



MILLS
OAKLEY

Legal Update 2020

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Bowman v Nambucca Shire Council



Boat ramp





Warning sign



Allegations

- Clean the boat ramp monthly;
- Ensure the boat ramp:
 - Was constructed in accordance with the plans and Standards with respect to gradient;
 - Was constructed with cut grooves to prevent slipping when wet or covered with vegetation/moss;
 - Could accommodate larger rubber mats to reduce the slipperiness;
 - Was closed following a comment from the Manager of Civil Works;
 - Was rectified following complaints of slipperiness;
 - Was regularly pressure cleaned;
 - Had a sign clearly placed in a visible area relative to the boat ramp.



Questions for the Court

- Was the condition of the ramp an obvious risk?
- Was the warning sign adequate to provide a warning of the risk of slipping?
- At the time of the incident, was Mr Bowman engaged in a recreational activity?

Findings

- The risk of slipping whilst walking on a marine surface was common knowledge and hence an obvious risk (section 5F).
- As the risk was found to be obvious, Council did not owe a duty to warn of the obvious risk (section 5H).
- Walking on the beach or approaching the water amounted to a recreational activity (section 5K).
- The sign contained a risk warning which warned of the general nature of the particular risk was sufficient to have warned Mr Bowman of the risk of slipping in the vicinity of the boat ramp (section 5M).
- No breach of duty on the part of Council pursuant to s 5B as Mr Bowman had not demonstrated a reasonable person in the position of Council would have taken the precautions asserted by Mr Bowman as means of reducing the risk of harm (section 5B).
- Contributory negligence at 90% (section 5R).



Section 42 - Civil Liability Act



What does s 42 say?

42 PRINCIPLES CONCERNING RESOURCES, RESPONSIBILITIES ETC OF PUBLIC OR OTHER AUTHORITIES

The following principles apply in determining whether a public or other authority has a duty of care or has breached a duty of care in proceedings for civil liability to which this Part applies--

- (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions,
- (b) the general allocation of those resources by the authority is not open to challenge,
- (c) the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate),
- (d) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.



Myth

- Section 42 of the Civil Liability Act is a defence available to Councils in which it can escape liability due to it having insufficient resources

- It is not a defence at all.
- It is a set of principles which a Court must have regard to when determining if a Council:
 - Owes a duty of care; and/or
 - Breached that duty of care.



How in reality does s 42 work?

We start with s5B of the *Civil Liability Act*.

5B GENERAL PRINCIPLES

- (1) A person is not negligent in failing to take precautions against a risk of harm unless--
 - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
 - (b) the risk was not insignificant, and
 - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)--
 - (a) the probability that the harm would occur if care were not taken,
 - (b) the likely seriousness of the harm,
 - (c) the burden of taking precautions to avoid the risk of harm,
 - (d) the social utility of the activity that creates the risk of harm.



How in reality does s 42 work?

- There is a general understanding that all Councils, as public authorities, have limited financial and other resources because their ability to generate funds to carry out their functions is largely confined to grants, rates and contributions.
- There is an inherent tension between justifying inaction on the basis of limited resources and having a local authority's limited resources exposed to judicial review. Section 42 was a legislative response to that.

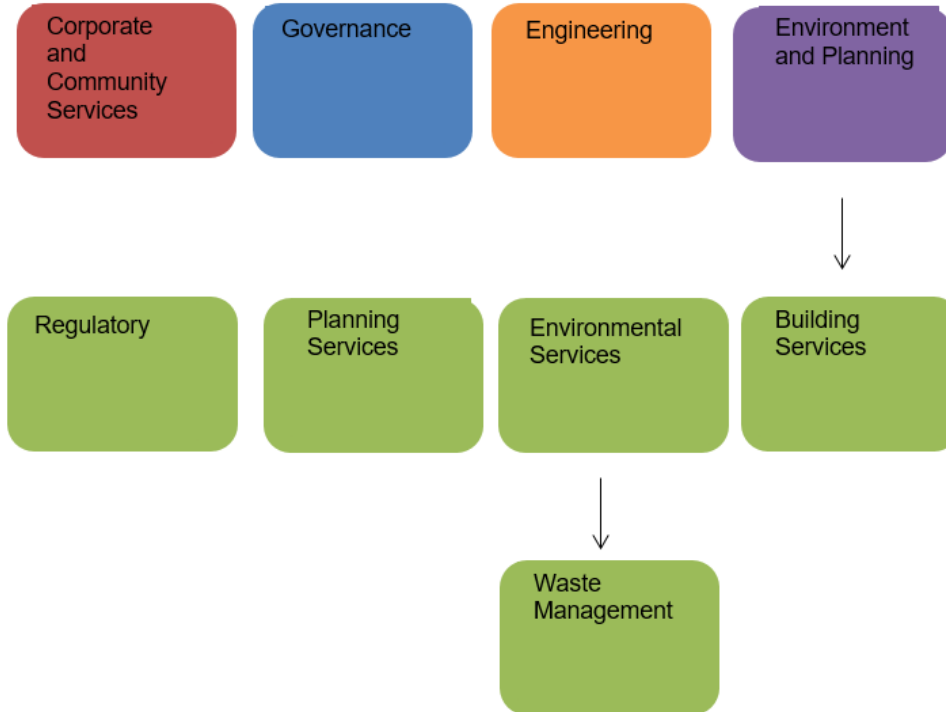


Weber v Greater Hume Shire Council

- The Court concluded the general allocation of funds by a Council to undertake its various functions is not open to challenge. However, its allocation within those functions can be challenged.



