30/00; [1998] VSC 175

SUPREME COURT OF VICTORIA

WHITTAKER v DELMINA PTY LTD

Hansen J

24 November, 18 December 1998 — (1998) 87 IR 268

OCCUPATIONAL HEALTH AND SAFETY – BUSINESS OFFERING UNSUPERVISED HORSES FOR HIRE TO RIDE – IMPROVEMENT NOTICE ISSUED BY INSPECTOR REQUIRING RIDERS TO BE SUPERVISED – APPEAL AGAINST NOTICE TO MAGISTRATE – FINDING BY MAGISTRATE AS TO STANDARD OF SATISFACTION REQUIRED – FINDING THAT LEGISLATIVE PROVISION RESTRICTED TO WORKPLACE – DECISION OF COUNTY COURT JUDGE FOLLOWED – WHETHER MAGISTRATE BOUND TO FOLLOW SUCH DECISION – MEANING OF "EXPOSED TO RISKS", "UNDERTAKING", "CONDUCT" – WHETHER "UNDERTAKING" SYNONYMOUS WITH "WORKPLACE" – NOTICE CANCELLED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *OCCUPATIONAL HEALTH AND SAFETY ACT* 1985, SS22, 43.

Section 22 of the *Occupational Health and Safety Act* 1985 ('Act') provides:

> "Every employer and every self-employed person shall ensure so far as is practicable that persons (other than the employees of the employer or self-employed person) are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer or self-employed person."

W. an inspector appointed under the Act, issued an improvement notice to DP/L concerning a business which DP/L conducted whereby it hired horses to members of the public for riding on a trail outside DP/L's property. W. was of the opinion that the provision of unsupervised horse rides was likely to cause a risk to the health and safety of riders and gave a direction that DP/L was to provide supervision of the rides. DP/L appealed against the notice to the Industrial Division of the Magistrates' Court. During the hearing, the magistrate considered a decision of a County Court judge who held that s22 of the Act "only applied to regulate behaviour at the workplace". The magistrate decided that the improvement notice should be cancelled. Upon appeal—

HELD: Appeal allowed. Remitted for further hearing and determination.

1. Although the County Court is above the Magistrates' Court in the hierarchy of courts in Victoria, a magistrate is not bound by a decision of a judge of the County Court. However, for reasons of comity it is proper that a magistrate not depart from a decision of the County Court unless after earnest consideration and for good reason the magistrate is convinced that the decision was wrong.
***Valentine v Eid* (1992) 27 NSWLR 615; (1992) 15 MVR 541, followed.**

2. If a party is to rely on a decision of a judge of the County Court in a hearing in the Magistrates' Court, it should be ensured that other, and perhaps conflicting, decisions are provided. In the present case, a decision of another County Court judge whereby the judge came to the opposite conclusion in relation to the interpretation of s22 of the Act should have been supplied to the magistrate. If this course had been followed, the magistrate may have concluded that the decision of the judge which he followed was wrong because it was based on erroneous reasoning.

3. S22 protects persons who are not employees of the employer or self-employed person. That is, it is designed to prevent harm to members of the public. Further, so far as is practicable, the employer or self-employed person is to ensure that the public are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer or self-employed person. The expression "exposed to risks" in s22 means exposure to a potential risk and whether or not persons so exposed are at the location of the relevant undertaking. The word "undertaking" in s22 takes its meaning from the context in which it is used and means the business or enterprise of the employer. The word "conduct" refers to the activity or what is done in the course of carrying on the business or enterprise. The word "undertaking" is not to be read as synonymous with "workplace".

4. Interpreting s22 according to the ordinary and natural meaning of its words, it was not open to the magistrate to interpret s22 as restricted to risks at the workplace in relation to the health and safety of persons while at the workplace. Section 22 applied to potential risks to health or safety that arose from the conduct of the undertaking even if those risks were present or operated outside the place at which the undertaking was conducted.

5. On an appeal against the issue of the notice, the magistrate was required to consider the

matter and be satisfied as to the risk and the contravention of s22. In so doing, the magistrate was in the same position as the inspector and had to be satisfied just as the inspector had to be satisfied. Whilst there may be merit in the view that the balance of probabilities is the standard of satisfaction, there can be no different standard or level of satisfaction between them.

HANSEN J:

1. This is an appeal from an order made in the Industrial Division of the Magistrates' Court at Melbourne on 13 August 1998. The questions of law raised in the appeal concern the interpretation and operation of s22 of the *Occupational Health and Safety Act* 1985 ("the Act") which provides as follows:

> "22. ***Duties of employers and self-employed persons***
> Every employer and every self-employed person shall ensure so far as is practicable that persons (other than the employees of the employer or self-employed person) are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer or self-employed person."

2. The questions of law are:

> (a) whether the Magistrate erred in restricting the operation of s22 to a "workplace";
>
> (b) whether in construing s22 the Magistrate erred in restricting the "exposure to risk" to a "workplace"; and
>
> (c) in the alternative, whether the Magistrate erred in finding that the workplace in the present case was confined to the boundaries of the respondent's premises.

The word "workplace" is not used in s22 but it is used elsewhere in the Act and it is defined in s4 to mean "any place, whether or not in a building or structure, where employees or self-employed persons work".

3. Section 22 takes its place in the Act in Part III - General Provisions Relating To Occupational Health and Safety. Part III includes ss21-28. Section 28 provides that nothing in the Part shall be construed as conferring a right of action in any civil proceedings in respect of any contravention of any provision of the Part, or as conferring a defence to any civil proceeding or as otherwise affecting a right of action in any civil proceedings, or as affecting the extent (if any) to which a right of action arises or civil proceedings may be taken with respect to breaches of duties imposed by the regulations. A contravention of s22 is an indictable offence (s47).

4. The appellant is Gary Charles Whittaker who, as a duly appointed inspector under the Act, had issued an improvement notice dated 20 December 1994 to the respondent, Delmina Pty Ltd ("Delmina"). The notice concerned a business which Delmina conducted at Halls Gap known as the Halls Gap Ranch in which it hired horses to members of the public for riding on a trail outside Delmina's property.

5. The notice was issued under s43 of the Act, sub-s(1) of which provides that:

> "(1) Where an inspector is of the opinion that any person—
> (a) is contravening any provision of this Act or the regulations; or
> (b) has contravened such a provision in circumstances that make it likely that the contravention will continue or be repeated—
> the inspector may issue to the person an improvement notice requiring the person to remedy the contravention or likely contravention or the matters or activities occasioning the contravention or likely contravention."

Sub-section (2) specifies a number of matters that an improvement notice shall state. They are the inspector's opinion, the reasons for that opinion, the provision of the Act in respect of which that opinion is held, and the day before which the matter is to be remedied. Sub-section (3) provides that a person who fails to comply with an improvement notice is guilty of an offence against the Act. That too is an indictable offence (s47). Where, however, a person appeals against an improvement notice under s46 of the Act, the operation of the notice is suspended pending the decision on the appeal (s46(3)).

