

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: BOLD GEM PTY LTD  
PREMISES: THE EASTERN HOTEL MIDLAND  
PREMISES ADDRESS: 309 GREAT EASTERN HIGHWAY, MIDLAND  
LICENCE NO: 6020027052  
**NATURE OF MATTER: EXTENDED TRADING PERMIT – ONGOING HOURS**

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On 9 April 2008 an application was received from Bold Gem Pty Ltd, licensee of The Eastern Hotel Midland, requesting approval for an extended trading permit (ETP), pursuant to section 60(4)(g) of the *Liquor Control Act 1988* ('the Act'), to permit extended trading as follows:

Wednesday to Saturday: 12 midnight to 2.00am the following morning;  
Sunday: 8.00am to 10.00am; and 10.00pm to 12.00midnight.

Pursuant to section 67 of the Act, the application was advertised on the site of the premises between the dates of 9 June 2008 and 23 June 2008; by way of a Notice published in *The West Australian* newspaper on 9 June 2008; and by way of a Notice to Residents and Businesses, distributed within a 200 metre radius of the premises. An intervention and two (2) objections were received.

Accordingly, pursuant to sections 13 and 16 of the Act, I have decided to determine the application on the written submissions of the applicant.

**MERITS OF THE APPLICATION**

In order to discharge the onus on the applicant under section 38(2) of the Act, a Public Interest Assessment (PIA) was lodged on 9 April 2008. The PIA is summarised below:

- The licence for the Junction Hotel ("the Hotel") was transferred to the Applicant on 11 March 2008.
- The Applicant has recently purchased the Hotel which is in an extremely poor and rundown state.
- The Hotel was only operating from the bottle shop and the main bar and could best be described as a "blue collar/working man's tavern" which hosted regular skimpy shows.

- No food was provided and the Hotel was primarily patronised by workers who at the conclusion of their working day wished to enjoy a beer while enjoying the entertainment provided by the skimpys. It would not have been an attractive venue for couples, women, families or tourists to the area.
- The Applicant proposes to:
  - a) Remodel the Hotel into a stylish and functional hotel, utilising quantity material sourced directly by the designer from suppliers in Asia.
  - b) Transform the venue from its current state to a modern and inviting space designed to provide a broad spectrum attractive to a relatively diverse demographic.
- The Applicant intends to discontinue the current practice of hosting skimpy shows at the premises immediately.
- A strict dress standard will be imposed and enforced, requiring smart casual attire during daytime hours with slightly more formality in the evening.
- Through the proposed changes, the Applicant aims to attract a cross section of patrons the majority of which will be aged 25 to 40 years of age, including:
  - a) A semi-professional after work market.
  - b) Diners seeking a refined atmosphere and quality food and for later in the evening.
  - c) People looking for a venue that will provide multiple spaces for socialising or enjoying a range of entertainment.
  - d) Tourists visiting the Swan Valley district.
  - e) Young farmers coming into town from surrounding districts.
  - f) Backpackers who want budget accommodation.
  - g) Families, by promoting a suitable atmosphere and amenities for young children during the day and early evening.
- The Applicant intends to utilise the full facilities available at the Hotel as follows:
  - a) Opening the beer garden with a modern theme.
  - b) Re-opening the existing restaurant as a bistro with an Australian theme.

- c) Transforming the existing main bar into a live band venue.
  - d) Catering for functions.
  - e) A liquor store, which will operate from 10am to midnight each day.
  - f) Re-opening hotel rooms situated on the upper level of the Hotel in the form of budget accommodation.
- The venue will offer multiple forms of live entertainment from Wednesday through to Sunday, to cater for its different clientele.
  - In order to secure the services of performers it is essential that late trading hours be secured.
  - The ETP permitting later trading hours is an important part of the Applicant's strategy to revitalise the Hotel.
  - Over recent years, the number of licensed premises within Midland for patrons to socialise has dramatically reduced. A search of records of the Department of Racing, Gaming and Liquor reveals that at one stage Midland enjoyed 32 licensed venues, however in recent times, this has been reduced to 13 active licensed premises of which only three are taverns/hotels and two are restaurants. There are no nightclubs, with the remaining licences being a mixture of liquor stores, special facility licences and function rooms.
  - The existing licensed premises within Midland can not satisfy the needs of patrons who wish to enjoy the following services at the one licensed venue, whether jointly or in combination:
    - a) Restaurant quality meals at reasonable prices.
    - b) A variety of entertainment, including bands, acoustic music, duos and solo performances.
    - c) Socialising, while enjoying a drink with friends in modern, stylish surroundings.
  - The difficulty with socialising in Midland, by way of example, was that if a patron wished to enjoy a meal and then live entertainment or simply to socialise beyond 12 midnight, inevitably their evening would be broken if they commenced socialising within Midland, due to the need to travel to Perth or some other location outside of Midland to enjoy the service they desired.

- Patrons will be able to enjoy the convenience of having a meal and continuing to socialise while enjoying live entertainment, or, once the beer garden is re-opened, a quiet area within which to drink and socialise with friends, without the need to:
  - a) travel to Perth to enable them to enjoy an unbroken evening; or
  - b) alternatively, commence socialising in Midland and then travel to Perth later on during the course of the evening.
- Annexed to the PIA submission and marked "Annexure E" are copies of the completed surveys that have been received by the Applicant to date. Within the responses received to date, it is noted that:
  - a) They have been received from a reasonable cross section of the targeted demographic from the Hotel.
  - b) There is strong support for, and intention to patronise The Eastern Hotel Midland, in the event that it is permitted to trade until 2am.
- At present there is a limited range of venues within Midland where persons can enjoy a breakfast or brunch on a Sunday in well presented surroundings.
- As part of the rejuvenated Junction Hotel the Applicant will have a special Sunday breakfast menu which will be accompanied by a range of both champagnes and signature Bloody Marys. The ETP in relation to Sunday mornings is being sought to cater for those patrons who wish to consume breakfast during the early hours of the morning.
- In particular, it is anticipated that tourists, who will breakfast early so that they can commence their day of touring, will find the breakfast services being provided by the Applicant particularly convenient.
- The locality for the purpose of this application is a 2km radius of the premises, which encompasses the following suburbs:
  - a) Midland;
  - b) Woodbridge;
  - c) Guildford (East);
  - d) Bellevue (West);

e) Midland (West); and

f) Viveash.

- The WAPC promotes Strategic Regional Centres as “cities in the suburbs”, adopting the view that retail, office, entertainment, recreational and community facilities should be located and concentrated in Strategic Regional Centres.
- The granting of the present application will be consistent with the WAPC Policy. At present, Midland is falling far short of a “city in the suburbs” from an entertainment point of view when it comes to evening and late night entertainment.
- While the locality extends beyond the geographical boundaries of Midland suburb, it is noted that the primary suburb that will be affected by this application will be Midland.
- Indigenous persons represent 6.07% of the residents in Midland (suburb).
- Given its proximity to the Swan Valley, the facilities available within the Midland Regional Centre, and its own heritage and cultural sites, Midland is an attractive town centre for people visiting the Swan Valley.

In relation to those matters prescribed by section 38(4)(a) of the Act ('harm or ill health'), the applicant submits:

- The Applicant has determined that there are no at risk groups for the purpose of the present application.
- The venue:
  - a) Is located in an area designated for mixed use which will, through current redevelopment schemes, incorporate commercial, industrial, entertainment and residential buildings. The venue is therefore compatible with neighbouring uses.
  - b) Will increase pedestrian activity on Great Eastern Highway, Helena Streets and the surrounding area after midnight, therefore increasing safety and passive surveillance in the area.
  - c) Premises will be well lit providing safe pedestrian access along Great Eastern Highway and Helena Street to patrons and the general public.
  - d) Have specific entry/exit locations for patrons allowing areas to be easily monitored by staff and surveillance equipment.

