SUPREME COURT OF QUEENSLAND

CITATION:	*Owens v Normanton Liquor Accord & Ors* [2012] QSC 118
PARTIES:	**TREVOR JOHN OWENS** (Applicant) v **NORMANTON LIQUOR ACCORD** (First respondent) **QUEENSLAND POLICE SERVICE** (Second respondent) **OFFICE OF LIQUOR AND GAMING REGULATION** (Third respondent) **CARPENTARIA SHIRE COUNCIL** (Fourth respondent) **NORMANTON BOWLS CLUB INCORPORATED** (Fifth respondent) **A.V. & M.J. ZELLER PTY LTD TRADING AS CENTRAL HOTEL NORMANTON** (Sixth respondent) **DOROTHY PRINCE PTY LTD TRADING AS THE PURPLE PUB** (Seventh respondent) **MAGGIE MAY ENTERPRISES PTY LTD AS THE TRUSTEES FOR THE COOK FAMILY TRUST TRADING AS THE ALBION HOTEL** (Eighth respondent) **THE LAMBERR WUNGARCH JUSTICE GROUP NORMANTON** (Ninth respondent)
FILE NO/S:	523 of 2011
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	27 April 2012
DELIVERED AT:	Cairns
HEARING DATE:	23 March 2012
JUDGE:	Henry J
ORDER:	**1. The application of the applicant is refused.** **2. I will hear the parties as to costs and what final order should be made as to the third respondent's application at 9.15am on 11 May 2012.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – where a "liquor accord" purported to ban the applicant – whether the decision to ban was a decision of the "liquor accord" or of each publican – whether publican's have a common law right to refuse entry to licensed premises – whether the issuance of the prohibition letter was an exercise of public power – whether the accord document should be the subject of a declaration

Judicial Review Act 1991 (Qld)
Liquor Act 1992 (Qld) ss165, 165A, 224

Chase Oyster Bar v Hamo Industries [2010] NSWCA 190
Craig v South Australia (1995) 184 CLR 163
Forbes v New South Wales Trotting Club Ltd (1979) 143 CLR 242
Heatley v The Tasmanian Racing and Gaming Commission (1977) 137 CLR 487
Hinckley v Star City Pty Ltd & Anor (2011) 284 ALR 154
Luton v Bigg (1721) Skin 291, 90 ER 131
R v Panel On Take-Overs and Mergers, ex parte Datafin PLC and Anor [1987] 1 QB 815
Sealey v Tandy [1902] 1 KB 296
Uston v Resorts International Hotel Inc 445 A 2d 370 (NJ, 1982)
Wade v New South Wales Rutile Mining Co Pty Ltd (1969) 121 CLR 177

COUNSEL: J Trevino for the second respondent
M Jonsson for the third respondent

SOLICITORS: Fiona Campbell of Aboriginal Torres Strait Islander Legal Service for the applicant
Crown Law for the second respondent, third respondent
MacDonnells Law for the fourth respondent
V Butler for the seventh respondent
R G Marsh for the ninth respondent

[1] The applicant was given notice by a *"Normanton Liquor Accord Liquor Prohibition Letter"*, that a meeting of the Normanton Liquor accord resolved that he be banned from entering licensed premises in Normanton known as the Albion Hotel, the Central Hotel, the Purple Pub and the Normanton Bowls Club.

[2] The applicant's "application for review" seeks the following orders:

> *"1. An order in the nature of certiorari quashing the decision of 23 November 2011 to issue a liquor prohibition letter (letter) to the applicant pursuant to the Normanton Liquor Accord, such notice*

purporting to ban the applicant from attending at licensed premises named in the letter for twelve (12) months.

2. A declaration that the phrase "Violence will not be tolerated and acts of violence will result in a minimum three (3) month ban" in the Normanton Liquor Accord (page 9) be read "Liquor related violence will not be tolerated and acts of liquor related violence will result in a minimum three (3) month ban."

3. In the alternative, a declaration that the phrase "Violence will not be tolerated and acts of violence will result in a minimum three (3) month ban" in the Normanton Liquor Accord is ultra vires the power in s 224 of the Liquor Act 1992 (Qld) and invalid.

4. In the alternative, a declaration that, to the extent it purports to implement a programme of banning individuals from licensed premises in certain circumstances, the Normanton Liquor Accord is ultra vires the powers in s 224 of the Liquor Act 1992 (Qld), invalid and should be severed."

[3] The third respondent makes application for a stay or summary dismissal of the primary application, seeking the following order:

"Pursuant to s 48 of the Act, the application for review be stayed and/or dismissed on the following grounds:
(a) It would be inappropriate –
(i) for proceedings in relation to the application or claim to be continued; or
(ii) to grant the application or claim.
(b) No reasonable basis for the application is disclosed."

[4] The hearing of the latter application proceeded in conjunction with the hearing of the primary application.

Factual background

[5] *"The Normanton Liquor Accord"* is the title of a document containing an agreement between some members of the Normanton community[1] who, in meeting as a group, also describe their group by that name.

[6] The accord document describes the accord as *"a proactive approach to community alcohol related issues"*.[2] The document purports to record the commitment of its signatories to achieving its documented mission and aim, namely:

"Mission
To work cooperatively in developing and implementing proactive strategies enhancing safety and security at licensed premises and

1 Ex FC6 to the affidavit of Fiona Campbell filed 21 December 2011.
2 Ex FC6, 10.

> *minimising the effect liquor has on the greater community of Normanton.*
>
> *Aim*
> *To reduce alcohol related incidents in and around licensed premises and within the wider Normanton community. To improve responsible service of alcohol requirements within the licensed premises of Normanton."*[3]

[7] The document addresses in some detail headings including:

1. No unduly intoxicated patrons
2. No underage drinking
3. Discourage activities that encourage drinking excessively.
4. Not promote or sell alcoholic beverages that may encourage rapid or excessive consumption of liquor.
5. Promote non and low alcohol beverages and food.
6. Maintain proper standards of behaviour.
7. Maintain safety and security.
8. Maintain records of incidents and have good communication with police.
9. Improve the local amenity.
10. Patrons' responsibility.
11. Ensure all staff are trained.
12. Actively monitor and promote the Accord.