6. Pursuant to sub-s(2) the notice stated that Whittaker was of the opinion that Delmina was contravening s22 of the Act or had contravened that provision in circumstances that made it likely that the contravention will continue or be repeated, and he required Delmina to remedy the contravention or likely contravention or matters or activities occasioning the contravention or likely contravention before 31 December 1994, and stated the reasons for his opinion, as follows:

> "That the provision of unsupervised horse rides by the Halls Gap Ranch is likely to cause a risk to the health and safety of riders".

The notice concluded with a statement, pursuant to s45(1) of the Act, of the measures to be taken to remedy the contravention or likely contravention. Section 45 (1) provides that:

> "An inspector may include in an improvement notice or a prohibition notice directions as to the measures to be taken to remedy any contravention, likely contravention, risk, matters or activities to which the notice relates".

The measures were:

> "That the operator of the Ranch provides supervision of the rides operated from the Ranch or by the Ranch. That supervision of the rides needs to comply with the permit conditions as outlined in the permit conditions issued by the Department of Conservation and Natural Resources. Specifically in relation to:
>
> 1. Client/guide ratio not to exceed 1:8.
>
> 2. The operator is to ensure their guide (supervisor) can demonstrate proficiency in trail riding and basic riding skills with a minimum of two years active work with horses.
>
> 3. Group size is not to exceed a maximum of 20 horses including guides."

7. Within a day or so Delmina exercised its right of appeal against the notice under s46(1) of the Act, its notice of appeal being received by the Authority on 22 December 1994. Section 46(2) provides that on an appeal, which as I mention below is now to the Industrial Division of the Magistrates' Court, the Court:

> "...shall inquire into the circumstances relating to the notice and may—
> (a) affirm the notice;
> (b) affirm the notice with such modifications as it thinks fit; or
> (c) cancel the notice."

8. Under s46 as it then stood the appeal was to the Full Session of the Employee Relations Commission. The appeal first came on before the Commission in Full Session on 14 February 1995. The hearing was adjourned to 7 March 1995. Then, on 11 March 1995 another inspector issued to Delmina two prohibition notices under s44 of the Act. Delmina appealed against the prohibition notices under s46 and those appeals were thereafter heard with the appeal against the improvement notice. There was a further hearing before the Commission on 8 August 1995 at which outlines of argument and documents were filed. The proceedings were continued before the Commission in Full Session on 10 days in September and October 1995, although from what I was told they were not all full days of hearing. A transcript of the proceedings is exhibited to an affidavit in the appeal before me but neither counsel judged it necessary to take me to the transcript and accordingly I was neither given it nor have I perused it. A number of documents were tendered during the hearing before the Commission. From their description they include reports of horse riding incidents involving admissions to the Stawell District Hospital, a letter from a doctor to the Department of Conservation and Environment, background information concerning Australian Horse Riding Centres, certain Coroners findings dated 16 May 1983, photographs of horse riding equipment and, in addition, a helmet seized at Delmina's property on 20 December 1994. At the completion of the hearing written submissions were filed on behalf of the parties. From what I am told the final written submission was delivered in November 1995.

9. Before a decision was given, the Commission ceased to exist due to the operation of the *Commonwealth Powers (Industrial Relations) Act* 1996 by which the Industrial Division of the Magistrates' Court was substituted for the Full Session of the Employee Relations Commission as

the body to whom an appeal under s46 of the Act was to be brought and determined. Pursuant to that Act the appeal before the Commission was taken over by the Industrial Division of the Magistrates' Court. The parties agreed that a Magistrate in that Division determine the appeals by reading the evidence placed before the Commission and considering the parties submissions.

10. On 17 February 1998 the appeals came on before the Magistrate from whose decision this appeal is now brought. On 14 April 1998 the Magistrate gave his decision on the appeal against the prohibition notices. He ordered that they be cancelled. No appeal was taken from that decision.

11. There was a further hearing before the Magistrate on 6 May 1998. On 13 August 1998 the Magistrate delivered his decision on the appeal against the improvement notice. He decided that the improvement notice should be cancelled. He granted liberty to apply on the question of costs. On 13 November 1998 he ordered that the Victorian WorkCover Authority ("the Authority") pay Delmina's costs in the sum of $7,172.00 with a stay on payment of one month. The connection of the Authority with the case is that it is Whittaker's employer and, as the body having responsibility under the Act (s8) it is empowered to, and in Whittaker's case did, appoint any officer or employee of the Authority to be an inspector for the purposes of the Act (s 38(1)). It is understandable that the order for costs was made against the Authority. The certified extracts of the orders of the Magistrates' Court record the Authority as the defendant to the appeal. However, it was Whittaker as an inspector who issued the improvement notice and he is the appellant in the appeal before me. Neither counsel before me raised any point as to whether the proper appellant was Whittaker or the Authority, let alone suggested that anything turned on the difference. I assume that Whittaker is the proper appellant before me.

12. The parties conducted the appeal before me with commendable efficiency. I have mentioned that they did not ask me to consider the transcript. Further, they gave me for my consideration in determining the appeal only some of the exhibits, viz: HBG 1, 24 & 25 and DKM 2 & 28. In addition I was provided with an extract of the costs order and written submissions and supporting materials. I now turn to the Magistrate's decision.

13. It is convenient to summarise the Magistrate's reasons for his decision. After referring to ss22, 43(1) & 47 he stated that on the appeal Whittaker bore the onus of establishing that there was a proper basis for the issue of the notice; that was accepted as a correct statement both before the Magistrate and me. He then said that that necessarily involved consideration whether the evidence established a breach of s22. The Magistrate then considered the standard of proof that was required on the appeal in relation to the allegation of a breach of the legislation. By reference to decisions in cases dealing with the exception to legal professional privilege where the legal advice is sought in furtherance of a crime or fraud the Magistrate concluded that Whittaker "must produce evidence sufficient to satisfy the Court that there is a prima facie case of contravention of a provision of the Act". I will return to this matter later.

14. The Magistrate then referred to the facts, as follows:

> "For the purpose of this decision the facts are not greatly in dispute and may be summarised briefly as a transcript of the evidence is available. The appellant runs a horse riding business at Halls Gap where it owns a property of several hectares. Members of the public are invited to hire horses and ride them from the property an [sic] upon public land. If a group attends Stewart Riddiford (a Director) will choose a person he considers suitable as a leader of the group. In making such a choice he relies upon his own observation of the persons horse riding ability and what he has been told. That assessment is conducted over a period of 5 minutes. Once the riders leave the property no supervision by the appellant is provided. Witnesses gave evidence of serious accidents and of two deaths; of numerous incidents involving injuries requiring treatment at the Stawell Hospital and incidents of horses becoming uncontrollable. There was a substantial body of evidence which indicated that proper supervision during horse riding reduced or minimised the risk of injury to riders and can be achieved by employing properly qualified personnel."