- e) Is located in a well defined private space with specific staff employed for the purpose of security and crowd control.
- f) Passive surveillance by patrons and staff within the venue is encouraged by the mix of people within the defined area of the premises.
- It is submitted that the granting of the Application will not adversely affect the rate of crime within Midland.
- The statistics indicate that the vast majority of offences do not involve alcohol.
- Further, given the significantly higher levels of offences which occur which do not involve alcohol, it is very questionable whether alcohol was a contributing factor to those offences which have been recorded as involving alcohol.
- The Applicant intends to engage Global Alliance Security Company to monitor security at the Eastern.
- One security guard will be available for every 100 patrons attending the premises.
- Additional security guards will be stationed in the rear car park and at the entrance to the bottle shop on Friday, Saturday and Sunday nights.
- The Applicant intends to install CCTV to monitor the premises. Surveillance coverage will be extensive, including the internal areas within the Hotel and its perimeter, the liquor store and the beer garden. There will be a minimum of 36 cameras operational for this purpose.
- All CCTV footage will be held for a period of 2 weeks.
- The Applicant is committed to an effective and efficient resolution of any complaints received.

In relation to those matters prescribed by section 38(4)(b) of the Act ('impact on amenity'), the applicant submits:

- Not only is there a recognised lack of amenity facing the current population in Midland, the *Midland Metro Concept Plan 2010* acknowledges that Midland's population is increasing and that its expanding population will require services and opportunities including employment, education, health and recreation.
- The Applicant's proposal for the Hotel will make it unique to the Midland area.

- The Eastern will be a place where various different types of people comprising the expanding Midland catchment can attend and enjoy themselves, rather than having to leave the City of Swan in order to find entertainment.
- The applicant submits that the proposal in respect of its premises will serve to improve the amenity of the locality. The Applicant's proposal for the premises will promote the visions held by the City of Swan and the MRA by:
  - a) Improving the standard of the premises.
  - b) Providing for additional leisure and recreational activities.
  - c) Facilitate the development of the Juniper Gardens as the precinct earmarked for the entertainment area.
  - d) Contributing to the ongoing revitalisation of Midland.
- It is submitted that the extended hours provided by an ETP will increase security by enabling those areas of Great Eastern Highway and Helena Streets in the vicinity of the Hotel, to be monitored for a longer period by staff, patrons and pedestrians alike.
- The Hotel is conveniently situated within 500m of the Midland Train Station and Bus Terminal ("the Midland Station").

In relation to those matters prescribed by section 38(4)(c) of the Act ('offence, annoyance, disturbance or inconvenience'), the applicant submits:

- There are no residential premises in the immediate proximity of the venue. Further, those commercial premises that have been identified as being situated within the locality will not trade or operate during the proposed extended trading hours.
- The Applicant has developed its plan for the premises with the intention of attracting a cross section of patrons aged 25 to 40 years of age within the Midland area.
- The 25-40 year old age group are less likely to be involved in antisocial behaviour as opposed to the younger 18-21 year old age group.
- Given the lack of licensed venues within Midland, there is little risk that patrons will travel from licensed venue to licensed venue over the course of the night.

- The Applicant does not anticipate that there will be any antisocial behaviour, noise or disturbance associated with patrons attending the venue on Sunday mornings.
- To ensure that nearby premises and potential future residents in the area do not experience undue offence, annoyance, disturbance or inconvenience due to the operation of the premises under the ETP, three factors are important, namely:
  - a) The design features of the Applicant's premises.
  - b) Training provided to staff and adherence to responsible service of alcohol guidelines.
  - c) Acoustic attenuation measures employed to reduce noise emissions.
- Adherence to the objectives of "Designing Out Crime Through Planning Guidelines" will serve to reduce the opportunity for anti-social behaviour in and around the premises.
- The wealth of public transport options within close proximity to the Applicant's venue ensures that patrons do not congregate within the vicinity of the premises upon closing. The ability to disperse patrons quickly is an important factor in reducing noise and disturbance from patrons congregating within the vicinity of the premises and antisocial behaviour.
- In an effort to control and where possible reduce noise emissions, the Applicant proposes to take the following measures:
  - a) Roller shutters will be fixed to the windows in the band area.
  - b) All speakers will be positioned facing into rather than towards the street.
  - c) All amplifiers will have preset sound limiters and the Manager and Sound Engineer will log sound readings throughout the evening.
  - d) Sound engineers will be briefed not to allow internal acoustic levels to exceed 100dba.

## OBJECTIONS

Notices of objections were lodged by the following parties:

- Mr Steve Howlett (Maura); and
- Acting Detective Superintendent Dale Bell on behalf of the Commissioner of Police.



**OBJECTION LODGED BY MR STEVE HOWLETT (MAURA)**

On 24 June 2008 Mr Steve Howlett lodged an objection based on the following:

- Extending the trading hours is not giving the proper message to the community, nor is it in the best interests of the Midland community.
- Vibrant night life is not a requirement for suburb living and must not be expected to be one. It is a sad reflection on life that to enjoy the social company of others one must (should) get 'plastered'.
- "The attitude of the people has not changed. It is a disgrace that in the 21<sup>st</sup> century we haven't yet shown ourselves capable of creative leisure time, without the assistance of public aids, or to use them responsibly."
- As stated in 'Community Health In Australia 1978', the present situation in Australia in regard to alcohol abuse is rapidly reaching crisis point, which may justify the development of strong social sanctions against excessive drinking.
- "I feel we have vastly overreacted the crisis point and beyond so we must pursue other interventions like a) stopping extended hours b) find other social pursuits and c) engaging the community in the planning and delivery of health services by making us all responsible for the health and welfare of our community."

**OBJECTION LODGED BY ACTING SUPERINTENDENT DALE BELL ON BEHALF OF THE COMMISSIONER OF POLICE**

On 1 July 2008 the Commissioner of Police lodged an objection based on the following:

- It is stated that backpackers and local farmers visit the Midland area, and that this is a basis for extended hours. Generally, backpackers are looking for cheap accommodation to rest their heads with a night time economy to match as they pass through a given area. As such, they are more likely to use facilities in places like Northbridge where there is a host of late night entertainment services.
- It is the considered view of WA Police that there are less tourist attractions in the area than the application states.
- As stated in the applicant's request for a 2.00am ETP on Wednesday, Thursday, Friday and Saturday and also 8.00am till 12 midnight on Sunday (paragraph 50), the Midland area supported 32 licensed venues in recent times, however this number has since been reduced to just 13 licensed venues. This shows that the demand for such venues has dramatically reduced in Midland.

This may be attributed to the development of the Swan Valley licensed venues, which currently boast over 100 licensed premises in a concentrated area of approximately 15km radius.

- There appears to be no current public demand for extended hours in Midland on Wednesday, Thursday, Friday, Saturday or Sunday evenings and an aggressive marketing campaign will be required to achieve this.
- The breakfasts to be offered by the Eastern Hotel are not out of the ordinary and can be purchased at the following restaurants:
  - a) Fast Eddy's, opening at 7.00am on a Sunday which is serving food and alcohol.
  - b) Jimmy Deans Diner, serves food and alcoholic refreshment from 8am on Sunday.
  - c) Café De Luca's, opening for breakfast at 9am on Sundays.
- The above restaurants are located in the centre of Midland CBD and away from the Great Eastern Highway.
- When Police were recently shown around the main bar area of the Eastern Hotel by the applicant, the applicant stated that the main bar was to be a café bar. However, when questioned further by Police about how many tables and chairs would be in the main bar after the alterations were complete, the applicant stated that there would be none. Police have doubts that it could be a café bar when it is quite obvious that the main bar is to be a vertical drinking area. This would mean that more customers could be packed in and people are more inclined to consume alcohol at a faster rate than if sitting down.
- The applicant wishes to offer a range of "Bloody Mary" drinks and Champagne from 8am on Sunday mornings. Vodka, which is the main ingredient in "Bloody Mary's", is usually 40% proof and Champagne is typically 12% proof. Both of these drinks are particularly high in alcohol and consuming just a single glass of one of these drinks at 8am could make a person tipsy and light headed. For the customer to then negotiate the busy intersection of Great Eastern Highway could result in tragic consequences.
- The East Metropolitan area has approximately 189,866 residents and Midland and surrounding districts support a large indigenous community. According to the *2006 Australian Bureau of Statistics census data*, there were 4,525 ATSI persons within the East Metropolitan area.

