SUPREME COURT OF QUEENSLAND

CITATION:	*Dunlop v Department of Justice and Attorney-General (Qld)* [2020] QSC 160
PARTIES:	**DAMIEN BERNARD DUNLOP** (applicant) **v** **CHIEF EXECUTIVE, DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL** (respondent)
FILE NO/S:	SC No 250 of 2020
DIVISION:	Trial division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	5 June 2020
DELIVERED AT:	Cairns
HEARING DATE:	29 May 2020
JUDGE:	Henry J

ORDERS:

1. **It is declared that upon the proper construction of the *Property Occupations Act 2014* (Qld) ("the Act") and in the circumstances in which the applicant's conviction occurred in the Magistrates Court at Mossman on 22 March 2017:**
   - **(a) the applicant was not convicted of a serious offence within the meaning of the Act because he was not convicted of an offence punishable by three or more years imprisonment;**
   - **(b) the applicant was not convicted of a serious offence within the meaning of the Act because his offence did not involve the use or threatened use of violence or any other conduct prescribed in the Act's definition of a serious offence;**
   - **(c) the applicant's resident letting agent licence number 3717044 was not cancelled by operation of s 77 of the Act because the conviction was not an event to which s 77 applied.**
2. **The respondent will pay the applicant's costs of**

and incidental to this proceeding to be assessed on the standard basis.

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – POWERS OF COURTS – DECLARATIONS – where the applicant was convicted of one offence of using a carriage service to menace, harass or cause offence contrary to s 474.17 *Criminal Code* (Cth) – where the respondent considered the applicant's letting agent licence was automatically cancelled because he had been convicted of a "serious offence" as defined by the *Property Occupations Act 2014* (Qld) – where the applicant brought an application seeking a declaration that his licence was not automatically cancelled on two separate grounds – where subsequent to the filing of the application, the respondent conceded one of the grounds but continued to resist the other ground – whether there is any utility in making a declaration when the respondent has conceded the applicant's licence was not automatically cancelled

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – OTHER MATTERS – where the applicant convicted of an offence contrary to s 474.14 *Criminal Code* (Cth) which carries a maximum penalty of 3 years – where s 4J *Crimes Act 1914* (Cth) provides that the maximum penalty that can be imposed by a Magistrate dealing with an indictable offence with a maximum penalty not exceeding 5 years is 12 months imprisonment – where s 77 *Property Occupations Act 2014* (Qld) provides that a letting agent's licence is cancelled upon conviction of a "serious offence" – where Sch 2 *Property Occupations Act 2014* (Qld) defines "serious offence" to mean, relevantly, an offence punishable by 3 or more years imprisonment – whether the applicant was convicted of a "serious offence" punishable by 3 or more years imprisonment in circumstances where he could only be sentenced by a Magistrate to a maximum of 12 months imprisonment

Acts Interpretation Act 1954 (Qld), s 14A, s 14B
Crimes Act 1914 (Cth), s 4J, 4J(3)(a)
Criminal Code (Cth), s 474.14
Property Occupations Act 2014 (Qld), s 77, Sch 2

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564, cited
Australia Postal Corporation v Sinnaiah (2013) 213 FCR 449, considered
Buck v Comcare (1996) 66 FCR 359, considered
Coleman v DPP (Vic) (2002) 5 VR 393; (2002) 132 A Crim R 255; [2002] VSCA 116, applied
Finance Facilities Pty Ltd v Federal Commissioner of

Taxation (1971) 127 CLR 106, applied
GAF v QPS [2008] QCA 190, distinguished
Hacienda Apartments Pty Ltd v Vago (unreported, Supreme Court of New South Wales, Equity Division, Young J, 19 May 1985), applied
Hastings & Folkestone Glassworks Limited v Kalson [1949] 1 KB 214, distinguished
Mitchell v The Queen (1996) 184 CLR 333, cited
NSW Crime Commission v D'Agostino (1998) 103 A Crim R 113, distinguished
R v Melbourne (1980) 2 Cr App R (S) 116, applied
R v Nerbas [2012] 1 Qd R 362; [2011] QCA 199, applied
Regina v Guildhall Justices; Ex parte Marshall [1976] 1 WLR 335, distinguished
Wood v Reason & Anor [1977] 1 NSWLR 631, distinguished

COUNSEL: M Jonsson QC for the applicant
R Logan for the respondent

SOLICITORS: WGC Lawyers for the applicant
Crown Law for the respondent

[1] The applicant, Mr Dunlop, seeks declarations relating to the impact of his conviction of a criminal offence upon his letting agent licence under the *Property Occupations Act 2014* (Qld).