15. Having thus stated the facts the Magistrate turned to the question whether, as a matter of law, there was a *prima facie* case of a breach of s22. He noted a submission of Delmina that s22 "does not extend beyond the workplace" and he referred to the definition of "workplace" in s4 of the Act. The Magistrate then said that, as he understood it, "it is conceded that once outside the gate of the property of the appellant horse riders are beyond the workplace". He must have been

referring to a concession which he understood to have been made by or on behalf of Whittaker. It was common ground before me that no such concession had been made. I accept that the Magistrate was in error in this respect.

16. The Magistrate then dealt with Delmina's submission that s22 did not extend beyond the workplace. In support Delmina relied on a ruling which had been given by his Honour Judge Ross in the County Court on 3 December 1997 in *R v AAA Auscarts Imports Pty Ltd.* That case concerned two charges under s22 of the Act arising from an accident which had befallen a person while using a go-kart hire car at a facility conducted by the defendant. His Honour found, on a no-case submission, that the section was not applicable. It was submitted to the Magistrate that Judge Ross had held that s22 "only applies to regulate behaviour at the workplace". The Magistrate said that that conclusion was *obiter* because the essential point of the ruling of Judge Ross was a conclusion that in the circumstances the *Lifts and Cranes Act* 1967 and not s22 was the applicable source of criminal liability. Yet, as the Magistrate put it, in the course of his reasons Judge Ross had stated "in strong terms … that the purpose or object of the Act is to regulate behaviour at the workplace". It is apparent from what the Magistrate said that he was not completely at ease with this conclusion for, as he noted, and as Judge Ross too had noted, s22 on the plain and natural meaning of its language extended to situations beyond a workplace. The Magistrate said that he would have been inclined to adopt "the literal approach to an interpretation of s22" but he concluded that "for the sake of consistency and certainty" he should follow the opinion of Judge Ross that s22 applied to behaviour at the workplace only. The Magistrate also said that he was "to some degree comforted" in this conclusion by a passage in an earlier ruling of his Honour Judge Stott in *R v The Mayor Councillors and Citizens of the City of Dandenong and Bailey*. The Magistrate stated that having come to that conclusion it was obvious that Whittaker could not have a charge under s22 sustained in relation to riding activities away from the workplace. For completeness the Magistrate referred to *Top of the Cross Pty Ltd v Federal Commissioner of Taxation* (1980) 50 FLR 19; 11 ATR 366 as to the meaning of the word "undertaking" in s22 and in that respect said that he adopted the meaning which Judge Stott had attributed to the word in his ruling in which he said that "undertaking" meant a "business or enterprise". He then concluded his reasons by saying:

> "I also consider the evidence sufficient to establish a *prima facie* case that the appellant did not ensure, so far as is practicable, that persons riding horses hired from the appellant were not exposed to risks to their health or safety."

17. I should say something about the conclusion of the Magistrate that he should follow the opinion of Judge Ross for the sake of consistency and certainty. Although the County Court is above the Magistrates' Court in the hierarchy of courts in this State, a Magistrate is not bound by a decision of a judge of the County Court. Indeed the Magistrate in this case acknowledged that fact. Nevertheless it is proper for a Magistrate to have a decision of the County Court drawn to his attention and to consider it. In *Valentine v Eid* (1992) 27 NSWLR 615; (1992) 15 MVR 541 Grove J considered the position as between the Local Court and the District Court in New South Wales, and at 622 stated that for reasons of comity it is proper that a magistrate not depart from decision of the District Court unless after earnest consideration and for good reason he or she became convinced that the decision was wrong.

18. I agree with that expression of view in relation to the Magistrates' Court and the County Court. Stripped to its essentials it means, in my view, that if a Magistrate, after appropriate consideration, concludes that a decision of a County Court judge is wrong because it is based on erroneous reasoning he or she should not follow the decision. It is important to remember that judges of the County Court have a heavy workload which inevitably places an emphasis on expedition and turnover of the many cases before it with limited scope to reserve a matter for judgment and adequate time for reflection and consideration in formulating reasons for decision. Further, many decisions are given by the judges in the County Court and if a party is to rely on a decision of a judge of the County Court in a hearing in the Magistrates' Court, care will be required to ensure that other, and perhaps conflicting, decisions are provided. Indeed, in this case, if the decision of Judge Ross was to be referred to, the decision of her Honour Judge Harbison to which I refer below, which was given only 13 days later, should have been given to the Magistrate. It is obvious that it was not. It indicated the contrary, and in my view, correct interpretation of s22 and may well have inclined the Magistrate to conclude that Judge Ross had erred in his reasoning.

19. I now turn to the questions of law. I can deal at once with question (c). Counsel for the appellant (Whittaker) explained this question as being concerned with the statement of the Magistrate as to a concession having been made that once outside the gate of Delmina's property horse riders were beyond the workplace. As I have already mentioned no such concession was given. Nothing turns on this because the Magistrate did not base his decision upon the supposed concession.

20. Question (a) raises for consideration the correctness of the holding that s22 applied only in relation to behaviour at the workplace. Question (b) may be taken with question (a) because in concluding as he did the Magistrate necessarily concluded that the "risks" contemplated by s22 were confined to risks at the workplace. In other words, the Magistrate held that exposure to any risk outside the workplace was irrelevant. On this basis it was not necessary for the Magistrate to separately consider the meaning and operation of the expression "exposed to risks".

21. Before me counsel for Whittaker submitted that the meaning of the expression "conduct of the undertaking" in s22 is not limited in its application to behaviour at the "workplace". It was submitted that the reasoning of the Magistrate and, in turn, Judge Ross, (on whom the Magistrate relied) was wrong. It was also submitted that the operation of s22 is not confined to situations in which the *Equipment (Public Safety) Act* 1994 or any other penal legislation is inapplicable. The reason for that submission being made is that the *Equipment (Public Safety) Act* 1994 has taken over the area of the *Lifts and Cranes Act* 1967 which Judge Ross concluded applied in the circumstances of the case before him to the exclusion of s22. His Honour felt able to discern a legislative intention or scheme to that effect. No such issue arises before me. Nor, to be more specific, does the case before me raise the issue which Judge Ross had to consider, namely, whether the operation of s22 was precluded by another statutory provision. Accordingly, it is neither necessary to do so and nor will I consider the correctness of the conclusion reached by Judge Ross or the appellant's submission that the operation of s22 is limited to situations in which the *Equipment (Public Safety) Act* 1994 or any other penal legislation is inapplicable.

22. I do not overlook what Judge Ross said in his ruling as to the area of operation of s22. I have some sympathy with the view of the Magistrate that in truth the ruling was based on the holding that in the circumstances before him Judge Ross discerned a legislative intention or scheme that the *Lifts and Cranes Act* 1967 and not s22 was the source of any criminal sanction. So regarded it may be said, as the Magistrate said, that the comments of Judge Ross as to s22 only regulating conduct at the workplace were *obiter*. The difficulty in so regarding his Honours remarks concerning the application of s22 is that they underlay his reasoning and he referred to them in his concluding remarks. Whether or not his Honour's remarks were an essential part of his reasoning does not matter for present purposes because they were part of the ruling upon which the Magistrate based his conclusion and they bear upon the question of law I have to decide concerning the interpretation of s22.