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- The Indigenous community are a particularly high risk group, due to the many alcohol related assaults linked to consumption of liquor. On many occasions, domestic violence and injury has been caused to members of this group following the excessive use of liquor. Increasing the trading hours of this premises will invariably lead to increased assaults. Granting this application will increase the risk of undue harm to people, due to the use of liquor.
  - The Eastern Hotel, Midland has requested a significant extension to its opening hours over five successive days. This is of substantial concern to WA Police due to Midland having no substantial public transport system to support a night time economy.
  - As East Metropolitan Police District has no "late night" venues (including night club licenses), the majority of the population will go outside of the district to source late night entertainment – and at locations that are more conducive to supporting late night venues. The area in which the Eastern Hotel is located is largely day-commercial with an emerging (but small) residential component. As such, it is not conducive to development as a precinct that will support late night entertainment.
  - While the Midland train station is approximately 150 metres from the Eastern Hotel, the last train departs Midland on a Monday to Saturday at 1:30am. On a Sunday the last train departs 11:30pm. The proposed closing times go beyond what the current train schedules can support.
  - Midland is serviced by only three Transperth bus routes, they being:
    - a) 310 to Upper Swan
    - b) 311 to Bullsbrook and Muchea via Upper Swan
    - c) 312 to Baskerville via Middle Swan

During weekdays the last 310 bus leaves Midland station at 7:15pm, 7pm on Saturdays and does not run on Sundays and Public Holidays. The last 311 bus leaves Midland station at 10:30pm on weekdays and 4:30pm on Saturdays and 5pm on Sundays and Public Holidays. The last 312 bus leaves Midland station at 4:44pm weekdays and does not run on weekends. The proposed extended trading hours go beyond what the current bus schedules can support.

- The historical problem in attracting taxis to the East Metro area goes back a number of years and has been documented in previous East Metro Liquor Accords. This problem has recently been raised in the last East Metro Liquor Accord (11<sup>th</sup> June 2008).

Local licensees are still experiencing difficulties associated with non-reliable taxi services including attendance at licensed premises and the problems they have in attracting taxis to their venues to transport local customers home safely. This problem is becoming more prevalent and is a detriment to their businesses and in turn people are becoming renowned for driving under the influence of alcohol. A person's ability to make rational decisions can be clouded when intoxicated, therefore increasing incidents of risk taking behaviour, such as driving a vehicle under the influence of alcohol.

- Between 22/3/07 and 4/4/08 Police have been called to the Junction Hotel, Midland 54 times. These callouts relate to anti-social behaviour including assaults, intoxication, fighting, stealing, hooning, burglary and driving under the influence.
- It has been recognised by the Licensing Authority that Hotels and Taverns cater to a different section of the public, as opposed to persons attracted to traditional nightclubs. It is the submission of the WA Police that undue harm would be caused to people, due to the use of liquor.
- There is a direct relationship between extending trading hours at licensed premises and assaults, which can be found in Northbridge. The assault figures represented below attest to the rise in assaults after midnight:

WEDNESDAY EXTENDED PERMIT: TRADE 12 MONTHS TO 20 NOVEMBER 2007

Assaults 9pm to Midnight	Nil
Assaults Midnight to 2am	31

A reasonable inference can be drawn from the increase in assaults after midnight that extending the hours of trade will cause an increase in undue harm to patrons.

- There is a clear relationship between assaults reported to police and consumption of alcohol at licensed premises. Any continuation or extension of an ETP for ongoing hours will continue this trend and increase incidents in and around the licensed premises (*Chikritzhs and Stockwell, 2002*).
- Any further patrons attracted to the premises will result in greater incidence of public disorder and disturbance. As stated by *The National Drug Research Institute; Restrictions on the Sale and Supply of Alcohol 2007*:

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"In 2001/02 it was found 44% of violent incidents occurred at the weekend (6pm Friday to 6am Monday) and 63% occurred during the evening or night (Allen et al, 2003)".

- If the extended trading permit were granted, the Eastern Hotel would be ushering out patrons at closing time who have consumed liquor, causing a mass exodus of the Hotel onto a busy arterial road which could have major consequences for patrons and road users.
- Patrons are likely to mill around waiting for transport. Experience has shown that patrons get so desperate to find transport that some are prepared to lay on the road in an attempt to stop a vehicle to give them a lift home. This occurred on several occasions at Spring in the Valley in 2007, after the event had finished.
- The west bound double carriageway of the Great Eastern Highway is 40 metres to the South of the Eastern Hotel. This major road would have to be negotiated to get to Midland train and bus stations, again a risk to patrons and road-users.
- Police have also noted that there is an alfresco area included on the plans to accommodate patrons on the slim footpath area (3.5 metres in width) outside the Eastern Hotel and adjacent to the Great Eastern Highway. There is also a breakout area (3.2 metres in width) proposed for patrons smoking cigarettes facing onto Helena Street. Both locations are highly unsuitable for the stated purpose due to the limited width of the footpaths and the proximity of major roads. Also, passing members of the public would have difficulty passing by chairs and tables in this location.
- There is also the risk that patrons would be taking alcoholic beverages into the breakout area which is not licensed. The breakout area would require constant attention unless security staff were to be employed at the Hotel throughout the opening hours (6.00am to 2.00am or Sunday 8.00am to 12 midnight). This area is not well lit and would present a significant hazard for patrons and other passing by.
- Granting an extended trading permit will have a detrimental effect on policing in the East Metro Policing District. It will result in valuable Police resources being drawn from the surrounding sub-districts and from the specialist units operating in the Metropolitan area to deal with anti-social behaviour, assaults, liquor offences, drink-driving and possible vehicle crashes. This would have a negative impact on the local communities and the agency's grades of service on response to calls for assistance.

- Whilst the Midland CBD is small and compact, the area has no CCTV in existence independent to what is proposed in the Eastern Hotel. CCTV is an essential tool in the policing of street violence and anti-social behaviour in areas surrounding licensed premises. Video cameras supported by the local government authority would be of extreme importance and would assist in reducing all types of crime and disorder in the Midland CBD.
- Section 5(1)(b) of the Act is intended to minimise harm or ill health caused to people, or any group of people, due to the use of liquor. Given the concerns highlighted above, it is the view of WA Police that the proposed extended hours are not warranted or desirable from a community safety perspective. The potential for increased harm to patrons and others is significant.
- Section 5(1)(c) of the Act relates to the proper development of the liquor industry. It is the view of the WA Police that the Act clearly defines the permitted hours of a Tavern licence as distinct from a Night Club licence, and as Taverns should be properly developed so should Night Clubs. A 12am and 2am closing for Taverns blurs this distinction.
- Permitted hours for a tavern licence are 10am to 10pm Sunday evenings and weekdays including Saturdays from 6am until 12am. Significant changes to the Act were recently introduced and there was opportunity for the Government to change permitted hours for taverns and this did not occur. This is further substantiated by the Government's repealing of section 60(5) of the Act narrowing the once broad consideration the Director had to give ETP applications.
- At present the Eastern Hotel has an entertainment condition placed upon its licence which supports strippers. Police request that due to the structural alterations submitted and the area gaining more square metres for customers to stand, that the entertainment condition be removed.

#### **INTERVENTION LODGED BY THE EXECUTIVE DIRECTOR PUBLIC HEALTH (EDPH)**

On 29 July 2008 an intervention was lodged by the Executive Director, Public Health, stating:

- The purpose of this intervention is to object to the Eastern Hotel Midland's application for an ETP and to make representations regarding:
  - ❖ existing alcohol-related harm and problems occurring in the locality of the premises;
  - ❖ high risk aspects of the proposed ETP; and

- ❖ research demonstrating a link between late night trade and increased levels of alcohol-related harm.
- It is noted that the applicant intends to implement a number of harm minimization strategies, such as full menu available until 9pm. While the strategy is commended, it does not address harm minimisation during the most high risk times (ETP hours) at the venue.
- There are no known late-night licences in the area that are able to trade past 12 midnight.
- It is relevant to consider that the Eastern Hotel Midland will be operating in a local community where alcohol-related harm occurs regularly. There is, therefore, an even greater risk of problems associated with the introduction of a late night trading licence, given it would be operating within an external environment (community attitudes and acceptance/tolerance of antisocial and drunken behaviours) that does not support the prevention and minimisation of alcohol-related harm.
- The high level of alcohol-related violence and antisocial activity occurring in the locality of the premises is a public health concern.
- In the context of police crime data, including assault offences, the applicant questions the relationship between alcohol and crime in the PIA. For example the applicant states:

“Given the significantly higher offences which occur which do not involve alcohol, it is very questionable whether alcohol was a contributing factor to those offences which have been recorded as involving alcohol.”