Background

[2] Mr Dunlop needed that licence as the holder of caretaking and letting agreements with the body corporate of an apartment complex in Port Douglas. His responsibility for the business of that complex led him to make complaints to the local council about the adverse impact upon it of a nearby construction site. He evidently became frustrated. The excessive frequency, manner and content of his contact with council officers resulted in him being charged with using a carriage service to menace, harass or cause offence contrary to s 474.17 *Criminal Code* (Cth).

[3] It is unnecessary to recite the detail of his misconduct. It is sufficient to note the facts recited, when he pleaded guilty to the offence in the Magistrates Court at Mossman 22 March 2017, did not include any allegation involving the use or threatened use of violence. A conviction was recorded by the learned Magistrate and Mr Dunlop was fined $1000.

[4] Some years later, by a letter to Mr Dunlop dated 24 September 2019, a representative of the Industry Licensing Unit of the Queensland Department of Justice ("the Department") advised that by virtue of the above-mentioned conviction he had been convicted of a "serious offence". This was said to have the consequence, per s 77 *Property Occupations Act 2014* (Qld), that his licence was

deemed cancelled from the date of conviction and that he must not carry out the functions of a residential letting agent.[1]

[5] Section 77 *Property Occupations Act* relevantly provides:

> "**77 Immediate cancellation**
>
> (1) A licensee's licence is cancelled on the happening of any of the following events—
>
> (a) the licensee is convicted of a serious offence;
> (b) if the licensee is an individual, the licensee is an insolvent under administration;
> (c) if the licensee is a corporation, the licensee has been wound up or deregistered under the Corporations Act." (emphasis added)

[6] The phrase "serious offence" is defined in Sch 2 to mean:

> *"**serious offence** means any of the following offences punishable by 3 or more years imprisonment—*
>
> (a) an offence involving fraud or dishonesty;
> (b) an offence involving the trafficking of drugs;
> (c) an offence involving the use or threatened use of violence;
> (d) an offence of a sexual nature;
> (e) extortion;
> (f) arson;
> (g) unlawful stalking." (emphasis added)

[7] The Department held the view that:

(i) the offence of which Mr Dunlop had been convicted was an offence involving the use or threatened use of violence; and,

(ii) was punishable by 3 or more years imprisonment;

and was therefore a serious offence.[2]

[8] The consequences of the Department's view presented an obviously significant threat to Mr Dunlop's livelihood. He engaged the services of a solicitor to make representations to the Department. The Department adhered to its view, despite Mr Dunlop's solicitor pointing out to it that:

(i) the transcript of the hearing revealed the matter had not involved an alleged use or threatened use of violence ("the factual point"); and

(ii) Mr Dunlop was not convicted of an offence punishable by 3 or more years imprisonment because, by reason of s 4J(3) *Crimes Act 1914* (Cth), he could not have been punished by more than 12 months imprisonment on his conviction in the Magistrates Court ("the legal point").[3]

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1 Affidavit of Damien Bernard Dunlop, dated 1 May 2020, Ex DBD-5, p 14.
2 Affidavit of Damien Bernard Dunlop, dated 1 May 2020, Ex DBD-9, pp 44-46.
3 Affidavit of Damien Bernard Dunlop, dated 1 May 2020, Ex DBD-8, pp 24-28.

[9] It may be observed at once that, while the legal point arguably related to a matter of some complexity, the factual point was readily apparent as correct from a perusal of the transcript. On that basis alone the Department's position was wrong. Because the Department maintained its erroneous position, Mr Dunlop instituted the present application for declaratory relief.

