SUPREME COURT OF QUEENSLAND

CITATION:	*Wilmar Sugar Pty Ltd v Blackwood* [2017] QSC 180
PARTIES:	**WILMAR SUGAR PTY LTD** (applicant) **v** **BLACKWOOD (AS REGULATOR UNDER THE *WORK HEALTH AND SAFETY ACT* 2011 (QLD))** (respondent)
FILE NO/S:	BS No 7397 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 August 2017
DELIVERED AT:	Brisbane
HEARING DATE:	6 February 2017
JUDGE:	Douglas J
ORDER:	**The application is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – GENERALLY – where the applicant was the operator of a sugar mill at which an employee died in a workplace accident – where the applicant offered an undertaking to the respondent pursuant to s 216 of the *Work Health and Safety Act* 2011 – where the respondent refused the undertaking and continued its prosecution of the applicant – where the applicant seeks statutory review of the respondent's decision to refuse the applicant's undertaking – whether the respondent failed to take into account relevant considerations – whether the respondent committed an error of law – whether the respondent failed to give proper reasons *Judicial Review Act* 1991 *Work Health and Safety Act* 2011, ss 216, 217, 221, 222 *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462; [1995] QCA 187, cited *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; [2013] HCA 43, cited

COUNSEL:	J M Horton QC for the applicant S A McLeod for the respondent
SOLICITORS:	Norton Rose Fulbright for the applicant Crown Law for the respondent

[1] This is an application for a statutory order of review pursuant to the *Judicial Review Act* 1991 of the respondent's decision to reject an enforceable undertaking offered by the applicant pursuant to s 216 of the *Work Health and Safety Act* 2011 ("the Act"). That section permits the respondent as regulator under the Act to accept a written undertaking given by a person in connection with a matter relating to a contravention or alleged contravention by a person of the Act.

Background

[2] The circumstances in which the respondent's decision came to be made stem from the death of a worker at a sugar mill recently acquired by the applicant. The death occurred within a year of the applicant buying the mill. It had spent approximately $5 million in improving operations at the mill since it bought it and went to considerable efforts to propose an enforceable undertaking instead of being criminally prosecuted for the death of the worker at the mill. An independent panel appointed by the respondent unanimously recommended that he accept the undertaking. He did not do so and this application seeks to challenge his reasons for failing to do so. The hearing of the criminal charge stemming from the death has been adjourned pending the disposition of this application.

[3] The decision is challenged on the basis that it failed to take into account relevant considerations, involved an error of law and also a failure to give proper reasons as required by s 217(2) of the Act. The evidence related to the death was not contentious.

[4] The applicant purchased the relevant mill in December 2011. The mill had previously functioned continuously since the late 19th century under the ownership and control of the Proserpine Co-operative Sugar Milling Association Ltd.

[5] Mr John Erikson, an employee of the applicant, was killed at the mill on 11 November 2012 when he walked into an area in the path of an empty sugar cane bin. He had been walking down a corridor next to the train track along which empty cane bins travelled after they had been tipped up and emptied. The empty bins are stopped at the end of the ramp along which they have travelled by an automatic hydraulic fixed braking system.

[6] The corridor along which the deceased had been walking was marked off from the area of the track by a yellow line. Mr Erikson walked across that yellow line in front of an empty cane bin travelling down the ramp at about walking speed behind him, was struck in the back and caught between the bin and the fixed braking system. He sustained crush injuries and died.

[7] It is not known why he crossed into the path of the bin. It was probably momentary inadvertence. There had been no previous incidents which might have alerted the applicant to the likely risk of such an event.

[8] The applicant operates eight sugar mills and has a good record of performance and history of workplace health and safety compliance at each of them. Since this incident it has taken measures to ensure that such an event should not recur by upgrading to a different coupling system which is fully automated, removing the need for workers to enter the area in which the fatality occurred. A guarding and lockout system was also installed to prevent unintended entry by employees.

[9] The applicant also provided flights and accommodation to the deceased's extended family to attend at his funeral, assisted the family with the funeral arrangements and provided counselling and support services to his spouse and to other employees. It has maintained contact with the deceased's spouse and consulted her about the rectification works and has donated equipment to the local hospital to assist in the treatment of crush injuries and entered into a short term arrangement to provide the hospital with the use of a helicopter pad and was to provide one on a long-term basis pursuant to the enforceable undertaking.

Statutory context

[10] Section 216 of the Act provides:

> "216 Regulator may accept WHS undertakings
>
> (1) The regulator may accept a written undertaking (a WHS undertaking) given by a person in connection with a matter relating to a contravention or alleged contravention by the person of this Act.
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> Note—
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> Section 230(3) requires the regulator to publish guidelines in relation to the acceptance of WHS undertakings.
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> (2) A WHS undertaking can not be accepted for a contravention or alleged contravention that is a category 1 offence.
>
> (3) The giving of a WHS undertaking does not constitute an admission of guilt by the person giving it in relation to the contravention or alleged contravention to which the undertaking relates."

