

**LICENSING COURT OF SOUTH AUSTRALIA**

MCCARTHY, Sheena

v

BARBARA ANNE & GRAHAM JOHN COX T/AS LORD EXMOUTH  
HOTEL

**JURISDICTION:** Referral from Commissioner

**CASE NO/S:** LC-23-00141

**HEARING DATE:** 30 and 31 January 2024

**JUDGMENT OF:** His Honour Judge BP Gilchrist

**DELIVERED ON:** 27 February 2024

**CATCHWORDS:**

*Referral of a complaint under s 106 of the Liquor Licensing Act 1997 in connection with the activities being undertaken at the Lord Exmouth Hotel in Exeter and that behaviour of the patrons of that hotel – The Complaint was received by the Liquor and Gambling Commissioner notwithstanding that it was only supported by one signature – Upon the request of the hotel the complaint was referred directly to the Court without any attempts to reach a conciliated outcome – The complainant lives immediately adjacent to the hotel’s beer garden and she is particularly concerned by the fact that routinely on Sunday afternoons during warm fine weather live bands play in the beer garden – The complainant contended that because the hotel in a high-density residential area that is close to her home and other homes, and that it holds music events in its beer garden with heavy and loud music amplified in the direction of her home, restrictions need to be put in place to prevent live music from being played in the beer garden and there needs to be changes to the hotel’s opening hours – **Held** that considering this complaint the Court must take this into account the objects of the Act which include facilitating “the responsible development of the licensed liquor industry and associated industries, including the live music industry, tourism and the hospitality industry” – **Held** that for the complaint to be upheld the complainant must establish that what the hotel and its patrons are asking her to put up with is undue, which is a question of degree that must be adjudged objectively and by reference to contemporary community standards, having regard to all the relevant circumstances – **Held** that the style of music*

*routinely played at the hotel is soft rock played at a modest volume in the outdoor beer garden on Sunday afternoons during periods of sunny, fine weather, for around four hours and usually ending by no later than 8.30 pm and occasionally on other days, such as public holidays or special events, but never after midnight – **Held** that the style, volume, time, and frequency of the live music played at the hotel is well within the bounds of what might be expected of a suburban hotel in metropolitan Adelaide – **Held** that by reference to contemporary community standards, the live music that is being played at the hotel, and the times at which it is played, could not objectively be regarded as unreasonable – **Held** that the evidence does not permit a finding that the activities at the hotel are causing litter issues or that those making their way to or from the Lord Exmouth have behaved in an offensive, annoying, disturbing, or inconvenient way – **Held** that there are no issues regarding potential changes to the future character of the locality for the purposes of the Planning, Development and Infrastructure Act 2016 nor are there issues in connection with any environment protection policy for the purposes of the Environment Protection Act 1993 – **Held** that the degree of offence, annoyance, disturbance, and inconvenience that the complainant is being subjected to by the activities at the hotel, or the noise emanating from those premises or by the behaviour of persons making their way to or from those premises falls well short of being undue for the purposes of s 106 of the Act – **Held** that the complaint is therefore dismissed – Liquor Licensing Act 1997, Planning, Development and Infrastructure Act 2016, Environment Protection Act 1993.*

*Hackney Tavern Nominees Pty Ltd v McLeod* (1983) 34 SASR 207  
*Vandeleur and Others v Delbra Pty Ltd and Liquor Licensing Commissioner*  
(1988) 48 SASR 156  
*Victoria Hotel* [2011] SALC 98

## **REPRESENTATION:**

Counsel:

Applicant: In person  
Respondent: Mr G Coppola

Solicitors:

Applicant: n/a  
Respondent: Australian Hotels Association – SA Branch

- 1 Sections 106(1) and (2)(c) of the *Liquor Licensing Act 1997* (the Act) permit a person who resides, works or worships in the vicinity of licensed premises who claims to be adversely affected by an activity on, or the noise emanating from, those premises or by the behaviour of persons making their way to or from those premises that is unduly offensive, annoying, disturbing or inconvenient, to lodge a complaint with the Liquor and Gambling Commissioner.
- 2 Ordinarily, the complainant must be authorised to make the complaint by at least 10 other persons who reside, work or worship in the vicinity of the licensed premises.<sup>1</sup> However, if the Commissioner is satisfied that the nature of the complaint is sufficiently grave, the Commissioner may proceed with the complaint without that authorisation.<sup>2</sup>
- 3 In the ordinary course the Commissioner will attempt to resolve the complaint through conciliation between the complainant and the licensee. However, a party may request that the complaint be referred directly to a hearing.<sup>3</sup> In cases where a conciliation is conducted, resolution by agreement is not always possible. In such cases the parties may request the Commissioner to determine the matter.<sup>4</sup> Absent such a request, the matter must be determined by this Court.<sup>5</sup>
- 4 Upon the hearing of a complaint, the Commissioner or the Court, as the case may be, can dismiss the complaint or make an order against the licensee.<sup>6</sup> That order may add or vary the conditions of the licence.<sup>7</sup>
- 5 In determining the complaint, the Commissioner or the Court must take into account the following matters prescribed by s 106(6) of the Act:
  - (i) the relevant history of the licensed premises in relation to other premises in the vicinity and, in particular, the period of time over which the activity, noise or behaviour complained about has been occurring and any significant change at any relevant time in the level or frequency at which it has occurred; and
  - (ii) the unreasonableness or otherwise of the activity, noise or behaviour complained about; and
  - (iii) the trading hours and character of the business carried out by the licensee on the licensed premises; and