- Contrary to the applicant's PIA, research consistently shows a strong link between alcohol consumption and crime, particularly violent crime. According to Graham & West (cited in Heather, Peters and Stockwell 2001), *“[T]he effects of alcohol on risk taking, problem solving, emotions and power concerns tend to increase the probability that people will respond aggressively or violently in certain situations, engage in other crimes such as robbery and choose to drive while impaired and then possibly drive aggressively or carelessly.”*
- In the 2006/2007 financial year, there were a total of 616 assaults in the Midland Police sub-district, of which 188 (31%) were recorded as being alcohol-related (WA Police IMS database, unpublished, 2008). It has been reported that between 60-80% of police work at particular times is alcohol and drug related (Doherty & Roche, 2003).

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- In 2006/2007, a high number of assaults occurred at Hotels/Taverns in Midland. Police statistics show that 52 of the 616 assaults in the Midland sub-district occurred at a Hotel/Tavern. Five of the 52 reported assaults were recorded as occurring at the Junction Hotel. There was only one other venue in the Midland Police sub-district which had 5 recorded assaults in 06/07. No other single premise contributed as many assaults in this district (WA Police, unpublished 2008).
  - The number of non-family violence assaults in Midland is already high, when compared to other sub-districts which already have late night licences. Research shows that there is a risk that these levels of violence could increase if a late night licence is introduced.
  - During the 12 month period from June 2007 to May 2008, in the East Metropolitan Police District (within which the Eastern Hotel Midland is located), there were a total of 1731 assaults, of which 560 were recorded as being alcohol-related (WA Police, unpublished, 2008).
  - In addition to the 1731 assaults that occurred in the East Metropolitan Police District, there were 378 sexual assaults during the same period, of which 142 (38%) were recorded as being alcohol-related (WA Police, unpublished, 2008).
  - The introduction of a late night licence in Midland needs to be considered in the context of the existing alcohol-related violence and antisocial behaviour occurring in the vicinity of the Eastern Hotel, particularly as research demonstrates an association between late night trading and an increase in violence.
  - From 2002-2006, in the Swan statistical local area (in which the Eastern Hotel is located) there were a total of 1066 male alcohol related hospitalisations and 751 female alcohol-related hospitalisations, at a total cost of \$9,524,150.38 (Epidemiology Branch of Health WA and Drug Alcohol Office WA, 2008). If the alcohol-related hospitalisations, fall injuries (n=343), assaults (n=212, suicide (n=181) and road injuries-vehicle (n=127) featured in the top six contributors of all alcohol-related conditions (Unpublished, Epidemiology Branch, Department of Health, July 2008). These conditions are indicative of short-term harm caused by excessive drinking on single drinking occasions.
  - In 2007/2008, there were a total of 33,277 attendances to the Swan Districts Hospital Emergency Department. Of the 33,277 attendances, 9431 had an injury diagnosis, a category in which alcohol-related presentations, such as injuries from violence, are often recorded (WA Department of Health EDIS database, unpublished, 2008).



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- The statistics for alcohol related hospitalisations for the period 2005/2006 to 2007/2008 for those codes identified above reinforce the concerns expressed by local stakeholders that there is an existing level of alcohol-related harm associated with alcohol intoxication in Midland.
  - The Eastern Hotel's application for an extended trading permit consists of a number of risk factors that are likely to facilitate alcohol-related harm and incidents.
  - Examples of risk factors associated with, and in some cases predictive of, alcohol-related harm that are well documented in national and international literature include:
    - ❖ late night trading;
    - ❖ existing levels of harm in an area; and
    - ❖ nature/type of patrons (Heather, Peters and Stockwell, 2001).
  - The multiple risk factors in the Eastern Hotel application for an ETP include:
    - ❖ Research demonstrates that venues, particularly hotels and taverns with extended trading hours are associated with greater alcohol-related harm than those without extended trading;
    - ❖ The existing levels of violence and alcohol-related problems in the locality of the Eastern Hotel;
    - ❖ Lack of public transport services to the area, particularly late at night during the times of the proposed ETP, considering the existing levels of alcohol-related road trauma in the Swan Local Government area;
    - ❖ Close proximity of the premises to a main highway, which increases the risk of road trauma, particularly given that people will have had extended drinking time, if this ETP is granted; and
    - ❖ The anticipated young adult clientele expected to patronize the late night facilities, who are high risk group for alcohol-related harm.
  - Should the application be granted, it will be the only licensed venue in Midland to trade until 2am.
  - The applicant states in their PIA that, '*the granting of the application will not adversely affect the rate of crime in Midland*'. Contrary to the applicant's statement, research demonstrates a link between late night trade and increased levels of crime. Therefore, the granting of this licence has the potential to increase the levels of crime in Midland, particularly violence and drink-driving.

- Internationally renowned WA research has demonstrated that, as a function of the amount of alcohol sold, different licence types are associated with very different degrees of risk for serious alcohol-related harm for their customers. In Perth, nightclubs and hotels/taverns were found to have a higher risk for assaults, drink-driving and road crashes (Stockwell et al, 1992).
- A 2am ETP provides an additional 2 hours of drinking time. In support of the notion that ETP's can increase consumption rather than encourage a patron to spread their consumption over the extended time, a Perth study found that *"levels of wholesale alcohol purchases increased dramatically among hotels that gained ETPs but found only modest increases for normally trading hotels over the same period of time"* (Chikritzhs and Stockwell, 2002).
- The impact of providing an additional two hours of late night trading on drink-driving behaviours is also a reasonable concern.
- Late night trading hours can have a significant role in the potential for alcohol-related road trauma. A 2002 Road Safety report on drink-driving offences and place of last drink in WA showed that licensed premises accounted for the most drink-driving offences from 10pm to around 4am, whereas other premises (for the most part, private residences) are more likely to be linked to offences earlier in the evening (Catalano & Stockwell, 2002).
- There is known to be a lack of public transport available in Midland at night time, raising concern regarding patrons ability to return home safely after leaving the proposed venue between 12 midnight and 2am. Of the public transport options available, there are significant limitations that would hinder the ability of Eastern Hotel patrons to get home during, or after, the proposed ETP hours.
- The provision of a local late night venue does not necessarily reduce the potential for alcohol-related road trauma.
- Limited transport options increases the likelihood of patrons choosing to drive home.
- The availability of late night public transport or alternative transport is a crucial harm minimisation issue given the venue's location.
- Stevenson (1996) concludes that the opportunity for conflict and propensity for violence may result from intoxicated patrons congregating in and around the licensed premises. There are already a high number of assaults occurring on the street/footpath in Midland. In 2006-07, of the total 616 assaults that occurred in Midland, 125 occurred on the street/footpath.
- The location of the Eastern Hotel on a main road potentially increases the risk of road trauma, should this application for an ETP be granted.

- The applicant states in their PIA that, *'There are no at-risk groups for the purpose of the present application'*. Contrary to the applicant's submission, young adults are a more 'at-risk' clientele because they are the age group at highest risk of alcohol-related injury, including road trauma, violence, sexual coercion, falls, accidental death and suicide. In addition, local youth service providers have noted a culture of binge-drinking and associated violence amongst young people in the Midland area.

#### CITY OF SWAN COMMENTS

On 9 June 2008 Jeff Somes, Senior Environmental Health Officer of the City of Swan, provided the following comments by email:

- The proposed use 'live bands' presents the potential for noise nuisance.
- With regard to the proposed use as a hotel, the Licensing Authority needs to satisfy itself that the premises are of a suitable standard. Many of the rooms are in a state of disrepair and one is unfit for habitation due to surfaces being coated in pigeon manure.
- The City strongly recommends the following conditions:
  - a. Noise generated by activities on site do not exceed the levels set out in the Environmental Protection (Noise) Regulations 1997
  - b. The development comply with the Health (Public Building) Regulations 1992.

