officer of a PCBU	Prison – maximum 5 years OR Fine – maximum \$600,000, OR BOTH
	any other person, ie in contrast to “an individual” a non-natural person, such as a limited company PCBU	Fine - maximum \$3 million
<p>s48 failing to comply with duty that exposes individual to risk of death or serious injury or serious illness</p> <ul style="list-style-type: none"> Less culpable than s47 because does not involve reckless conduct. Failure exposes an individual to risk of death, serious injury or serious illness. 	individual who is not a PCBU or an officer of a PCBU, ie a worker or other person (customer, visitor)	Fine – maximum \$150,000
	individual who is a PCBU or an officer of a PCBU	Fine – maximum \$300,000,
	any other person, ie a limited company or similar (PCBU)	Fine - maximum \$1.5 million
<p>s49 failing to comply with duty</p> <ul style="list-style-type: none"> Has a duty and fails to comply with that duty Less culpable than the other two offences as does not involve exposure to risk of death, or of serious injury or illness. 	individual who is not a PCBU or an officer of a PCBU, ie a worker or other person (customer, visitor)	Fine – maximum \$50,000,
	individual who is a PCBU or an officer of a PCBU	Fine – maximum \$100,000
	any other person, ie a limited company or similar (PCBU)	Fine - maximum \$500,000

35. The HSW Act and the regulations set out other offences relating to failure to comply with specific requirements, with maximum fines set at different levels depending on the gravity of the offence and with lower maximums for individuals than for “other (legal) persons”. More information on the offences and penalties framework is provided in Annex Four.
36. The offences and penalties framework in the HSW Act was a response to the enforcement gaps in the previous Health and Safety in Employment Act 1992 (HSE Act) that were exposed by the Pike River Mine tragedy. This is particularly the case with the officers’ duty.

Is the penalty level for officers appropriate?

37. We understand there may be some concerns about the potential exposure of officers to sentences of imprisonment, and the incentives this may have on their willingness to serve on boards.
38. While the submission of the Institute of Directors stated that sections 47, 48 and 49 “impose significant penalties”, it added that “[t]hese penalties should remain for cases of gross negligence but should be balanced with incentives for transparency and proactive engagement.” Their key proposal in this respect was: “Balanced Enforcement: Shift from a punitive focus to proactive guidance and education, making lessons from regulatory actions transparent and accessible.
39. We compared the penalties with other legislation where there are officers, albeit with different responsibilities and not in situations where they are responsible for governance of systems designed to manage risks of injury, illness or death. The penalties are not out of step with these other regimes. In particular, the most serious offences in the Companies Act carry maximum prison sentences of five years or a fine up to \$200 000. Annex Four provides more information.
40. The concerns we’ve heard about officers’ liability are more focused on uncertainty about the extent of their duties, which are compounded by the general lack of guidance and concerns about WorkSafe’s enforcement approaches.

You are already taking actions that will alleviate concerns about enforcement and prosecutions

41. In our view the main drivers behind any concerns about penalties are the main issue appears to be the climate of fear and uncertainty created by the enforcement approach of WorkSafe, combined with the lack of clear guidance, and for officers, uncertainty about the extent of their duties.
42. The changes you have underway are designed to address these drivers.

Addressing the climate of fear and narrowing the focus to critical risks

43. In your April Cabinet paper *Shifting WorkSafe expectations and operational focus* [EXP-25-MIN-0044] you advised you will set an expectation that WorkSafe review its Enforcement Decision-making Model (EDM), and reconsider its approach to prosecutions, and ensure it is focused on cases of clear breaches and causation.
44. Combined with your legislative changes to focus WorkSafe and HSWA on critical risks, and your wider expectations that WorkSafe’s actions and activities are proportionate and practical and that they give consistent and clear advice, these changes are designed to shift WorkSafe away from the punitive culture to one that focusses on helping duty-holders do what is proportionate to the risks.
45. We have included these expectations in the draft letter of Expectations to the board Chair.

Addressing officers' concerns about the extent of their liability

46. In March Cabinet noted your intention to report back to Cabinet in May for detailed policy decisions on clarifying the HSW Act's application to officers [CBC-25-MIN-0004 refers].
47. In April you agreed to our proposals to amend HSWA so that an officer is not exposed to any liability for management actions by explicitly excluding management of the PCBU from the list of officers' diligence reasonable steps and clarifying that where an officer works in a PCBU, the HSWA is not to be read to include their duties as a worker in the PCBU in their officer duties.
48. You agreed other changes to the HSW Act to clarify the limits of the due diligence steps and to make the steps clearer. You also agreed that these changes would be supported by ACOPs and/ other guidance. [BRIEFING-REQ-0012039].

