



**Submission by**

**The Employers and Manufacturers  
Association (EMA)**

to the

**Education and Workforce Committee**

on the

**Health and Safety at Work Amendment Bill**

Paul Jarvie  
Manager Employment Relations & Safety  
145 Khyber Pass Road  
Auckland 1023  
Phone 027 4949 628  
[paul.jarvie@ema.co.nz](mailto:paul.jarvie@ema.co.nz)

Contents	Page
1. Introduction	3
2. Executive Summary	3
3. General comments	5
4. Recommendations	6
5. Focus on Critical risk	6
6. Defining a “small PCBU”	12
7. Duties of PCBU’s	18
8. Officers and governance	18
9. Other legislative regimes	19
10. Recreational use of land	19
11. Notifiable injuries	20
12. ACOPs	20
13. Regulators function	21
14. Conclusion	22
15. Appendix 1 Critical Controls	23
16. Defining the word “likely”	25

## **1. Introduction**

About the Employers and Manufacturers Association (EMA)

The EMA has a national membership of more than 7,000 businesses with the bulk of that membership based north of Taupo. Around 15 percent of employees nationally are employed by our members.

The EMA provides its members with employment relations advice and legal services from industry specialists, consulting services in HR, ER and Health and Safety, Collective Bargaining negotiation, a People Experience Practice, and Advocacy at both Central and Local Government levels to help their businesses and people grow.

The EMA advocates on behalf of its members to bring changes in areas that can make a real difference to the day-to-day operations of our members including RMA reform, infrastructure development, employment law, skills and education, Health and Safety and export growth.

The EMA is part of the BusinessNZ network.

Health and Safety law makes up the third leg of the key pieces of legislation creating the employment relationship, the other two being the Employment Relations Act and the ACC Act. These three are closely connected and interdependent on each other. You cannot move one leg of the stool without moving the other two.

### **Purpose of submission.**

This submission has been written to clearly outline the feelings of EMA members regarding the Health and Safety at Work Amendment Bill (the Bill). Our members formed focus groups to discuss the Bill, and their positions are outlined in the submission.

This Bill has the potential to drastically alter the manner in which businesses approach Health and Safety and therefore the safety of employees, contractors, visitors and members of the public.

### **Executive Summary**

EMA strongly supports efforts to improve health and safety outcomes across New Zealand.

EMA broadly supports the Government's intention to simplify health and safety requirements, reduce red tape for small employers, and focus the system on preventing serious harm by using a risk-based platform.

We support clarifying notifiable injuries to Worksafe will be beneficial for employers and will ease up time for Worksafe.

EMA supports the introduction of industry-led Approved Codes of Practice and the shift toward a modern, proactive regulator which will assist PCBUs undertake their duties.

Similarly, the attempt to clarify officers' governance duties is welcome, but further guidance is needed to ensure practical application in smaller organisations where governance and operational roles overlap.

But, we have concerns that some definitions remain vague and that the creation of a two-tier system, where businesses of fewer than 20 employees only have to manage an ill-defined critical risk framework, may have unintended consequences that could undermine the intent of the new Act.

We welcome this submission process and the later select committee process as an opportunity to clarify some of those issues.

The Bill has made structural changes to the Health and Safety at Work Act (HSWA) that may unintentionally also reduce worker protections as only Critical Risk will need to be addressed (for small PCBUs). The proposed definition excludes the majority of harm experienced by workers and workplaces, e.g. stains, sprains, fatigue and burnout.

In its current form, the Health and Safety at Work Amendment Bill (the Bill) may unintentionally increase harm, complexity, and compliance uncertainty for businesses and workers. The Bill's design risks undermining the benefits stated above by reducing the scope of risk management for most New Zealand businesses. Around 97% of New Zealand businesses are defined as SMEs.

Key concepts central to the Bill, such as "critical risk", "likely", and the definitions of a "small PCBU" lack clarity and are difficult to apply in real-world business environments.

The Bill introduces a two-tier health and safety framework based solely on PCBU size. This risks leaving 650,000 workers employed in small businesses to manage only "critical risks", leaving the majority of common workplace hazards—including musculoskeletal disorders (which represent around 65% of ACC workplace claims)—outside the mandated risk management system.

So called non-critical risks can be managed voluntarily but the concern is that voluntary management won't happen at a scale that will help reduce New Zealand's ongoing comparatively poor outcomes from our Health and Safety system.

Small PCBUs frequently engage contractors, temporary workers, trainees, or volunteers, making accurate worker-count thresholds complex, administratively burdensome, and misaligned with the Government's objective of reducing red tape.

The proposed "Small PCBU" definition will also distort risk management practices in multi-PCBU worksites, creating practical and legal tensions between small and large PCBUs working alongside one another.

The Bills proposals may also be inconsistent with the purpose of HSWA, which requires all workers to receive the highest level of protection from harm.

To ensure the Bill delivers on the Government's intent, EMA recommends:

- Maintaining a universal duty for all PCBUs—large and small—to identify and manage all workplace risks, not just those deemed critical.
- Providing a clearer, evidence-based definition of “critical risk” and “likely to cause serious harm”.
- Reviewing the <20 worker threshold and removing or redesigning it to avoid inequitable worker protections and administrative burden.
- Developing a statutory list of overlapping legislative regimes where compliance with other Acts can satisfy HSWA duties.
- Supporting the development and review of industry-led ACOPs, including mechanisms to fund participation by SMEs.

Previous feedback about the Health and Safety Law reform highlighted that the HSWA was fit for purpose, albeit needing some “minor tweaks”, but what was missing was the Regulations and guidance to support the Act.

We still do not have any Regulations and Worksafe continues to review, amend, rewrite or discard much of the old guidance it had on its books.

EMA recommends that without targeted amendments like these, the Bill risks reducing protections for hundreds of thousands of workers, increasing costs to the health and ACC systems, and creating uncertainty for businesses striving to meet their obligations. We welcome the opportunity to work with MBIE to refine these proposals to ensure they deliver a safer, more effective, and more practical health and safety system for all.

### **Summary position on the Bill**

The EMA has doubts that the wish to simplify health and safety for small employers, reduce “red tape” and focus on critical risks to reduce harm across NZ workplaces will be met by this Bill. There are positive changes which will benefit employers; however, other changes we feel will only add confusion and extra work with no real benefits.