On 6 January 2009 the City of Swan was informed that the above comments and recommendations would not be taken into consideration when determining the application based on the following:

- As the application is by a tavern licence, the City's comments regarding its use as a hotel are not relevant in determination of this matter.
- Regarding the recommendation that the applicant engage the services of a noise consultant to ensure the premises will comply with the Environmental Protection (Noise) Regulation, the applicant's PIA stated that sound engineers will be appointed to control and reduce noise emissions from the premises.

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## APPLICANT'S RESPONSE TO OBJECTIONS AND INTERVENER

On 29 October 2008 the applicant lodged submissions in response to the objectors and intervener as follows:

- In relation to the present application both the police and the EDPH have relied upon both national and international research which support a number of general propositions linking the consumption of liquor to harm and/or ill health. Although obiter dicta, guidance is provided in the decision of *Hancock v Executive Director of Public Health & Ors [2008] WASC 224* at paragraph 78 in relation to the approach to be adopted by the licensing authority when considering such evidence. The decision of the Chief Justice of the Supreme Court made it clear that while such evidence may be relied upon, it is necessary for the licensing authority to consider how such general propositions apply to the specific circumstances of the application before it.
- It is submitted that, as identified by the Supreme Court in *Executive Director of Health v Lily Creek [2000] WASCA 258*, it is essential for the licensing authority to address the notion of causation as identified in the relevant provisions, ie is the harm or ill health identified, caused by or due to the use of liquor. This question will be answered in the affirmative if the evidence is sufficient for the licensing authority to find that, if liquor had not been consumed, the harm or ill health complained of would not occur.
- It is submitted that the present application, due to the objections and intervention received, gives rise to a conflict between the objects contained in s. 5(1)(b) and (c) of the Act. As both are primary objects of the Act, neither one is afforded primacy over the other. It is therefore necessary to weigh the evidence relied upon by objectors and interveners in support of a finding that the grant of the application has the potential to result in harm or ill health being caused to people due to the use of liquor against the evidence which would support a finding that the grant of the application is necessary to cater for the requirements of consumers for liquor and related services. Upon a consideration of the evidence, the licensing authority may well find that in assessing the public interest in granting or refusing an application, the requirements of consumers outweigh the need to minimise harm or ill health being caused to persons due to the use of liquor.
- Notwithstanding that there is no burden of proof upon an intervener, the licensing authority is not required to accept evidence placed before it or representations made by an intervener. In exercising its discretion under the Act the licensing authority is required to weigh and consider the evidence before it, whether presented by an objector, applicant or intervener. This will inevitably involve questions of reliance, reliability and the probative value of evidence when assessing what weight, if any, is to be given to the evidence.

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- The objection received from the Howletts is not in the prescribed form and no attempt has been made to specify which, if any, ground under section 74 of the Act is relied upon.
  - No attempt has been made by the police to specify which grounds under section 74 of the Act they are relying upon in support of their objection.
  - It is submitted that the police have no particular expertise in matters relating to tourism or the requirements of local farmers and as such, their comments and observations cannot be considered expert evidence, but rather simply opinion evidence.
  - Reference is made to paragraph 117 of the PIA which identifies six tourist accommodation facilities located within Midland. It is important to note that Midland is located on the doorstep to the Swan Valley. It is submitted that tourists who reside at one of the accommodation facilities within Midland would enjoy the convenience of socialising at a late night venue within Midland rather than having to travel further afield. Local Midland residents may also wish to have the ability to enjoy late night entertainment without travelling.
  - The police have submitted that the breakfast that will be made available at the applicant's venue are not out of the ordinary and are available at three other local venues. This is disputed. The applicant proposes to offer 15 different Bloody Marys, and a signature breakfast menu which is not offered by competitors. It is submitted that the police have demonstrated that another venue is desperately needed.
  - The police have indicated that during busy periods there will be no tables and chairs within the main bar. This is incorrect. The main bar consists of three booths seating 20 people. There are also three upright tables with six stools and ten stools at the bar.
  - There is no basis for the opinion of the police that consuming a single Bloody Mary or glass of champagne at 8am could make a person tipsy and light-headed.
  - The police have expressed concerns in relation to patrons attempting to negotiate the busy intersection of Great Eastern Highway. There are traffic lights there and it is anticipated that patrons would have sufficient experience to know how to utilise these traffic lights. By way of example, it cannot be suggested that The George on St Georges Terrace should not have been granted its licence for the simple reason that some patrons may consume one or more glasses of wine at The George and then potentially have to negotiate crossing St Georges Terrace.

- No attempt has been made by the police to narrow down the huge East Metropolitan District to a population which conceivably may utilise the services of the Applicant's premises.
- The police have provided statistics in relation to the drinking habits of indigenous Australians provided by the ABS. After adjusting for age differences, the proportion of indigenous adults who reported drinking at risky levels was similar to that for non-indigenous adults. There is no basis for distinguishing between indigenous drinkers and members of the non-indigenous community.
- There is no basis upon which the licensing authority can find that the indigenous population who may access the services provided by the applicant are high risk drinkers, violent and likely to commit assaults.
- It is submitted that the police concerns in relation to an inadequate public transport system is without foundation (see paras 136-141 PIA).
- Police callout figures between 22 March 2007 and 4 April 2008 are irrelevant and should be disregarded as the applicant was not operating the premises during that period.
- The combined effect of renovations and changes in style of operation are such that no comparison can be made between the style of venue during the period identified by the police and the manner in which the premises will operate under the stewardship of the applicant. The venue formerly operated as a rundown neighbourhood bar whose primary source of entertainment was the employment of "skimpys" and erotic dance shows.
- There is a danger in relying upon statistics from Northbridge, given that the venues trading during later hours within Northbridge are doing so in an entirely different environment. There is more opportunity for persons to interact and as such greater likelihood of altercations occurring.
- Northbridge cannot be compared to Midland in circumstances where the present application will result in the Eastern being the only venue within Midland which trades during later hours.

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- The Court Hotel ETP (decision A187688) was renewed, permitting the venue to trade until 2am on Friday and Saturday, notwithstanding the finding of the Director that on *'the balance of probabilities, alcohol related harm is occurring in the locality of the Court Hotel. Furthermore, the applicant, in responding to the intervention of the Commissioner of Police, attempts to mitigate the harm occurring in or in the vicinity of the Court Hotel but does not refute that harm is occurring'*. There was specific evidence that harm or ill health was occurring due to the use of liquor within the area. No specific evidence has been provided by the police in support of their objection in relation to the present application. Based on the Court decision, it is submitted that reliance upon general research cannot be considered sufficient to ground a finding that extended trading hours should not be granted.
  - No attempt has been made by the police to explain why the Chikritzhs report is applicable to the present application.
  - It is submitted that the later trading hours will permit a more staggered egress of patrons from the venue.
  - No comparison can be made between the Spring in the Valley event and the present application given the large number of persons who are attracted to Spring in the Valley (estimated at 60,000 to 70,000 by Swan Valley Visitors Centre).
  - No evidence has been provided to support the blanket statement of the police to the effect that there are insufficient police resources to deal with the ETP.
  - The lack of CCTV cameras employed by the local government authority is a matter for the police to raise directly with the local government authority.
  - It is submitted that the police have not proven their objection on the balance of probability.
  - No attempt has been made by the EDPH to apply general propositions from research papers to the particular circumstances of this application.
  - With regard to 'alcohol related' assaults, based upon previous submissions made by the EDPH and police, it would appear that 'alcohol related' simply means that the offender has consumed alcohol at some stage prior to the commission of the offence. It is not necessary for the offender to be intoxicated, the offence is deemed to be alcohol related if the offender has consumed liquor. The licensing authority has no way of telling whether or not the consumption of alcohol in any way caused the commission of the assaults.

