

Australian Airports Association

***Wildlife Strikes: What your
airport needs to know to keep
it out of the Courts***

Phil Shaw and Richard Robinson
16th November 2018



The Plan

- i. Richard to provide a brief context to the legal system in Australia
- ii. Phil will describe the Kangaroo case and its outcomes
- iii. Richard will explain the requirements of a due diligence defence.
- iv. Questions

Adversarial Law

In Australia court cases are conducted under the adversarial system in which the court is asked to adjudicate upon 'issues' put forward by the parties upon evidence adduced by the parties. The presiding judge has no power of inquiry (the 'inquisitorial system'), unlike courts in parts of Europe.

The NSW Bar Association (September 2007)

COURT STRUCTURE, JUDGES' TITLES AND ORDER OF SENIORITY

Statute Law

Statute law is law passed by Acts of parliament. This law takes the form of Acts and Regulations made under an Act. Statute law specifies penalties for breaches.

Statutory offences usually require that the case against the accused be proved 'beyond reasonable doubt'. This is considerably heavier than the civil standard.

Common Law

Common law is law derived from actual cases - that is, law made by or modified by the judiciary. Common law is the product of societal values over centuries and evolved in the English courts. One party claiming damages from another brings civil cases under common law. In common law the case is proved “on the balance of probabilities”.

Another interesting result is that common law decisions are effectively retrospective which is why judges try to limit the scope of any decision to a particular time, place and circumstance.

(Per a conversation with Cambridge law professor, David Howarth in Melbourne on 6th February 2017).

Negligence

Negligence is an action in tort law, the elements of which are the existence of a duty of care; breach of that duty; and material damage as a consequence of that breach of duty. A duty of care is a legal obligation to avoid causing harm, and arises where harm is foreseeable. The type of damage, not the extent must be foreseeable.

Butterworth's concise Australian legal dictionary.
A tort is a civil wrong, other than a breach of contract.

Typically two defences

- No power: meaning, no control – no responsibility.
- Due Diligence typically decided using the ‘reasonable person’ test

The Reasonable Person

The reasonable person is not any particular person or an average person... The reasonable person looks before he leaps, never pets a strange dog, waits for the airplane to come to a complete stop at the gate before unbuckling his seatbelt, and otherwise engages in the type of cautious conduct that annoys the rest of us... “This excellent but odious character stands like a monument in our courts of justice, vainly appealing to his fellow citizens to order their lives after his own example.”

J M Feinman (2010). *Law 101. Everything You Need to Know About American Law.* Oxford University Press. Page 159.



Five Star Medical Centre Pty Limited

v

Kempsey Shire Council



The Incident



- 25 Feb 2014
- Mooney M20TN
- Landed at Kempsey Aerodrome under VFR
- Impact with Eastern Grey Kangaroo

The Roo and the Damage



Documentary Evidence

ERSA

- “Kangaroo hazard exists”

WHMP & SOP's

- WHMP in place (fence suggested) with SOPs on:
 - Count frequency (twice weekly or more where there is an increase)
 - NOTAM to be raised when there is a “significant increase in birds and wildlife activity”

Not issued at the time of the incident

Aerodrome Safety Inspections & CASA surveillance reports

- Several highlighting the risk and recommending various actions

Judge D Russell

13th September 2017

Under NSW Civil Liability Act 2002, Section 5B(2):

A person is not negligent in failing to take precautions against a risk of harm unless:

- a) the risk was foreseeable
- b) the risk was not insignificant
- c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

Defendant (Kempsey Council) was ordered to pay \$195,853.51



Judgement

- “So, while the **probability of a collision was not high**, it was a definite prospect, and probably **just a matter of time** if nothing was done.
- The defendant failed to take reasonable care by **not issuing a NOTAM** stating that kangaroo incursions onto the aerodrome had increased to dangerous levels.
- The defendant also failed to take reasonable care by **failing to increase inspections of wildlife** in January and February 2014 to daily inspections, as required by the Plan. Further, those counts which were made **did not comply with its own SOP-01** which related to the method of counting wildlife.
- The third way in which the plaintiff put the case on breach (**failure to erect a complete kangaroo proof fence**) involves consideration of an additional legal matter.”