## **2. General Comments on the Bill**

The Bill as presented will not reduce red tape, reduce harm or make compliance easier for small employers. Rather than making “minor tweaks” we feel the Bill introduces structural changes that we believe will undo all the progress to date. It makes systemic changes that will create (by design) a two-tier platform where a large number of employees may be at risk and receive a lower level of protection. This appears inconsistent with the intent of HSWA’s purpose that all workers receive the highest level of protection against harm. (s3(2))

### 3. Recommendations

EMA recommends the following:

- 3.1 That the provision to create a small PCBU be removed from the Bill.
- 3.2 That the universal duty for all PCBUs to identify and manage all risk equally is restored.
- 3.3 That the definition of “critical Risk” be reviewed and amended to become more usable in a real-world environment that captures where the real harm occurs and is reliable and durable for all PCBUs to use.
- 3.4 That the term “likely to result” is redefined to be more usable and understood by all PCBUs
- 3.5 That S36 the “Primary Duty of Care section is clarified in respect of small PCBUs and taking “reasonably practicable” steps.
- 3.6 That a list of acceptable “other legislation” is developed by Worksafe for PCBUs to review and use if applicable
- 3.7. That work on ACOPs continue with clear procedural guidance being available.
- 3.8. That all the Regulations that were identified as being required to support the HSWA Act be completed and published as soon as possible.

## 4. Focusing the System on Critical Risks

**4.1 Critical risk.** The notion of “critical risk” is fairly new but has become widespread especially within larger and more complex businesses.

Small PCBU’s are unlikely to use critical risks unless they operate within a high-risk sector or contract to larger PCBU’s who use critical risk controls.

It is unlikely a small PCBU would be able to undertake the scope of critical controls as identified in the **Appendix 1**. These are designed for large complex industries with large amounts of internal resources, not small PCBUs.

**The Government Health & Safety Lead (GHSL) define critical risk as,**

*“as those that, although less frequent, have the potential to cause significant injury, illness, or fatality if not adequately controlled”.*

Other definitions include:

- A **high-consequence** risk (not just high likelihood)
- Capable of **fatal** or **life-altering harm**
- Requiring **deliberate, strong, and actively monitored** controls
- Often associated with **high-energy hazards** (e.g., gravity, speed, electricity, chemicals).

## 4.2 Non Critical Risks .

It remains unclear what “small” PCBU’s do with non-critical risks.

From the Explanatory Notes of the H&S at Work Amendment Bill:

“Small PCBUs are required to manage only critical risks under their duties (see sections 36 to 43 of the HSW Act) and under the requirements in the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016 to provide information, supervision, training, instruction, and personal protective equipment, and to ensure that personal protective equipment is worn or used”.

Large PCBU’s are required to manage all risks.

“All other PCBUs—those that are not small—must manage all risks but prioritise critical risks under all provisions”

From the above texts it reads like all noncritical risks for small PCBU’s are not required to be identified, assessed, or mitigated. There remains some doubt given the above text as to whether S.36 Primary Duty of care remains intact and in force for small PCBU’s. This section requires that PCBU’s “must ensure so far as reasonably practicable the health and safety of workers who undertake work for the PCBU while workers are at work. EMA recommends that this issue is clarified.

## 4.3 Definition of “Critical Risk” (New s22A)

The definition of critical risk within the Bill is based on two criteria separated by an “or”, meaning the critical risk will be found in “1A”, a type of hazard situation **or** a described type of harm e.g. death, notifiable injury/illness, notifiable incident or a condition found in Schedule 2 of the ACC Act.

It is noted that HSWA does not define the word risk.

### **ACC Schedule 2 considerations.**

Critical risks arising from notifiable accidents (physical injuries) are fairly straight forward. If an injury event could cause any of the named types of harm, then this would satisfy the definition of critical risk.

However, using Schedule 2 could be a little more difficult. Schedule 2 is a list of named conditions and known chemical/biological agents. It would be more likely that large businesses, with internal resources, could undertake an assessment based on Schedule 2, however, for a small business this could be outside their reach thus requiring an external consultant to undertake this work.

For an employer to cross reference the list from ACC’s Schedule 2 and make a determination as to whether the chemical is likely to result in harm will require specialist knowledge and assessment. This is the work of hygienists and or Occupational Physicians. PCBU’s may use Safety Data Sheets (which contain a lot of important toxicology information) however,

analysing this material and applying it to the real world is where specialist knowledge is needed:

To determine critical risks for occupation illnesses the following would be needed.

- Identify and verify exposures - may require air monitoring
- Identify possible disease outcomes- may require employee monitoring
- Determine exposure likelihood
- Classify risks. Verify controls etc.

The tension with doing this is that illnesses and cancers may occur 20-40 years after exposures because the harm is cumulative and risk perception is low.

Additionally, it is a clear that disease risk is underrepresented in claims but overrepresented in fatalities.

Worksafe information would suggest that around 700 – 900 workers die from occupational health conditions p.a. Many workers who die from these conditions may be retired.

An overview of Accident and Health claims from Worksafe and ACC

Category	Claims	Deaths
Workplace injuries	2000,000+	Less than 100
Occupational disease	4000	700-900

**Table 1**

#### **4.4 What's not covered in 1A**

Identifying Critical Risk requires an assessment that is binary: its either in or out. What the Bill does not cover are the numerous and debilitating conditions under the heading "MSD- Musculoskeletal Disorders". These conditions account for around 65% of ACC claims and within Manufacturing alone amount to \$165 mill per year. These conditions cause long lasting harm to the individual, their family plus productivity losses to the company. The ACC costs are paid for by employers paying ACC levies so are a real business cost.

There are other medical conditions caused by work that are not included in the Bill. Research clearly shows that psychosocial risks cause mental stress, fatigue, burnout, depression and the list goes on. These conditions are known precursors to incidents and accident events likely to cause serious harm or kill workers or members of the public like Road Traffic crashes.

It is interesting that the *ISO 45003:2021 – Occupational health and safety management — Psychological health and safety at work — Guidelines for managing psychosocial risks*, clearly frames psychosocial risks as workplace hazards. In Australia they have recently introduced Regulations requiring employers to formally address psychosocial risks.