Constitutional conventions

Next steps

56. We will reflect your decision on critical risk in the Cabinet paper.

Constitutional conventions

Annexes

Annex One: Regulations under the Health and Safety at Work Act 2015 (including Regulations carried over from the Health and Safety in Employment Act 1992)

Annex Two: Causes of fatalities by high-risk industries during 2015–2023

Annex Three: Comparison of options for the definition of critical risk

Annex Four: More information on offences and penalties in the Health and Safety at Work Act 2015

Annex One: Regulations under the Health and Safety at Work Act 2015 (including Regulations carried over from the Health and Safety in Employment Act 1992)

Activity/hazard-focused regulation

1. **Health and Safety at Work (General Risk and Workplace Management) Regulations 2016.**

Sets out the specified risk management process for risks generally, and specifically regulates risks from:

- remote/isolated work
- atmospheres with potential for fire or explosion
- raised and falling objects
- containers of liquids
- loose but enclosed materials
- substances hazardous to health.

Also sets out duties towards young persons, additional duties of PCBUs operating limited childcare centres.

These regulations also contain the general workplace facilities requirements to provide adequate lighting, ventilation, first aid and emergency procedures etc that all businesses still need to provide, as well as information, training, supervision, personal protective equipment as necessary for critical risks.

2. **Health and Safety at Work (Asbestos) Regulations 2016**, regulating activities related to asbestos to minimise worker exposure.

3. **Health and Safety at Work (Hazardous Substances) Regulations 2017**, regulating the management of hazardous substances, such as flammable or explosive substances, in the workplace, including proper handling, storage, use, and disposal of hazardous substances, and development of emergency response plans for workplaces dealing with such substances.

4. **Health and Safety in Employment Regulations 1995**, regulating risks from:

- machinery (including cleaning, maintenance and repair)
- woodworking and abrasive grinding machinery
- self-propelled mechanical plant
- construction excavations
- scaffolding
- working at heights

- high risk work, including requiring certificates of competence for scaffolders, occupational divers, powder actuated tool operators
 - noise
 - requiring notification of hazardous work – scaffolding, excavations, various others.
5. **Health and Safety in Employment (Pressure Equipment, Cranes and Passenger Ropeways) Regulations 1999**, regulating their design, manufacture, use, and maintenance.
 6. **Amusement Device Regulations 1978** (made under the Machinery Act), regulating the safety and operation of various amusement devices like fairground rides, bungee jumping (with mobile cranes), and mechanically-powered units for rider entertainment.

Sector-focused regulation

7. **Health and Safety at Work (Adventure Activities) Regulations 2016**, regulating the provision of adventure activities, ensuring safety for participants and operators. Specifically, it covers aspects like defining what constitutes an adventure activity, the process for operators to register, their duties, and the offences associated with non-compliance.
8. **Health and Safety at Work (Major Hazard Facilities) Regulations 2016**, regulating the health and safety of people involved in the operation of, and local communities near, major hazard facilities, a place where large quantities of hazardous substances are stored or processed, posing a significant risk of catastrophic harm to people, the environment, and the economy. These regulations specify the duties related to process safety for both existing and potential Major Hazard Facilities. They also outline requirements for facilities that handle hazardous substances above a certain threshold.
9. **Mining Regulations 1981** and
10. **Health and Safety at Work (Mining Operations and Quarrying Operations) Regulations 2016**, regulating a wide range of aspects, from risk management and management systems to competency requirements and emergency preparedness. These regulations also ensure that operators comply with minimum standards and have clear notification and reporting obligations.
11. **Health and Safety at Work (Petroleum Exploration and Extraction) Regulations 2016**, regulating the health and safety of people involved in petroleum exploration and extraction activities, covering both onshore and offshore operations.
12. **Health and Safety in Employment (Pipelines) Regulations 1999**, regulating the design, construction, operation, maintenance, suspension, and abandonment of pipelines that carry significantly hazardous substances (ie gas).
13. **Geothermal Energy Regulations 1961 (made under Geothermal Energy Act)**, regulating the safe and responsible extraction and use of geothermal resources in New Zealand. This includes provisions for drilling, safety equipment, hazardous gas precautions, explosive use, and more.