Judgement

S 42 Civil Liability Act 2002 – airport as a voluntary service

*“If a government chooses to provide a **voluntary service** of this kind, prima facie **it must take all such precautions against the risks of injury** which the provision of those services will create and, in particular, it is prima facie **not open to it to plead lack of resources** if it does not do so. A plaintiff may say that, **if it has not the resources to make such provision against risk, it should not offer to provide the services.**”*

Demonstrating Due Diligence

Due diligence is a legal concept and represents an aspect of moral philosophy, that is, how the world ought to be and how humanity should behave in order to bring this about.

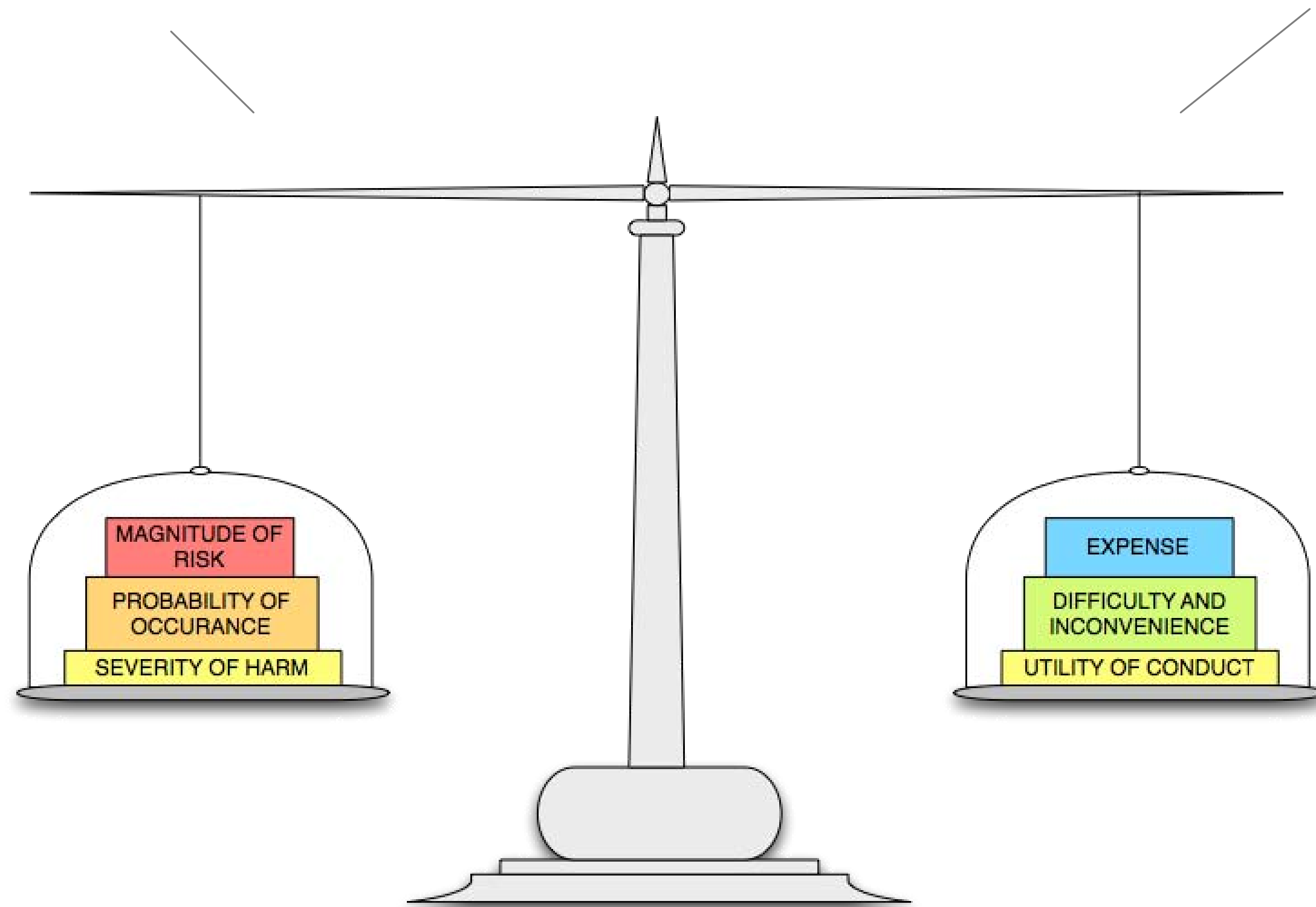
Due Diligence

It is forensically tested by our courts with the advantage of hindsight, for example, using the 'reasonable person' test.

