

Section 36B(4) Submissions



Applicant:	Endeavour Group Limited
Application:	Application for Conditional Grant of Liquor Store Licence
Proposed Store:	BWS – Beer Wine Spirits Sienna Wood

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1 Introduction and background

1.1 Introduction

- (a) The Applicant has made an application (**Application**) to the Licensing Authority for the conditional grant of a liquor store licence for a proposed new BWS – Beer Wine Spirits liquor store (the **Proposed Store**) to be located at the new Sienna Wood shopping centre (the **Centre**) being constructed at the corner of Forrest Road and Weatherley Way, Hilbert.
- (b) To support the Application the Applicant has lodged:
 - (i) a Form 2 Public Interest Assessment (**PIA**), which addresses the public interest requirement under section 38(2) of the Liquor Control Act 1988 (**Act**); and
 - (ii) material and evidence to support the PIA and Application (**Applicant's Evidence**).
- (c) Under sections 36B(2) and (4) of the Act the Licensing Authority must not grant the Application unless it is satisfied that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality in which the Proposed Store will be situated (**Requirements Test**).
- (d) This document addresses the Requirements Test. The Applicant relies upon the PIA and Applicant's Evidence to inform and support its submissions in this document.

1.2 About the Application

- (a) Full details of the nature of the Application and the services and facilities to be provided by the Proposed Store are detailed in the PIA.¹
- (b) In short, the Proposed Store is for a modern, browse style liquor store that is predominantly designed to provide complementary services to customers of the new Woolworths Supermarket at the Centre and the local community.
- (c) In total the proposed store will be 200m² in size, inclusive of a display trading floor area, walking cool room and a nontrading area (stockroom).
- (d) Currently there is no BWS liquor store, or any other retail packaged liquor outlet, in the Locality of the Application.²

2 The Requirements Test

2.1 The legislative provision

- (a) Section 36B(4) states as follows:

*"The licensing authority must not grant an application to which this section applies unless satisfied that **local packaged liquor requirements** cannot*

¹ PIA clauses 3.1, 4.1 and 5

² PIA clauses 2.2 and 8.1

*reasonably be met by existing **packaged liquor premises** in the locality in which the proposed licensed premises are, or to be, situated.”* (emphasis added).

- (b) “Local packaged liquor requirements” is defined as:
*“in relation to an application to which this section applies, **means the requirements of consumers for packaged liquor in the locality in which the proposed licensed premises are, or are to be, situated”** (section 36B(1))(emphasis added).*
- (c) “Packaged liquor premises” is defined as:
“means premises to which a licence referred to in subsection (2) relates”. (section 36B(1)).
- (d) Subsection (2) states:
“This section applies to an application for the grant or removal of any of the following licences –
 - (a) a hotel licence without restriction;*
 - (b) a tavern licence;*
 - (c) a liquor store licence;*
 - (d) a special facility of a prescribed type.*
- (e) In short, the provision establishes a prohibition on the Licensing Authority to grant a specified application if it is satisfied the “requirements for consumers of packaged liquor in the locality” cannot be reasonably met by the existing outlets.
- (f) Conversely, if the Licensing Authority is satisfied that the relevant requirements cannot be reasonably met, then the application can proceed to be determined in accordance with the Act.

2.2 Liquorland Karrinyup Decision

- (a) Legal principles as to the meaning and interpretation of the Requirements Test were set down by Archer J in the WA Supreme Court decision of *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2012] WASC 366 (**Liquorland Karrinyup Decision**)
- (b) These include the following:
 - (i) On a proper construction of section 36B the phrase ‘requirements of consumers for packaged liquor’:
 - (A) Is not limited in its scope to the physical item or product of packaged liquor [at p.108].
 - (B) The words ‘requirements of consumers’ mean the same in section 36B(1) and section 5(1)(c) and may involve consideration of the same types of matters [at p.89]. However in considering the term in section 36B(1), consideration must also be given as to whether the requirements cannot

reasonably be met by existing packaged liquor premises in the relevant locality [at p.100-103].