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<sup>1</sup> Section 106(3)(a) of the Act.

<sup>2</sup> Section 106(3)(b) of the Act.

<sup>3</sup> Section 106(4) of the Act.

<sup>4</sup> Section 106(5)(a) of the Act.

<sup>5</sup> Section 106(5)(b) of the Act.

<sup>6</sup> Section 106(6a)(a) and (b) of the Act.

<sup>7</sup> Section 106(7) of the Act.

- (iv) the desired future character of the locality in which the licensed premises are situated as stated in any relevant provision of the Planning and Design Code under the *Planning, Development and Infrastructure Act 2016*; and
  - (v) whether or not any environment protection policy made under Part 5 of the *Environment Protection Act 1993*, or guidelines published by the Environment Protection Authority established under that Act, applicable to the provision of live music on the licensed premises have been complied with; and
  - (vi) any other matter that the Commissioner or the Court considers relevant.
- 6 As with all matters to be decided under the Act, regard must be had to the objects of the Act.<sup>8</sup> Those objects include facilitating “the responsible development of the licensed liquor industry and associated industries, including the live music industry, tourism and the hospitality industry”.<sup>9</sup>
- 7 In this case, Sheena McCarthy, lodged a complaint under s 106 of the Act and requested that it proceed notwithstanding that she was not authorised to make the complaint by at least 10 other persons. A delegate of the Commissioner was satisfied that the nature of the complaint was sufficiently grave that it should proceed without that authorisation.
- 8 The complaint was made in connection with the licensed premises known as the Lord Exmouth Hotel. The licensees of those premises are Graham and Barbara Cox. Upon receipt of the complaint, they requested that the complaint be referred to a hearing. The Australian Hotels Association, acting on behalf of Mr and Mrs Cox, subsequently requested that the complaint be referred directly to this Court.
- 9 Upon that referral, directions were made regarding the disclosure of documents and other material germane to the subject matter of the complaint and the matter was set down for hearing.
- 10 Orders that Ms McCarthy requested that this Court make included the following:
- 1 Service and consumption of alcohol to be restricted to between the hours of 9:00 am and 9:00 pm Friday and Saturday.
  - 2 Service and consumption of alcohol to be restricted to between the hours 11:00 am and 8.00 pm Sunday to Thursday.

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<sup>8</sup> Section 3(2) of the Act.

<sup>9</sup> Section 3(1)(d) of the Act.

- 3 No private parties or events are to be held within or around the venue at any time.
  - 4 No amplified music or broadcast of any kind is to take place in the venues “beer garden” space.
  - 5 The guidelines and laws regarding responsible service of alcohol are to be always adhered to.
  - 6 All live, amplified or broadcast music should be kept within the internal walls of the venue to ensure a noise buffer for neighboring residents.
  - 7 All broadcasts of any kind, including televised sports games and TAB, are to be kept within the internal walls of the venue and kept at a reasonable noise level.
  - 8 Smoking of all kinds (within and around the venue) is to be prohibited.
  - 9 Service of alcohol, in a take-away form, should not be allowed at any time.
  - 10 Capacity limits to be capped at 50 patrons, as the venue is very small.
  - 11 The conduct and behaviours of patrons must be always monitored. Appropriate behaviours of staff and patrons must be maintained, in an official capacity, always.
  - 12 All noise will be kept to an appropriate level within and around the venue.
  - 13 Dangerous, disruptive behaviours will be addressed, genuinely and immediately by staff or the neighboring residents have the right to contact the police for assistance.
  - 14 Any actions or threats of retaliation, harm or harassment of neighbouring residents and/or property will result in immediate loss of the Lord Exmouth Hotel’s license and criminal investigation.
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- 11 The hearing of the complaint commenced with a view of the Lord Exmouth and surrounding areas, and the following observations are based on that view and are uncontroversial.
  - 12 The Lord Exmouth is situated on the south-western corner of Exmouth Road and Montpelier Street, Exeter. Exeter is an old suburb on the Le Fevre Peninsular, about 14 kilometres north-west of the Adelaide CBD and is immediately adjacent to the seaside suburb of Semaphore.