Within Retail, Hospitals, Care facilities, road workers and Hospitality workers are constantly facing aggression, physical assaults, verbal assaults, and intimidation on a daily basis. In some sectors guards are required to protect workers, yet these risks and injury types are not considered critical. Given the law of probability, it's only a matter of time before someone is seriously injured or killed. Relying on the term "likely" to cause is highly problematic.

This Bill however completely leaves these conditions (and others) out of the definition of “critical risk”.

#### **4.5 The assessments of risk.**

Many Health and Safety systems use either an inhouse or proprietary product (typically the 3x3 or 5x5 risk matrix system) to determine risk. This has been used for years. They unfortunately have been used and abused. They have been used to objectively provide a risk score when no objective data has been used. The resultant risk score has no bearing on the actual risk but based on subjective perceptions of those undertaking the risk assessment process.

The risk matrix assessment was or should have been used only as a starting point rather than as we see today an end point. Undertaking risk assessments is a formal process based on good data and process. Doing a quick risk assessment is not the same as doing a risk assessment.

#### **4.6 Challenges with just using the Bills definition.**

Using the Bills definition of critical risk could lead to tunnel vision by employers and workers. This will result in other risks not being identified and when things do go wrong (as they will) someone will be harmed. If the hazard/risk had been recognised earlier and mitigated all the downstream reactive administration, rehabilitation and possible legal defences would not have been required, not to mention all the harm suffered by the worker, their families and the possibility of lifelong scarring.

#### **4.7 Schedule 1A. Hazard and injury types.**

**4.7.1. Schedule 1A** sets out numerous tasks and situations where death, serious injury or illness might occur or cause an occupational condition. These are not new criteria but rather a compilation of hazards and risks found within the Health and Safety at Work Act (HSWA) and Regulations and the ACC Schedule 2. There is also a set of hazards found in the old Health and Safety in Employment Act 1995, these were never repealed and remain in force.

The Bill requires employers to assess whether it is “likely” that any of these conditions could result in any of the listed harms. The work *likely* is not defined. This lack of definition may cause a wide variation of definitions being formed by PCBU’s and their workers, thus undermining the entire process.

EMA **recommends** that a robust definition of “likely to cause” be developed and inserted into the legislation.

Common law systems, and the courts generally interpret “likely” as:

A real or appreciable possibility of harm occurring — something that could well happen.

This threshold is:

- Higher than: a remote or speculative possibility
- Lower than: “more probable than not”

In other words, the law does not require a >50% probability of harm.

Under HSWA the focus is on “risk” and “reasonably practicable” therefore.

If an activity is “likely” to result in harm”, courts may normally ask:

1. Is there a credible mechanism of harm?
2. Is the harm foreseeable?
3. Is the risk real rather than remote?

If the answer is yes, the duty could be triggered.

Refer to **Appendix 2** for more considerations.

To solve this issue a definition using the terms like e.g. “is there a credible pathway by which harm could reasonably occur” would be beneficial.

This would require an assessment of how a chain of events could occur and the energy sources, that are capable of causing harm, in that pathway.

Currently what is proposed is not clear.

Is it *likely* that exposure will occur, or

Is it *likely* that harm will occur, or

Does likely refer to frequency or severity, or

Does it refer to residual risk after controls have been applied or

Does it refer to likely before controls have been put in place?

These are important questions which the Bill does not address.

Workplace assessments will be used to determine critical risks. These will be based on opinions not data. It will be easy to allow “group think” to occur and convince a committee, a work team etc that the hazard/risk is not critical. Not having to make this determination will negate this obvious bias from occurring.

The status quo requires all hazards/ risk to be identified and then mitigated following the hierarchy of control. The use of risk assessments merely attempts to rank the risks and do not determine whether they are critical or not.

#### **4.7.2 Actual vs Perceived Risk**

Another real concern is the tension between Perceived risk versus Actual risk.

This is the fundamental question in Health and Safety. There are important differences between the two, however, in practice they are often intertwined.

A common definition used in risk management is Risk = Likelihood × Consequence

**Perceived risk** is the subjective judgement people make about how dangerous something is. It is influenced by psychology rather than statistical evidence.

Factors that increase perceived risk include:

- Hazards that are dramatic or catastrophic
- Hazards that are unfamiliar
- Hazards that feel out of personal control
- Hazards that receive media attention
- Hazards that look visually dangerous

Conversely, hazards that are familiar or routine are often underestimated.

**Actual risk** is the objectively measurable likelihood and severity of harm occurring from a hazard. It is usually supported by:

- Injury and fatality statistics
- Exposure measurements (noise, chemicals, vibration, etc.)
- Epidemiological data
- Incident and near-miss trends
- Engineering or scientific analysis
- 

#### Examples of Common Perception Gaps

<b>Hazard</b>	<b>Perceived Risk</b>	<b>Actual Risk</b>
Sharks	Very high	Extremely low
Air travel	High	Very low
Driving	Moderate	Very high

Residual risk is the risk that remains after controls have been identified and implemented. Risk appetite (how much risk is acceptable to the company in given specific circumstances) is often found within company policies, company culture documents or the Boards Risk policy.

Most businesses in New Zealand do not have data or the access to the data required to undertake an *actual* risk assessment. That being so we are left with critical risks being assessed using a *perceived* risk starting point.

#### 4.8 Schedule 2 - ACC Act

EMA supports the use of Schedule 2 to progress ACC Gradual Process claims. These claims occur where exposures occur over a long time and harm is generally diagnosed late in the exposure timeframe.

To assist employees making Gradual Process claims Schedule 2 describes specific hazardous chemicals or biological hazards, if employees have the named conditions, it is “deemed more than likely to be work related, as non-work exposures would be most unlikely”. This stops endless reports and costs for the employee.

Occupational health remains the distant poor cousin of safety. This position has not changed over numerous Health and Safety Acts and numerous Strategic plans both from ACC and Worksafe.

The Schedule does have some limitations, and not all conditions are highlighted. Pain syndromes, musculoskeletal disorders and psychosocial risks/hazards are not included. The Schedule is reviewed regularly and updated if required.

As noted earlier the use of Schedule 2 for PCBU’s to determine a critical risk does have some challenges. **See 4.3.**

## **5. Defining a “small PCBU”**

### **5.1 Definition of Small PCBU.**

The Bill sets out the criteria to establish if a PCBU is to be considered “small”. This proposal will by design create a two-tier system within NZ. There will be large PCBU’s and Small PCBU’s. There will differing duties for small PCBUs.