23. Accordingly, I have regard to Judge Ross's reasoning. In the course of his reasons he referred to the Act, to s35 of the *Interpretation of Legislation Act* 1984, to the Minister's second reading speech on the Act when it was a Bill, and stated that he had no doubt that the purpose or underlying object of the Act was the regulation of safety in the workplace, and that the Act was an attempt to codify the respective rights and duties of employer and employee in the workplace. He recognised that "persons" in s22 were not employers or employees and that "on a literal interpretation [s22] does not purport to restrict the liability of employers to accidents occurring at the workplace". It is evident that his Honour was troubled by the reach of the section on its literal meaning. He referred to his view that the purpose and underlying object of the Act was concerned with the health, safety and protection of persons at work, and stated that in his view "there must be some limitation placed on the operation of s22, insofar as it relates to members of the public other than employees". His Honour said that there was no warrant, from reading the legislation, to hold that Parliament intended to introduce a completely new field of criminal liability for employers. He said that the natural meaning of the language in s22, which the prosecution in the case before him contended was its true meaning, "could potentially attach liability to every incident involving injury to members of the public where such injury could be said to arise from the conduct of the employer's undertaking". This, he said, would spread the risk of prosecution "way beyond the workplace".

24. Not only did such an application of s22 trouble his Honour, he was troubled by the section applying to "all accidents occurring on business premises where negligence of the type contemplated by s22 was established", as he put it. His Honour said that there "is no indication that the legislation was meant to cover such incidents and there would be many other situations where injury occurs during the conduct of an employer's undertaking, which could not sensibly attract liability under this section". His Honour said that he entertained "no doubt that this type of liability was not the intention of Parliament", and that the parliamentary debates suggested it was not intended that s22 so apply. It is notable that his Honour did not essay an opinion as to the area of operation which he apprehended s22 to have. It is also significant that in discussing the section he referred to accidents and injury, that is to the actual occurrence of an incident causing injury. He used language that was appropriate to a civil case in negligence in which damages are sought for injury and loss arising from an actual incident. Perhaps his Honour was merely testing the operation of s22. But the fundamental fact is, as I discuss below, that s22 is concerned with the existence and eradication of potential risks and in aid of the preventive aim imposes a criminal penalty.

25. At this point his Honour turned to a submission that other legislation, and not s22, applied in the circumstances of the case before him which involved amusement equipment. He concluded that the *Lifts and Cranes Act* 1967 applied by definition to the subject go-kart equipment and provided a criminal sanction on the operator of the equipment which for all practical purposes was expressed in identical terms to s22 of the Act. He then concluded that the literal meaning of s22 was inconsistent with the purpose or object of the Act as he had stated it to be, namely "to regulate behaviour at the workplace". Section 35 (a) of the *Interpretation of Legislation Act* 1984 required a construction that would promote that purpose. Having so concluded his Honour held that s22 was not applicable "because of the existence of the legislative scheme of the *Lifts and Cranes Act* 1967".

26. It has been convenient to refer to Judge Ross's ruling at this point because it arose so directly in the submission of counsel for the appellant before me. Proceeding on, counsel submitted that the "conduct of the undertaking" is not limited to the "workplace". He submitted that in the present case the "conduct of the undertaking" covered the operation being conducted in association with the Ranch and thus extended to include the property used in connection with the operation such as the equipment and horses and the riding track being used as part of Delmina's business. It was submitted that there is a distinction between "workplace" and "conduct of the undertaking", in which respect it is seen that s31(2)(a)(i) refers to both and in doing so distinguishes between them. Reference was also made in this respect to s36 and to ss43 & 44 the latter of which (s44) expressly confines the power to issue a prohibition notice to activity "at any workplace" whereas the former (s43) does not and does not refer to the "undertaking" or its conduct.

27. I turn then to the submissions of Delmina's counsel. He submitted that the word "undertaking" is merely a convenient term to describe what the Act otherwise calls the "workplace" and that it is inapt to use the word "workplace" in s22 because the persons to whom the duty is owed are members of the public. On this basis the word "undertaking" is to be read as meaning the business conducted at the workplace or the physical operation of the business.

28. The submission that "undertaking" and "workplace" were to be equated sought support in other provisions of the Act including in particular the statement of objects in s6 and the terms of ss21 & 23-26 relating to the health and safety of persons at a workplace. He submitted that this construction of the word "undertaking" would make s22 harmonious with the rest of the Act because it would restrict the application of s22 to business or the physical operation thereof conducted at the workplace. This interpretation would, counsel submitted, promote the objects of the Act stated in s6 and as otherwise manifested in the Act.

29. Counsel submitted that the alternative, or literal, interpretation of s22 would provide protection for the public against risks beyond the workplace. If, he asked, the legislature had so intended, why were the duties imposed by other sections limited to the workplace? Further, he said, if the legislature had intended a provision that encompassed all commercial activity it could have omitted the reference to employers and self-employed persons and instead imposed the obligation on all persons involved in any commercial undertaking which exposed the public to risk.

30. To this point it may be thought that counsel for Delmina was supporting the conclusion of the Magistrate that s22 did not apply beyond the workplace. But counsel did not do so. He said that the Magistrate had erred in his reasoning. He did not support the submission that had been made to the Magistrate on behalf of his client.

31. The difficulty caused by the Magistrate's reasoning and which Delmina's counsel sought to meet, was that something done or omitted to be done in the conduct of a business at a workplace could expose persons to a risk to their health or safety beyond the workplace. He conceded that the "exposure to risk" should not be confined to exposure at or within the workplace. He gave as a "classic example" a brick dropping from a building site onto a pedestrian on a public way beyond the workplace. Another example was the escape of gas. "It might originate in the workplace but the exposure to risk goes beyond that", counsel for Delmina said. He also gave as an example of what would be caught by s22: the hire of a chainsaw which because it had not been properly maintained carried risk of injury to the hirer in use. In that situation the hiring occurs at the business premises, but the risk which the hirer is exposed to will exist in use away from those premises. In fact, a very similar case *Martin & Co (Aust) Pty Ltd v Parry-Jones* involving the hire of a defective sander resulted in a plea of guilty to a charge under s22 in which her Honour Judge Harbison gave reasons for judgment on penalty on 16 December 1997.

32. At this point the submissions of counsel for Delmina have driven a coach and four through the reasoning of the Magistrate. But counsel was still left with a problem: how to distinguish the present case from the above examples. He readily conceded that if a supervisor went out on a ride with persons who had hired horses, the concept of "undertaking" or "workplace" would be applicable. It would travel on the ride, so to speak, because the presence of the supervisor meant that an employee was at work in Delmina's business. Apparently that was the case with school groups who booked in advance but not in the ordinary case of a hiring.