- 13 Exmouth Road is a moderately sized street, typical of suburban Adelaide. It runs from east to west, ending to the east at the junction of Causeway Road. Adjacent to that junction, about 150 metres from the Lord Exmouth is the Cumberland Hotel. About 500 metres further south on Causeway Road is the Glanville Hotel.
- 14 Montpelier Street is a short, narrow street that runs from south to north between Exmouth Road and Semaphore Road. About 70 metres or so to the east of the junction of those roads is the Exeter Hotel on Semaphore Road.
- 15 The Lord Exmouth is a very old two-story building that is heritage listed. It has been licensed since the 1850's, making it one of the oldest licensed premises in this State. It might be assumed that in the past the second story provided accommodation, that being a former requirement for licensed premises trading under a hotel licence to provide. For a time, Mr and Mrs Cox resided there, but some years ago they moved out and they now live in premises immediately to the west of the Lord Exmouth. The ground floor comprises of a rectangular bar area that abuts the southern side of the hotel. The bar is surrounded to the east, north and west by stools, tables and chairs. It is an old-fashioned bar that is more in line with what might be expected of a country hotel. There is a passageway to the north of the bar that leads to toilets and further north to a veranda and a small beer garden. The Lord Exmouth regularly provides its patrons with live music. In the summer, weather permitting, this is conducted in the beer garden. Bands are set up under the veranda in the south-east corner. Otherwise, bands play inside and are set up in the north-eastern corner of the bar area.
- 16 Immediately to the north of the beer garden is a driveway that is separated from it by a two-metre corrugated iron fence. To the north of the driveway is a solid stone house, with three bedrooms, a lounge, kitchen, dining, laundry, and study area, all of which are adjacent to the southern wall. This is number 7 Montpelier Street, and it is where the complainant, Ms McCarthy, resides with her three young children.
- 17 To the north of this is number 9 Montpelier Street. It shares a common wall with number 7. Ms Victoria Tobin resides there. She gave evidence in support of Ms McCarthy.
- 18 Further to the north of this is number 11 Montpelier Street. It shares a common wall with number 9. Mr Owen Hemmings-Kavanagh resides there with his partner. He also gave evidence in support of Ms McCarthy.
- 19 I now turn to consider the evidence.

*Ms Sheena McCarthy*

- 20 Ms McCarthy said that she rents number 7 Montpelier Street from her aunty, Ms Patricia Darley, and that for present purposes, she commenced residing there in December 2021 with her three young children. She said that from the time she commenced residing there, live bands routinely played music in the Lord Exmouth's beer garden. She said that the sound usually began about 3.30 pm as the band set up and that the live music would start at 4.00 pm. She said that the music was advertised to end at 8.00 pm but it often went on for longer, twenty minutes or so and sometimes for up to an hour.
- 21 Ms McCarthy described the noise as "very loud." She said that people within her house were unable to have conversations. She said "It feels like torture. It's so oppressive."<sup>10</sup>
- 22 Ms McCarthy said that over the course of 2022 she noticed a change in the patronage of the hotel. She said that more people seemed to be coming and going from the hotel and they seemed rowdier.
- 23 Ms McCarthy said that over the winter months the bands played inside.
- 24 Ms McCarthy said that bottles and cans are frequently thrown over her fence, there is glass in the gutter and cigarette butts are in the gutter and in her garden.
- 25 Ms McCarthy identified Australia Day, 26 January 2023, as an "impactful day" that "was a horrible day for me and my children".<sup>11</sup> She said that the Lord Exmouth held an event for the day, as did a number of other venues in the area. She said that the event started at around 3.00 pm and attracted a larger crowd. She said that patrons and the band were louder than what was usually the case. She said that a few hours after it commenced someone entered her property through the driveway and urinated in front of her lounge room while her children were watching television. She said that she asked the person to leave, and he refused. She said that she called the police, but they did not respond. She resolved to type a document that she copied and placed copies under the windscreen wipers of cars parked in the vicinity of the hotel. It read as follows:

26.01.2023 AUSTRALIA DAY

Dear Patrons of the Monkey House, Lord Exmouth hotel. Dear Residents of surrounding area.

I am desperately begging for your assistance.

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<sup>10</sup> Transcript (Tr) 8.

<sup>11</sup> Tr 10-11.

The owner has ignored my plea and the plea of other residents for many years.

3 young children live in the home next to the Beer Garden.

The monkey house, Exmouth Hotel is not permitted to hold band nights and events so frequently and its because they are in a residential area.

They constantly breach the directions of the liquor licensing authority. Drunken and irresponsible behaviour is not just ignored its encouraged.

The noise is excessive and unnecessary. It is stressful for the people who live around the hotel.

Every Sunday evening my children and I must leave our own home to escape the noise. Events have become more frequent and louder over the past year.

