SUPREME COURT OF QUEENSLAND

CITATION:	*Wilmar Sugar Pty Ltd v Blackwood* [2018] QCA 138
PARTIES:	**WILMAR SUGAR PTY LTD** **ACN 081 051 792** **(appellant)** **v** **BLACKWOOD (AS REGULATOR UNDER THE *WORK HEALTH AND SAFETY ACT* 2011 (QLD))** (respondent)
FILE NO/S:	Appeal No 9515 of 2017 SC No 7397 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 180
DELIVERED ON:	26 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	13 March 2018
JUDGES:	Sofronoff P and Philippides JA and Boddice J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – where the appellant operated a sugar mill – where an employee at the mill died of crush injuries after veering into the path of a cane bin travelling along a downward sloping track – where the track along which the cane bins travelled was only separated from a walkway by a painted yellow line – where the appellant allegedly contravened the *Work Health and Safety Act* 2011 (Qld) by failing to ensure, so far as was reasonably practicable, the health and safety of the deceased employee while he was at work – where the appellant offered to give a written undertaking – where an undertaking, while in effect, precludes the bringing of a prosecution in relation to the relevant incident – where the respondent refused the undertaking – whether the learned primary judge erred by failing to find that the respondent had not taken into account the appellant's past performance ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – where the appellant submits that the respondent treated the facts to which the respondent referred in coming to a decision to refuse a written undertaking as precluding the acceptance

of the undertaking – whether the respondent exercised his power to make the decision so unreasonably that no reasonable person could have exercised it in that way

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – where the appellant's proposed written undertaking was considered by a three member panel that had been appointed to assist the respondent in making a decision about whether to accept the undertaking – where the panel recommended acceptance of the written undertaking – whether the respondent failed to give adequate reasons for his rejection of the panel's recommendation

Work Health and Safety Act 2011 (Qld), s 216, s 217(1), s 222, s 230(3)(b)

COUNSEL: J Horton QC, with S Richardson, for the appellant
S A McLeod for the respondent

SOLICITORS: Norton Rose Fulbright for the appellant
Crown Law for the respondent

[1] **SOFRONOFF P:** The sugar mill in Proserpine has been working continuously since the late 19th century. The appellant bought the sugar mill in December 2011. On 11 November 2012 Mr John Erikson was killed after suffering crush injuries at the mill. He had been walking along a corridor. There was a downward sloping rail track running parallel to this corridor. Empty cane bins travelled along that track after having been unloaded. They were slowed at the bottom of the track by a hydraulic braking system. The corridor down which Mr Erikson was walking was separated from the track only by a yellow line. As Mr Erikson made his way down the corridor he walked across the yellow line and a cane bin collided with him, crushing him to death between it and the braking system.

[2] The *Work Health and Safety Act* 2011 provides various means by which threatened non-compliance, actual non-compliance and breaches of provisions of the Act can be dealt with. Section 216 provides for a means by which an alleged contravener may avoid a prosecution by giving an undertaking to the Regulator appointed under schedule 2 of the Act. At the relevant time s 216 provided:

> "**216 Regulator may accept WHS undertakings**
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> (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.
>
> *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."

[3] The alleged contravention in this case was that the appellant did not ensure, so far as was reasonably practicable, the health and safety of Mr Erikson while he was at work. In substance, the alleged contravention was constituted by permitting him to use the corridor while cane bins were moving on the nearby track.

[4] The appellant offered to give a written undertaking. Its proposed terms need not be considered for the purposes of this appeal.

[5] Section 230(3)(b) of the Act provides that guidelines must be published on the Regulator's website in relation to, among other things, the acceptance of undertakings under the Act. Such guidelines have been published. Guideline 6 is in the following terms:

> "6. When deciding whether to accept an EU, the regulator will consider a number of factors, including:
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> - the objective gravity of the contravention and the nature of the applicant's alleged misconduct (the greater the gravity of contravention, the less likely the EU will be accepted)
> - submissions received from any relevant party, including any injured worker/s or next of kin, in relation to the contravention
> - the person's conduct in respect of mitigation and remedial action, regarding both the contravention and any person effected by the contravention
> - the applicant's past performance and history of compliance with the safety Acts, including the management of workers' compensation
> - any other matter which the regulator considers relevant."

[6] The virtue of a written undertaking, from the point of view of an alleged contravener, is that while the undertaking is in effect there can be no prosecution in respect of the alleged contravention. After the successful discharge of the undertaking no prosecution may ever be brought.[1]

[7] The appellant's proffered undertaking was considered by a three member panel which had been appointed to assist the Regulator in making a decision whether to accept a written undertaking. After an initial hesitation, the three members of the panel recommended its acceptance. Nevertheless, the Regulator decided not to accept the written undertaking. Relevantly he said:

> "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

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1 *Work Health and Safety Act* 2011 (Qld) s 222.