The test of a “small PCBU” requires an assessment to determine if worker numbers that the employer could “reasonably expect” is be fewer than 20 for less than 9 months of a financial year, if yes, you would be a small PCBU.

The NZ financial year runs from 1 July through to 30 June each year.

Firstly, the Bill requires the number of “workers” to be assessed. Within the HSWA Act workers include, employees, contractors, workers of contractors, those doing work experience/trial, those undertaking workplace training, an apprentice, a homeworker and volunteers under specific conditions.

Given the nature of the real business world worker numbers can vary enormously. It is therefore very possible given the scope of who are workers that the 20-worker threshold could be exceeded even though the actual employed staff numbers are low to moderate.

This will place added administrative costs to the business just keeping an accurate head count throughout the year. This is especially the case if numerous contractors are used as part of the business model.

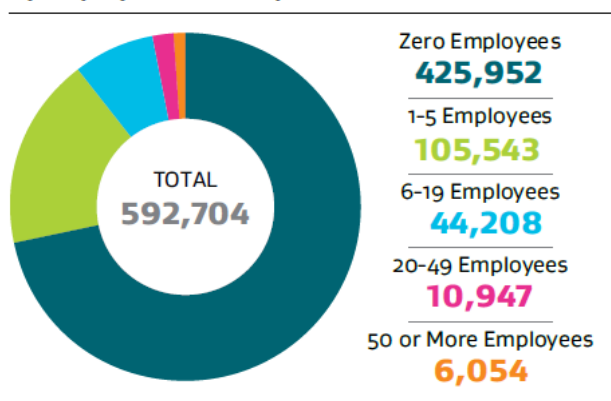
Secondly, given the Ministers desire to reduce red tape and administrative burdens the Bill seems to be at odds with this notion. Keeping ongoing and accurate “worker numbers” as per the Bill will require more administrative time.

Thirdly, the threshold of 20 will by design, carve out 97% of all businesses in NZ which employ around 650K workers (27%). These workers will, by the Bill’s design, be disadvantaged from receiving a full and comprehensive hazard and risk management system that all workers should receive.

The size of the business is not indicative of the risk profile of the business. Small businesses can be extremely hazardous e.g. abseiling or white-water rafting compared to a large commercial accounting firm with a vastly decreased risk profile.

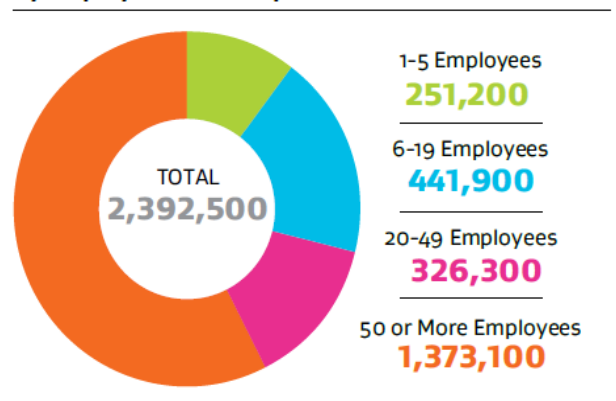
In comparison, large employers make up around 3% of employers and employ around 73% of workers. See below.

**Chart 1: Number of Businesses by Employee Size Group**



Source: Business Demography Statistics, February 2022

**Chart 2: Number of Employees by Employee Size Group**



Source: Business Demography Statistics, February 2022

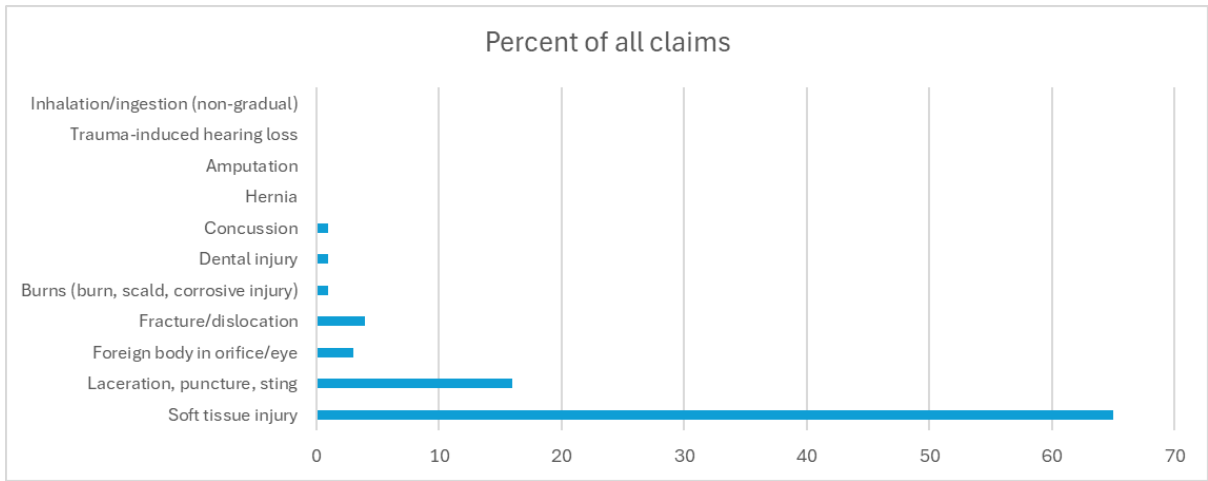
Figure 1 represent the statistics from 2022 however the trends remain constant.

All legislation has unintended consequences. An unintended consequence of the Bill could allow businesses to restructure themselves into smaller units (less than 20) and limit their Health and Safety scope. This is not what society wants but it may certainly occur. The workers will be the losers under this scenario.