[8] Under a heading *"Commitment to fostering a stronger and safer community"* the document imposes a schedule of banning patrons from licensed premises as a result of school truancy by their children or acts of violence including domestic violence by patrons.[4] The paragraph dealing with school truancy requires no apparent link between the truancy and alcohol abuse or misbehaviour associated with alcohol abuse by a child's parent.

[9] As to the bans relating to violence, headed "*2. A safer community"*, there are three banning provisions:

> "*1. Violence will not be tolerated and acts of violence will result in a minimum three (3) month ban.*
> *2. Acts of liquor related domestic violence will result in a minimum three (3) month ban.*
> *3. A second act of liquor related violence or domestic violence will result in a twelve (12) month ban."*[5]

[10] There is some obvious inconsistency of drafting within the above quoted banning provision in that no connection with alcohol appears to be required for a ban for a first act of violence under provision 1 whereas it is for a second act of violence under provision 3.

[11] On any view the accord document contemplates the banning of persons from licensed premises for non-liquor related reasons.

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3 Ex FC6, 3.
4 Ex FC6, 9.
5 Ex FC6, 9.

[12] The document makes provision for signatories on behalf of the Purple Pub, the Albion Hotel, the Central Hotel, the Normanton Bowls Club, the Carpentaria Shire Council, the Office of Liquor and Gaming Regulation and the Normanton Police Station, Queensland Police Service.[6] The Lamberr Wungarch Justice Group apparently became a signatory to the document at same stage after it was first entered into.

[13] The minutes of a so called *"Liquor Accord meeting"*, of 23 November 2011, to which the applicant Mr Owens was not invited and of which he was unaware,[7] refer to an apparent decision to ban the applicant as follows:

> *"Trevor Owens – 12 months total ban – multiple calls for service for alcohol related violence…*
> *It was suggested that Trevor Owens be barred from takeaway only but Liz Rose (Purple Pub) provided information that Owens is rude and obnoxious to her staff and makes inflammatory comments to other patrons. Police informed the Accord that Owens' home address regularly hosts alcohol fuelled parties and that police have had repeat calls for service on these occasions due to alcohol related assaults etc. Alcohol related parties were disturbing the other residents and the level of violence was escalating."*

[14] The reference to *"multiple calls for service for alcohol related violence"* in the minutes is explained in the affidavit of Senior Sergeant A of the Queensland Police Service who deposes that the QPS referred the behaviour of Mr Owens to the meeting. His affidavit explains the repeated *"calls for service"* related to the police service being called to attend incidents at Mr Owens' home and street:

> *"The summary of the incidents is as follow:*
> *Repeated calls for service over five months since June 2011, 20 calls for service relating to violence and alcohol predominantly at night, large gatherings of intoxicated persons, excessive noise, numerous fights at the residence and in the street, five occasions for domestic violence with highly intoxicated individuals, three of those occasions involved actual threats, two where persons had been struck by sticks, OC deployed by police, threats by persons to kill or harm themselves, taser deployment on drunken party goer trying to assault Trevor Owens with a concrete block, assault police by Trevor Owens when compliance checking on alcohol related bail and the regular complaints from neighbours about Trevor Owens."*[8]

[15] It appears none of the information provided by police to the meeting involved any misconduct by Mr Owens at hotels. While Liz Rose's comments about Mr Owens being rude and obnoxious to her staff and making inflammatory comments to other patrons at The Purple Pub is recorded under the general discussion section of the minutes, the specific entry in the minutes, as against Mr Owens' name and ban, only

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6 Although the exhibited document does not contain signatures entered therein.
7 Ex DAA 1 to the affidavit of Duane Amos filed 21 March 2012.
8 Affidavit of Duane Amos filed 12 March 2012, [18], [19].

refers to the multiple calls for service for alcohol related violence, that is to the police service attendances at his home and in the street.

[16] The applicant was purportedly informed of the decision to ban him by the ensuing so-called liquor prohibition letter dated 24 November 2011, which according to Senior Sergeant A was served by him upon the applicant.[9] The minutes do not specifically record a resolution about what such a letter should contain. Notwithstanding that the decision the subject of the application was the decision to issue the letter, as distinct from the decision to ban, argument proceeded as if the decision to ban by implication included the decision to issue the letter. I proceed on the basis that implication is correct given it was shared in by the parties, is a reasonable inference to draw and, as will be seen, the potential distinction is of no consequence to the decision here.

[17] The only entry in the prohibition letter identifying any reason for the prohibition is:

> *"Incident details:*
> *That about 21.20 hours on 2nd day of November 2011 you assaulted police whilst in the execution of their duties. That since the 30th day of August 2011 you have been charged in relation to three incidents relating to violence against persons."*

[18] None of those incidents occurred at licensed premises. Furthermore they were each incidents that were the subject of charges before the Magistrates Court, which Mr Owens was contesting and for which he had bail with no conditions prohibiting him from attending licensed premises.

[19] The letter was obviously drafted to have an official appearance. After expressly banning the applicant from entering the licensed premises, the letter indicates that if he enters the premises during the period in which he is banned he will *"become a trespasser and may be liable to criminal prosecution and a further 12 month ban"*. The letter continues:

> *"You are entitled after your twelve (12) month prohibition to apply in writing to the Accord stating what you have done to rehabilitate your behaviour and why you should now be allowed to enter the said premises and be served alcohol."*[10]

Threshold issues

[20] The facts need only to have been stated to demonstrate that the decision making process which purportedly banned Mr Owens did not give him natural justice. However, that is not seriously in issue in this application for the respondents contend the decision making and the accord under which it occurred were of a character which ought not attract the intervention of the Court.

[21] The respondents contended there was no utility in the application because:

(a) each publican had the unfettered right to ban the applicant;

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9 Affidavit of Duane Amos filed 21 March 2012, [23].