They keep the bands going past 9pm some nights and they start at 3pm. 6 hours of unbearable noise.

Most residents are too scared to say anything because they think that something bad may happen to their cars or homes if they complain.

Bottles and cans are thrown over the fence. My driveway is often littered with rubbish and broken glass.

Foul language and loud music can be heard from the beer garden It is not just on the weekend or on the public holidays.

It is happening all week long. They hire out the beer garden to private parties, clubs, buck shows, and 21<sup>st</sup> etc. They are not licenced for this.

Today I have had drunk people vomit in my driveway. I had a man delivering alcohol (over my fence) to the beer garden. He did not leave when I asked.

He was also seen peeing on my fence by my front door in front of my two-year-old child. This was 15 metres inside my properties fence line.

Would you be ok if this is happening at your house?

I have never asked that they cease operating or stop the bands completely.

I have just asked that the noise is kept at a reasonable level and respectable behaviours are maintained amongst customers.

The owners have been extremely rude and patronising towards me. Police, council and Licensing commission could be involved but it shouldn't be that way.

Be a truly good Australian and stand up for people like us who are just trying to live in peace. Please help.<sup>12</sup>

- 26 Ms McCarthy said that shortly after a woman who she believed to be the hotels' manager, Donna, ripped up the fliers and threw them into Ms McCarthy's driveway.
- 27 Ms McCarthy said that the band was still playing at 10.00 pm. She was unable to say when the noise ceased. She said that following this, in February 2023, she lodged a complaint with Consumer and Business Services, but it was rejected on technical grounds.
- 28 As part of her case Ms McCarthy tendered three videos captured on Facebook that were in the nature of promotional material published by the Lord Exmouth. The videos are dated 10 September 2023,<sup>13</sup> 14 October 2023,<sup>14</sup> and 5 November 2023.<sup>15</sup> She said that the bands that are depicted on these videos is typical of those that play at the hotel.
- 29 The September 2023 video depicts a band playing a song that I am permitted to know is "Proud Mary" which is a folk rock song from the late 1960's. It is plainly daytime. The crowd looks predominantly middle aged.
- 30 The October 2023 video depicts a band playing a song that I am permitted to know is "Rock and Roll All Nite" which is a rock song from the mid 1970's. It is plainly at night and the crowd looks younger than that depicted in the earlier video.
- 31 The November 2023 video again depicts a band playing Proud Mary. It is plainly daytime, and the crowd looks virtually the same as that depicted in the September 2023 video.
- 32 Ms McCarthy also tendered a video taken on her phone depicting events of 26 January 2023.<sup>16</sup> It commences with her opening the wire door of her house that leads into her driveway abutting the fence that is to the north of the Lord Exmouth's beer garden. It then depicts the beer garden. It is reasonably crowded with patrons of varying ages. It is not possible to discern what is being played but it appears to be a more modern song than that depicted in the other videos. The video then shows torn pieces of paper in Ms McCarthy's driveway. It concludes by showing a number of cars

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<sup>12</sup> Exhibit (Ex) A1.

<sup>13</sup> Ex A4.

<sup>14</sup> Ex A3.

<sup>15</sup> Ex A2.

<sup>16</sup> Ex A5.

parked in Montpelier Street, and some torn pieces of paper in her driveway, and a can on the footpath outside of the hotel.

- 33 In addition to these, Ms McCarthy tendered a photograph of the exterior of the Lord Exmouth that depicted a drink can in an ashtray outside of the hotel and an empty glass on a step leading to a doorway of the hotel.<sup>17</sup>
- 34 Having stated that she observed many people drinking alcohol on the street outside of the Lord Exmouth, Ms McCarthy was asked whether she had reported this to the police. She said that she had not because she did not have “great faith in the system supporting me”, that she is a single mother with three children, and she has her “mind on taking care of them”.<sup>18</sup>
- 35 Ms McCarthy stated that it was not appropriate for a hotel to play amplified music in a residential area. She was then taken to the flier that she had produced on 26 January 2023, and it was suggested that many of the assertions she made in it were inaccurate. She accepted that her statement that the Lord Exmouth was not permitted to hold band nights and events so frequently might not have been completely accurate, but stated that she believed it accurate at the time she wrote it.
- 36 In connection with her assertion that the Lord Exmouth constantly breached the directions of the liquor licensing authority, Ms McCarthy said that she wrote this, because the hotel serves patrons who are inebriated and it allows entry in the beer garden through a side entrance that is not monitored. She then agreed that she had not seen anyone who was inebriated served with liquor at the hotel.<sup>19</sup> In response to a suggestion that the side entrance was only opened to permit the band to load and unload, she said that this was untrue.<sup>20</sup>
- 37 As for her statement about encouraging irresponsible behaviour, she stated that on an occasion the band had said: “Let’s get nice and loud for the neighbours”.<sup>21</sup> She then suggested that if members of the band were sober, they would not have said this. She accepted that she had not witnessed a band member consuming alcohol but added: “I can tell when people are inebriated, it is very obvious. When people behave drunk and disorderly, it is clear.”<sup>22</sup>
- 38 Ms McCarthy was taken to her statement about the band playing from 3.00 pm to 9.00 pm. She accepted that this might not be “entirely

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<sup>17</sup> Ex A6.