The utility of the declarations sought

[10] Subsequent to the filing of the application the Department's legal representatives in the application conceded the factual point was correct and Mr Dunlop therefore had not been convicted of a serious offence. On account of that belated acknowledgement the Department's counsel submitted there was no utility in the application and that it should therefore be dismissed. Mr Dunlop's counsel contends to the contrary, pressing for three declarations: one affirming the legal point, one affirming the factual point and one affirming Mr Dunlop's licence was not cancelled by his conviction.

[11] It is trite that there must be some utility warranting the making of a declaration.[4] It does not follow that a capitulation by a respondent prior to the hearing of an application for declaratory relief will necessarily deprive a prospective declaration of its utility. In *Hacienda Apartments Pty Ltd v Vago*,[5] Young J relevantly observed one rule gleaned from the cases on declaratory relief was:

> "[I]f a dispute is live at the date of its commencement but has become spent, but the point is of some public importance, the court will still consider the matter and grant declarations."[6]

[12] As earlier mentioned, the legal point in this matter is attended by some complexity. It is of public importance that it be resolved because the livelihoods of licensees could be drastically jeopardised by erroneous bureaucratic applications of s 77 *Property Occupations Act*. There would therefore be utility in making a declaration on the legal point regardless of the concession by the Department's lawyers of the factual point.

[13] In any event, I would not regard the position taken in this application as meaning the dispute underlying it is spent. Whatever may turn out to be the correct position regarding the legal point, the applicant was clearly the victim of an error on the factual point. It was an error which Mr Dunlop's solicitor cogently explained to the Department, yet the Department persisted in it. That background of bureaucratic intransigence on a matter of critical importance to a citizen's livelihood, in the face of correct information from Mr Dunlop's legal representative, provides good reason why a declaration would provide more reliable protection than the belated acknowledgement by the Department's legal representative. Its utility would be to guard against a recurrence of such bureaucratic intransigence on the same point once away from the scrutiny of the court.

[14] These reasons explain why there is still utility in making declarations in response to the application. That conclusion makes it unnecessary to consider the merits of

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4 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582.

5 (unreported, Supreme Court of New South Wales, Equity Division, Young J, 19 May 1985).

6 His Honour also wrote on this topic, prior to his appointment, in his book *Declaratory Orders* (Butterworths, 1975) [817].

another argument advanced,[7] to the effect that a declaration would redress the alleged reputational harm occasioned by the Department's erroneous decision.

The factual point

[15] I am satisfied the aforementioned factual point is correct. The transcript of proceedings in the Magistrates Court shows that Mr Dunlop was not convicted of an offence involving the use or threatened use of violence. Nor, for that matter, was he convicted of any other conduct prescribed in the definition of serious offence in Sch 2 *Property Occupations Act*. It follows he was not convicted of a serious offence and s 77 of that Act did not apply.

The legal point

[16] It remains to consider the aforementioned legal point. That point, advanced on behalf of Mr Dunlop, was that he was not convicted of an offence punishable by 3 or more years imprisonment because, by reason of s 4J(3) *Crimes Act*, he could not have been punished by more than 12 months imprisonment on his conviction in the Magistrates Court. If correct, the point provides another reason why Mr Dunlop was not convicted of a serious offence within the meaning of s 77.

[17] The offence provision in the *Criminal Code* (Cth), with which Mr Dunlop was charged, relevantly provides:

> "**474.17 Using a carriage service to menace, harass or cause offence**
>
> (1) A person commits an offence if:
>
> (a) the person uses a carriage service; and
>
> (b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.
>
> Penalty: Imprisonment for 3 years…" (emphasis added)

[18] It follows Mr Dunlop was certainly "charged" with an offence punishable by 3 or more years imprisonment. But was he, as s 77 requires, "convicted" of such an offence?

[19] It is common ground that s 4J of the *Crimes Act 1914* applied to permit Mr Dunlop to be sentenced with the consent of the prosecutor and Mr Dunlop in the Magistrates Court. Section 4J relevantly provides:

> "**4J Certain indictable offences may be dealt with summarily**
>
> (1) Subject to subsection (2), an indictable offence (other than an offence referred to in subsection (4)) against a law of the Commonwealth, being an offence punishable by imprisonment for a period not exceeding 10 years, may, unless the contrary intention appears, be heard and determined, with the consent of

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[7] The argument relied upon the observations of the plurality in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 that a declaration may redress reputational harm occasioned by a denial of natural justice.