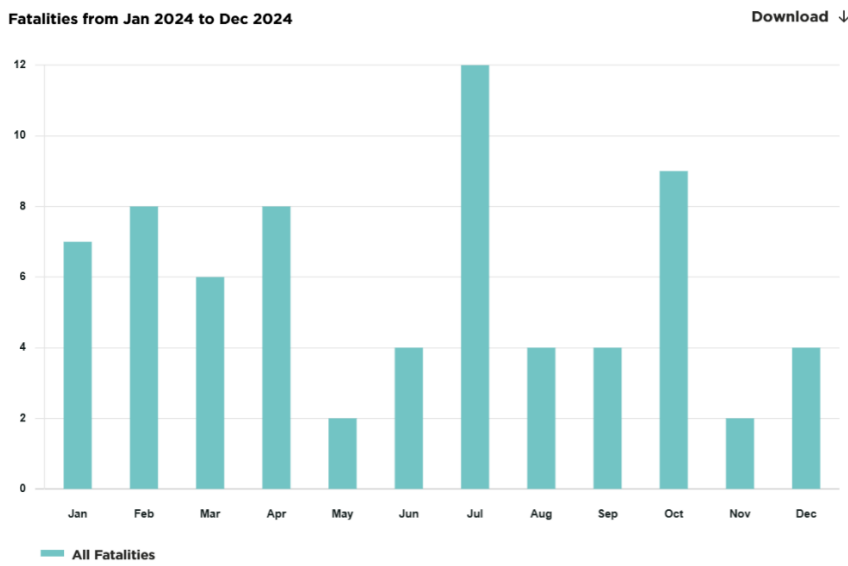
## 5.2 Restricting Duties to Critical Risks Only

The Bill sets out that small PCBUs only need to consider critical risks. By definition then, all non-critical risks, by far and away the most numerous and expensive, need not be identified or mitigated. As seen below, “soft tissue” injuries are the most frequent and costly injuries, however, this type of injury does not meet the critical risk criteria and therefore will not need to be managed by small PCBU’s.

Below are the statistics from Stats NZ relating to injuries from workplaces

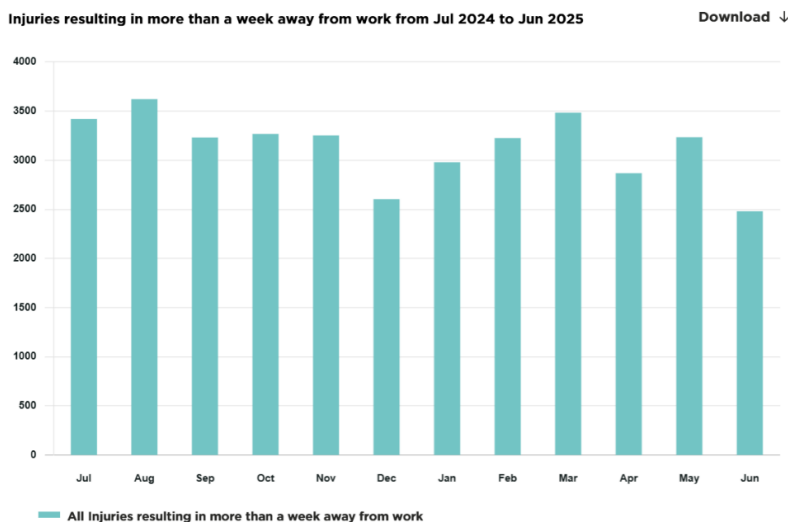


**Figure 2.** from Stats NZ. This graph indicates the extremely large proportion of strains and sprains suffered by NZ workers at work compared to the very low number of acute injuries.



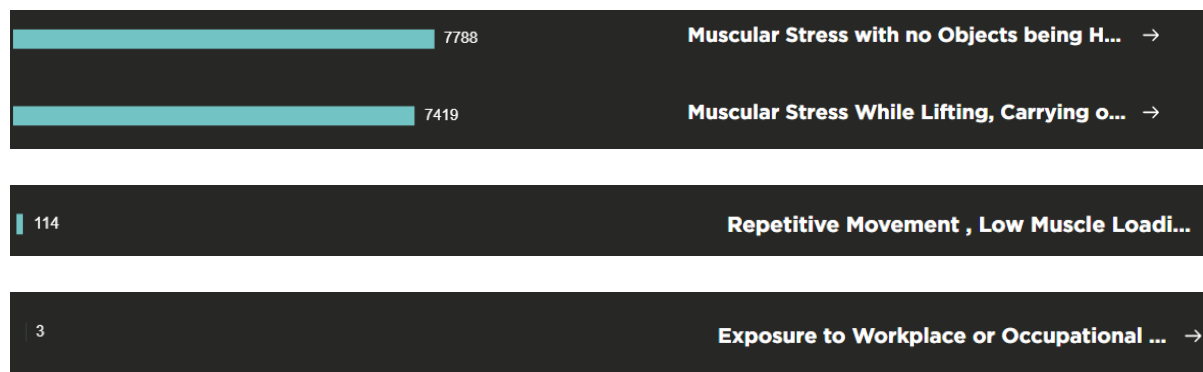
**Figure 3** Fatalities data from Worksafe NZ 2024.

### Injuries statistics from Worksafe NZ

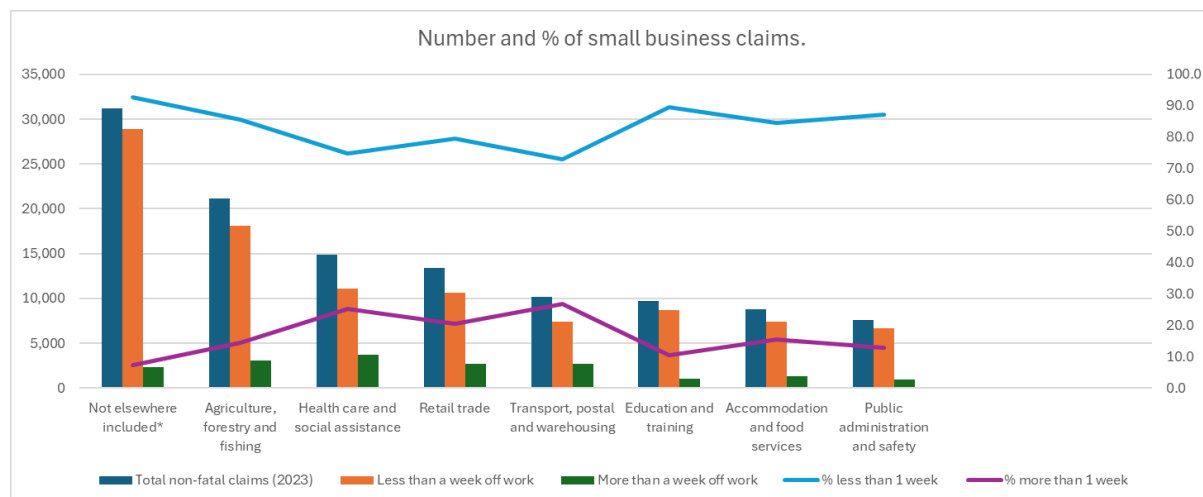


**Figure 4** This graph indicates the number of injuries reported and accepted by ACC requiring 1 week off plus. Some of these may not meet the threshold of a critical risk. Doctors are the gate keepers for time off and receiving ACC claims.