10 Ex FC4 to the affidavit of Fiona Campbell filed 21 December 2011.

(b) the decision to ban was in reality a series of separate decisions by each publican in respect of their own hotel; and

(c) to the extent the decision was a decision of the so-called accord it could not, even if natural justice had been afforded to the applicant, be of any legal effect.

[22] The applicant disputed these contentions. Leave was given at the hearing for the parties to make further written submissions as to the first of them.

The power to ban citizens from licenced premises

[23] The *Liquor Act 1992 (Qld) ("Liquor Act")* provides a process for the banning of individuals from particular licensed premises or classes of licensed premises through the mechanism of civil banning orders under Part 6C of the *Liquor Act*. Applications for such orders can only be made by the Chief Executive or a police officer[11] and are made to the Magistrates Court, following a process set out in ss 173U and 173V for the exchange of affidavits. The Court may make a civil banning order if satisfied on the balance of probabilities the respondent committed an act of violence within the preceding 12 months in licensed premises or in an area in the vicinity of licensed premises without reasonable excuse and if the respondent poses an unacceptable risk to good order and safety in the vicinity of licensed premises.[12]

[24] Licensees are not entitled under Part 6C to themselves bring civil banning orders, however the Act confers a broad discretion upon licensees to remove or refuse entry to patrons:

> *"**165. Removal of persons from premises***
> *(1) An authorised person for premises to which a licence or permit relates may require a person to leave the premises if –*
> *(a) The person is unduly intoxicated; or*
> *(b) The person is disorderly; or*
> *(c) The person is creating a disturbance; or*
> *(d) The person is a minor, other than an exempt minor; or*
> *(e) The person has entered the premises despite being refused entry under s 165A; or*
> *(f) The person refuses to state particulars, or to produce evidence, as to age when required to do so under s 16.*
> *…*
> *(3) If a person fails to leave when required under subsection (1), the authorised person may use necessary and reasonable force to remove the person.*
> *…*
> *(5) In this section –*
> ***authorised person**, for premises to which a licence or permit relates, means –*
> *(a) the licensee or permittee; or*
> *(b) an employee or agent of the licensee or permittee.*

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11 Per the definition of authorised person in *Liquor Act* s 173Q.

12 *Liquor Act* s 173X.

> ***165A. Refusing entry to premises***
> *(1) An authorised person for premises to which a licence or permit relates may refuse to allow a person to enter the premises if –*
> *(a) the person is unduly intoxicated; or*
> *(b) the person is disorderly; or*
> *(c) the person is a minor, other than an exempt minor; or*
> *(d) the authorised person suspects on reasonable grounds the person is a minor and the person fails to –*
> *(i) Produce acceptable evidence that the person is not a minor; or*
> *(ii) Show that, if admitted to the premises, the person will be an exempt minor; or*
> *(e) Part 5, Division 5, applies to the premises and it would be a breach of the condition imposed under s 142AB of the person were allowed to enter the premises.*
> *…*
> *(3) If a person attempts to enter a premises despite being refused entry to the premises under subsection (1), an authorised person may use necessary and reasonable force to prevent the person from entering the premises.*
> *…*
> *(5) In this section –*
> ***authorised person**, for premises to which a licence or permit relates means –*
> *(a) the licensee or permittee; or*
> *(b) an employee or agent of the licensee or permittee."*

[25] Sections 165 and 165A do not expressly refer to bans in the sense of a defined future period during which a patron will be refused entry. The acts of removing or refusing entry under ss 165 and 165A appear to have a temporal connection with the condition or behaviour of the patron at the time of the removal or refusal of entry.

[26] Notwithstanding the conferring of these particular powers on licensees the Act clearly indicates those sections are not intended to limit other legal rights the licensee has to prevent entry to or remove a patron:

> *"**165B Preservation of other rights to prevent entry to premises or remove persons from premises***
>
> *Sections 165 and 165A do not limit any rights a person has under another law to prevent entry to premises to anyone or remove anyone from premises.*
>
> *Example –*
> *A licensee decides on a dress standard for persons in the licensed premises. The licensee may exercise the licensee's rights apart from this Act to stop anyone who does not comply with the standard from entering the premises."*

[27] Sections 165, 165A and 165B were introduced in the Liquor (Evictions, Unlicensed Sales and Other Matters) Amendment Bill 1999, the explanatory notes for which say of s 165B:

> *"New section 165B preserves the rights of persons to prevent entry to the premises or remove persons from the premises other than in the circumstances outlined in ss 165 and 165A. Licensees have the same general rights as the operator of any other business to manage the business in a manner that they see fit. This may include targeting a niche market, through dress codes for example, and generally setting standards regarding patron behaviour. This will differ from premises to premises. It is not intended that ss 165 and 165A limit those rights in any way."*

[28] The applicant argues that ss 165 and 165A confine the nature of the power of a licensee to remove or prevent the entry of patrons but that argument ignores the express preservation in s 165B of such other rights as licensees may have to remove patrons. Moreover, a statute ought not be construed so as to interfere with vested property rights or interests in the absence of a manifestation of an unmistakable intention to do so.[13] As Barwick CJ observed in *Wade v New South Wales Rutile Mining Co Pty Ltd*:

> *"…the fundamental principle that if Parliament intends to derogate from the common law right of the citizen it should make its law in that respect plain is pertinent to the question whether any such implication should be sought to be made. The Courts are not entitled, and ought not, to eke out a derogation of such private rights by implications not rendered necessary by the words used by Parliament but merely considered to be consistent with the policy which the Courts conclude or suppose the Parliament to have intended to implement."*[14]

[29] What is the common law right of a publican to refuse entry to licensed premises? Is it as unfettered, as the third respondent suggests, as that of common traders and the owners of a private premises?