33. Counsel then submitted that there was a distinction, which he relied on in this case, between a risk that occurs in or by reason of the physical operation of a business and a case such as the present which, counsel submitted, was merely one of hiring horses. He said that the Ranch is not a riding school, that people hire a horse and go out under their own devices on a defined and clearly selected trail that was free of physical hazard. He said there is no element of control once persons are out riding and that people hired horses "knowing them to be dangerous". He said that "there were signs everywhere to that effect, knowing that there was risk". He said that hirers entered into a "Contract to Hire a Horse" which contained a disclaimer and a warning that horse riding involved some risk. He then submitted that what happened when they take the horses away from the place which the employer controls is not caught by s22 because it has nothing to do with the physical operation of the business. Counsel submitted that the decision of the Magistrate to cancel the improvement notice could be supported on this basis. In other words, while the actual reasoning of the Magistrate could not be supported, there existed a different process of reasoning which in conjunction with the facts produced the same result. I was invited to accept this alternative interpretation of s22, to apply the facts as counsel stated them to be to the section as so construed and on that basis to conclude that the ultimate conclusion that the improvement notice be cancelled, was correct.

34. It would be wrong to take that course for several reasons. First, it invited me to consider the facts and form conclusions thereon. Yet I was not given the transcript and therefore I am not in a position to do what counsel invited me to do. Anyway, in the first instance it is the function of the Magistrate to consider the relevant facts in light of the submissions addressed to him. Secondly, the Magistrate has stated that there is a substantial body of evidence which indicated that proper supervision during horse riding reduced or minimised the risk of injury to riders, and he found, although, *obiter*, that the evidence established a prima facie case of a breach of s22. This is a further reason why the matter must be remitted to the Magistrate for further consideration. I was invited to in effect second guess this *obiter* conclusion of the Magistrate and to do so without viewing the transcript. That would be quite wrong. Thirdly, it is obvious that Delmina's now submission as to the proper interpretation and application of s22 to the facts in this case was not put to the Magistrate. This can be done on the remitter of the proceeding. In all these circumstances it would be wrong for me to now uphold the Magistrate's order on the basis of Delmina's submission. I should say that although I will remit the proceeding to the Magistrates' Court, that remitter does not reflect upon the factual finding mentioned above. The Magistrate

dealing with the matter will have to consider the facts in light of the interpretation of s22 which I indicate below.

35. I turn then to the proper interpretation of s22. I am clearly of the view, as were counsel before me, that the Magistrate adopted an erroneous construction of s22. To be fair to the Magistrate, he was not attracted to the construction but he felt he should follow and apply the view of Judge Ross.

36. The first task is to read the section and see what it says. First, it protects persons who are not employees of the employer or self-employed person. That is, it is designed to prevent harm to members of the public. Secondly, so far as is practicable the employer or self-employed person is to ensure that the public are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer or self-employed person.

37. It was a policy question for Parliament whether the exposure to risk be confined to exposure at the place of conduct of the undertaking or, if it means something different, at a workplace of the employer or self-employed person. In New South Wales such a limitation was expressed in the equivalent legislation by stating that the duty only applied while persons were at the place of work; see *Occupational Health & Safety Law in Victoria*, 2nd ed., para 554. In Victoria, by contrast, no such limitation was included in s22. Yet that is the limitation which Judge Ross and the Magistrate have read into the section.

38. I have read the second reading speech of the Minister on the Act when it was a Bill. The speech does not refer expressly to s22. It concentrates on the work related injury aspect, which is not surprising having regard to the overall provisions of the Act (or Bill as it then was). In the course of his background remarks the Minister referred to the increased range of potentially hazardous materials and situations in the workplace and the difficulty in identifying long-term harmful effects. He referred to a need for considerable reform of the current mechanisms for collecting information, researching effects and implementing appropriate regulations and safeguards and said that the Bill sought to achieve such consolidation, reform and development. He also said that the present legislation did not impose adequate duties on those responsible for the workplace or the articles and substances used in it. Nor, he said, did it provide for adequate penalties for breaches of health and safety standards. He concluded his remarks in this section by referring to recent reforms in Canada and the United Kingdom and said that the Bill sought to draw "upon the appropriate elements of those reforms elsewhere. It includes provisions which meet our own particular needs". He also referred in his speech to the Bill having a preventive aim, that is it sought to introduce processes aimed at preventing harm to persons. This aim is apparent in the Act, including s22.

39. It is instructive to consider the relevant United Kingdom legislation to which the Minister referred when he mentioned reforms. It is the *Health and Safety at Work etc Act* 1974, a perusal of which makes it obvious that it was a significant inspiration for the Victorian Act. One finds the like provision to s22 in s3(1) which provides that:

> "It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety."

Sub-section (2) applied the same duty to self-employed persons. The Victorian draftsman combined the two provisions into the one section. It is to this reform, among the others in the United Kingdom legislation, that the Minister must be taken to have been referring in his speech on the Bill.

40. It appears that neither the Magistrate nor Judge Ross was referred to the United Kingdom legislation, or given an understanding of the reforms that the Minister was referring to in his speech. Nor, it appears clear, did they have brought to their attention the decision of the English Court of Appeal on the interpretation of s3(1) of the United Kingdom Act in *R v Board of Trustees of the Science Museum* [1993] 3 All ER 853; [1993] 1 WLR 1171; [1993] ICR 876.

41. In that case the board of trustees had been convicted on a charge of failing to discharge the duty imposed upon them by s3(1). By s33(1) of that Act it was an offence for a person to fail

to discharge a duty to which he is subject under s3(1). The charge arose from the presence in the air cooling towers at the Science Museum of a bacterium which causes legionnaires disease. At 855 (WLR 1173- 1174) Steyn LJ who gave the judgment for the Court said that:

> "The predominant route of infection is by inhalation. ... Contamination of water systems by [the bacterium] only becomes dangerous to man when the conditions create an opportunity for the organisms to multiply and then to become airborne in the form of an aerosol."

His Lordship continued by pointing out that the focus of the prosecution case was not a risk to the health and safety of employees of the Science Museum. The prosecution allegation was that by reason of the trustees inadequate system of maintenance, treatment and monitoring, members of the public outside the Science Museum were exposed to risks to their health from the bacterium. It was common ground that persons within a cordon of 500 yards of the escape of the bacterium from the cooling tower could be exposed to risks to their health and safety.

42. On the appeal the trustees argued that the expression "thereby exposed to risks to their health and safety" meant a real risk and not merely a potential risk. Steyn LJ said it seemed "right to consider the interpretation of s3(1) against the spectrum of risks against which the statutory provision is intended to provide protection" (All ER at 857-858; WLR at 1176). He then referred to and quoted from the report by the Robens Committee of 1972 on *Safety & Health at Work*. This spoke of the need to protect the public, as well as workers, from the very large-scale hazards which sometimes accompany modern industrial operations, and instanced the storage and use of dangerous substances in situations where any failure of control could create situations of disaster-potential. The report further stated that situations of considerable potential risk to the public can be created in a variety of ways and circumstances and that the area of risk may be fairly limited, or may extend to a whole neighbourhood. The report recommended a new range of powers and, relevantly, Steyn LJ referred to certain sections as to enforcement which are seen or reflected in the Victorian Act – the powers given to inspectors, including the power to issue improvement and prohibition notices, a failure to comply with such a notice being an offence. Steyn LJ observed that it was "clear that the broad purpose of this part of the legislation was preventive", that s3 must, therefore, not be read in isolation, and that the powers in ss20-22 of the United Kingdom Act (see ss 39, 40, 43 & 44 in the Victorian Act) are an important contextual aid to the construction of s3(1).