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.

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)).

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."

[8] The appellant sought judicial review of the decision to reject its undertaking. Douglas J dismissed the application for review on 6 February 2017. The appellant now appeals against that dismissal.

[9] The appellant raises three grounds of appeal. First, it contends that his Honour erred in failing to find that the respondent had not taken into account the appellant's "past performance".

[10] The Regulator had made the following findings:

"4.14 I find that Wilmar has no previous convictions and has not been prosecuted previously for a breach of the Act.

4.15 I find that Wilmar has no concerning WHSQ compliance history prior to this matter."

[11] The appellant complains that these "negative findings were a partial discharge only of the duty upon the decision-maker to consider Wilmar's past performance: here, Wilmar's very good (exemplary even) relevant past performance".

[12] When pressed in oral argument to make good that submission the appellant's counsel pointed to a letter from the appellant to the Enforceable Undertakings Program Co-ordinator dated 5 January 2016. The relevant part of the letter to which the Court's attention was drawn concerned the appellant's willingness, after it had bought the business, to commit to certain enforceable undertakings in respect of incidents that had occurred prior to its ownership. The letter stated:

> "The voluntary submission to the EU in respect of those prior incidents shows Wilmar's commitment to safety in the workplace. This commitment to safety is also demonstrated in the undertaking given in respect of the Incident, both in terms of the works already completed by Wilmar and those proposed to deliver benefits to workers, the industry and community as part of the undertaking."

[13] Counsel submitted that this is the "good past performance" that the Regulator failed to consider.

[14] The difficulty with this submission is that the Regulator expressly referred to the letter in his reasons as something that he had taken into account. What is more, the status of the appellant as a good corporate citizen was never in doubt and was not a contentious issue.

[15] Accordingly, his Honour rejected this as the appellant's first ground of review and, for the same reasons, I reject it as the first ground of appeal.

[16] The appellant's second ground of appeal is that the respondent had exercised his power to make the decision so unreasonably that no reasonable person could have exercised it in that way. It is said that he substituted his own subjective views of what is and is not capable of acceptance for an exercise of the statutory discretion. It is said that the unreasonableness in his decision emanates from the respondent's statement as follows:

> "4.18 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."

[17] The appellant submits that this statement shows that the Regulator treated the facts to which he referred as precluding the acceptance of the undertaking.

[18] It is not possible rationally to read the respondent's statement in that way. Rather, as the respondent submitted correctly, and as Douglas J accepted, the respondent meant that he had found as a fact that the appellant, as a leader within the sugar industry, had failed in its statutory duty to ensure the safety of a worker in the important and fundamental area of cane rail safety. I would respectfully agree with Douglas J that a contravention in this potentially highly dangerous area of cane rail operation by a vaunted leader of the industry is a "very significant issue to assess in deciding whether or not to accept the undertaking".[2]

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2 *Wilmar Sugar Pty Ltd v Blackwood* [2017] QSC 180, [20].

[19] I would reject this ground of appeal.

[20] The final ground of appeal is what is said to be a failure on the part of the Regulator to give adequate reasons for his rejection of the panel's unanimous recommendation.

[21] It is uncontroversial that the Regulator was not obliged to accept that recommendation.

[22] Section 217(1) of the Act obliges the Regulator to give written notice of a decision to accept or reject an undertaking and the reasons for the decision.

[23] The appellant complains that the Regulator's reasons "ought to have engaged with and considered the issues that the panel saw as material to their unanimous recommendation that the Undertaking be accepted".

[24] This submission cannot be sustained. In paragraph 5.9 of his reasons, which I have set out above, the Regulator expressly referred to the panel's recommendations. He explained that he considered that the factors favouring rejection of the undertaking outweighed those that favoured accepting the undertaking. In paragraphs 5.10 and 5.11 he enumerated the most important such factors. In particular, he considered that the fact that a death had resulted from the alleged contravention made this a case in which the objects of the Act would best be served by continuing with the prosecution rather than accepting an undertaking. Indeed, since the events in this case, the Act has been amended so that an undertaking cannot be accepted in cases of fatality.

[25] There is no obligation for the Regulator to deal with the reasons for the panel's recommendation point by point. It is not the Regulator's function to review the recommendation or to find error in it. It is the Regulator's function to consider such material as is relevantly placed before him and to exercise his discretion. He has revealed the factors that moved him to reject the recommendation. No more was required. I would respectfully agree with Douglas J that the Regulator's reasons were "appropriately detailed and come to grips with the issues the respondent was required to consider".[3]

[26] I would reject this ground of appeal and, accordingly, dismiss the appeal.

[27] **PHILIPPIDES JA:** I agree with the reasons of Sofronoff P and the order proposed by his Honour.

[28] **BODDICE J:** I agree with Sofronoff P.

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3 *Supra,* at [26].