[30] The common law's historical restriction upon the rights of the owners of public houses to refuse entry related to the special role of such premises in providing necessary food and lodging to travellers on their journeys. The innkeeper was obliged to receive and provide lodging and sustenance for travellers unless there was reasonable ground for refusal.[15] In *Luton v Bigg*[16] it was observed that at common law the proprietor of an establishment offering lodging and sustenance for travellers was in a special position compared to a common trader:

> *"…an innkeeper is called in law the communis hospitator, which signifies the nature of his office and imployment, scil. he is a person who receives travellers and provides lodging and necessaries for them and their horses, and attendants…he is in the nature of a publick person, and his house and occupation a thing of necessity… and therefore he differs from a common trader."*[17]

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13 See *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 618-620.

14 (1969) 121 CLR 177 at 181.

15 See for example *Warbrook v Grand Hotel Co* (1609) 2 Br & Gold, 23 ER 927; *Medawar v Grand Hotel Co* [1891] 2 QB 11 at 19-20; *Irving v Heferen* [1995] 1 Qd R 255 at 261, 262.

16 (1721) Skin 291, 90 ER 131.

17 Ibid.

[31] A hotelier or publican acting as an innkeeper was not bound under the common law to receive guests who were not travellers.[18] The proprietor of a mere licenced public house or alehouse is not obliged by any common law duty to admit guests or permit guests to remain. In *Sealey v Tandy* Darling J noted:

> *"…that there is, and always has been, a very great difference between the old form of inn and the modern public-house, or between the old form of inn and what was simply an alehouse."*[19]

[32] In the same matter Lord Alverstone CJ found*:*

> *"…we think that the occupier of a public-house has a right to request a person to leave, if he does not wish him to remain on the premises… We think that… except in the case of a traveller at an inn, the licensee or occupier of licensed premises has a right to request a person to leave."*[20]

[33] Thus publicans have the same unfettered right at common law to exclude members of the public as other occupiers of land. The only arguable common law exception, namely the circumstance where the publican is offering accommodation and sustenance to travellers, is irrelevant to the facts of the present matter.

[34] In *Heatley v The Tasmanian Racing and Gaming Commission* Aickin J aptly summarised the private right of exclusion of occupiers of premises to which the public are otherwise permitted access:

> *"Since the decision in Cowel v Rosehill Racecourse Co Limited, there has been no doubt that a member of the public, admitted to such places as theatres or racecourses, has only a revokable licence from the owner or lessee of the premises, and that revocation even in breach of contract, is effective so that such person may be required to leave the premises. Needless to say the owner of such premises may refuse to admit any person without assigning any reasons."*[21]

[35] That common law right of exclusion may of course be limited by legislation, for instance where exclusion would be in breach of anti-discrimination laws, but that does not arise on the facts as known of the present matter either.

[36] There may be cases in which a citizen with a right to exclude persons nonetheless fetters that right by reason of the activity carried on at the premises. For example, in *Forbes v New South Wales Trotting Club Ltd*[22] the rules of the New South Wales Trotting Club conferred a power of removal upon stewards. Gibbs J explained:

> *"The effect of these rules is that during the currency of a race meeting the power of exclusion or removal from the course lies*

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18 Compare for example *R v Luellin* (1701) 12 Mod Rep 445, 88 ER 1441 where the indictment of an inn-keeper who refused a sick person entry was quashed because the person did not claim to be a traveller and *Lamond v Richard and The Gordon Hotels Ltd* [1897] 1 QB 541.

19 [1902] 1 KB 296 at 299.

20 Ibid.

21 (1977) 137 CLR 487 at 506 ("*Heatley's Case*").

22 (1979) 143 CLR 242 ("*Forbes' Case*").

> *with the stewards, not with the respondent, and the stewards may exercise that power only on specific grounds…*
>
> *It is not altogether surprising that the rules should fetter in this way the powers of the owner of a racecourse used for trotting. An owner who uses his land to conduct public race meetings has a moral duty to the public from whose attendance he benefits; if he invites the public to attend for such a purpose, he should not defeat the reasonable expectation of an individual who wishes to accept the invitation by excluding quite arbitrarily and capriciously. The rules recognise the public nature of the race meeting by placing some restrictions on the rights of the owner of the course. Speaking broadly, the effect of the rules is that on a day on which a race meeting is being held the respondent cannot use its powers by preventing, for no apparent reason, a member of the public who is in a decent condition and behaving properly from entering the course. The control of the course and power to exclude people from it have been conferred temporarily on the stewards… the effect of the rules is that, in relation to relevant persons, a power to prohibit entry of the kind which constitutes a warning off may not be exercised in any manner other than in accordance with the rules."*[23]

[37] In *Heatley's Case,* Aickin J referred to s 39(3) of the *Racing and Gaming Act 1952* (Tas) which empowered the Tasmanian Racing and Gaming Commission to issue warning off notices in respect of racecourses as overriding the ordinary rights and expectations associated with attendance by members of the public upon racecourses which he discussed in the following way:

> *"It is also true to say that any member of the public has a legitimate expectation that upon payment of the appropriate charge he will be admitted to racecourses. They are in a practical sense "open to the public" and indeed by announcements in advertising their owners invite and seek to encourage the public to attend. This is not an expectation that the Commission will act in some particular way but an expectation by members of the public they will be able to enjoy the right or liberty granted to them by the owner to go onto the racecourse, i.e. that they will be permitted to enter along with other members of the public in response to the owner's implied invitation. That expectation exists by reason of the nature of the premises and the fact that members of the public are invited to attend and freely admitted on payment of the stated charge. The fact that the owner may eject them even in breach of contract, though no doubt known to some racegoers, does not detract from that expectation, nor does the fact that the owner may refuse to admit any particular person without giving any reasons. Section 39(3) provides as it were an overriding exception or control which sets aside those rights and expectations."*[24]

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23 Ibid at 268, 269.