43. Steyn LJ then turned to the interpretation of the word "risk". He noted that the starting point must be the ordinary language of s3(1). He concluded that consistently with that meaning the prosecution was required to establish only that there was a risk that the bacterium might emerge not that it had in fact emerged and was available to be inhaled. In other words, the legislation is concerned with exposure to a risk, and not with actual danger let alone the actual incurring of injury or damage to health. There was, he said (at All ER 859; WLR 1177) nothing in the language of s3 or in the context of the Act which supported a narrowing down of the ordinary meaning. On the contrary, he said, the preventive aim of ss 3 & 20-22 reinforced this construction. He said that the interpretation which rendered the statutory provisions effective in their role of protecting public health is to be preferred. He then went on to deal with an argument based on the word "exposed" and said that that word "simply makes clear that the section is concerned with persons potentially affected by the risk". The word did not change the meaning of "risk" from the possibility of danger to actual danger.

44. Steyn LJ concluded on this aspect of interpretation by dealing with an argument that the interpretation he had held correct may mean that, subject to the defence of practicability, all cooling towers in urban areas are prima facie within the scope of the prohibition in s3(1). His Lordship said:

> "On the evidence led in the present case that may be correct. Almost certainly such a result would be true of a number of extra-hazardous industrial activities. Subject only to the defence of reasonable practicability s3(1) is intended to be an absolute prohibition. Bearing in mind the imperative of protecting public health and safety so far as it is reasonably practicable to do so, the result can be faced with equanimity."(All ER 859; WLR at 1178).

45. I have referred to the judgment of Steyn LJ at some length because, notwithstanding some textual and other differences in the United Kingdom Act I regard his Lordship's reasoning

as applicable to the interpretation of s22 of the Victorian Act. In my view the expression "exposed to risks" in s22 means exposure to a potential risk and whether or not persons so exposed are at the location of the relevant undertaking.

46. Further, reference to the judgment in the *Board of Trustees case* and the Robens Committee report serves to explain, indeed to give content to, some of the remarks of the Minister in his second reading speech as to reforms overseas and the path the Victorian legislation was seeking to tread. In my view there is nothing in the speech which states, expressly or by implication, that s22 is to be interpreted as restricted to risks at the workplace in relation to the health and safety of persons while at the workplace. Nor do I find any such implication in the Act read as a whole. Nor as I say did counsel before me contend for such an interpretation. In my view the implication of such a restriction would cut across, and significantly negate, the obviously preventive aim of s22 and the other provisions concerned with the powers of inspectors. For my part I see nothing in s22 or the Act read as a whole to indicate that s22 is not to be interpreted according to the ordinary and natural meaning of its words.

47. There was some debate before the Magistrate and me as to the interpretation of the word "undertaking". The word is not defined in the Act. The expression is broad in its meaning. In my view such a broad expression has been used deliberately to ensure that the section is effective to impose the duty it states. It may have been thought that the word "workplace" had a narrower meaning. For instance, would the word "workplace" as defined include a storage area where employees do not regularly work? Perhaps the word "undertaking" was used because it is used in s3 of the United Kingdom legislation. There too it is not defined. The word must take its meaning from the context in which it is used. In my view it means the business or enterprise of the employer, as the Magistrate thought, and the word "conduct" refers to the activity or what is done in the course of carrying on the business or enterprise. A business or enterprise, including for example that conducted by a municipal corporation, may be seen to be conducting its operation, performing work or providing services at one or more places, permanent or temporary and whether or not possessing a defined physical boundary. The circumstances must be as infinite as they may be variable. Although such a place may, and often will be, a workplace as defined it seems to me that the legislature has chosen not to use that word and, rather, to use an expression of breadth and possibly of wider application. I am of the view that this was deliberate to ensure the duty applied as it was intended and that the word "undertaking" should not be read as synonymous with "workplace". It is neither helpful nor necessary to do so. The meaning of the word "undertaking" was considered in a different context in the *Top of the Cross Pty Ltd case*, to which I referred earlier.

48. In summary, the Magistrate fell into error in interpreting s22 as being confined to the workplace. Section 22 applies to potential risks to health or safety that arise from the conduct of an undertaking even if those risks may be present or operate outside the place at which the undertaking is conducted.

49. In this case the risk arose, or it was Whittaker's opinion that it arose, from hiring out horses without accompanying supervision. It seemed to be the view that the risk of injury to which a rider was exposed was one which would only occur while a rider was out on a ride away from Delmina's property and not within the property. It is a question of fact whether the risk did not exist within the property, that is from the commencement of the ride to the return of the horses at the Ranch. For the reasons I have given the Magistrate erred in concluding that because the risk to health or safety was one which could become an actual risk or danger away from (and not within) the property or Delmina it was beyond the reach of s22. It is important not to overlook that the risk in question is a potential risk that is created at one point, namely at the place where the undertaking is conducted, and which is a risk at another point or in another area. The distinction is between the act or omission in the conduct of the undertaking which gives rise to a potential risk and, on the other hand, the locality at which the risk is present and may materialise as an actual risk or event. As the Board of Trustees case shows, it is not necessary that the risk become an actual risk, that is, that actual injury or defect to health ensue. It is sufficient if a risk is created within the meaning of the section. That is because s22 is concerned to prevent the creation of harmful circumstances, in the interest of public health and safety.

50. In the present case Whittaker complains of the risk to which persons may be exposed by

reason of riding horses hired from Delmina without accompanying supervision. The decision as to that, and the hiring of horses on the basis that there will be no supervision, and the terms of hire, was made and imposed by Delmina in the conduct of its undertaking at its premises. In other words, the risk arose at the point of the hiring and, plainly enough, in the conduct of the undertaking. It is for the Magistrate to determine whether there is a risk within the meaning of s22, taking account, of course, of all of the elements of the section.

51. For these reasons questions (a) and (b) must be answered yes. For the reason I have mentioned question (c) does not arise. In this situation it was common ground that the matter should be remitted to the Magistrates' Court, and I will so order, along with an order setting aside the cancellation of the improvement notice and the order for costs.