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- Other factors against the statistics include the lack of definition of an 'alcohol related assault', the circumstances of the assault, and confirmation of the amount of successful prosecutions.
  - The EDPH submits that, in 2006/07, police statistics show that 52 assaults occurred at a hotel/tavern in the Midland sub-district. Five of them were recorded as occurring at the Junction Hotel. There was only one other venue which had five assaults. Earlier in the EDPH submission it is stated that there are only 3 hotels/taverns in the sub district. If five assaults (the highest number) occurred at the Junction, and five at one of the other taverns, and (at most) four in the third tavern, where did the other 38 assaults occur?
  - The EDPH indicates the number of assaults in Midland for 2007/08 was 532. However, a search on the WA Police web site shows the actual number to be 235.
  - The number of assaults relied upon by the EDPH are disputed by the applicant as they are not consistent with crime statistics published by the WA Police. It is submitted that the statistics in relation to assaults sought to be relied upon by the EDPH, due to the errors identified, are inherently unreliable.
  - It is further submitted that the EDPH has failed to identify how these general statistics are applicable to the present application and give rise to an inference that if it is granted the rates of assaults within Midland will increase.
  - In relation to alcohol related hospitalisations, there is no basis upon which it can be determined whether the liquor has been consumed by way of takeaway liquor or on licensed premises. The distinction is important because the licensing authority can only have consideration to harm or ill health caused due to the use of liquor which is relevant to the application being considered. If there is a significant problem within the Midland area with persons abusing takeaway liquor in uncontrolled environments, the refusal of the present application will have no effect upon the rates of harm or ill health being caused.
  - Research reveals that trading later alone does not result in an increase in violence. It may simply be that the timing of the assault shifts when an ETP or later trading is permitted. Other factors might be aggressive crowd controllers, poor ventilation, high boredom etc.



Also relevant in the determination of this application is the research undertaken by:

- Chikritzhs and Stockwell, 2002 report (The Impact of Later Trading Hours for Australian Public Houses (Hotels) on Levels of Violence);
- Stockwell et al, 1992 research paper (The Relationships between Licence Types and Alcohol-Related Problems attributed to licensed premises in Perth)
- Briscoe and Donnelly, 2001 study (Assaults on Licensed Premises in Inner Urban Areas)

This research can assist the licensing authority in identifying licence types and circumstances that are associated with alcohol-related harm.

The Chikritzhs and Stockwell 2002 report associates increases in monthly assault rates for hotels with ETP's and the Stockwell *et al* 1992 study found that nightclubs, hotels and taverns have a higher risk of assaults, drink-driving and road crashes than clubs or nightclubs.

With respect to the Chikritzhs and Stockwell paper, at paragraph 176 of the Response, the applicant acknowledges the general proposition of the paper that statistically a hotel with extended trading hours can have "... *an increase of less than two assaults per year as a result of having extended hours...*"

The Briscoe and Donnelly study identified hotels (particularly with extended or 24 hour trading) and night clubs "... *as being the most problematic for violence on licensed premises ...*" However, as is normal with research papers, the authors "*qualified*" their findings; and at paragraphs 180-184 of its Response, the applicant submits that because of the qualifications, the Briscoe and Donnelly report does not support a finding that late trading is associated with an increase of alcohol-related harm. In this regard, at paragraph 183 the applicant comments that, with respect to the assaults on these late night trading premises, "*... it may simply be that the timing of the assault shifts when an ETP or later trading is permitted, the latter trading itself is not resulting in any increased harm or ill-health due to the use of liquor.*" Nevertheless, the study reports that assaults are occurring at these premises. Notwithstanding the qualifications, Briscoe and Donnelly conclude:

*"Two characteristics of problematic licensed premises which emerge from the present study is that they are more likely to be hotels than any other type of licensed premises and that they are more likely to have extended trading beyond standard hours."*

Therefore, notwithstanding the issue of timing, there still remains the possibility of an increase in the number of assaults during later trading hours.

The applicant's PIA stated that the majority of patrons it aims to attract will be in the range 25 to 40 years. In its Response the applicant considers the Eastern Hotel would be no different to any other late night venue within Perth; no evidence, however, was submitted to establish this assertion.

The EDPH's representation is that young people are at risk drinkers because they consume liquor at a high risk level. In response the applicant argues that they will not be drinking at high risk levels at the Eastern Hotel Midland because the licensee will adopt responsible service of liquor practices. Although the applicant submits that juveniles will not be permitted to consume liquor to the point of intoxication, under the Liquor Control Act, juveniles are not permitted to consume liquor on licensed premises at all. Nevertheless, the following evidence submitted by the EDPH, that was not controverted by the applicant, is compelling with respect to the *"mere possibility of harm or ill-health"* to which the licensing authority must have regard:

*"... young adults are a more "at-risk" clientele because they are the age group at highest risk of alcohol-related injury, including road trauma, violence, sexual coercion, falls, accidental death and suicide (National Health and Medical Research Council, 2001). In addition, based on experience with young people in the area, local youth service providers have noted a culture of binge-drinking and associated violence amongst young people in the Midland area. (pers comms. M Nasser, Swan City Youth Services)*

*The incidence of alcohol-related injury is particularly high in young people and young adults. For example, between 1990 and 1997, over half of all serious alcohol-related road injuries (52%) were sustained by people aged 15-24 years, and a further 23% sustained by young adults aged 25-34 years (Chikritzhs et al, 2000)*

*Late-night venues are appealing to high-risk drinkers such as young people and young men who are, "more likely to take advantage of the increased trading hours and are not inclined, or less able to, regulate their own drinking" (Chikritzhs and Stockwell, 2002)"*

With respect to the Indigenous community the police made the following comment:

*"The Indigenous community are a particularly high-risk group, due to the many alcohol-related assaults linked to consumption of liquor. On many occasions, domestic violence and injury has been caused to members of this group following the excessive use of liquor. Increasing the trading hours of this premise will invariably lead to increased assault."*

While the police only provided statistics in relation to drinking habits of Indigenous Australians produced by the Australian Bureau of Statistics, at paragraph 85 of the Response, the applicant responded:

*‘... significant statistic is that after adjusting for age differences, the proportion of indigenous adults, who reported drinking at risky/high risk levels, was similar to that of non-indigenous adults.’*

Nevertheless, the Australian Bureau of Statistics indicate that there is a possibility that both Indigenous and non-Indigenous drinkers, who report drinking at risky/high risk levels, could, by extrapolation, resort to the licensed premises.

In addressing the harm or ill-health criterion of section 38(4) of the Act, at paragraphs 150 - 152 of the applicants PIA, the applicant submitted alcohol related crime statistics, including:

- assaults in Midland;
- motor vehicle offences in Midland; and
- burglary offences in Midland.

The applicant submits “... *that the granting of the application will not adversely affect the rate of crime within Midland.*”

The EDPH intervened to make representations regarding existing alcohol-related harm and problems that occur in the locality of the proposed premises, under the headings of:

- assaults occurring in Midland.
- violence and disorderly conduct occurring in the Eastern Metropolitan Police District.
- alcohol-related hospitalisations and mortality.
- emergency department admissions at the Swan Districts Hospital.

The EDPH submits “... *that the granting of this licence has the potential to increase the levels of crime in Midland, particularly violence and drink-driving.*”

The applicant's Response identified errors in statistics in relation to assaults relied upon by the EDPH. The EDPH relied upon rates resulting in 2007/2008 of 532 of which 173 recorded as being alcohol related. At paragraph 148 of the Response, the applicant submits that 235 assaults were recorded, not 532. The argument, however, is about the quantum rather the existence of assaults, a number of which are alcohol-related.

With respect to the evidence submitted by the EDPH in relation to alcohol-related hospitalisations and mortality and emergency department admissions at the Swan Districts Hospital, at paragraphs 155-157 of the Response, the applicant raises the issue of the catchment area of the Swan Districts Hospital as not being solely Midland, the locality of The Eastern Hotel and the Swan statistical local area being wider than Midland.