The Due Diligence Approach

All credible, critical issues identified

All practicable precautionary options identified



Disproportionality decision making engine used to determine 'reasonableness'

Agreed precautions implemented with supporting QA system

Identification of all Credible Critical Issues

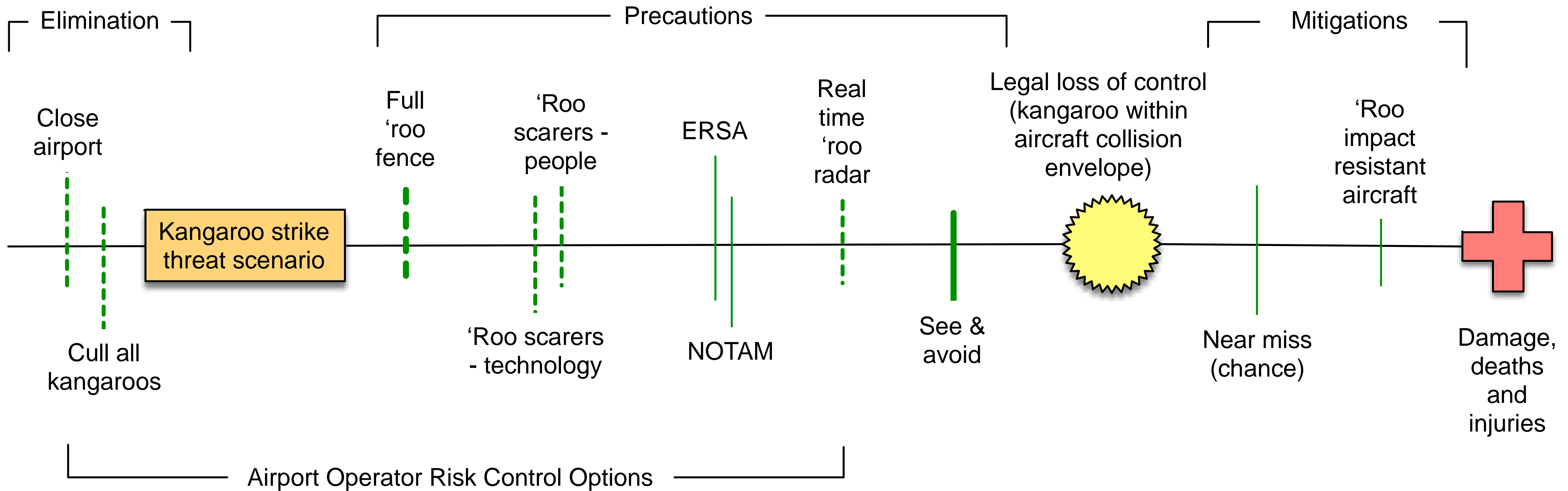
The first step is to build an argument as to why all credible, critical issues have been identified. This can be done in a number of ways including the threat and vulnerability technique, which is derived from the military intelligence community. In essence this asks the question: What exposed groups are we trying to protect and to what credible threats are they exposed? An exposed group can be vulnerable to a number of threats. This is usually done functionally and geographically.

In the first instance R2A usually uses a generative zonal vulnerability approach, conceptually consistent with aspects ARP 4761: *Guidelines and Methods for Conducting the Safety Assessment Process on Civil Airborne Systems and Equipment*.