> the prosecutor and the defendant, by a court of summary jurisdiction. …
>
> (3) Subject to subsection (6), where an offence is dealt with by a court of summary jurisdiction under subsection (1), the court may impose:
>
> (a) where the offence is punishable by imprisonment for a period not exceeding 5 years—a sentence of imprisonment for a period not exceeding 12 months or a fine not exceeding 60 penalty units, or both; …" (emphasis added)

[20] Counsel for the respondent correctly accepts the effect of s 4J was to limit the maximum sentence available to the Magistrate in sentencing Mr Dunlop to one of 12 months imprisonment.[8] However, she submits that was merely an incident of procedure and did not alter the category of the offence as an offence theoretically "punishable", pursuant to s 474.17 *Criminal Code* (Cth), with three years imprisonment.

[21] In support of that argument reliance was placed upon *GAF v QPS*.[9] That case involved an offender's application for leave to appeal an appellate decision of the District Court, on a sentence imposed in the Magistrates Court, for an offence of indecently dealing with a child. That offence carried a maximum penalty of 14 years imprisonment. It could be dealt with summarily by reason of s 552B *Criminal Code* (Qld). Because it was dealt with summarily the maximum penalty the Magistrate could impose, pursuant to s 552H was three years imprisonment. Section 552D, which has no parallel in the Commonwealth's *Criminal Code* or *Crimes Act*, reserved to the Magistrate a discretion to decline to sentence summarily if the seriousness of the offence meant it could not be adequately punished on summary conviction. However, that discretion was not exercised, and the Magistrate imposed a sentence of 15 months imprisonment suspended after four months.

[22] The argument advanced for the applicant in *GAF v QPS* relied upon the reduction of the maximum sentence the Magistrate could impose. That reduction was said to require a proportionate reduction of the sentence which was otherwise appropriate to the circumstances of the case. The respondent argued that the chapter containing the above provisions was procedural and "not about changing maximum penalties for offences".[10]

[23] In dismissing the application Lyons J, with whom Keane and Fraser JJA agreed, observed:

> "Section 552H … does not reduce the maximum penalty for the actual offence. The purpose of the section is to limit the penalty that a Magistrate can impose for that offence. Pursuant to s 552D …, the jurisdiction to proceed under s 552B is limited…

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8 It was implicit in this acceptance that in s 4J(3) the word "may" means "must". As much follows from the reasoning of Windeyer J in *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106, 134–5, approved in *Mitchell v The Queen* (1996) 184 CLR 333, 345.

9 [2008] QCA 190.

10 [2008] QCA 190, [24].

> Accordingly, the overarching requirement is that the Magistrate cannot proceed under the section if the nature and circumstances are such that a summary conviction with a penalty of three years imprisonment or less is inadequate."[11]

[24] *GAF v QPS* stands as authority for the proposition that the maximum sentence available under an offence provision remains relevant to the exercise of the sentencing discretion, despite the offence being dealt with summarily and not being punishable by the same maximum. It was concerned with the theoretical influence of the offence's prescribed maximum penalty upon the assessment of an apt sentence range. The reality of what the actual maximum was reduced to because the case was dealt with by a Magistrate was in effect held to be irrelevant to that abstract consideration. The case cannot logically support an argument that the reality of such a reduction is in other contexts irrelevant.

[25] In the present context, the terms of s 77 and the definition of "serious offence" requires focus upon whether Mr Dunlop was "convicted of" an "offence punishable by 3 or more years imprisonment". The respondent's argument has to be that he was, because, despite the legal reality that the Magistrate could only impose a maximum of 12 months imprisonment, the offence provision meant the offence was "punishable" by three years imprisonment. The argument effectively relies upon the offence being considered in the abstract, as of a category which can theoretically attract a maximum sentence of three years imprisonment, even though it was not in reality punishable by such a maximum at the time of conviction.