<sup>18</sup> Tr 40.

<sup>19</sup> Tr 51.

<sup>20</sup> Tr 51.

<sup>21</sup> Tr 52.

<sup>22</sup> Tr 52.

accurate”.<sup>23</sup> She added that it did not matter what time they played, they should not be there.<sup>24</sup>

- 39 It was suggested that Ms McCarthy was wrong to assert that the Lord Exmouth was not licensed to hire out its beer garden for private parties. She seemed to accept that this statement might not have been completely accurate, but added that it is what she believed at the time it was written.

*Ms Victoria Tobin*

- 40 As noted earlier Ms Tobin lives immediately adjacent to Ms McCarthy. She has lived there for many years. She said that the Lord Exmouth had always had people coming and going. She said: “And that used to bring lots of different people, and it used to be a lot of undesirable people.”<sup>25</sup> She said that people had urinated in her yard and that on one occasion a person had collapsed in her front yard. She said that this was pre Covid.

- 41 Ms Tobin said that after Covid there is loud and intrusive noise coming from the Lord Exmouth “every single Sunday.”<sup>26</sup> She complained about the noise, the music, the people and the traffic. She described this as “beyond the pale.”<sup>27</sup> She said that when this happens, she has to go inside, close her doors and windows, and turn off her hearing aids. She said that she fully supported Ms McCarthy’s complaint. She said: “I want the live bands to cease and desist. I don’t want any recorded music played”.<sup>28</sup>

- 42 In cross examination, Ms Tobin accepted that the typical age of those attending the Lord Exmouth was 40 to 50 years old and that it was not noticeably a teenage or young person’s hotel. She accepted that the hotel’s side gate was usually closed, even when the hotel was trading.

- 43 At the end of her evidence, Ms Tobin agreed that she did not want the Lord Exmouth to be there.

*Mr Owen Hemmings-Cavanagh*

- 44 As noted earlier, Mr Hemmings-Cavanagh lives immediately adjacent to Ms Tobin. He said that he supported Ms McCarthy because he found the frequent performances at the Lord Exmouth to be “quite disruptive.”<sup>29</sup> He said that he felt very strongly that she should not have to deal with what was happening there. He also spoke of issues regarding rubbish in his front

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<sup>23</sup> Tr 53.

<sup>24</sup> Tr 53.

<sup>25</sup> Tr 71.

<sup>26</sup> Tr 72.

<sup>27</sup> Tr 76.

<sup>28</sup> Tr 76.

<sup>29</sup> Tr 94.

yard, although he accepted that he was not absolutely sure that it had come from the hotel.

45 In connection with the Lord Exmouth more generally, Mr Hemmings-Cavanagh said that “it makes it less pleasant to live where I am living.”<sup>30</sup>

46 An issue that Mr Hemmings-Cavanagh raised was that absence of notifications from the Lord Exmouth about events that would be occurring. When it was pointed out to him that the upcoming events are advertised on Facebook, he said that because of some personal difficulties he would have some trouble checking this.

47 Mr Hemmings-Cavanagh accepted that bands usually play between 4.00 pm and 8.00 pm on Sundays but added that they frequently run between 15 and 30 minutes late. Having said that he felt uncomfortable with people being outside his house, he agreed that he had never reported any issues with the local council or the police, nor had he made any complaint to Mr Cox.

*Ms Patricia Darley*

48 As indicated earlier, Ms Darley is Ms McCarthy’s aunty, and she is the owner of the house that Ms McCarthy resides in. She stated that she bought the house in 1993 at which time it was a quiet community pub. She said that in 1999 smoking rules changed and that patrons started to go into the beer garden to smoke. She said that over time the beer garden was being used more and more and began to host live music. She said that the house had become uninhabitable, and she lodged a complaint with the Liquor and Gambling Commissioner. She said that in 2010, sometime following the birth of her son, they moved out to a house that she and her husband had purchased some distance away in Exeter.

49 Ms Darley stated after she moved out, she rented the house out to other people and that remained the case until she rented it to Ms McCarthy in December 2021. She said that during that period it was used as a share house with two people living there the majority of the time, with others coming and going.

50 Ms Darley said that as landlord she feels a level of responsibility for the trauma that Ms McCarthy and her children are experiencing.

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<sup>30</sup> Tr 97.