52. Counsel for Delmina raised some further points as grounds on which the decision to cancel the improvement notice could be upheld. I mention them briefly. They were set out in counsel's written submission but barely mentioned in argument. The first point is that the improvement notice amounted to a prohibition of the activity and not regulation and was thus bad on the principle expressed by Dixon J in *The Shire President, Councillors and Ratepayers of the Shire of Swan Hill v Bradbury* [1937] HCA 15; (1937) 56 CLR 746 at 762; [1937] ALR 194. There the principle related to the validity of a by-law made under a power to regulate and the distinction was drawn between prohibition and regulation. The difficulty confronting the submission in this case is that the power of an inspector to give directions under s45 extends to a direction to remedy the contravention, likely contravention, risk, matters or activities concerned. If a direction given under s45 the purpose of terminating the arising of a risk to public health and safety, and compliance with that direction has the effect that an employer must cease to carry on the undertaking which produces the risk, what is wrong with that? The purpose of giving an inspector these powers is to attack a risk to the health and safety of the public at its source. For this purpose inspectors are able to give directions designed to stop a contravention of the Act and remedy matters. If the employer cannot remedy a contravention without ceasing to conduct the activity which gives rise to the risk, then so be it subject of course to the right of appeal. The submission fails for want of proper analysis. It is a simple enough principle that a power to regulate does not carry the power to prohibit. But the power to issue an improvement notice is by definition a power to require that the thing that creates the risk cease to operate or exist. If a consequence of requiring that cesser is that an undertaking cease then that is the consequence of the exercise of the power granted. This is not to say that an inspector is at large, and in addition to the requirements of the Act and the right of appeal conferred by s46 the act of an inspector in issuing an improvement notice may be open to review on other well known grounds. In this case, Delmina exercised its right of appeal and the appeal will return to the Magistrates' Court for determination.

53. The next point raised was that the evidence did not disclose a breach of s22, in particular because the Magistrate could not have been satisfied that Delmina had failed the "so far as is practicable" element. The difficulty for Delmina here is twofold. The Magistrate has already stated, *obiter*, that Delmina had not satisfied that element. Further, counsel did not take me to the evidence. I therefore am unable to consider the point. For these reasons the point fails.

54. The next points were concerned with issues of fact which for reasons already mentioned I do not venture upon.

55. I conclude with a few words on the matter of the standard of proof which Whittaker was required to meet on the appeal. I mentioned earlier that the Magistrate concluded that Whittaker had to establish a prima facie case of contravention of s22 and the reasoning on which he based that conclusion.

56. An inspector giving a notice under s43 relying upon a contravention of s22 must be satisfied that in the circumstances there is a risk within the meaning of that section which warrants the issue of the notice including any requirements under s45(1). On an appeal under s46 the Magistrates' Court is required to consider the matter and be satisfied as to the risk and the contravention of s22. In doing so the Magistrates' Court is in the same position as the inspector and must be satisfied just as the inspector had to be satisfied. There can be no different standard or level of satisfaction between them. If it is not so satisfied it may modify the notice as it thinks fit or cancel it.

57. Before the Magistrate and to an extent before me there were submissions which seemed to be to the effect that while an inspector's opinion could be reached upon a prima facie standard of satisfaction, on an appeal the standard was the balance of probabilities. This issue was not raised by a question of law on the appeal before me but I mention it because it was raised in submissions before the Magistrate and mentioned although not developed before me. The reasoning of the Magistrate which I mentioned earlier which led him to the conclusion that Whittaker had to produce evidence to satisfy the Court that there was a prima facie contravention of s22 indicates that he considered, correctly in my view, that the same standard of satisfaction applied to an inspector and the Court on appeal. Yet I am also of the view that the actual process of reasoning was erroneous. The answer to the question which the Magistrate considered is to be found in a consideration of relevant provisions of the Act itself. It is pertinent to note that this Act, and the step of issuing an improvement notice, is somewhat different from the act of the secretary of the Law Institute of Victoria who in forming an opinion as to misconduct under s38Q(5) of the *Legal Profession Practice Act* 1958 was held in *Cornall v AB* [1995] VICSC 7; [1995] VicRp 25; [1995] 1 VR 372, to only have to reach a prima facie degree of satisfaction. In that case the forming of the opinion was merely a step which led to a hearing in which the merits would be considered. Here, under the Act, a notice is complete in itself, subject only to an appeal, and failure to comply with the notice is an indictable offence.

58. Because the matter is not raised by a question of law before me and was not developed in argument before me I do no more than make these observations trusting that they may be of benefit on the resumed hearing in the Magistrates' Court. The parties may of course address such submissions on the point as they may be advised. Whether or not one says that the balance of probabilities is the standard of satisfaction that an inspector and a Magistrate on appeal must have, and there seems to be merit in this view, it is clear that what is required is that one be satisfied, having regard to all the relevant circumstances, that there exists an exposure to risk to health or safety within the meaning of s22, that is, that the section is contravened.

59. In a narrow or strict sense it may be that Judge Ross decided only that in the particular circumstances of the case before him the legislative scheme was that the *Lifts and Cranes Act* 1967, and not s22, was the source of any criminal sanction. So regarded it may be said, as the Magistrate did say, that Judge Ross' comments as to the Act only regulating conduct at a workplace were *obiter* indeed. Some support for that may be found in the fact that his Honour did not even consider whether the subject incident occurred at a workplace. Indeed it is difficult to know what application his Honour imagined that s22 might have. The difficulty with regarding the remarks of his Honour as to the purpose or object of the Act and the application of s22 is that they underlay his reasoning and he referred to them expressly in his concluding remarks that the Act was not intended to apply to the subject activities.

60. In the present case it is not suggested that the Act and s22 in particular is not applicable by reason of any other legislation. The question is whether on its proper construction s22 could operate in the circumstances that were before the Magistrate and which he described in his reasons.

61. Judge Stott gave his ruling on certain submissions that were made after arraignment but before empanelment of a jury. The case concerned one charge under s24 of the *Crimes Act*, two under s21 and two under s22 of the Act. The submission which his Honour ruled upon did not go to the point of construction and application in this case and the case did not consider the facts such as those in the present case. In the case before him the accident occurred at a workplace. His Honour did however refer briefly to the meaning of the expression "undertaking of the employer" and to the concept of workplace. As to the latter his Honour observes that a workplace may be temporary and he gave the example of employees of a municipal corporation working in a street in which circumstances "the street" (meaning, I think, the locality of the work) may constitute a workplace and also represent an undertaking being conducted by the employer.

As his Honour also observed, the legislation contemplated members of the public might attend at the place where the undertaking is conducted and sought to protect them from risk to their health and safety. The point that his Honour was making, and of which he was plainly correct, is that an employer's undertaking may be conducted at permanent or temporary locations. In that case it was the conduct by a municipal corporation of a recreation centre which included a

swimming pool. Thus the Act could not be limited to workplaces or undertakings such as factories or industrial activities.

62. Before me counsel for Delmina submitted, perhaps conceded is the better word, that the operation of s22 could not be confined to a workplace. Counsel himself gave the simple example of a brick dropping from a building site onto a passer by on a public way. What the concession amounts to is that the conduct at one point (a workplace) may result in a risk to health and safety if not actual injury at another point (beyond the workplace). In my view this submission or concession of counsel is so plainly correct that it is beyond argument.

63. What the Magistrate decided was that s22 had no application outside the workplace, that relevant riding activity did not occur in the workplace and therefore s22 was not applicable to such activity. As I have said, counsel for Delmina conceded that "workplace" need not be confined to the boundary of physical premises but was to be found where an employee was working. Thus, he submitted, if Delmina provided a supervisor who went out on a ride, the "workplace" went with that person or on that ride, so to speak. But that is not this case.