From Worksafe NZ Data centre from July 2024 to June 2025



**Figure 5** This data confirms the musculoskeletal injuries far exceed all the acute physical injuries yet these conditions will outside the definition of critical risk for both small and large PCBU's.



**Figure 6** from Stats NZ This clearly shows the ratio of injuries against 1 week off claims (an indication of seriousness)

Taken from Injury Statistics Work Related Claims 2023, Stats NZ

Occupational injuries	000's			
	Male	Female	Total	% of all claims
Soft tissue injury	93.4	52.8	146.5	65
Laceration, puncture, sting	30.2	7.1	37.3	16
Foreign body in orifice/eye	5.3	0.4	5.8	3
Fracture/dislocation	6.0	2.7	8.8	4
Burns (burn, scald, corrosive injury)	1.8	1.2	3.0	1
Dental injury	1.3	0.6	1.9	1
Concussion	1.2	0.9	2.2	1

<b>Occupation diseases</b>				
Industrial deafness	4.4	0.4	4.8	2
Pain syndromes	0.8	0.4	1.1	0
Local inflammation	1.3	0.4	1.7	1
Compression syndrome	0.3	0.1	0.4	0
Occupational disease	0.2	0.1	0.3	0

**Table 2**

This can be seen the disproportion of musculoskeletal injuries compared with all other injury types. The Bill if it succeeds will not address (for small PCBU's) this major cause of injury and national harm burden costs. Using the above data only 29% of claims / hazards would need to be identified and mitigated as they would meet the critical risk definition.

### **5.3 Practical Implications for Compliance**

The Bill may inadvertently distort (for small PCBU's) the management of below threshold risks and possibly increase the complexity and seriousness of these musculoskeletal injuries. These risks leave 650K workers without PCBU oversight of the most common and chronic types of harm. These costs will ultimately be picked up Public Health and ACC, plus society as a whole. It fails to recognise the serious and confronting real world risks workers face in today's workplaces. (Not to require business to identify and then mitigate these risks is difficult to understand).

Overseas examples of split Health and Safety duties are difficult to find. In Australia they do have some reduced duties for businesses less than 20, however this only applies to reporting incidents and having lower level of resources and administration, **but in no way** reduces the general duty to protect all workers from all hazards and harm.

If the Bill progresses, NZ will be an outlier internationally with regard to workers within small businesses (less than 20) having less protection than workers in PCBUs with 21 plus worker

### **5.4 Risks of Reduced Coverage**

If successful, the Bill will create a two-tier system within business across NZ. There will be the small businesses just focusing on critical risks and large businesses having to identify and mitigate all risks. This demarcation is 100% based on worker numbers, hardly based on evidence or science.

## Multi-PCBU situations.

The Bill is silent on how the Multi-PCBU workplace could or should manage small and large employers working on the same job, at the same location but using vastly different critical risk profiles.

In a Multi-PCBU worksite large PCBUs may become de facto risk managers for the entire workplace, even where they do not control the work activity.

But legally the small PCBU could argue:

- “Our duty is limited to critical risks.” When a large employers would be required to manage all risks. This creates contract vs statute tensions.

Multi-PCBU situations it could create complications where classifications (of risk) differ:

- Coordination becomes difficult.
- The shared duty to consult and cooperate becomes legally ambiguous, and
- Disputes may occur over who is responsible for controls.

On the ground real world challenges may appear like:

- Large PCBUs will need to verify if small PCBUs have all the workplace risks identified and managed in a Multi-PCBU workplace.
- Large PCBUs may need to impose additional prequalification or oversight requirements, increasing administrative burden and further distorting contracting markets.
- Small PCBUs could rightly only manage their critical risks thus leaving gaps on a Multi-PCBU workplace.

The amendment simplifies duties for individual small PCBUs but may increase complexity in multi-PCBU workplaces.

The proposed amendment may unintentionally increase the safety burden on large principal contractors, because they must ensure system integrity across multiple smaller PCBUs.

It will create downstream problems when a business expands or takes over another business. By default, their worker count will increase therefore requiring a completely different focus on risks within the business. Conversely, if a company downsizes (for economic reasons) are they then going to reduce their Health and Safety programme to only manage critical risks.

Other associated problems with having a two-tier system is in the area of contracting or having a Multi-PCBU workplace.

It is possible that a small business engages a large business to undertake some work on its property. How will the small business be able to meaningfully understand the large business risks and systems if the small business is only focusing on 1 or 2 critical risks.

Conversely, if a large business engages a small PCBU how could they verify the safety systems of the small PCBU. Will the large business require the small business to identify and mitigate all non-critical risks that may occur onsite to be fully managed?

We already see and hear of the problems created by “pre-qualifications” in the tendering process and the overreach of “lead” contractors towards small PCBUs. We feel the two-tier system will make this worse.

## **6. Duties for Other PCBUs**

### **6.1 Requirement to Prioritise Critical Risks**

The Bill requires both small and large employers to assess the presence of critical risks and then to prioritise them. The Bill sets out a process to undertake this assessment. Not prioritising the critical risks is not a breach of the PCBU’s duty both for small and large PCBUs. This doesn’t make any sense. The Bill requires that the more significant critical risks be managed first and given the appropriate resources to mitigate those risks. If there is no breach of duty for not prioritising, then how will the PCBU know which risk is greatest.

### **6.2 Operational and Governance Implications**

The Bill’s attempt to separate the roles out is welcome, but it does come with a real need for more advice and clarity around these duties and functions.

The Bill creates a separation of duty for officers. The functions of governance and operations have been split. This is a welcome move albeit easy on paper but more difficult in practice.