Other regulations that we propose not to draw upon for the definition of critical risk

These regulations are due to be revoked in May as part of the wider work health and safety reforms:

14. **Spray Coating Regulations 1962** (made under Health Act), regulating the use of spray booths, drying of articles with inflammable substances, storage of inflammable substances, and related safety aspects like ventilation, amenities, and medical examinations.

15. **Lead Process Regulations 1950** (made under Health Act), regulating work with lead or any material containing lead.

These regulations do not relate to risk:

16. Health and Safety at Work (Infringement Offences and Fees) Regulations 2016
17. Health and Safety at Work (Rates of Funding Levy) Regulations 2016
18. Health and Safety at Work (Worker Engagement, Participation, and Representation) Regulations 2016

Annex Two: Causes of fatalities by high-risk industries during 2015–2023

This Annex is a preliminary analysis by MBIE that has not been reviewed by WorkSafe New Zealand.

Four high-risk industries account for 80% of fatalities and 70% of serious non-fatal injuries: agriculture, forestry & fishing; manufacturing; construction; and transport, postal & warehousing.²

Serious harm data is summarised by outcome,³ which therefore cannot be ascribed to a cause. Fatality data is summarised by cause.⁴ Between 2015–2023, the most frequent causes of fatalities per each of the four industries mentioned above were:

Industry	Agriculture	Forestry and logging	Manufacturing	Construction	Transport, postal, warehousing
Highest cause of fatalities	Vehicle incidents 67%	Being hit by falling objects 47%	Being trapped in moving machinery or equipment 23%	Vehicle incidents 36%	Vehicle incidents 63%
Second	Being hit by moving objects 5%	Vehicle incidents 16%	Being hit by falling objects 20%	Fall from height 22%	Transport incident 12%
Third / fourth	Being hit by falling objects 5%	Mobile plant rollover 11%	Vehicle incident 14%; Fall on the same level 11%	Fall on the same level 13%	Fall from height 8%

Similar causes for separate industries are colour coded.

Overall, vehicle incidents are the primary cause of fatal injuries, followed by being hit by moving or falling objects, and falls (including falls from height).

² <https://www.worksafe.govt.nz/research/work-health-and-safety-an-overview-of-harm-and-risk-in-aotearoa-new-zealand-2024/>

³ https://data.worksafe.govt.nz/graph/summary/injuries_serious_harm

⁴ <https://data.worksafe.govt.nz/graph/detail/fatalities>

Annex Three: Comparison of options for the definition of critical risk

Option	1 – prescriptive	2 – judgment-based	3 – hybrid approach
Core approach	A specific list of high-risk activities based on risks specified in existing regulations	A general definition of critical risks based on <u>serious harm</u> , supported by a likelihood-test	A specific list of high-risk activities, with a judgment-based catch-all to cover other unlisted but risky activities
Clarity for duty holders	Clear activities listed	Broad definition may be harder to interpret	Clear activities listed, with a catch-all for when a PCBU recognises a critical risk that isn't specifically regulated.
Flexibility	Low – only known and already regulated risks captured and methods prescribed	High – definition is broad and relies on interpretation	Medium – known risks are captured while catch-all allows for inclusion of unforeseen risks
Consistency	Consistent for listed risks, unlisted risks not covered	Less consistent between duty holders due to interpretation/judgment	Potentially more consistent if regulatory list is clearly aligned with definition
Ease of enforcement	More straightforward for listed activities	Enforcement based on harm outcomes may be difficult	Clearer enforcement based on harm outcomes and existing regulations
Adaptability to changing risks	Relies on regulatory updates	Should be captured by broad definition	May rely on regulatory updates although catch-all should capture unforeseen changes in risks
Worker protection	Strong for listed risks; may lack for unlisted risks	Strong due to focuses on harm severity	Strong for all critical risks
Administrative burden	Low – relies on regulatory updates	Potentially higher – needs interpretation of 'serious harm'	Moderate – needs interpretation of 'serious harm', but regulatory list gives clarity
Examples	E.g. working at height of more than 3 metres, work with asbestos, work with hazardous substances	Anything that can potentially cause serious harm (e.g. quad bikes, any site-specific risks)	E.g. any risks specified in the regulations (working at height of more than 3 metres, work with asbestos) - plus catch all for others

Annex Four: More information on offences and penalties in the Health and Safety at Work Act 2015

Offences and penalties that apply to duties other than the general duties of the HSW Act

The HSW Act has a number of offences that relate to failure to comply with specific requirements, with maximum fines set at five different levels depending on the gravity of the offence. For these offences, the maximum penalties are set at one level for an individual and another higher level for any other person, such as a limited company or similar.