64. It is immediately seen that s22 does not use the word "workplace", whereas the word is used in numerous sections in the act including ss21 and 23 to 26, the group of sections in which s22 is to be found.

65. It is sufficient to say of the use of the word "workplace" in those sections that by reason of the definition in s4, if not common-sense, that workplace is any place where employees work. That need not be in a building such as a factory or an industrial plant or a structure of any sort at all. As the definition states, it may be "any place" whether or not possessing a defined physical boundary. The circumstances of employment and the nature of work indicate the sense of such a broad concept. It is the place where people work. It is understandable that counsel for Delmina felt constrained to concede that a supervisor of a ride would be at work in employment therefore that the concept of workplace would be applicable in that circumstance.

66. But no amount of reference to provisions in the act including the objects in s6 can alter the fact that the word "workplace" is not used in s22 and that s22 is directed to the protection of the public and not employees at work. In this respect the section is both an extension of legislation which otherwise seems as its purpose to have the object of protecting persons at work but is also perfectly understandable, in my view. It does not confer a civil remedy. It prescribes an offence and does so by reference to the "conduct of the undertaking of the employer". Neither this phrase nor the words "conduct" or "undertaking" are defined. The word "undertaking" must take its meaning from the context. In the present context it means, in my view, the business in which the employer engages but more than that it includes a task that is being undertaken in the course of the business or enterprise of the employer, such as, for example, by the municipal employees working in a street. The phrase refers to the actual conducting of that business or enterprise. The phrase addresses the activity, what is done and a risk that arises therefrom.

67. In his reasons the Magistrate referred to the word undertaking, to *Top of the Cross* in which Woodward J considered the meaning of the word in s62A of the *Income Tax Assessment Act* 1936, and to the meaning of the word which he said that Judge Stott adopted, of a business or enterprise. In truth what Judge Stott did in that respect was to quote from and adopt what Sugarman J had said in *Reference under the Electricity Commission (Balmain Electric Light Co Purchase) Act* 1950, in a passage quoted by Woodward J in *Top of the Cross* at 37. Each Judge made it clear that the word "undertaking" is a word of variable meaning, which meant the business or enterprise, and that the actual meaning of the word would depend in large part upon the context and circumstances in which it is used.

68. Question (b) ventures into the area of what becomes the critical question in this case. That is whether s22 comprehends a risk to health or safety that may occur or materialise outside the place where the undertaking is or was conducted. Let us take as an example an actual case decided in the County Court on 16 December 1997, *Martin and Co (Aust) Pty Ltd v Parry-Jones* which involved a plea of guilty and conviction under s22 where a company in the course of its business had let out on hire a defective sander which in use became electrified leading to the death of the hirer. I was told by counsel for the respondent Whittaker of two other successful prosecutions

under s22 where the risk was beyond the workplace. It goes without saying that if parliament had intended that the risks comprehended by s22 must be risks which arise while persons are at the workplace and not outside the workplace it would have simply added the appropriate words of limitation to the section; see, for instance, the *Occupational Health and Safety Act* 1983 (NSW) s16(2).

69. In my view it is plain beyond argument that the risks comprehended by s22 includes the risks to which one may be exposed beyond the place where the undertaking is conducted or the "workplace" if one is to use that word. That is the plain meaning and effect of the language and I find nothing in any other provision of the act or the act read as a whole, or the stated objects of the act or in the Minister's second reading speech or any of the other statements made in parliament to which I was referred that indicate let alone persuade me to the contrary. The purposive nature of s22, which is the protection of members of the public, and the plain and natural meaning of the language of the section lead me to that conclusion.

70. Further, *R v Board of Trustees of the Science Museum* [1993] 3 All ER 853; [1993] 1 WLR 1171; [1993] ICR 876, shows that the like provision to s22 in the *Health and Safety at work etc. Act* 1974 is taken to operate in the way I have described. That case concerned the presence of a bacterium which caused Legionnaires disease, which existed in the water in the air cooling system of the museum conducted by the Trustees. The charge concerned the risk to members of the public inhaling the bacterium in cloud form in the air. The Court of Appeal held, in dismissing an appeal from a conviction, and having regard to the preventive aim of the statute, that it was enough for the prosecution to prove that there was a risk that the disease bacterium might escape. They were not even required to go further and show that the bacterium had in fact emerged into the atmosphere and be inhaled. It was also pointed out that the use of the word "exposed" in the section makes it clear that the section is concerned with persons potentially affected by the risk (at 859).

71. I note too that the authors of *Occupational Health and Safety Law in Victoria*, 2nd Ed., para 554, are of the view that the duty in s22 is owed "to persons who live or work in such proximity to an 'undertaking' as to be potentially affected by the manner in which it is 'conducted'".

72. In this case the risk arose, or it was Whittaker's opinion that it arose, from hiring out horses without accompanying supervision. The risk of injury to which a rider was exposed was one which would occur while a rider was out on a ride away from Delmina's property. For the reasons I have given the Magistrate erred in concluding that because the risk was one which would occur away from the property it was beyond the reach of s22. As a matter of the proper construction and application of the section, it was not. Moreover, it is important to not overlook that the risk that is in question is one that is created at one point, namely at the place where the undertaking is conducted, and which may materialise or manifest itself at another place. And the risk thus materialising or manifesting itself is to a member of the public at that other place. The distinction is between the act or omission which creates or gives rise to the risk which occurs in the conduct of the undertaking and, on the other hand, the place or places where the risk may materialise or manifest itself.

As the Board of Trustees of the Science Museum case shows, it is not necessary that the risk actually materialise or manifest itself in the sense of, as in that case Gleeson being infected with the bacterium. It is sufficient if a risk is created within the meaning of the section. In the present case what is being complained of is the risk to which persons are exposed by reason of riding horses away from Delmina's property without accompanying supervision. The decision as to that and the hiring of horses on the basis that there will be no supervision was made by Delmina in the conduct of its undertaking at its premises. It is a question for the Magistrate to determine whether there was a risk within the meaning of s22, although I note that in the passage quoted the Magistrate has essayed a view about it already. The point which I am making, and which should perhaps be stressed, is that s22 does not depend for its operation upon the actual occurrence of an injury in circumstances which involve the actual occurrence of a risk arising from the conduct of an employer's undertaking. The section is satisfied by a person being exposed to risk (in the circumstances prescribed by the section) arising from the conduct of the undertaking. If there is a risk as Whittaker opined, the risk resulted from the hiring of horses without accompanying supervision. And that occurred in the conduct of the undertaking.

73. For these reasons questions (a) and (b) will be answered yes. For the reasons I have mentioned it is unnecessary to answer (c). In this situation it was common ground that the matter should be remitted to the Magistrates' Court, and I will so order, along with an order setting aside the cancellation of the Improvement Notice and the order for costs.

APPEARANCES: For the appellant Whittaker: Mr D Just, counsel. Ms N Andriopoulos, Victorian WorkCover Authority. For the respondent Delmina Pty Ltd: Mr BE Walters and Mr KD Mueller, counsel. Wisewoulds, solicitors.