The HSWA Act introduced the notion of Officers and Due Diligence. This was a new duty placed on directors and carried significant penalties. The functions rolled fairly slow but then risk aversion took over and the line between governance and operational functions become very blurred. Given every company needs a director the vast majority of Directors wear both hats and sometimes more. The functions become intertwined and from a day-to-day perspective there is often no clear delineation between changing from one role to another. It would be not uncommon for SME’s to have a director who is doing governance, operations, ER/HR, logistics, quality, marketing and so on.

It is estimated that there are around 10,500 plus members of the Institute of Directors (IoD) (conservative) out of a total of some 745,048 Registered Companies in NZ and approximately 650,000 unique directors. This equates to around 1.1%. Even if a figure of 10% or 15% is used it is still a very low membership rate. The IoD does provide Health and Safety courses and information for its members. Other providers also offer Health and Safety training in the Officers/ Due Diligence space but nothing like what the numbers of directors are actually out there.

It is accepted that one director may be involved in several companies however this would not cover all businesses that need a director.

It has been observed over the last few years a large degree of risk aversion from Boards often resulting in overreach and significant requirements and conditions being placed on

contractors tendering for work. This clutter adds nothing to the safety outcomes but does cost many tens of thousands of dollars plus time meeting all these terms and conditions.

The EMA notes there has been some talk about reducing the need to report incidents and near misses because of the so called “red tape”. Incident reporting is crucial to ascertain what is going on within the business. It provides otherwise unknown data about the H&S systems that are under stress or need attention. Officers have a clear duty under S. 44, to “ensure the PCBU has processes for incident and risk reporting and timely response”. The Bill does not restrict or limit this duty.

Directors need to be able to apply due diligence with confidence and then turn their minds to operational duties. Finding the correct on/ off settings will be important.

## 7 Clarifications of Existing Duties

### 7.1 Compliance with Other Legislative Regimes (New s 35)

The Bill suggests that if a PCBU is compliant with another piece of legislation that manages a Health and Safety risk then there will be no need to then comply with the provisions of the HSWA Act and its Regulations. It cites the Maritime Act as an example. In practice, however, there are numerous other pieces of legislation that do or could meet this criteria.

In practice, having two sets of duty from two agencies is very challenging.

- Under the **Waka Kotahi** they demand that truck drivers supervise the loading of their vehicles... balance on each side, balance on axles etc this requires them to be alongside their vehicles.
- **WorkSafe** expect drivers to be in a “place of safety” well away from the loading zone so that they cannot be hurt etc.
  - But a driver needs to hold open curtains and consider the various unloads... as pallets are removed and added during the day, the truck must still be in balance etc.
  - This will get harder if NZ follows Australia in relation to “Chain of responsibility” etc.

While the intention is good to reduce duplication of costs and efforts the practice is far more complicated.

The EMA **recommends** the MBIE and Worksafe develop a list of specific Acts/ Regulations that could be used under this clause, rather than PCBU’s making up their own determinations correctly or incorrectly.

### 7.2 Recreational Use of Land (s 37 Amendments)

The Bill clearly sets out the duties of landowners where other recreational users may be present. If the landowner is working or has arranged for work to be carried near to the recreational users, then a duty of care applies. Where there is no work from the landowners perspective occurring in or around the recreational users then i) the landowner has no duty

for the recreational users, and **ii)** all Health and Safety matters pertaining to the recreational use lie with the recreational users.

What is not covered in the Bill is the situation of owned but vacant land, e.g. a quarry. Because it is not an active workplace do duties remain? What is the legal position of people using the quarry as a dirt track for their bikes?

Overall, this is a welcome clause and clearly describes the duty for relevant all parties.

### **7.3 Notification Requirements and New Definitions**

We support this clarification of Notifiable Injuries and who are medical practitioners. This will *benefit* PCBU's and reduce the amount of "non-serious" notifications to Worksafe NZ.

## **8. Strengthening Approved Codes of Practice (ACOPs)**

The EMA has long advocated for more guidance and assistance for PCBU's to undertake their duties under the HSWA.

The Bill will allow industry led ACOP's. this is a major step forward as it based on the concept "for industry, by industry" which will allow guidance to be developed by a sector for that sector. This will provide ownership and empower those sectors PCBU's to use the ACOP as it directly relates to their sector.

ACOP's generally take 18 months to 2 years to complete, so the appetite to review and keep fresh may well be lacking. However, with the rapid changes in technology there will be a need for all ACOP's including ones developed by Worksafe to be reviewed at least every two years or on "as and when required basis". Failure to do so will end up in the position we see now where Worksafe had on their books several hundred pieces of guidance, wrong, out of date or no longer required.

PCBU's involved in developing ACOP's currently have no access to any funding. Given the business demographics as described earlier many SME's may not be able to commit to time or resources to assist in developing their ACOP. It is recommended that funding to assist in the development of ACOP be provided to get the best and enduring outcome.

ACOP's can be viewed as a ceiling, meaning that PCBU's might just do the minimum as prescribed in the ACOP. Innovation and advancements within the sector might be withheld or stymied as following the ACOP is deemed to be compliance with the relevant legislation.

Having a "safe harbour" status i.e. compliant with the legislation is good as it gives PCBU's the direction and scope of what is needed to comply. Knowing what to do is a common call we hear from our members, "just tell us what to do" really exemplifies the need for industry led ACOP's.

## 9. Regulator Functions and Prioritisation

### 9.1 Prioritisation of WorkSafe's Functions

We have seen and heard positive feedback from members regarding the shift away from Worksafe being a policing body to being more helpful and supportive of new initiatives to reduce harm. EMA is supportive of this change.

The Bill outlines the new roles and functions of Worksafe. EMA has long advocated for Worksafe to become a “modern regulator”. See below for a comparison.

A modern Regulator maintains all the investigation and prosecution powers which are often reactive or after an event. The modern regulator is here to help, offer guidance and support PCBU's move forward to better protect their workers and reduce harm.

See below for a comparison.

#### Modern Health and Safety Regulator

- **Risk-based and intelligence-led:** Focuses resources where harm is most likely or most severe.
- **Performance-based** rather than prescriptive: Encourages systems thinking, continuous improvement, and proportionality.
- **Collaborative:** Seeks to build capability across duty-holders; engages industry bodies, unions, and communities.
- **Prevention-focused:** Aims to stop harm before it occurs through education, guidance, partnerships, and early intervention.