Table One: Maximum fines for other offences in the HSW Act

Example offence	Individual: maximum fine	Any other person: maximum fine
s117 failure to display or damaging or removing a notice that has been issued to them	\$5,000	\$25,000.
s55 duty to preserve site where notifiable event has happened	\$10 000	\$50 000
s58 duty to engage with workers	\$20 000	\$100 000
s78 Breach of provisional improvement notice	\$50 000	\$250 000
s92 prohibition of coercion or inducement	\$100 000	\$500 000

Offences and penalties in the regulations

The various regulations include offences for breaching the requirements, again with graduated maximum fines to reflect the gravity of the offences, and a distinction between individuals and other persons, such as a limited company or similar. Across the regulations the range of maximum fines is set out in Table Two.

The Health and Safety at Work (Infringement Offences and Fees) Regulations 2016 set out the lowest level offences under the HSW Act the Health and Safety at Work (Asbestos) Regulations 2016, the Health and Safety at Work (Worker Engagement, Participation and Representation)

Regulations 2016, and the Health and Safety at Work (Hazardous Substances) Regulations 2016. The fees (instant fines) for these offences are graduated according to the gravity of the offence, and set as in Table Two:

Table Two: Maximum fines for offences in HSWA regulations and fees for infringement offences

Maximum fines		Infringement fees	
Individual	Any other person	Individual	Entity
\$2,000	\$10,000.	\$300	\$1500
\$6 000	\$30 000	\$500	\$1500
\$10 000	\$50 000	\$1000	\$6000

Sentencing guidance

HSW Act prosecutions are laid as criminal proceedings in the District Court. The Act provides guidance to the sentencing Judge at section 151. As well as applying the provisions of the Sentencing Act 2002, the court is to apply specific factors, including the purpose of the HSW Act, the risks that serious harm or death could have occurred or did occur, the safety record of the person, the degree of departure from the prevailing standards of the industry or sector, and the financial capacity of the person to the extent that it could increase the fine.

In practice many sentencing decisions apply fines substantially below the initial starting point (and the maximum penalty) once the Judge has taken account of any restitution or reparations paid. The person's financial position often results in discounts as well because of their inability to pay larger fines.

Maximum penalties faced by officers

Table Three: Comparable offences and penalties for officers

Act	Maximum penalties	Types of offence
Companies Act 1993	Imprisonment up to 5 years or a fine up to \$200 000	<ul style="list-style-type: none"> - s138A serious breach of director's duty to act in good faith and in best interests of company - s383(6) acting as a director of a company while prohibited by the court - s386A(2) acting as a director of a phoenix company).

Act	Maximum penalties	Types of offence
Financial Markets Authority Act 2011	\$200 000 and \$300 000	<ul style="list-style-type: none"> - s51 failing to comply with order - Non-disclosure of information or documents from exercise of powers - s60 Non-compliance with conditions relating to publication or disclosure of information or documents - s61 Criminal liability for obstructing exercise of powers
Charities Act 2005	\$50 000	<ul style="list-style-type: none"> - s42B knowingly failing to comply with (financial reporting) standards - s42E failing to comply with audit and review of financial statements

Background to the officer duty

The HSWA officer duties were designed to be fairer, more effective and more consistent with other governance roles than was the case under the HSE Act

The Royal Commission on the Pike River Coal Mine Tragedy noted the failures of Pike River Coal Ltd’s Board and executive management to ensure effective systems and resources to manage health and safety risks.

Three of the Commission’s 16 recommendations concerned enhancing the contribution of officers to work health and safety, on the basis that the “board and directors are best placed to ensure that the company effectively manages health and safety.”

Under the HSE Act officers, directors or agents of a company were liable for any health and safety failure by the company if they authorised, sanctioned, agreed to or participated in that failure. Officers were incentivised to avoid inquiring into health and safety matters because the risk of liability is reduced if they are not involved. It also meant that they could be liable, whether or not they contributed to the failing.

The HSW Act’s officer duty was designed to be more consistent with governance roles in the wider business sense as it broadened the familiar concept of due diligence to include health and safety. It was also designed to create the right incentives for directors to be proactive and to focus on the things they can do to make a difference.

Because the officers’ duty is a “positive duty”; any charges must be proven beyond reasonable doubt that they failed to carry out proper due diligence as part of their governance role.