[26] Such a theoretical argument finds some support in the authorities. For example, in *Hastings & Folkestone Glassworks Limited v Kalson*[12] the plaintiff company's articles of association provided if a director was "convicted of an indictable offence" his directorship should be vacated. Mr Kalson, a director, was convicted by a court of summary jurisdiction of an offence which could be dealt with either summarily or on indictment. It was held that even though he was convicted in summary proceedings rather than on indictment, Mr Kalson nonetheless had been convicted of an offence for which he could have been indicted and had thus been convicted of an indictable offence. Harman J rejected the stress placed by Mr Kalson's counsel upon the word "convicted", observing:

> "Of course it is a condition precedent to disqualification that there should have been a conviction; mere accusation may be wholly unjustified; but once a conviction has been recorded the test is the nature of the offence. Not every offence brings the sanction into effect; it must have been "indictable," that in plain English means "for which an indictment lies." This offence satisfies that test, and the defendant's disqualification in my judgment follows."[13]

[27] Those observations, cited with approval in *Regina v Guildhall Justices; Ex parte Marshall*,[14] and a similar line of reasoning adopted in *Wood v Reason & Anor*,[15] provide some support for the argument that what matters for the purposes of s 77 is

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11 [2008] QCA 190, [22].
12 [1949] 1 KB 214.
13 [1949] 1 KB 214, 222.
14 [1976] 1 WLR 335, 338.
15 [1977] 1 NSWLR 631.

whether Mr Dunlop was convicted of an offence which was at least theoretically punishable by three or more years imprisonment.

[28] However, the event of conviction is of materially greater relevance here than it was perceived to be in the above line of authority. Here, the relevance of the event of conviction, occurring as it did in the Magistrates Court, goes beyond the mere procedure by which an indictable offence may be heard – summarily or on indictment. Rather, it bears directly upon the reality of what maximum penalty the offence was punishable with.

[29] Another case of arguable assistance to the respondent is *NSW Crime Commission v D'Agostino.*[16] In that matter an assets forfeiture application turned upon whether the defendant had been engaged in "serious crime related activity" involving an offence punishable by imprisonment for five years or more. The activating event relied upon by the Commission was the defendant's summary conviction for larceny, an offence carrying a maximum penalty of five years imprisonment but for which the defendant was only liable to a maximum penalty of 12 months imprisonment, by virtue of being dealt with in the local court. Sperling J followed his reasoning in an earlier case that it was the offence in its generic sense which fell to be categorised. He concluded the defendant had been engaged in serious crime-related activity involving an offence punishable by imprisonment for five years or more. However, his reasoning turned upon whether the respondent had "engaged" in serious crime-related activity involving an offence punishable by imprisonment for five years or more, not whether the respondent had been "convicted" of an offence punishable by imprisonment for five years or more.

[30] A case of greater relevance to the present is *R v Melbourne*,[17] a successful appeal to the English Court of Appeal against a court's activation of a suspended sentence by reason of the appellant having committed "another offence punishable with imprisonment". The offences of which the appellant had been convicted whilst subject to a suspended sentence were punishable with imprisonment in the event of conviction on indictment but could only be the subject of fines in the event of summary conviction. The appellant was only convicted summarily. Jupp J observed in upholding the appeal:

> "The magistrates' court, on summary conviction, as already pointed out, had no power whatever to sentence the appellant to imprisonment. Accordingly, he was not, when before them, convicted of an offence punishable with imprisonment. To hold otherwise would mean reading into the Act such words as "or would have been if he had been committed for trial on indictment," or the like, and of course to read in words of that kind into an Act of Parliament is really not permissible, except in the most dire circumstances of difficulty in interpretation, and those circumstances certainly do not operate here."[18]

[31] Such reasoning favours Mr Dunlop's position in the present case. Similar reasoning was adopted in *Coleman v DPP (Vic).*[19] Coleman was subject to a wholly

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16 (1998) 103 A Crim R 113.
17 (1980) 2 Cr App R (S) 116.
18 (1980) 2 Cr App R (S) 116, 118.
19 (2002) 5 VR 393; (2002) 132 A Crim R 255.