- (C) Matters such as convenience, product range, service and efficiency can be relevant to both the requirements test under section 36B and the public interest test under section 38 [at p.106].
- (ii) On a proper construction of section 36B(4) the phrase ‘cannot reasonably be met’:
 - (A) Means “cannot sensibly or rationally be met” [at p.131].
 - (B) Does not mean “without great or undue difficulty or inconvenience” [at p.121].
 - (C) Regard should be given to contemporary standards and expectations for the requirements of packaged liquor [at p.133].
- (iii) When determining the “locality” for the purposes of section 36B(4)(the **S36B Locality**):
 - (A) It is the area that surrounds, and is geographically close to, the location of the proposed premises [at p.181].
 - (B) It does not equate to the area(s) from which consumers would come (i.e. the retail catchment area) [at p.181 and 183-184]. However the retail catchment area may be a relevant consideration for the purposes of determining locality [at p.188].
 - (C) A specific test to be applied or an exhaustive list of the factors that will or may be relevant in the determination of the locality in any given case cannot be prescribed due to the variety of factual situations that may arise [at p.186].
 - (D) The shape and size of the locality may be influenced by topographical features (including man-made features such as roads) and the areas from which the proposed site could be accessed reasonably easily on foot or push bike. If there is a community in the area of the proposed site, the geographical spread of that community may also influence the shape and size of the locality [at 185].
 - (E) Despite section 36B(4) specifically referring to existing packaged liquor premises in the locality in which the proposed licensed premises are, or are to be situated, potentially premises outside an identified locality may be relevant to the assessment [at p.202].

2.3 Role and function of the Licensing Authority

- (a) In the hearing and determination of an application or matter under the Act, the Licensing Authority must apply itself to the real issues to be decided and evaluate

the evidence before it, including by inference.³ Its fact finding task also extends to the making of findings and the drawing of conclusions, wholly or partly, from notorious facts.⁴

- (b) The Licensing Authority is not bound by the rules of evidence.⁵ In the Bicton Decision Buss J found this “enables [the Licensing Authority] to make findings of fact on the basis of any probative material before it”.⁶

3 Addressing the Requirements Test

3.1 Three stage process

- (a) To address the Requirements Test a three stage process is required.
- (b) First, the relevant area that comprises the S36B Locality must be identified. Second, the requirements of consumers for packaged liquor in the relevant locality must be identified. And lastly, an assessment of whether those requirements can be reasonably met by the existing premises must be completed.⁷

3.2 Determining the S36B Locality

- (a) The Applicant engaged MGA Town Planners to identify, in its opinion, what comprises the S36B Locality for the Application, applying the principles laid down by Archer J in the Liquorland Karrinyup Decision.
- (b) MGA Town Planners concluded that given the nature, character and projected growth and development of the area where the Proposed Store will be located, the relevant area is the “Locality” that applies for the purposes of the Public Interest Test for the Application. The reasons supporting these conclusions are set out in MGA Town Planner’s report at section 4. For the purposes of this document, the area will be referred to as the “S36B Locality”, even though it comprises the same area as the Locality.
- (c) The area comprising the S36B Locality is the area outlined by the thick red line on the map below.

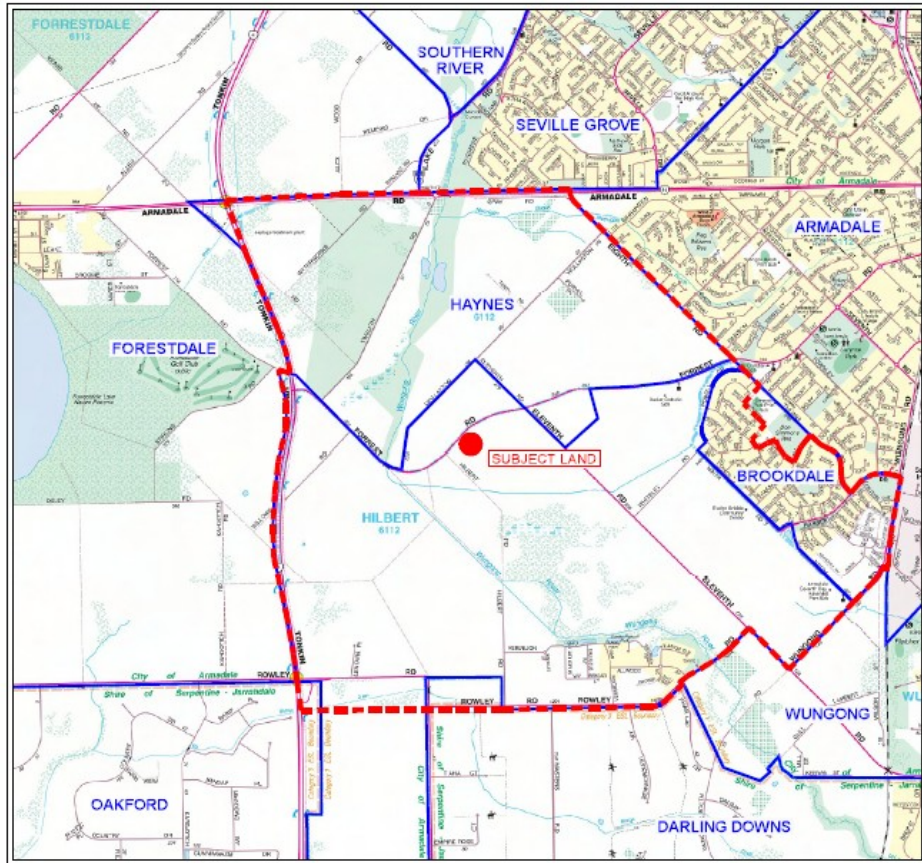
³ Bicton Decision per Buss J at [70]