[11] The alleged contravention by the applicant is a category 2 offence which enlivens the discretion of the regulator to accept an undertaking instead of pursuing a prosecution. Guidelines for the acceptance of such undertakings have been issued and acceptance of an undertaking precludes a prosecution for an alleged contravention while it is in effect. Its complete discharge means that no prosecution for the alleged contravention may ever be brought; see s 222(1) and s 222(2) of the Act.

Alleged grounds of review

Failure to take into account relevant considerations

[12] The submission for the applicant was that the respondent failed to take into account the applicant's good or, as it was submitted, exemplary past performance in terms of work, health and safety. It had, for example, entered into an undertaking for incidents that occurred before it took over control of the mill. Clause 6 of the guidelines made under the Act required the respondent to consider, among other things, the applicant's past performance and history of compliance with the "safety Acts".

[13] He did so in his reasons dated 18 July 2016 by finding that the applicant had no previous convictions and had not been prosecuted previously for a breach of the Act and that it had no concerning workplace health and safety compliance history before this matter; see paras 4.14 and 4.15 of his reasons. They were the factual findings he recited but, in arriving at his decision, he also said that he had had regard to the applicant's submissions about its past safety performance and other matters referred to in correspondence from its solicitors dated 1 June 2016.[1] That letter was a response to a preliminary decision by the respondent which asserted that he had not taken proper notice of the applicant's good past safety performance and went on to emphasise how the applicant had applied itself seriously and diligently to addressing the circumstances in which the incident occurred.

[14] In his final reasons he said that he had had regard to the applicant's submissions about its prior safety performance. In circumstances where there was no assertion to the contrary, it does not seem to me that it can be said that the respondent failed to take the applicant's positive past performance and history of compliance into consideration. It is not correct, in my view, to characterise his reasoning as limiting his consideration of the applicant's past performance and history of compliance to the absence of adverse matters while ignoring positive facts in the applicant's favour.

[15] All the evidence available for the applicant on this issue was favourable and it is clear that the respondent took that evidence into account as well as the solicitors' letter referring to the positive steps taken by the applicant. The simple assertion that his factual findings were expressed in terms of the absence of previous convictions or prosecutions and of any concerning compliance history in the past should not lead to a conclusion that he has failed to take into account the positive aspects of that history of past performance and of compliance with the safety Acts in this context.

[16] Accordingly, the first ground of review fails.

Unreasonableness

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[1] See the affidavit of Danika Jane Casey filed 20 July 2016 at pp 183-184 of the exhibits.

[17] The second ground of review related to para 4.18 of the respondent's reasons where he said:

> "I find it unacceptable that the nature of the alleged contravention is related to cane rail safety and that Wilmar is considered a leader within the sugar industry and have failed in their duty to ensure the safety of a worker."

[18] When one reads that passage in context it is the final paragraph of the respondent's findings on material questions of fact. Over the previous 17 subparagraphs he made a number of findings related to the adequacy of the undertaking provided by the applicant and the objective gravity of the incident giving rise to the issue as required by the guidelines. They included a finding, for example, that the undertaking committed the applicant to a standard higher than the recognised compliance for the activity "and/or to activities over and beyond recognised compliance levels"; see para 4.11 of the reasons.

[19] He also accepted that all the panel members consulted by him recommended acceptance of the undertaking, found that the worker had sustained a fatal injury and that there were several deficiencies in relation to pedestrian access around the bin braking device.

[20] In that context it was submitted for the respondent that his use of the word "unacceptable" in para 4.18 was not one by which he applied a test of acceptability or unacceptability to certain facts so as to preclude acceptance of the undertaking. Rather it should be construed as a finding on the evidence that the applicant, as a leader within the sugar industry, where the nature of the alleged contravention was related to cane rail safety, had failed in its statutory duty to ensure the safety of a worker. Clearly, in any event, that would have been a very significant issue to assess in deciding whether or not to accept the undertaking.

[21] I do not understand him to have concluded by that one word "unacceptable" that those facts precluded the acceptance of the undertaking and so limited the nature of the statutory discretion he had to exercise unreasonably. Rather, in my view, it is a summary of the relevant findings of fact related to the decision which he then went on to make.

[22] The conclusion he expressed in para 4.18 as a finding on material questions of fact was neither unreasonable in the sense that it warranted judicial review nor did it constitute an error of law as applying a test of acceptability or unacceptability to those facts. Rather, in my view, he was not applying a test of acceptability or unacceptability to those facts but was setting out his conclusions about the relevant evidence in such a way as to inform the decision he went on to make. He was not fettering the free exercise of his discretion.