*Mr Graham Cox*

- 51 Mr Cox said that he has been the holder of the licence for the Lord Exmouth for 46 years. He said that the only formal complaints that he had received in connection with the hotel were from Ms Darley in 2020 and the more recent complaints from Ms McCarthy. He said that he had not received any complaints from those who resided in 7 Montpelier Street after Ms Darley left there in 2010.
- 52 Mr Cox said that live music in the Lord Exmouth's beer garden commenced about 15 years ago. He said that on Sundays the hotel employs about five or six staff and the takings for that day represent about 50% of the hotel's weekly turnover. Through him, a video promotion prepared on behalf of the band "The Lincolns" was tendered. It depicts the band setting up and playing at the Lord Exmouth. I was informed that it was taken just before the Covid pandemic. The Lincolns are playing "Sorrow" which I am permitted to know is a folk-rock song from the mid-sixties that was later covered by David Bowie. The patrons ranged in age, but many were 50 or older, and many were females. They seemed to be enjoying themselves with some singing along to the music and dancing.
- 53 Mr Cox was asked about the flier that Ms McCarthy had placed on cars on Australia Day 2023. He said that his daughter had removed the fliers from cars, had ripped them up and thrown them into Ms McCarthy's driveway. He said that he did not see her doing it and had he, he would have told her off.
- 54 Mr Cox said that some people wishing to attend the Lord Exmouth have come from other nearby hotels. He said the Cumberland often has live bands on Sundays that finish at 7.00 pm so it is common for twenty or so of their patrons to come to the Lord Exmouth. He said that if they are intoxicated, they are not served and are asked to leave. He said that occasionally people on pub crawls have come to the Lord Exmouth and have behaved in an unruly and rowdy fashion. He said that this is mainly end of season football pub crawls. He said that he does not need security because people respect him. He said: "if I ask people to leave, I give them a choice. 'If you leave nicely now and behave yourself, you can come back next week. If you don't leave, ... we're getting a barring order.'" He said that most just leave.<sup>31</sup>
- 55 Mr Cox said that the Lord Exmouth opens for trade at 1.00 pm on Mondays; 12 noon on Wednesday, Thursday and Friday, 11.00 am on Saturdays and 1.00 pm on Sunday. It is usually closed on Tuesday. The hotels alarm logs reveal that the majority of the time it closes sometime between 7.00 pm and 10.00 pm and rarely later than 11.00 pm.

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<sup>31</sup> Tr 135.

- 56 Mr Cox said that in light of Ms McCarthy's evidence about the impact that Sunday live music was having on her children, he would contemplate starting the bands at 3.00 pm and finishing at 7.00 pm.

*Mr John Fisher*

- 57 Mr Fisher is semi-retired, having previously had a career in senior management. He plays in a band that occasionally plays at the Lord Exmouth. He said that the average age of the band was about 60 years. He said the music played is anything from the 1950's to the 2000's. He said that none of it could be described as heavy metal or head-banging music. He said that the typical age group of those at the hotel are between 40 and 60 years. He said that the band typically plays at the hotel from 4.00 pm to 8.00 pm but occasionally finishes a little later, but no more than 10 minutes later.

*Ms Soula Jones*

- 58 Ms Jones is employed by the Lord Exmouth, having started work there in 1986. She said the age range of the patrons at the hotel was 50's, 60's, 70's and 80's.
- 59 Ms Jones spoke very positively of the hotel's patrons. She said that on occasions she opened and closed the hotel. She said that she has never felt threatened. She was asked about violence at the hotel. She recalled an incident over 30 years ago but said that none had occurred recently.
- 60 When asked about when she became aware of residents making complaints about noise from the hotel she said: "It really surprised me."<sup>32</sup> She added that "it's part and parcel of living close to this particular hotel."<sup>33</sup>

### **The parties' submissions**

- 61 Ms McCarthy submitted that the Lord Exmouth is in a high-density residential area, it is close to her home and other homes, and that it holds music events in its beer garden with heavy and loud music amplified in the direction of her home. She submitted that it is causing stress, inconvenience and harm to its neighbours. She submitted that the fact that it continues to operate in this way, despite it knowing about the distress, inconvenience, and harm that it is causing, demonstrates that it is acting with malice. She submitted that restrictions need to be put in place to prevent live music from being played in the beer garden and there needs to be changes to the hotels' opening hours.

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<sup>32</sup> Tr 158.

<sup>33</sup> Tr 159.