⁴ Bicton Decision per Buss J at [70]

⁵ Bicton Decision per Buss J at [58]

⁶ Bicton Decision per Buss J at [59]

⁷ LC 32/2022 (BWS Kelmscott), at [136]



- (d) Full details and reasons supporting why this area is appropriate are provided in MGA Town Planners report, a copy of which is included in the Applicant's Evidence.
- (e) It is important to note that the Applicant does not consider that the S36B Locality should automatically, nor necessarily, be the same geographic area that applies for the purposes of the public interest test, except in relation to addressing amenity factors under section 38(4)(b). Having said that, as indicated above, in this instance, circumstances are such that the Applicant considers the relevant areas are the same.

3.3 The requirements of consumers for packaged liquor in the 36B Locality

- (a) Once the S36B Locality has been determined, the relevant question becomes whether the local packaged liquor requirements of consumers in that locality cannot be reasonably met by existing premises. This requires consideration of what consumers demand, or desire, as distinct from what they cannot manage without.⁸ It also involves consideration of shopper convenience and

⁸ Liquorland Karrinyup Decision, Archer J at [40] and [79]

preferences, including notorious facts such as the convenience of one-stop shopping.⁹

- (b) To ascertain the requirements of consumers of packaged liquor in the S36B Locality for the purposes of the Application, the Applicant undertook a market survey (**Market Survey**). It has long been accepted that a market survey can provide evidence of the subjective requirements of the public.¹⁰
- (c) Research objectives of the Market Survey are set out below. These include the express objective to understand and ascertain the specific requirements of consumers for packaged liquor and the extent to which these are being met by existing outlets:¹¹

Strategic Aim & Objectives



To assist Endeavour Group in the liquor licensing application process by providing a comprehensive understanding of the local market dynamics and community sentiment towards the proposed BWS. While also providing a comprehensive, robust and representative study of consumers' off-premise alcohol purchase behaviours and preferences.

In order to deliver on the strategic aim, this research was designed to:

1. Understand market demand and customer profiles for the proposed store
2. Determine the extent to which existing retail packaged liquor premises meet these requirements in the local area
3. Identify the extent to which the proposed BWS store meets consumer requirements for retail packaged liquor
4. Evaluate the community's perceptions and attitudes towards the proposed store

- (d) All households within the S36B Locality were given the opportunity to participate in the Market Survey.¹² A total of 439 qualified households did, providing a good representative sample.¹³
- (e) Of the 439 respondents 88% have purchased packaged liquor in the last 12 months, with 63% purchasing at least fortnightly.¹⁴ This is notwithstanding there is no retail packaged liquor outlet in the S36B Locality.¹⁵
- (f) Key findings in the Market Survey relating to the requirements of residents of the S36B Locality include:
 - (i) The Thirsty Camel store at the Hayes Bar & Grill tavern is the store most residents of the S36B Locality patronise currently to buy packaged liquor, mainly for the reason that it is close and convenient.¹⁶ This store is not located in the S36B Locality, but is the store closest to most residents of the locality.¹⁷

⁹ Liquorland Karrinyup Decision, Archer J at [79]; *Woolworths v Director of Liquor Licensing* (2013) 45 WAR 446, Buss J at [75]-[79]