suspended sentence when he committed a drug offence involving an offence provision that imposed different possible levels of penalty according to the circumstances. They included imprisonment but, in the event the court was satisfied the offence involved a small quantity of cannabis and was not committed for any purpose relating to trafficking, the maximum penalty was no more than five penalty units. The offence said to have breached the suspended sentence was only punishable under the latter category. Because the maximum penalty which could lawfully have been imposed upon Coleman was no more than a fine, the court declared the appellant had not been convicted of an offence punishable by imprisonment. In reasoning to that conclusion, Vincent JA observed:

> "As a matter of basic common sense and fairness, to reach the conclusion that an individual had committed such an offence when there was not even a theoretical possibility that imprisonment could have been lawfully imposed appears to me to be absurd. The legislature is not to be taken to have intended to achieve such a result in the absence of a clear expression to this effect."[20]

[32] In a similar vein, Batt JA observed:

> "In the present context whether the offender has committed a "triggering" offence is a question of the level of generality with which one describes the offence. As I see it, it is not whether the subsequent offence was of a kind or generic description that could be punished by imprisonment, but whether the particular offence actually committed was able to be visited with imprisonment."[21]

[33] The latter cases highlight the importance of the reality actually prevailing at the time of conviction. The theoretical approach urged by the respondent ignores that reality. It also appears contrary to the ordinary meaning of the language of s 77 and the language of the definition of "serious offence". Indeed, to paraphrase Vincent JA in *Coleman*, Mr Dunlop was not even subject to the theoretical possibility at the time of his conviction that his offence was punishable by three or more years imprisonment.

[34] The theoretical approach finds no support in the purposive approach to statutory interpretation per s 14A *Acts Interpretation Act 1954* (Qld). It is apparent that the objects of the *Property Occupations Act*, recited in s 12 thereof, include the protection of consumers by ensuring only suitable persons are licensed. One means by which that purpose is implemented is s 77's automatic cancellation of a letting agent's licence in the event of the agent's conviction of an offence of the seriousness stipulated by the Act's definition of "serious offence". Section 77, read with that definition, is directed at the level of seriousness of the offence of which a licensee "is convicted", consistently with the Act's protective purpose. The means used to gauge seriousness is not just the type of offence but also the maximum penalty for the offence of which a licensee is convicted. That maximum penalty must be three or more years imprisonment. It seems contrary to the purpose pursued by s 77 that it would apply to a conviction for an offence which, on conviction, only attracted a maximum penalty of 12 months imprisonment.

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20 (2002) 5 VR 393, 403; (2002) 132 A Crim R 255, 265.

21 (2002) 5 VR 393, 395–6; (2002) 132 A Crim R 255, 257.

[35] The respondent contended it is strange the interpretation urged for Mr Dunlop would have the offence's level of seriousness effectively gauged by whether the prosecution in its discretion consents to the charge proceeding summarily. That hardly seems strange when it is borne in mind the prosecution's discretion also extends to the type of offence it persists with to conviction and the type of offence is also a determinative aspect of the definition of "serious offence". In any event, it was the operation of statute, not prosecutorial discretion, which determined what the maximum punishment of Mr Dunlop could be on his conviction in the Magistrates Court.

[36] The above analysis exposes the importance of the reality actually prevailing at the time of conviction. Where and when was Mr Dunlop convicted? At the outset of the proceeding in the Magistrates Court at Mossman 22 March 2017 Mr Dunlop confirmed in response to the Magistrate's question of him that he was pleading guilty. His lawyer and the prosecutor proceeded to make submissions on the basis the case was then proceeding to sentence. At one stage of those submissions the Magistrate enquired whether there might need to be a trial because of a potential contest on a matter of fact, but that issue dissipated, and the Magistrate proceeded to sentence him, convicting him and fining him. A conviction on a plea of guilty occurs when there is some act constituting a determination of guilt. This occurs provisionally when a plea of guilty is accepted by a court and conclusively when the court thereafter imposes sentence.[22]

[37] It follows Mr Dunlop was convicted when sentenced by the learned Magistrate in the Magistrates Court at Mossman on 22 March 2017. The determinative issue is whether, at that time, before that Court, the offence of which he was convicted was punishable by 3 or more years imprisonment.