Failure to give reasons

[23] Section 217 of the Act requires the respondent to give reasons for his decision to accept or reject an undertaking. The argument that he has not provided proper reasons is that he is said not to have expressed a reason why the recommendation of the panel was not followed, beyond noting that he had had regard to their recommendations. A similar

submission was also advanced in respect of the use of the word "unacceptable" in para 4.18 which, for the same reasons as expressed already, I reject.

[24] When one reads the respondent's reasons as a whole it seems quite apparent to me that he has addressed comprehensively the reasons why he reached the conclusion he did. He was particularly concerned that the occurrence involved a fatality to a worker. It is worth setting out his reasoning process in full:

> "5.4 Although I accept that there are reasons to suggest that the proposed undertaking may be an appropriate enforcement option, there are particular concerns that favour rejection of the proposed undertaking as follows.
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> 5.5 The occurrence involved a fatality to a worker.
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> 5.6 The 'degree of harm that may result from the hazard or the risk" is a material factor that must be taken into account and weighed up by an obligation holder when determining what was reasonably able to be done to ensure health and safety [Act, s 18(b)],
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> 5.7 The WHSQ Mechanical Engineering report dated 2 December 2014 highlighted several deficiencies in relation to pedestrian access around the bin braking device. The report identifies many risks that were associated with workers being allowed to use the access way along the side of the moving cane bins, at points with limited or narrowed access and with the bins coming from behind them without sufficient warning. The activity of staff moving and working within this area was a regular occurrence and not a once off activity. Isolation procedures were in place for workers who had to access the area for cleaning and maintenance, however not for other staff. Following the fatal incident, Wilmar implemented isolation and lockout procedures, which demonstrates it would have been reasonably practicable to prevent workers from using the access way prior to the incident.
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> 5.8 I have given significant weight in making my decision to the fact that the degree of harm that may have resulted, and did in fact result, from a worker's exposure to the hazard and risk in this matter included fatal injuries. The hazard was created by a moving rail cane bin. The risk to workers from the hazard clearly and foreseeably included a risk of death from serious crush injuries. This degree of potential resultant harm from the hazard and risk was a matter that ought reasonably to have been known by the applicant when it decided what was reasonably able to be done to ensure health and safety of its workers under s 18 of the Act.
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> 5.9 I have had regard to the panel members' recommendations and Wilmar's submissions. However, I have concluded that, on balance, the factors favouring rejection of the proposed undertaking outweigh those favouring acceptance.

> 5.10 I have also considered whether the objects of the Act are best met by accepting the proposed undertaking or continuing the prosecution. I have had regard to Wilmar's submissions about the objects of the Act. Specifically I have considered the objects those submissions identify: consultation, cooperation and issue resolution in relation to work health and safety (s 3(1)(b)) and encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices (s 3(1)(c)). On the other hand, I have considered the objects to protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from particular types of substances or plant (s 3(1)(a)) and to secure compliance with the Act through effective and appropriate compliance and enforcement measures (s 3(1)(e)).
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> 5.11 Again because the occurrence involved a fatality, because of the matters identified in the engineering report and because of the nature and foreseeability of the risk involved in the operation of the rail cane bin, I have decided that, on balance, the objects of the Act would be best served by rejecting the proposed undertaking and continuing the prosecution.
>
> 5.12 Based on the evidence and findings and having regard to the objects of the Act, I have carefully considered this matter and am of the opinion that the undertaking given by Wilmar is not the appropriate enforcement option in this case."

[25] Those reasons were criticised as failing to explain the actual process of reasoning by which the respondent in fact formed his opinion in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law.[2]

[26] I reject that argument. The reasons were appropriately detailed and come to grips with the issues the respondent was required to consider. The respondent clearly took into account the recommendation by those he consulted to accept the undertaking in para 5.4 and para 5.9. Paragraphs 5.5 to 5.8 record the fact of the fatality and the number of serious risks that the system of work posed to the workers. Paragraphs 5.10 and 5.11 can only be seen as an explicit balancing exercise explaining why he decided to reject the undertaking and that the objects of the Act would be best served by rejecting the proposed undertaking and continuing the prosecution in spite of the advice offered to him.

[27] Those reasons were adequate to dispose of the issues that had been argued before him.[3] In arriving at his conclusions he considered matters both favourable and unfavourable to the applicant's position and articulated rationally why he reached the conclusion he did.

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[2] *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, 505 at [65].

[3] *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462, 482.

I do not see this as a failure to give reasons nor as a failure to explain why he rejected the recommendation made to him.

Order

[28] Therefore I conclude that the application should be dismissed. I shall hear the parties as to costs.