¹⁰ *Hay Properties Pty Ltd & Anor v Roshel Pty Ltd* Fct Sct Library 9804965 1998

¹¹ Market Survey slide 7

¹² Market Survey slide 8

¹³ Market Survey slide 8

¹⁴ Market Survey slide 16

¹⁵ MGA Report section 10

¹⁶ Market Survey slides 18 and 20

¹⁷ MGA Report Figure 1, clause 7.9

- (ii) Around 38% of residents currently purchase liquor “often” or “always” from a liquor store co-located with a supermarket, with a further 32% purchasing in this manner “occasionally”.¹⁸
- (iii) Purchasing packaged liquor when purchasing groceries all in the one trip is preferred by 66% of residents.¹⁹ The difference between this and the number that currently shop in that manner indicates a gap in the market.²⁰ This is particularly relevant given residents only have this amenity outside of the S36B Locality.²¹
- (iv) Over three quarters of residents (76%) reported they would find it more convenient to buy packaged liquor at the same time as doing their grocery shopping.²²
- (v) The top four most important features of a liquor store desired are: being in a safe environment to shop; availability of free on-site parking; a store that is well organised into sections that can be easily browsed; and being easily accessible or convenient to get to.²³ All these features will be offered by the Proposed Store.
- (vi) 94% of residents who currently shop for groceries and liquor at the same time considered being able to shop for liquor and groceries at the same time was “important” or “essential”.²⁴
- (vii) 3 in 4 residents support the Proposed Store.²⁵ The convenience of having a BWS store near to where the resident worked or lived was ranked as the number one most appealing feature of the Proposed Store.²⁶ This was followed by:²⁷
 - (A) Being located with a Woolworths Supermarket where supermarket/grocery shopping can also be done.
 - (B) A safe shopping environment.
 - (C) Being easily accessible/convenient to get to.
- (g) It is also observed that:
 - (i) Proximity, or being close by, is a key requirement of residents. Painted Dog notes:²⁸

“Those that support the proposed store are much more likely to consider a range of features important. Proximity to the store being important for almost all of those in support of the store, followed by access to an

¹⁸ Market Survey slide 25
¹⁹ Market Survey slide 27
²⁰ Market Survey slide 28
²¹ MGA Report section 10
²² Market Survey slide 26
²³ Market Survey slide 34
²⁴ Market Survey slide 36
²⁵ Market Survey slide 42
²⁶ Market Survey slide 47
²⁷ Market Survey slide 51
²⁸ Market Survey slide 50

exclusive / highly rated range of products and being co-located with a supermarket.”

- (ii) Overall 7 in 10 residents feel that the Proposed Store will better satisfy their needs than options that are currently available.²⁹
- (iii) 73% of residents of the S36B Locality are likely to use the Proposed Store if it were to open.³⁰ Painted Dog notes:³¹

“Around 3 in 4 residents intend on using the proposed store when it opens, and 1 in 2 indicated they are very likely to do so.”

- (h) The above demonstrates a specific requirement for a BWS branded store by residents of the S36B locality.
- (i) To supplement the Market Survey, consideration was given to general research completed by the Applicant to identify the requirements of Australian consumers for packaged liquor. Karen Sheppard, Head of Customer Insights for the Applicant states as follows:

“EGL ... carries out regular, extensive market research to obtain insights into consumer purchasing patterns, motivations and trends in retail packaged liquor. This research also obtains information on the profile of liquor consumers; the different types of consumer segments that exist; what consumer expectations and preferences are within each consumer segment; and how consumers rate the features of different liquor brands. It is essential for EGL’s strategic planning and to ensure the products and services it offers are relevant to consumer needs and requirements.”³²

- (j) The Applicant’s experience and research in other areas of Australia of the requirements of consumers throughout Australia is relevant and informative to the issue under section 36B(4) in this Application given:
 - (i) The Proposed Store and the BWS business model is consistent throughout Australia.
 - (ii) The Proposed Store is located in an established urban area, not a remote community with unique characteristics.
 - (iii) There is nothing to suggest the population of the S36B Locality is any different to any other urban area in the Perth Metropolitan Area.
- (k) The popularity and success of the BWS business model, and its success in WA, is a matter which must be taken into account in assessing whether there is a consumer requirement for the products and services that are to be provided by the Proposed Store.³³
- (l) As identified in the PIA, research by the Applicant evidences that there are different consumer segments for packaged liquor and that these segments have