[38] The effect of s 4J(3)(a) was to reduce to 12 months imprisonment the maximum sentence available to the Magistrate when convicting Mr Dunlop by sentencing him. At the time of his conviction, namely when he was sentenced by the Magistrate, Mr Dunlop's offence was not punishable by 3 or more years imprisonment. At most it was only punishable by 12 months imprisonment. For that reason he was not convicted of a "serious offence" as defined by Sch 2 *Property Occupations Act* and the licence cancelling effect of s 77 of that Act did not apply to his conviction.

[39] In the end result I perceive no ambiguity of meaning in the provisions' application to the present case. However, if it were necessary to resolve ambiguity and have regard to extrinsic materials per s 14B *Acts Interpretation Act 1954* (Qld), the only relevant source is a passage in the Bill's Explanatory Notes, acknowledging that s 77 breaches legislative principle by denying natural justice. The passage then continues:

> "However, the inconsistency with the fundamental legislative principle is justified on the grounds that immediate cancellation is limited to the most serious of instances that could cause the greatest detriment to consumers." (emphasis added)

[40] This tends to support the above concluded interpretation of s 77. The present instance of licensee offending was only punishable at conviction with a maximum

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22 *R v Nerbas* [2012] 1 Qd R 362, 364–5.

penalty of 12 months imprisonment. It fell short of those "most serious of instances" which the legislature, with its resort to maximums of three or more years, apparently intended s 77 to apply to.

[41] Finally, if there were ambiguity, the proper approach to its resolution would involve reasoning of the kind explained by Finn J in *Buck v Comcare*[23] and endorsed and applied in *Australia Postal Corporation v Sinnaiah*.[24] In *Buck v Comcare*, a statutory right to compensation was wrongly assumed to have been automatically cancelled by a legislative provision. Of that statutory right, Finn J observed:

> "That right does not fall into the category of "common law" rights which traditionally have been safeguarded from legislative interference etc in the absence of clear and unambiguous statutory language: cf J J Doyle QC, "Common Law Rights and Democratic Rights" in P D Finn (ed), *Essays on Law and Government*, vol 1, 158ff. Yet it is a right of sufficient significance to the individual in my view, that, where there may be doubt as to Parliament's intention, the courts should favour an interpretation which safeguards the individual. To confine our interpretative safeguards to the protection of "fundamental common law rights" is to ignore that we live in an age of statutes and that it is statute which, more often than not, provides the rights necessary to secure the basic amenities of life in modern society."

[42] In the present case the fact that s 77 denies, without natural justice, an individual's statutorily conferred rights as a licensee, strongly suggests preference should be given to the interpretation which safeguards the individual. If there were ambiguity, it follows the interpretation concluded above should be preferred to that urged by the respondent.

Orders

[43] I have concluded that both the legal point and the factual point were correctly advanced on Mr Dunlop's behalf. The declaration to be made ought reflect both of those points as reasons in their own right as to why s 77 did not apply.

[44] Mr Dunlop seeks costs on the standard basis. Cost should follow the event.

[45] My orders are:

1. It is declared that upon the proper construction of the *Property Occupations Act 2014* (Qld) ("the Act") and in the circumstances in which the applicant's conviction occurred in the Magistrates Court at Mossman on 22 March 2017:

   (a) the applicant was not convicted of a serious offence within the meaning of the Act because he was not convicted of an offence punishable by three or more years imprisonment;

   (b) the applicant was not convicted of a serious offence within the meaning of the Act because his offence did not involve the use or threatened use of

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23 (1996) 66 FCR 359, 364–5.
24 (2013) 213 FCR 449, 458.

violence or any other conduct prescribed in the Act's definition of a serious offence;

(c) the applicant's resident letting agent licence number 3717044 was not cancelled by operation of s 77 of the Act because the conviction was not an event to which s 77 applied.

2. The respondent will pay the applicant's costs of and incidental to this proceeding to be assessed on the standard basis.