24 Ibid at 507, 508.

[38] The reference to expectations of the public in the above remarks ought not be read as suggesting in the case of all premises open to the public a qualification of the proprietary right of occupiers to exclude. In *Hinckley v Star City Pty Ltd & Anor*[25] Giles JA explained that *Heatley's Case* and *Forbes' Case:*

> *"…do not establish that any reasonable expectations from the public nature of an activity trumps the right of the owner or occupier of the land on which it takes place to refuse entry to a member of the public without giving a reason."*[26]

[39] His Honour went on to observe of s 79 of the *Casino Control Act 1992* (NSW), which gave Star City a statutory power of exclusion:

> *"In my opinion, even if Star City was obliged to observe the rules of natural justice in exercising the power to give an exclusion order pursuant to s 79, it did not have to exercise its right as occupier consistently with that limitation on the exercise of the statutory power."*[27]

[40] In *Hinckley's Case* Tobias AJA observed:

> *"…I think it can fairly be said that neither Aicken J nor Stephen J said anything in Forbes which was inconsistent with their reasons in Heatley. If anything, their Honours confirmed the difference between first, an owner or occupier of premises (including premises such as racecourses) who is entitled at common law to exercise their proprietary right to refuse entry to those premises or to revoke a licence to enter without affording either reasons or natural justice and, second, a body such as the Commission in Heatley and the club in Forbes with statutory or quasi – statutory powers to exclude entry to premises it neither owns nor occupies but otherwise controls who must afford natural justice before the power is exercised."*[28]

[41] There is no suggestion in the circumstances of the present matter of a temporary fettering of the occupier's proprietary right to exclude of the kind that, for example, arises at racecourses during race meetings.

[42] The applicant in contending for a limitation on the occupier's right of exclusion deriving from an alleged right of public access relied *Uston v Resorts International Hotel Inc.*[29] There the New Jersey Supreme Court found the common law right to exclude was substantially limited by a competing common law right of reasonable access to public places. The parties have not cited any Australian authority to that effect. I acknowledge in *Forbes' Case* Murphy J observed that the common law historically "*declined to regard those who conduct public utilities, such as inns, as entitled to exclude persons arbitrarily*",[30] but that obiter dictum is not clearly

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25 (2011) 284 ALR 154 ("*Hinckley's Case*").
26 Ibid at 158.
27 Ibid at 159.
28 Ibid at 176.
29 445 A 2d 370 (NJ, 1982).
30 Supra at 274.

supported by the sixteenth century case footnoted in support of it[31] and probably relates to the exceptional obligation not to arbitrarily refuse accommodation and sustenance to travellers.

[43] The weight of authority is plainly against the applicant on this issue. Each of the publicans here has a proprietary right to exclude persons from their premises.

[44] The applicant's better point in this context is that the individual decision making of each publican is irrelevant as the decision under consideration was the decision of the so-called accord, not a series of individual decisions by individual publicans.

Was the decision to ban a decision of the accord or of each publican?

[45] The respondents tried to characterise the decision under consideration as actually being a number of individual decisions made by each publican.

[46] A series of affidavits by the relevant hotel managers or licensees ("publicans"), filed with leave on the day of the hearing, deposed to each of them in an individual sense having imposed the ban relating to their hotel.

[47] This belated characterisation of the decision was obviously pursued to emphasise the lack of utility in the application. The respondents emphasised the only members of the group who had the power to ban persons from their premises were each of the publicans and they only held that power in respect of each of their individual hotels. Even if the present application succeeds it cannot alter the reality that each of the publicans must as a matter of inference have made their own decision to ban the applicant from their own hotels, just as, even if the application fails, each of the publicans can at any time change their own mind and allow the applicant to enter their own hotel.

[48] The applicant emphasised that the prohibition letter made no reference at all to the rights that any of the four individual licensees had to ban him. He relied upon the High Court's decision in *Forbes' Case* as authority against the third respondent's argument that there was in effect a co-existing set of separate decisions by each of the publicans exercising their proprietary rights in respect of each of their hotels.

[49] In *Forbes' Case* the New South Wales Trotting Club Limited, which had no statutory power or recognition but controlled trotting in New South Wales by the consent of the government and all the trotting clubs of that State, served a *"warning off"* letter upon Forbes excluding him from admission to the Harold Park Paceway and the Menangle Park Paceway and any other course owned, occupied or under the control of the New South Wales Trotting Club Limited. The respondent was the owner of Harold Park and Menangle Park but not of other courses that the respondent controlled. Its rights merely as proprietor of those two courses did not enable it to exclude the appellant from other courses owned by other persons. However, the respondent in *Forbes' Case* argued the passing of the resolution and the warning off letter flowing from it was supportable as an exercise of its proprietary rights in respect of the two courses of which it was the owner. Gibbs J observed if the letter was no more than a statement of the intention of the landowner not to permit another to go onto his land that:

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[31] *White's Case* (1558) 2 Dyer 1586, 73 GR 343.

> *"…the letter may have had little or no legal significance except as evidence, but the appellant would have no right to challenge its validity, since the respondent was entitled to inform him of its intention whether it was or was not entitled to carry that intention into effect. But if what was done was in truth a warning off, it cannot be justified by calling it something else. In considering the true nature of what was done it is not permissible to ignore part of the resolution or of the letter which informed the appellant of it. When the whole of the letter is read, it quite clearly amounted to a warning off under the rules."*[32]

[50] Stephen J similarly found the case was not one involving the exercise of a specific power or jurisdiction sustainable on grounds other than those in fact relied upon at the time of its exercise. He observed:

> *"…that an ineffective exercise of the power to "warn off"…cannot be saved or made good by calling them and existence of the quite distinct power of the Club arising not from any rule but simply from its status as owner and occupier of these two courses."*[33]

[51] The circumstances in *Forbes' Case* are distinguishable from the present in a number of respects but those distinctions are relevant to the validity of the exercise of purported power, discussed below, not the character of the decision to exercise it. Here, as in *Forbes' Case*, the respondent seeks to call the decision something that it was not.