²⁹ Market Survey slide 55

³⁰ Market Survey slide 35

³¹ Market Survey slide 66

³² Statement of Karen Sheppard clause 3.1

³³ *Woolworths v Director of Liquor Licensing* (2013) 45 WAR 446, per Buss J at [84]

distinct and different shopping preferences.³⁴ Karen Sheppard reports some of the relevant findings of this research:³⁵

“Key findings ... include:

- (a) there are different consumer segments for packaged liquor.*
- (b) these segments have distinct preferences as to the manner and frequency in which they purchase packaged liquor;*
- (c) a number of factors determine each consumer segment as to where they will purchase their packaged liquor; and*
- (d) there is a need for a variety of packaged liquor outlets as different retailers are chosen to suit different drinking occasions.”*

(m) Other findings include:

- (i) Around 78% of all packaged liquor consumers in Australia visited a BWS liquor store to purchase their packaged liquor over the last 12 months.³⁶
- (ii) Two of the top attributes of a BWS store ranked by consumers are: “a good selection of products to choose from for my specific needs” and “value for money”.³⁷

(n) The above confirms the results of the Market Survey. That is, that the BWS Murphy’s brand and business model is sought out, and the association of a BWS store with a Woolworths supermarket is successful throughout Australia, and BWS’s pricing and product range are of particular appeal.

(o) As noted in the PIA, the Liquor Commission has found that the combination of the Applicant’s general research showing that one-stop shopping is of great importance and reflected in the success of the BWS business model, combined with specific evidence obtained through the Applicant’s Market Survey, forms a foundation in fact for inferring the existence of relevant consumer requirements in the locality in the manner explained in *Woolworths v Director of Liquor Licensing* (2013) WAR 44.³⁸ It also has found that:

*“As reflected in *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* (LC 06/2017), one contemporary trend now acknowledged to be in accordance with the proper development of the liquor industry is liquor stores associated with the larger supermarket outlets.”*³⁹

3.4 Existing premises in the S36B Locality

- (a) Currently there are no existing licensed premises in the S36B Locality that sells packaged liquor to the general public.⁴⁰

³⁴ PIA clause 9.1(b)

³⁵ Statement of Karen Sheppard clause 4.2

³⁶ Statement of Karen Sheppard clause 5.2

³⁷ Statement of Karen Shepherd clause 5.5(c)

³⁸ LC 32/2022 (BWS Kelmscott LC decision) paras 142-145

³⁹ LC 32/2022 para 146

⁴⁰ MGA Report Section 10

3.5 The extent to which the requirements of consumers for packaged liquor in the locality are being met by existing outlets

- (a) As there are no existing outlets, the requirements of consumers for packaged liquor in the S36B Locality is not currently being satisfied.

4 Submissions and Conclusion

4.1 Submissions

- (a) The Applicant's Evidence and the material and information supporting the Application establishes the following:
 - (i) Consumers of packaged liquor require, and expect, a range and variety of liquor stores to be available to them.
 - (ii) There is a demonstrated requirement of packaged liquor consumers in the S36B Locality for:
 - (A) a liquor store that:
 - (1) is within close proximity;
 - (2) is easy and convenient to get to; and
 - (3) is associated with the Woolworths Supermarket at the Centre.
 - (B) the specific services and facilities of a BWS liquor store in the S36B Locality,which is reflected in the level of support for the Proposed Store as well as the reasons for that support.
 - (iii) The above is consistent with the requirements and expectations of consumers in WA and Australia wide.
 - (iv) There is currently no existing retail packaged liquor outlet in the S36B Locality. This means that the requirements of packaged liquor consumers in the locality are not being met, nor are capable of being met. Residents are required to travel outside the S36B Locality to purchase packaged liquor. The Proposed Store will satisfy this unmet need.
 - (v) The services and facilities to be provided by the Proposed Store will meet the requirements of consumers.
 - (vi) On the evidence and material before it, it is not open to the Licensing Authority to be satisfied that local packaged liquor requirements can reasonably be met by the existing packaged liquor premises in the Locality.
 - (vii) The evidence from the Market Survey evidence specifically relates to consumers in the S36B Locality which makes it relevant and compelling.

4.2 Conclusion

Based on the above the Applicant submits the Licensing Authority should be satisfied that the Requirements Test is met, and does not preclude the grant of the Application.



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