However, this must be weighed against the statement at paragraph 131 of the PIA that the ETP "... will better service the demands of residents from the immediate locality, as well as young farmers from neighbouring suburbs ...". Furthermore, the PIA and Response indicates it will be catering for the requirements of consumers from a wider area than Midland; at paragraph 71 of the PIA, the applicant identifies the locality as including the following suburbs:

- Midland
- Woodbridge
- Guildford (east)
- Bellevue (west)
- Midvale (west)
- Viveash

Furthermore, at paragraph 59 the applicant identifies persons "...who intend to utilise the services of the Hotel" at "Annexure E"; of the thirty suburbs identified, Midland is listed on only three occasions. The 11 letters of support submitted at Annexure A of the Response, also includes the suburbs of "Bassendeen" (sic) and "Hazelmere".

In the PIA and Response, the applicant questions the use of the phrase "alcohol-related." In the Response, the applicant submits that the licensing authority cannot rely on the levels of assault in Midland to determine whether or not harm or ill-health has been caused in Midland due to use of liquor consumed at licensed premises because:

- there is no definition of what an "alcohol assault" is;
- it cannot be determined whether the alcohol-related assaults were following the consumption of take-away liquor or alternatively, from the consumption of liquor upon licensed premises; and
- there is no information on the circumstances of the assault.

At paragraph 153 of the PIA the applicant submits "... offences which could be described as instances of domestic violence which occur following the consumption of takeaway liquor at home would not be relevant to the present application".

The applicant further submits that it is necessary that the statistics relating to assaults occurring in Midland identify how they are applicable to the present application and give rise to the EDPH's inference that if it is granted, the rates of assaults in Midland "will" increase.

In its intervention the EDPH submits:

*"It is of note that alcohol involved domestic violence does not always occur as a result of the consumption of packaged liquor and that on-premises consumption of alcohol can lead to problems after a patron leaves a premises. Where the operation of a venue may increase that risk of harm (such as extended drinking time through extended trading hours), it is a relevant public interest consideration."*

In paragraph 158 of the Response regarding 181 hospitalisations relating to suicides, the applicant states that *"it is somewhat doubtful if a suicide can be categorised as alcohol-related."* The State Coroner's report on 22 deaths in the Kimberley region, and his subsequent report on the five deaths in Oombulgarri, attests to suicides being categorised as being alcohol-related.

In relation to the commissioning of offences, the applicant questions how can they be identified in police/EDPH statistics as being alcohol-related without establishing that the offender is intoxicated? Similarly, in relation to drink-driving statistics, the applicant argues that the EDPH statistics should be premised on persons who were in fact intoxicated when driving.

There is no onus on the licensing authority to establish the direct link with intoxication. The onus on the licensing authority is to minimise the harm or ill-health that may be caused to people, or a group of people, due to the use of liquor. In this case for example, the EDPH asserts that harm or ill-health may result from drink-driving. Greaves J in the Gull Petroleum (WA) Pty Ltd refused the application for the grant of a licence on the basis that *"... the reduction of such consumption may minimise harm to the consumer and third party road users..."*; the refusal was not linked directly to drivers having to be *"intoxicated"*.

Furthermore, the drink-driving offences, under the Road Traffic Act, are premised on Blood Alcohol Content and not on intoxication. Similarly, the National Health and Medical Research Council guidelines are directed at reducing the risk of harm or ill-health through the use of liquor and not to prevent intoxication.

The EDPH submits that extended trading hours results in an increase in drink-driving offences. The applicant submits, from its review of the 2002 road safety report on drink driving offences (Catalano & Stockwell 2002), which the EDPH relies upon, that the report does not support the EDPH's submission. Nevertheless, there remains:

- the possibility of offences occurring between midnight and 2.00am;
- the fact that hotels are cited as last place of drinking;
- in relation to accidents at which police have attended and taken blood alcohol readings, the fact remains that between midnight to 2.00am, persons cited licensed premises as being the last place of drink, and between 2.00am and 4.00am, persons cited licensed premises as the last place of drink; and
- in relation to recordings obtained for random breathalyser tests, not associated with accidents, the fact remains that between midnight and 2.00am, persons cited licensed premises as the last place of drink, and between 2.00am and 4.00am, persons cited licensed premises as their last place of drink.

The data reveals that persons who resort to licensed premises after 12 midnight do drink and drive and the applicant has not established that, on the balance of probabilities, there is not a possibility of increased drink driving and/or harm associated drink-driving. To address alcohol-related harm in relation to drink-driving, the applicant submits that there are no steps the licensing authority can take other than "... *placing mandatory restrictions on a number of drinks a person can consume within an hour.*" While noting this assertion, the licensing authority can refuse applications to minimise harm or ill-health due to the possibility of driving after having consumed liquor.

With respect to alcohol-related hospitalisation and mortality, the applicant argues that the information provided by the EDPH should identify the source of the liquor being consumed and from where the liquor has been purchased. The distinction between whether the liquor has been consumed via take-away liquor or on licensed premises is, in the opinion of the applicant "... *important because the licensing authority can only have consideration to harm or ill health caused due to the use of liquor which is relevant to the application being considered.*"

These claims by the applicant must be considered in the context of the inference by the applicant that the licensing authority is to assess, weigh and balance evidence and competing claims/assertions before it, in an absolute sense.

The applicant asserts that the licensing authority is to consider these matters in such terms as, for example: "*will increase assault rates*"; "*will have no effect*"; "*will cause harm or ill-health*"; "*will not result in harm or ill-health*"; "*no adverse impact*"; and "*link must be made*".

No such burden is placed on the licensing authority under section 16(1) of the Act as it is to make its determinations on the balance of probabilities. In considering the evidence and statistics and competing demands, the onus is on the licensing authority to consider "... whether the prospect of harm or ill-health is a possibility or a probability" (Lily Creek 2000 paragraph 28). Furthermore, it is not unreasonable for the licensing authority to rely on the evidence submitted and the representations made by EDPH that do not fall within the ordinary experience of a judicial officer. At paragraph 72 Justice Ipp stated in the 2000 Lily Creek decision that:

*"In my opinion this is an issue that can only be reliably commented upon by a person who is knowledgeable of the issue by reason of appropriate research or experience or both. It is not a matter within the ordinary knowledge of a judicial officer."*

Whether harm or ill-health would arise in this particular case (or whether the applicant will cater for the requirements of consumers for liquor and related services), requires predicting the future. Justice Ipp quoted the observation in *Malec v J.C. Hussein Pty Ltd* (1990) 169CLR638 (Lily Creek 2000 paragraph 26)

*"The future may be predicated in the hypothetical may be conjectured. The questions as to the future of a hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof."*

In this regard, in discharging its functions "... the mere possibility of harm or ill-health ..." is a relevant matter for the licensing authority to consider. "*The potential of harm or ill-health to people, irrespective of whether the harm or ill-health is proved on a balance of probabilities, would be a powerful public interest consideration.*" (Lily Creek 2000 paragraph 29)

While the term "*public interest*" is not defined in the Act, it is defined in Butterworth's Australian Legal Dictionary as:

*"An interest in common to the public at large or a significant portion of the public and which may or may not involve the personal or proprietary rights of individual people."*

In *O'sullivan v Farrer* (1989) 168 CLR 210 the term "*public interest*" was described as a term of "*wide import*". In this case the majority of the High Court, referring to Dixon J's judgement in *Water Conservation and Irrigation Commissioner (NSW) v Browning* (1974) 74 CLR 492 said that:

*"... the expression "in the public interest", when used in a statute, classically imports a discretionary value judgement to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and the purposes of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects that legislature could have had in view".*

In this case, it has been variously described as referring to considerations affecting the good order and functioning of the community and government affairs for the wellbeing of its citizens and also for the benefit of society, the public or the community as a whole. (*The public Interest: We know it's important but do we know what it means. (2006) AIAL Forum No 48 12-25 at p. 13*)

### **SECTION 38(2) DETERMINATION**

Under section 38(2) of the Act, the applicant must satisfy the licensing authority that the granting of the application is in the public interest. Sub-section (4) states that the matters the licensing authority may have regard to in determining whether the granting of the application is in the public interest, includes the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor.