[52] In the present matter the minutes of the accord meeting and the prohibition letter make it obvious that the decision, whether effectual or not, was a decision of the group of persons involved in the accord, for instance these words appear at the foot of the liquor prohibition letter:

> *"A meeting of the Normanton Liquor Accord was held on 23.11.2011 and it was voted unanimously that you be banned for the above stated period."*

[53] The decision the subject of this application was clearly made and expressed as decision of the accord meeting. It would an entirely artificial construction of the facts to not characterise it as a decision of the accord meeting.

[54] The decision the subject of the application involves the decision to issue a letter not merely informing the applicant of the ban but requiring the applicant to in due course show he has rehabilitated himself and in effect persuade the members of the accord that the ban should be lifted. The fact that the relevant individual publicans can and apparently have individually decided to ban the applicant from their respective hotels does not render this application, in respect of a purportedly more wide ranging decision, without utility.

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32 Supra at 267.
33 Supra at 273.

[55] However, the respondents have another, much more compelling argument regarding the lack of utility in the application, which is that the decision of the so-called accord meeting could not, even if natural justice had been afforded to the applicant, be of any legal effect.

Was the decision of the accord meeting potentially of any legal effect?

[56] The applicant submits that the decision to issue the prohibition letter was an exercise of power under a liquor accord, which has a character akin to delegated legislation. The applicant contends liquor accords are made pursuant to the *Liquor Act* and purport to involve all parties in the exercise of the public function of regulating liquor sale and supply practices in a locality.

[57] The applicant relies in particular upon s 224 of the *Liquor Act* 1992 (Qld) which provides:

> *"**224. Liquor Accord***
> ***(1)** Any 2 or more interested persons may be parties to a liquor Accord for a locality in which licensed premises are situated.*
> *(2) In this section –*
>
> ***Liquor accord,* for a locality,** *means an agreement, memorandum of understanding or other arrangement entered into for the purposes of –*
>
> *(a) promoting responsible practices in relation to the sale and supply of liquor at licensed premises situated in the locality;*
> *(b) minimising harm caused by alcohol abuse and misuse and associated violence in the locality;*
> *(c) minimising alcohol-related disturbances, or public disorder, in the locality."*

[58] The term *"interested persons"* is not defined.

[59] Section 224 appears in the *Liquor Act* in *"Part 10 Miscellaneous Provisions"*. There is no other provision in the Act that deals with liquor accords or has any direct connection with s 224.

[60] On the face of it the section purports to permit that which can occur in any event. Indeed, it appears members of the community were entering into liquor accords prior to the insertion of s 224 into the *Liquor Act* and the *Liquor and Other Acts Amendment Bill* 2008 (Qld).

[61] The explanatory notes for the Bill spoke of objectives including:

> *"Recognition of liquor accords*
> *Queensland's liquor accords will be provided legislative recognition, with membership of these voluntary, harm-minimisation focussed organisations to be encouraged;*
> *…"*[34]

[34] Liquor and Other Acts Amendment Bill 2008 (Qld) Explanatory Notes, 3.

[62] The explanatory notes specifically dealing with the new provision stated:

> *"Section 224 is inserted to introduce liquor accords into the legislation as a voluntary harm-minimisation initiative. The intention for the inclusion of accords is to clarify the purpose in membership of a liquor accord for a locality. The provision achieves this intention by providing a definition of liquor accords and their function. Liquor accords are agreements to promote responsible service practices at licensed premises and minimise harm and alcohol related disturbances."*

[63] Further, the contents of the second reading speech given by the then Treasurer, the Honourable A P Fraser, to the legislative assembly in support of the Liquor and Other Acts Amendment Bill 2008 in August 2008, included:

> *"Another new provision will acknowledge the important role played by liquor accords in addressing problems associated with alcohol misuse and abuse in and around licensed premises. The Queensland Parliament is committed to having an effective and sustainable approach to dealing with the misuse of alcohol through a network of voluntary liquor accords, forming a cooperative approach to liquor related issues. In this regard, liquor accords have now been recognised in the Act."*[35]

[64] It is implicit in the above use of language that members of the community were already entering into agreements known as liquor accords before the introduction of s 224. There is no evidence before me as to what form such accords took. It would be unsurprising if groups of publicans in a locale might in the past have reached accord about the exercise of their proprietary rights of exclusion in respect of particular problematic patrons. However, it seems unlikely the legislature intended s 224 should be read as encouraging the involvement of the executive branch of government, through the influence of its public officials such as police or liquor licencing officers, in the exercise of the proprietary rights of publicans, as an alternative to the executive otherwise having to meet the independent scrutiny of the courts inherent in its officials pursuing civil banning orders or the imposition of bail conditions upon citizens charged with criminal offences.

[65] It is also apparent from the above use of language that there was no material legislative purpose behind s 224 other than encouraging the existence of liquor accords and promoting their seemingly well-intended purpose by advertising their existence in a statute.

[66] Section 224 appears to have no meaningful legal consequence accompanying its purely aspirational acknowledgement that two or more *"interested persons"* might choose to be parties to an *"agreement, memorandum of understanding or other arrangement"* for the furtherance of some of the beneficial purposes of the *Liquor*

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35 Hansard Legislative Assembly of Queensland, 26 August 2008, 2287.

Act.[36] Using the serious business of legislation to include a vague promotional provision about liquor accords, without accompanying meaningful legal consequence, carries the risk that it will be misunderstood and wrongly relied upon by well intentioned public officials and members of the public as conferring some special legal power on or protection to liquor accords and the parties to them.

[67] Section 224 does not appear to confer any such powers or protections. It contains no mechanisms regulating the operation of an accord and no provision in any way regulating the membership of the groups of *"interested persons"* entering into accords. It confers no particular legal status upon the agreements, memorandums of understanding or arrangements to which it refers. It provides no express legal protection or immunity to the persons who enter into and make decisions under such agreements, memorandums of understanding or arrangements.

[68] Further it gives no status as a distinct legal entity to the groups who might arrive at an agreement, memorandum of understanding or arrangement described as a liquor accord. Section 224 does not describe a legal entity. At best, it describes an agreement, memorandum of understanding or arrangement reached between two or more interested persons. For this reason the *"Normanton Liquor Accord"* should not have been named as a respondent in this proceedings. There is no such legal entity.