62 Mr Coppola, on behalf of the Lord Exmouth, submitted that relative to most other hotels, the Lord Exmouth trades for limited hours in a limited fashion: it has no gaming machines, no kitchen facilities, no cocktail offerings, and no late-night activity of any sort. He submitted that like other hotels in the area, the Lord Exmouth was a supporter of live music. He submitted that the music was in the form of “cover” bands playing well known songs to what is largely an older demographic, generally on a Sunday between 4.00 pm and 8.00 pm. He said:

This is not a nightclub playing heavily amplified dance or rave music. Nor is it a late-night venue. It is a venerable suburban pub with a history of folklore that trades very limited hours. To prevent such would be inconsistent with the objects of the Act and would disadvantage a great many people including the licensee, employees, musicians and of course patrons.<sup>34</sup>

### Consideration

63 I commence by observing that although I thought all the witnesses who gave evidence before the Court were endeavouring to give their evidence truthfully, it was plain that Ms McCarthy, and to a lesser extent the other witnesses called by her, felt passionate about what they perceived to be the undue interference caused by the activities taking place at the Lord Exmouth, and that this coloured some of their evidence and compromised its objectivity.

64 For example, Ms McCarthy created the impression when giving her evidence, that litter from the Lord Exmouth was a significant issue. The only objective evidence comprised of one still photograph showing a single can and a single glass outside the hotel and her video of Australia Day 2023, that showed a single can on the footpath outside of the hotel and some torn paper in her driveway. It is also clear that many of the assertions that she made in the flier that she prepared and distributed on Australia Day 2023 were either untrue or exaggerated. The orders that she sought in pursuing this application are so draconian as to effectively amount to a request that the hotel cease to trade. My impression was that some of her evidence was reconstructed to achieve that outcome.

65 Ms Tobin described the noise, the music, the people and the traffic around the Lord Exmouth as “beyond the pale”. This is in respect of a hotel with a certified capacity of 200, with no evidence that that number has ever been exceeded; that attracts an age demographic that includes many middle-aged patrons and many females; and which plays a style of music that is more in line with soft rock, as opposed to amplified dance or rave music. I find that Ms Tobin’s use of the expression “beyond the pale” was

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<sup>34</sup> Outline of submissions of the Licensee, para 28.

an inaccurate description. I think in truth, Ms Tobin's preferred position was that the Lord Exmouth cease to trade, and like Ms McCarthy, some of her evidence appeared to be reconstructed to achieve that outcome.

- 66 Mr Hemmings-Cavanagh said that he felt uncomfortable with people being outside his house. Having viewed samples of the patrons of the Lord Exmouth, I find it surprising that he would be concerned by them. By contemporary standards, most of the hotel's patrons might fairly be regarded as relatively old and tame. It is also notable that Mr Hemmings-Cavanagh has never reported any issues regarding this to the local council or the police, or to Mr Cox. Whilst I can accept that he might genuinely feel discomfort about the hotel's patrons, his feelings about them are not objectively justified.
- 67 Then there is Ms Darley's evidence of feeling some responsibility for the trauma that Ms McCarthy and her children are experiencing. I accept that words can mean different things to different people, but generally the word "trauma" would be associated with something deeply distressing and disturbing, which does not seem apt to describe what is occurring at the Lord Exmouth.
- 68 Whilst I can accept that Ms Jones, as a long-standing employee of the Lord Exmouth, might not be truly objective in her observations about the hotel, I was struck by her stated surprise that residents had made complaints about noise from the hotel. Her response seemed considered and very genuine, as was her observation that: "it's part and parcel of living so close to this particular hotel".
- 69 Mr Cox struck me as a competent, well-respected publican. There is no evidence that supports Ms McCarthy's submission that he has acted with malice. To the contrary, Mr Cox's willingness to contemplate changing the time slot for bands on Sundays to finish earlier suggests quite the opposite. My impression was that he is trying to manage a suburban hotel in a residential area as best he can and is aware of the need to find some balance between the legitimate commercial interests of the hotel, its desire to play live music, and the interest of the hotel's neighbours.
- 70 As noted earlier in these reasons, the objects of the Act include facilitating "the responsible development of the licensed liquor industry and associated industries, **including the live music industry, tourism and the hospitality industry**" (Emphasis mine). It follows that Parliament has specifically contemplated that licensed venues, such as hotels, will actively encourage live music and will play their part in promoting tourism and the hospitality industry more generally. In considering this complaint, I must take this into account.

- 71 Although, for the purposes of the Act, intoxication is defined in terms a person's speech, balance, co-ordination, or behaviour being noticeably affected, this Court is permitted to know that there will be persons using the facilities on offer at licensed premises, that although not intoxicated within that definition, will nevertheless be acting in a way consistent with the disinhibiting effects of alcohol. This Court is permitted to know that persons who are only mildly affected by alcohol, at levels well short of the statutory definition of intoxication, can be loud and boisterous.
- 72 As such it is inevitable that many of those who reside, work or worship in the vicinity of licensed premises will be adversely affected by an activity on, or the noise emanating from those premises or by the behaviour of persons making their way to or from those premises. This will be especially so in the case of a hotel. The law recognises that in connection with all licensed premises, and especially hotels, nearby residents, workers and worshippers can be expected to tolerate a degree of offence, annoyance, disturbance, and inconvenience.<sup>35</sup> As Wells J observed in *Hackney Tavern Nominees Pty Ltd v McLeod* connection with those living near a hotel:

Let me hasten to say that disturbance such as loud talking, swearing, perhaps even the odd screaming, perhaps even a fight or two, even on a relatively regular basis might not in many cases be classed as undue. As I have said, **people who live in the vicinity of a hotel must accept some disturbance.**<sup>36</sup> (Emphasis mine)

- 73 Objectively, this cohort can be reasonably expected to put up with a degree of offence, annoyance, disturbance, and inconvenience that in the community more generally, might be regarded as unreasonable. As Zelling J noted in *Hackney Tavern*, for them the degree of offence, annoyance, disturbance, and inconvenience that they can reasonably be expected to put up with can go "**well beyond the bounds of the legal concept of nuisance**".<sup>37</sup> (Emphasis mine)
- 74 The critical issue is whether what the hotel and its patrons are asking them to put up with **is undue**. This is a question of degree that must be adjudged objectively and by reference to contemporary community standards, having regard to all the relevant circumstances.<sup>38</sup>
- 75 These circumstances extend beyond the immediate interests of the licensee and those who reside, work or worship in the vicinity of licensed premises. In this case, they include the interests of the patrons who wish to avail

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<sup>35</sup> *Vandeleur and Others v Delbra Pty Ltd and Liquor Licensing Commissioner* (1988) 48 SASR 156 at 160 per King CJ.

<sup>36</sup> (1983) 34 SASR 207 at 213.

<sup>37</sup> *Ibid* at 208.

<sup>38</sup> *Vandeleur* *ibid*, and *Victoria Hotel* [2011] SALC 98.

themselves of the facilities on offer at the Lord Exmouth, the members of the live music industry that wish to play there, the persons who are gainfully employed there, and the wider community that benefits from the contribution that the Lord Exmouth makes to the attractiveness of the Semaphore area. This Court is permitted to know that Semaphore is an attractive seaside suburb that attracts visitors from all over Adelaide and beyond, and that part of the attraction is the live music scene.

- 76 Turning now to the matters that s 106(6)(b) of the Act requires me to take into account, I accept Mr Cox's evidence and find that live music has been played in the Lord Exmouth's beer garden for about the last 15 years. In the period of ten or so years between Ms Darley leaving 7 Montpelier Street in 2010 and Ms McCarthy commencing to reside there in 2021, there was no complaint about any of the activities taking place at the Lord Exmouth. Apart from the period of shutdown caused by the Covid-19 pandemic, which may have lulled Ms McCarthy into a false understanding of what was entailed living directly next to a hotel, there has been no significant adverse change in the level or frequency at which activities take place at the Lord Exmouth.
- 77 Based on the exhibits depicting bands playing at the Lord Exmouth and Mr Fisher's evidence about his band, which was unchallenged, I find that the style of music routinely played at that hotel is predominantly soft rock and folk rock, played at a modest volume. I find that it is generally played in the outdoor beer garden on Sunday afternoons during periods of sunny, fine weather, for around four hours and usually ends by no later than 8.30 pm. I find that occasionally bands play live music in the beer garden on other days, such as public holidays or special events, but never after midnight. I find that when the weather is colder or it is raining, live music is played indoors. I find that style, volume, time, and frequency of the live music played at the Lord Exmouth is well within the bounds of what might be expected of a suburban hotel in metropolitan Adelaide. By reference to contemporary community standards, the live music that is being played at the Lord Exmouth, and the times at which it is played, could not objectively be regarded as unreasonable.
- 78 By reference to most hotels, the Lord Exmouth trades for very limited hours.
- 79 The evidence does not permit a finding that the activities at the hotel are causing litter issues.
- 80 The evidence does not permit a finding that those making their way to or from the Lord Exmouth have behaved in an offensive, annoying, disturbing, or inconvenient way.

- 81 There are no issues regarding potential changes to the future character of the locality for the purposes of the *Planning, Development and Infrastructure Act 2016*.
- 82 There are no issues in connection with any environment protection policy for the purposes of the *Environment Protection Act 1993*.
- 83 I understand Ms McCarthy's frustration. A house directly adjacent to a hotel is not ideal accommodation for a young family. Her personal circumstances might give her little choice but to continue to live there. However, **this Court must apply an objective test.**
- 84 In this case, viewed objectively, I find that the degree of offence, annoyance, disturbance, and inconvenience that Ms McCarthy is being subjected to by the activities on the Lord Exmouth, or the noise emanating from those premises or by the behaviour of persons making their way to or from those premises, falls well short of being undue for the purposes of s 106 of the Act. The complaint is therefore dismissed.