



Defending the Organisation through Sound Asset Management and Maintenance.

An Australian Perspective

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Coverage

- Setting the scene
- Managing Regulators
 - Australian Competition Tribunal – Ausgrid determination
- Managing Predatory Business models
 - Winmalee Fire - Class Action on Endeavour Energy
- Summary





Setting the Scene

- Why these examples?
- Function of Regulators
- The Class Action Model

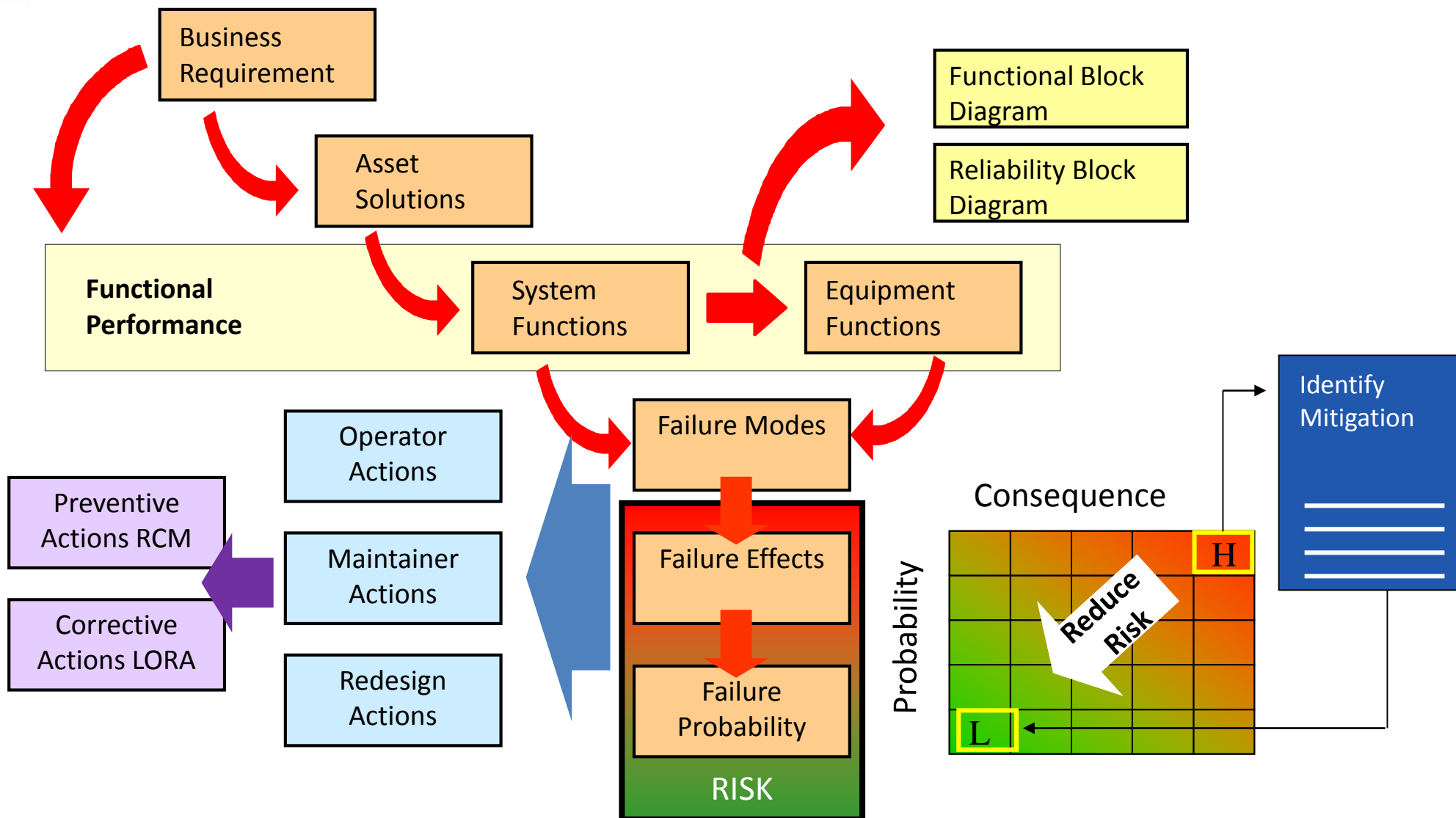


The Regulator

- *Ausgrid is the electrical distributor sold (51%) by NSW Government 2016 to two Australian Superannuation funds for \$16 Billion.*
- *2015 National Energy Regulator gave a retrospective direction that the **opex** budget for the 5 year regulatory period (2014 – 2019) be reduced by ~40%.*
- *Basis of Regulators determination was “**benchmarking**”*
- *Determination overturned by Australian Competition Tribunal*
- *The Ausgrid defence of “bottom up” determination of opex requirements was accepted by the tribunal (FMECA/RCM)*
- *Regulator appealed to the Federal Court and lost*



The Defence – FMECA/RCM





The Class Action

- Winmalee – a suburb of Sydney
- 194 houses destroyed and 3,600 acres burnt
- Claim of negligence by Endeavour Energy
 - Cause was a rotting tree falling on powerline
 - They had a duty of care as the provider
 - Tree clearing was inadequate
 - Failed to note and manage a rotting tree





Every Event an Opportunity!

- Asset owners, operators, their insurers and other parties will be targets for class actions in the wake of adverse events
- Class actions may be perceived by defendants as opportunistic by the plaintiffs or their representatives – so what!
- When, defending an action, the plaintiff's claim must be carefully addressed in conjunction with the defendant's legal team
- The discovery process will also be onerous and costly for the defendant and will lay bare any relevant material relevant to the matter in dispute



The Defence

In Australian law – successful litigation through negligence requires:

- **Causation:** *the failure in question was the direct or indirect cause of the loss*
- **Foreseeable:** *the failure was foreseeable by a **reasonable** person*
- **Preventability:** *the failure (or elimination or mitigation of its consequences) was preventable (by the defendant).*
- **Reasonableness:** *it was reasonable for the defendant to be able to take the necessary steps to prevent or manage the consequences or the failure.*



The Outcome

- Lawyers 1 - Claimants 0
- Out of court settlement – \$18 Million from insurers
- Endeavor defence – fully funded (\$10 Million)
- Maddens Lawyers – funded
- Claimants – 4% payout on the claims from uninsured
- Summed up in the following statement published in a leading newspaper at the time

*“Mr Smith, called the settlement “bulls**t. They’re in it for themselves, the lawyers, and sc**w everyone else.”*



Summary

The defence rests – the precedents are public domain!

FMECA/RCM is the answer