[69] Section 224 cannot on its terms be a source of the power relied upon for the accord meeting to ban the applicant, nor do the respondents suggest it was. Indeed neither the accord document or the prohibition letter contain any reference to s 224. Furthermore, the accord document cannot of itself provide a source of power. It is merely an agreement to act with a common intention.

[70] No other relevant source of power has been identified, save for the individual power of publicans to ban and as already mentioned it is the decision of the accord meeting to ban, not the individual decisions of publicans to ban, which is the subject of the application.

[71] Even if the accord meeting had afforded natural justice to the applicant in reaching its decision, its decision would have been of no legal effect. Only the publicans had a power to ban and that was a power confined to each in respect of their own hotels. The accord meeting simply had no power to make a legally enforceable decision, as a decision of the so-called accord, to ban the applicant.

[72] The position is distinguishable from that discussed in *Forbes' Case* where the High Court rejected an argument that an act done without compliance with the principles of natural justice is no act at all, ineffective and thus not a reviewable exercise of power. In *Forbes' Case* the decision maker was obliged to comply with the principles of natural justice in making its decision, but whether it did or not, its decision was of valid and operative legal effect until successfully challenged.[37] Here

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36 One of the main purposes of the *Liquor Act* pursuant to s 3(a) is:
"(a) to regulate the liquor industry, and areas in the vicinity of licensed premises, in a way compatible with –
(i) minimising harm, and the potential for harm, from alcohol abuse and misuse and associated violence; and
(ii) minimising adverse effects on the health or safety of members of the public; and
(iii) minimising adverse effects on the amenity of the community".

37 Supra at 277.

the decision, as a decision of the so-called accord, could not, even if there had been natural justice, have been of any legal effect. Unlike the decision considered in *Forbes' Case* it requires no court finding to deem it void ab initio.

[73] In the circumstances the application is of no utility because it seeks review of a decision and declarations about a document that can have no potential legally enforceable effect.

Certiorari

[74] The application seeks an order in the nature of certiorari. Such an order should not be given in respect of a decision that can have no legal effect or consequence.[38] As discussed above the decision under consideration has no legal effect or consequence. For that reason alone the application for the order should be refused. However there are also other obstacles to the application for such an order.

[75] The *Judicial Review Act 1991* (Qld) relevantly provides at s 41:

> ***"41 Certain prerogative writs not to be issued***
>
> *(1) The prerogative writs of mandamus, prohibition or certiorari are no longer to be issued by the Court.*
>
> *(2) If, before the commencement of this Act, the court had jurisdiction to grant any relief or remedy by way of a writ of mandamus, prohibition or certiorari, the court continues to have the jurisdiction to grant the relief or remedy, but must grant the relief or remedy by making an order, the relief or remedy under which is in the nature of, and to the same effect as, the relief or remedy that could, but for subsection (1), have been granted by way of such a writ. …"*

[76] Section 41(2) has the consequence that relief in the nature of certiorari is only available in circumstances where the Court would have been able to grant such relief in the exercise of its original or inherent jurisdiction. In *Craig v South Australia*[39] the High Court held a writ of certiorari in the exercise of the Court's original or inherent jurisdiction is only available in relation to decisions of inferior courts or tribunals exercising *"governmental powers".*

[77] There is no longer any requirement that the relevant decision maker has a duty to act judicially before the decision maker is amenable to prerogative relief in the nature of certiorari, however it is a core requirement for such relief that the decision maker must be exercising public power under the statute concerned.[40]

[78] In contending the prohibition letter was an exercise of public power the applicant relied upon *R v Panel On Take-Overs and Mergers, ex parte Datafin PLC and Anor*[41] to contend that the self regulating nature of a group of people acting in

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38 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580, 581.

39 (1995) 184 CLR 163.

40 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 at paras 10 and 67-81.

41 [1987] 1 QB 815 ("*Datafin*").

concert does not preclude it from exercising public power. The applicant referred in particular to the observations of Sir John Donaldson MR in *Datafin*, where he said, referring to the Panel on take-overs and mergers as an unincorporated association without legal personality and with no statutory prerogative or common law powers:

> *"'Self regulation' is an emotive term. It is also ambiguous. An individual who voluntarily regulates his life in accordance with stated principles, because he believes that is morally right and also, perhaps, in his own long term interests, or a group of individuals who do so, are practising self-regulation. But it can mean something quite different. It can connote a system whereby a group of people, acting in concert, use their collective power to force themselves and others to comply with a code of conduct of their own devising. This is not necessarily morally wrong or contrary to the public interest, unlawful or even undesirable. But it is very different.*
>
> *The panel is a self regulating body in the latter sense. Lacking any authority de jure, it exercises immense power de facto by devising, promulgating, amending and interpreting the City Code on Take-overs and Mergers, by waiving or modifying the application of the code in particular circumstances, by investigating and reporting upon alleged breaches of the code and by the application or threat of sanctions. These sanctions are no less effective because they are applied indirectly and lack a legally enforceable base."*[42]

[79] However, his Honour went on to conclude that the absence of a direct statutory base for the panel was a complete anomaly and that as a matter of fact it operated wholly in the public domain with a jurisdiction extending throughout the United Kingdom with codes and rulings applying equally to all who wish to make take-over bids or promote mergers whether or not they were members of bodies represented on the panel. Importantly, his Honour observed the position had already been reached where the panel had been incorporated by central government into its own regulatory network built up under the *Prevention of Fraud (Investments) Act 1958* and allied statutes such as the *Banking Act 1979*.[43] Against this background his Honour concluded the panel was performing a public duty in the course of which it had a duty to act judicially.[44]

[80] *Datafin* is therefore readily distinguishable from the present case in that, while the body with which *Datafin* was concerned was an unincorporated association without legal personality and no express statutory prerogative or common law powers, it had nonetheless been incorporated into a regulatory framework built up under government legislation. It is important to bear in mind the warning of Sir John Donaldson MR in *Datafin*[45] that courts not allow their vision of the realities of executive power *"to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted"* but the present case does not involve a self regulating body incorporated to the regulatory framework of government.