#### Policing-Type Regulator

- **Command-and-control:** Relies on strict rules and enforcement to achieve compliance.
- **Prescriptive:** Focus on compliance with detailed, specific requirements.
- **Authority-centric:** Maintains distance; relationships with regulated parties tend to be formal and adversarial.
- **Incident-reactive:** Often triggered by breaches or failures rather than proactive engagement.

Worksafe have moved into this role already following the launch of their new Strategic Plan.

*“Redefining our way of operating.*

*Our strategic approach is changing how we operate, how we engage, and how we influence the wider Health and Safety system. Trust and confidence in our advice, guidance, tools, resources, assessments and enforcement action are critical for business and workers as they look to meet their Health and Safety obligations. We are prioritising proactive engagement and support, so businesses have the tools and confidence to do the right thing before harm occurs. We will be helpful and approachable, providing clear and easy to find information so business and workers know what they need to know and what is reasonably practicable.”*

Taken from the “Statement of Intent” SOI 1 November 2025 to 30 June 2029.

Small PCBU's (97% of all PCBU's) do not have the resources to develop and implement sophisticated Health and Safety systems but will respond to continuous improvements with the assistance of a mentor. The size of the business does not indicate or predict the risk profile of the business.

All business owners have a duty to protect staff, contractors and members of the public.

Health and Safety, the theory and practice of, is rarely taught to managers of small businesses. They do need good practical advice and direction from an authoritative agency. Worksafe through its inspectors and its library of other guidance is an obvious solution.

A modern regulator maintains all its intervention powers where PCBU's resist or do not show positive signs of engagement. EMA supports this position fully.

## **10. Conclusion**

This is the first time the HSWA Act has been reviewed. The review was well overdue and needed. The Ministers' "Roadshow" was well received and supported by many small employers and workers. The result of that work was the Amendment Bill.

We feel rather than making a few tweaks here and there the Bill has proposed significant and structural changes. These we feel are a step backwards and not replicated anywhere else in the world. We feel workers in small PCBU's will be disadvantaged and may suffer more harm.

We feel that the proposed changes could well require more paperwork and more time, which is what the Minister wanted to reduce.

The EMA will continue to advocate for its members (mainly small) and is always willing to assist the Minister and Worksafe to further develop safe workplaces for PCBU's and all workers.

## Appendix 1.

### Critical Controls

Critical controls are formal set of actions that have been developed from the Mining industry as well as aviation, construction, and other complex worksites.

Critical risks come with “critical controls”, these are formal, documented, follow a set layout and prescriptive. The Bill does not mention critical controls but rather relies on the hierarchy of control and “reasonably practicable steps:” If critical controls were to be applied to small PCBU’s this would increase bureaucracy red tape and costs.

The critical control system includes.

1. **Identify the critical risk**
2. **Select critical controls**
3. **Define performance standards**
4. **Assign control owners**
5. **Verify controls regularly**
6. **Record results**
7. **Fix issues**
8. **Review and improve**

Below is a full list of the requirements.

### **Steps of Critical Control Management**

#### **1. Identify Critical Risks**

Determine which risks have the potential for fatal or life-changing harm.  
(These are usually a subset of all operational risks.)

#### **2. Define Critical Controls**

For each critical risk, identify the controls that must *never fail* because they prevent or significantly reduce fatal harm.

These are **performance-based**, not paperwork.

#### **3. Establish Performance Requirements**

Set clear, measurable criteria for what “good” looks like:

- What must the control do?
- Under what conditions must it work?
- What are the limitations?

This turns each control into something that can be **verified**, not assumed.

#### **4. Assign Ownership**

Give each critical control a clear owner:

- Who is responsible for implementing it?
- Who is responsible for verifying it?
- Who is accountable at governance level?

Ownership ensures controls are maintained and monitored.

## 5. Verify Controls in the Field

Regular checks that the control is **working as intended**, e.g.:

- Isolated energy sources actually locked out
- Harnesses inspected and anchored correctly
- Exclusion zones set up and enforced

Verification is the heart of critical control management.

## 6. Record and Report Verification Results

Document:

- Pass/fail
- Defects or gaps
- Actions required
- Trends over time

This builds an evidence base for assurance.

## 7. Respond and Remedy Failures

When a critical control fails or is absent:

- Stop work (if needed)
- Fix the control immediately
- Investigate causal factors
- Prevent recurrence

Critical controls must be restored to full integrity.

## 8. Review, Learn & Improve

Periodically:

- Review risk scenarios
- Update critical controls
- Improve verification methods
- Share learnings across teams

Continuous improvement keeps the system effective.

## Appendix 2.

### Defining the word : Likely”

- UK courts use phrases like “**likely to cause danger**” in safety legislation and the following approach is applied:
  - The risk must be **realistic**
  - It must be **foreseeable**
  - It does not need to be **more probable than not**
- Australian courts interpreting the **Work Health and Safety Act 2011** also treat “likely” or “risk” as meaning:
  - **a real chance or possibility of harm**, not necessarily a statistical probability
- Courts consistently reject two extreme interpretations.
  - **Too Low: Mere Possibility**  
  
The law does **not** mean: anything **conceivably possible** otherwise every activity could trigger the duty.
  - **Too High: Probability (>50%)**  
  
The law also does **not** require: harm to be **more likely than not**  
  
Waiting for that threshold would undermine preventative safety law.
- Using the phrase from the Amendment Bill “**likely to result in**” therefore legally focuses attention on hazards that present:
  - **credible failure pathways**
  - **known mechanisms of harm**
  - **realistic exposure scenarios**
- In other cases
  - In regulatory law, the **New Zealand Court of Appeal in Port Nelson Ltd v Commerce Commission** interpreted “likely” to mean:
    - a **real and substantial risk**, above mere possibility but not requiring probability.
  - In a building safety case, the court was examining whether a structure was “**likely to cause injury or death**” have explained that the phrase means:  
  
**a reasonable consequence**, or something that “**could well happen.**”  
  
For example, in **Weldon Properties Ltd v Auckland City Council**, the High Court confirmed that: “likely” does **not mean probable**, but it must be **more than a mere possibility**

Research from other definitions would indicate the following

- “Likely” generally means more than a mere possibility but less than a certainty.
- The Courts often interpret it as “a real, not remote, chance” of harm occurring.
- It involves judgment based on probability, not speculation.
- “a reasonably foreseeable risk that is more than a remote possibility”

It is clear that the definition of “likely” is not simple nor clear.