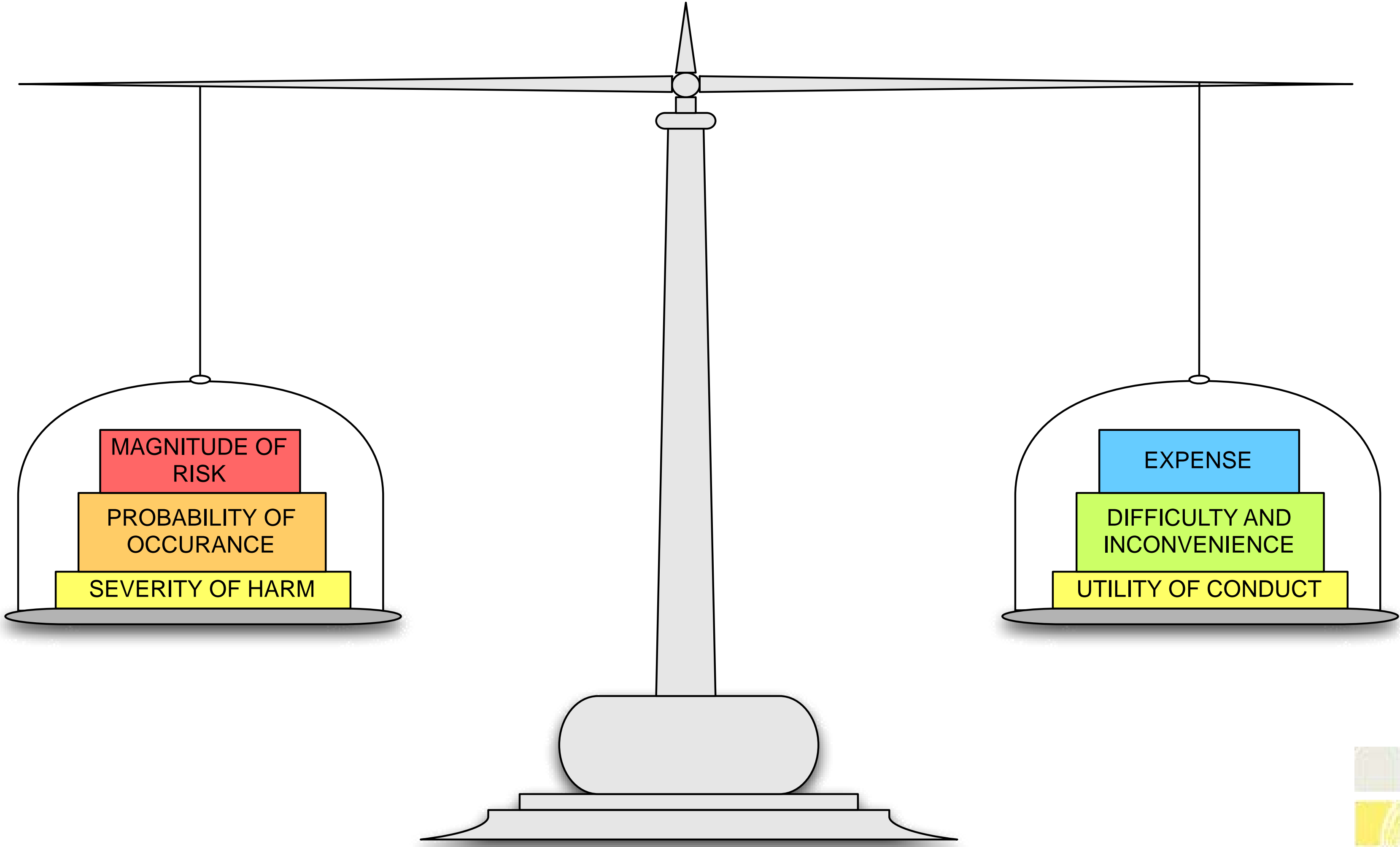


Eastern Grey Kangaroo

Preliminary Kangaroo Strike TBD



Reasonableness



Reasonableness

The perception of a reasonable man's response calls for a consideration of the magnitude of the risk and the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.

Mason J. of the High Court of Australia
Wyong Shire Council vs Shirt (1980) 146 CLR 40.

Avoiding the Rumsfeld manoeuvre



Stakeholder Group – final questions

- i) Are there any other issues of concern which have not been considered?
- ii) Are there any other practicable precautions, the value of which has not been tested?

Satisfies legal counsel

The arguable result is that every reasonably practicable precaution for all credible critical issues is in place (and the result is not prohibitively dangerous) the essence of a due diligence argument.

Key Learnings for Airports

- *Don't operate an airport unless you are prepared to pay for safety measures that would be expected by a "reasonable person"*
- *Don't prepare Plans that you don't implement or SOPs that you don't follow – always keep them updated*
- *Do stay abreast of current best practice (not just minimum regulatory requirements)*
- *Do make your WHMP 'outcomes focused' rather than 'legislation focused'*
- *Engage all sectors of the industry (particularly airspace managers and airspace users) and diverse external stakeholders in the solution*
- *Do investigate strikes thoroughly and frequently*
- *Be proactive, innovate, document efforts to manage risks*
- *Do maintain training*



Overall

“It is better to be vaguely right than exactly wrong.”

Carveth Read. *Logic, deductive and inductive* (1898).



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