In this regard, the EDPH submits "*[I]n assessing likely risks associated with the licence, it is relevant to consider that the Eastern Hotel Midland will be operating in a local community where alcohol-related harm occurs regularly.*"

The following comment by Wheeler J at paragraph 59 in the 2001 Lily Creek decision is relevant in relation to the level of alcohol-related harm within the Midland community:

*"The Act directs attention to the minimisation of alcohol-related harm generally (s 5(1) (b)). The relevant question for the Court, in that case, is the level of alcohol related harm, due to the use of liquor, which is likely to result from the grant of an application. This does not mean that only the increased harm which may result from the specific premises in question is to be considered; rather, it seems to me that must necessarily be assessed against any existing harm or ill health so as to assess the overall level which is likely to result if a particular application is granted. Where, as occurs in probably the majority of cases, the existing level of alcohol related harm is no greater than that which appears to be commonly accepted in the community, the distinction is probably not significant. However, where there is already a very high and serious level of alcohol related harm in a community, it may be that the Court would find a relatively small risk of increase in that level of harm to be unacceptable. In other words "...it is not the "risk" of harm in some abstract sense which is relevant, but rather the risk having regard to the proved circumstances of the particular area in relation to which the application is made"*

Based on the evidence submitted and representations made by the EDPH and the admissions by the applicant in relation to statistics on alcohol-related crime and other health indicators in its PIA and Response, I find that, on the balance of probabilities, harm or ill-health might be caused to people due to the use of liquor if the application was granted.



Accordingly, pursuant to section 38(2) of the Act, the applicant has not satisfied me that granting the application is in the public interest.

### **SECTION 33(1) DETERMINATION**

As submitted by the applicant at paragraph 26 of the Response, due to the objections and interventions received the licensing authority must determine whether to grant the application is in the public interest under section 33(1) of the Act. The objections and evidence give rise to a conflict between the objects contained in paragraphs (b) and (c) of section 5(1) of the Act and while both are primary objects of the Act, neither may be afforded primacy over the other.

Accordingly, the licensing authority has to weigh and balance the evidence and representations made by the applicant, objectors and interveners.

In this regard, the objector Mr Steve Howlett (Maura), has not submitted any evidence to support his assertions and therefore, has not met the burden of establishing validity of the objection.

The licensing authority must undertake a weighing and balancing exercise to resolve the conflict between objects (b) and (c). In this regard, however, the object of the licensing authority is to regulate the sale, supply and consumption of liquor having regard to objects (b) and (c).

In its PIA and Response together with Mr Tim Caporn's Proof of Evidence, the applicant submits that the requirements of consumers for the extended trading hours, includes tourists visiting the Swan Valley district, residents from the immediate locality, backpackers and local farmers.

The evidence and representations made in relation to object (b) of Section 5(1) have been considered.

To support its assertion in regard to catering for the requirements of consumers for liquor and related services, the applicant submitted Annexures R, S and T to its PIA as evidence of the number of visitors annually to the Swan Valley/City of Swan. However, there has been no attempt by the applicant to apply the general statistics to the particular circumstances of this application, particularly as stated in paragraph 113 of the PIA, "*Midland is located on the outskirts of the Swan Valley.*" There was also no attempt by the applicant neither to quantify the numbers nor to identify the requirements of "local farmers" and backpackers.

The opinion evidence submitted by the WA Police Service is that it appears that no current public interest for extended hours in Midland had been sought by the applicant. The police state:

*"Generally, backpackers are looking for cheap accommodation to rest their heads with a night time economy to match as they pass through a given area. As such, they are more likely to use facilities in place, like Northbridge, where there is a host of late night entertainment services. Also, local farmers would be reluctant to use the 2.00am EDP due to lack of public transport from Midland.*

*It is the considered view of W.A. police that there are less tourist attractions than the application states. The Military Market was destroyed by fire in early 2007 and no longer stands. The Farmers' Markets are only open on a Sunday until 3.00pm, offering fruit and vegetables with very few craft stalls. The old Town Hall in Midland, and a bank which was converted into an Art Gallery, cannot compete with the likes of Perth City and Northbridge until late in the evening and will not attract the client "owl" wishing to consume liquor until 2.00am. The needs of tourists are already being met in Northbridge and the Swan Valley."*

The applicant submitted Annexure E with its PIA, which was the result of a survey placed on-site for December 2007 and January 2008. The completed survey forms from 30 persons, who resided in a range of suburbs, with the majority residing outside the Midland area, were submitted as part of Annexure E.

In response to the question, "Would you patronize The Eastern Hotel if it stayed open to 2.00am?" one responded no, one unsure, one possible and one n/a. However, the question could have been answered in the affirmative even if the respondent did not intend to avail itself of the later trading to 2.00am.

With respect to answering question 14, respondents were only asked "what nights do you usually go out?" In indicating which nights the respondent "usually goes out", it does not necessarily follow that any of the respondents intend to avail themselves of any late trading past midnight or after 10.00pm on Sundays.

The survey form does not mention the earlier trading before 10.00am or the later trading after 10.00pm on Sundays. Furthermore, no letter of support mentions extended Sunday trading hours. However, in support of trading on Sunday mornings from 8.00am, the applicant states that it does not want to provide anything that a licensed restaurant within Western Australia cannot provide. In drawing on this analogy, it needs to be noted that the primary focus of a restaurant is the provision of meals, and while licensed to sell liquor ancillary to a meal, the tables and chairs in a restaurant must be set up to maintain the primary focus of the provision of those meals. If the applicant intended to establish a dining area to operate in the manner of a restaurant, it would be eligible to apply for an ETP under section 60(4)(b) of the Act to trade on Sunday mornings.

The applicant also submitted with its Response, support for the extended trading hours from 11 persons. However, the manner in which the letters of support (and the survey) were solicited was not provided. In the case of the letter of support from Ms T Brougham, she states *"So when I was asked by the manager if I would support the 2.00am licence application, I was happy to oblige."* In considering these letters of support, it is relevant to note that Mr Steve Howlett (Maura) of Midland does not support the application.

In summary, no rigorous marketing analysis has been undertaken by the applicant to establish the requirements of consumers for the extended trading hours. No separately justified case for extended trading hours for any night was submitted by the applicant; nor was a separate case made for Sundays, given *"... the ETP provisions of the Act do not require the Director to treat Sunday in the same way as other days of the week."*(Romato *supra* paragraph 38)

### **Conclusion**

In discharging its functions *"... the mere possibility of harm or ill-health ..."* is a relevant matter for the licensing authority to consider. *"The potential of harm or ill-health to people, irrespective of whether the harm or ill-health is proved on a balance of probabilities, would be a powerful public interest consideration."* (Lily Creek 2000 paragraph 29)

I find that the veracity of evidence presented by the EDPH, together with evidence contained in the applicant's PIA and Response, regarding the possibility of harm or ill-health caused to people or any group of people, due to the use of liquor, if the application was granted, on balance out-weighs the evidence that granting the application will cater for the requirements of consumers for liquor and related services.

After considering the applicant's submissions I am of the opinion that, on the balance of probabilities, the grant of the application is not in the public interest. Accordingly, pursuant to section 33(1) of the Act, the application by Bold Gem Pty Ltd for an extended trading permit is refused.

Parties to this matter dissatisfied with the outcome may seek a review of the Decision under section 25 of the Act. The application for review must be lodged with the Liquor Commission within one month after the date upon which the parties receive notice of this Decision.

Barry A. Sargeant  
DIRECTOR OF LIQUOR LICENSING

28 January 2009





Department of Racing, Gaming & Liquor  
Government of Western Australia

Your Ref: 37622.PF

Our Ref: 6020027052

Enquiries: Mary Ioannidis  
☎ (08) 9425 1882

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GPO Box B51  
PERTH WA 6838

Dear Sir/Madam

**APPLICATION FOR AN EXTENDED TRADING PERMIT: THE EASTERN HOTEL MIDLAND**

Enclosed is the decision in respect of the above application.

If you have any queries regarding this lease please contact me on [08] 9425 1882.

Yours faithfully

Mary Ioannidis  
ACTING POLICY OFFICER

28 January 2009

Enc

- cc: Licensing Enforcement Division
- cc: Police – East Metropolitan District Office
- cc: Drug & Alcohol Office
- cc: City of Swan
- cc: Mr Steve Howlett