Weber v Greater Hume Shire Council





Weber v Greater Hume Shire Council

- Evidence was called from Council's General Manager, Director of Corporate and Community Services and Director of Environment & Planning to show there were insufficient funds to carry out the measures it was asserted ought to have been taken to manage the tip to the standard alleged by Weber.
- Council's budget under the broad heading of Environment & Planning was scrutinised and found it had funds that had not been exhausted at the time of the fire.
- Court concluded there was sufficient funds available to have taken steps which would have reduced (i) ignition of the fire and (ii) spread of the fire beyond the boundary of the tip.



Five Star Pty Ltd v Kempsey Shire Council

- Significant portion of Council's defence centred on the fact it did not have the required \$210,000 to install a kangaroo-resistant fence around the airstrip.



Five Star Pty Ltd v Kempsey Shire Council

- Evidence:
 - Council's limited resources were insufficient to extend to erection of a fence that carried with it no guarantee of preventing kangaroos and wallabies from accessing the runway.
 - Council had applied for Federal funding to install a fence in 2013.
 - Due to a change in government, the promised funding was withdrawn.
 - No regular passenger services operated from the airstrip and it was effectively operating at a loss. In addition, overall, Council had a consolidated net operating loss.
 - Without government funding, Council would have had to take out a loan to build the fence.



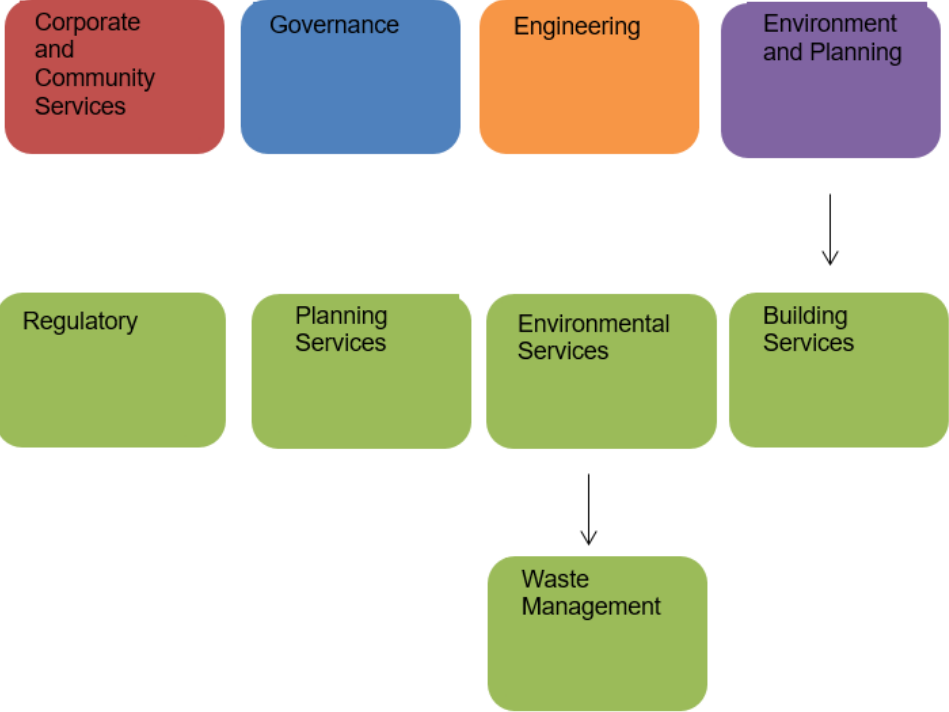
Five Star Pty Ltd v Kempsey Shire Council

- For Council to have funded the cost of the fence, it would have impacted present and future expenditure in other areas.
- *“The proper operation of the principle in s 42(b) is that, at least, in the circumstances of this case, the Court should not find a breach of duty by failure to take a precaution in circumstances where a decision to take the precaution required an assessment of conflicting demands on the Council’s budget”.*



What does Council need to do for s 42 purposes?

- There has to be evidence of the “financial and other resources” available to Council, “the general allocation by it” of those resources and the range of Council’s activities.
- The wider the exercise of the function being carried out, the more difficult and therefore more important it is to have available a detailed budget allocation and evidence of budgetary expenditure at the green level.
- Try not to have unallocated funds in the green level.
- Don’t fail to take action and rely on a lack of resources as the reason for the inaction.
- As Council did in Five Star, consider the costs associated with the risk reduction measures and document that process.





Questions?



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