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42 Ibid at 826.
43 Ibid at 835, 836.
44 Ibid at 838.
45 Ibid at 838, 839.

[81] In light of the above analysis of s 224 of the *Liquor Act* it is readily apparent that it does not confer a power to ban patrons from licensed premises. The applicant properly emphasised that the source of power test is not the sole test of whether a body is subject to judicial review, referring in particular to the observations of Lloyd LJ in *Datafin:*

> *"I do not agree that the source of the power is the sole test whether a body is subject to judicial review… Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review…*
>
> *But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may… be sufficient to bring the body within the reach of judicial review. It may be said that to refer to "public law" in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we were referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other."*[46]

[82] In the present manner the power purportedly exercised by the prohibition letter and the decision to send it did not involve the exercise of any public law function or have any public law consequence. The body of persons who resolved to send it were not operating under some public duty. The nature of the power exercised essentially involved the exercise of private rights possessed by each of the participant publicans in their capacity as occupiers of the subject premises.

[83] The applicant also relied upon *Forbes' Case*. It involved another example of a body that had no statutory power or recognition. However, on the evidence *"it controlled trotting in New South Wales by the consent of the government"*[47] and all of the trotting clubs of that State. Further to the source of its power, the nature of the power it exercised involved an obviously public duty namely, the exclusive control and general supervision of trotting within New South Wales. In any event it was not disputed in *Forbes'* that if the power exercised went beyond a purported exercise of proprietary rights it was an exercise of public power with which the court could interfere.

[84] The applicant, emphasising the need to look beyond the outer veneer and not overlook the subtlety of the exercise of executive power, highlighted the involvement of employees and resources of the executive branch of government in the process complained of. These included the presence of a police officer and an

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46 Ibid at 847.

47 Supra at 262.

officer from the Office of Liquor and Gaming Regulation at the relevant accord meeting, the role of the police in providing the main body of information upon which the meeting appears to have acted, the fact that the police had referred Mr Owens' conduct to the meeting, the role of the officer from the Office of Liquor and Gaming Regulation in providing advice to the meeting, the role of the police in providing the Normanton Police Station as the venue for the meeting and the role of the police in serving the prohibition letter. The applicant also pointed more broadly to the general background of government support, particularly through the Office of Liquor and Gaming Regulation, in developing an accord.

[85] However, the contribution of the resources of the executive branch of government, whether in the nature of advice, facilities or assistance through the contribution of employees of government, does not of itself render the power purportedly exercised here an exercise of public power. The fact that the government encourages and supports interested persons in reaching decisions under an accord between those interested persons does not mean those persons are exercising a public power. As already explained, such power to ban as legitimately existed was not derived in any way from s 224 or from the so-called accord.

[86] In truth the only actual power to ban of any potential relevance was the private power held by each of the respective publicans. However that is not a public power and in any event the individual decisions of the publicans to exercise such a power are not the subject of this application.

[87] Further to all of these obstacles, certiorari is only available in respect of decisions that have a discernible legal impact upon substantive rights.[48]

[88] The applicant did not ever have a substantive right of access to the premises in question. He had, at best, a privilege taking the form of an implied licence to enter onto each of those premises which was revokable at will by any of the participating licensees without assigning any reason for it.

[89] The application for an order in the nature of certiorari should be refused.

Declaratory relief

[90] As to the application for declaratory relief, the second and third of the three declarations sought are premised on clauses in the accord document being *"ultra vires the power in s 224".* For the reasons earlier discussed s 224 confers no particular power. The application for the second and third declarations must therefore fail.

[91] Further the submissions generally in support of declaratory relief and specifically in support of the first declaration sought were premised on a requirement that the content of the Normanton Liquor accord should comply with the definition of *"liquor accord"* in s 224 of the *Liquor Act*. That premise is flawed. The accord does not on its face indicate it is or purports to be a liquor accord within the meaning of s 224 of the *Liquor Act;* indeed it makes no mention of that provision. Nor is there any legal requirement that all agreements between persons who choose to call their agreements *"liquor accords"*, must meet the description of liquor

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48 See eg ,*Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149.

accords in s 224. It follows the application for the first declaration sought must also fail.

[92] Further, the discretion to make a declaration ought not be exercised in circumstances where the declaration it is of no utility.[49] Such declarations as are here sought relate not to the decision the subject of the application for an order in the nature of certiorari but to the content of the accord document.[50] The document is a voluntary agreement. Its terms have no impact upon any individual's substantive rights, interests or entitlements because its terms are not legally binding upon any of the signatories to it. For the reasons earlier discussed it has no legally enforceable effect.

[93] This is a further reason why the application for declarations should be refused.

Order

[94] The applicant's application must fail.

[95] The third respondent's application for a stay or summary dismissal was not heard in advance and was in effect heard with the applicant's application. The third respondent's application necessarily required a consideration of the applicant's application. In the circumstances where I have concluded the applicant's application must be refused any final order in respect of the application for a stay or summary dismissal would be inconsequential save arguably as to costs. The parties did not address this aspect in their submissions. They should have the opportunity, if they wish to exercise it, to be heard on this aspect and as to costs.

[96] My orders are:

1. The application of the applicant is refused.
2. I will hear the parties as to costs and what final order should be made as to the third respondent's application at 9.15am on 11 May 2012.

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49 See, eg, *Renard Partners Pty Ltd v Quinn Villages Pty Ltd* [2001] QCA 538.

50 In contrast see *Ainsworth v Criminal Justice Commission* supra at 581, 582. There the report that blackened the appellant's name was of no legal consequence or effect and an application for certiorari therefore failed. However the fact that the report, which had denied natural justice to the appellant, had practical consequences for the appellant's reputation was regarded as sufficient to justify the making of the declaration sought.