

Section 36B(4) Submissions



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

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1 Introduction and background

1.1 Introduction

- (a) The Applicant has made an application (**Application**) to the WA 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 Eglinton Village shopping centre (the **Centre**) being constructed at the corner of Marmion Avenue and Imperial Entrance, Eglinton.
- (b) To support the Application the Applicant has lodged:
 - (i) a 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 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 125m2 in size, inclusive of a display trading floor area, walk-in cool room and a non-trading area (stockroom). It will be one of a number of speciality tenancies supporting the Woolworths Supermarket.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 reasonably be met by existing **packaged liquor premises** in the locality in which the proposed licensed premises are, or to be, situated.”* (emphasis added).

¹ PIA Form 2A Annexure 1 clause 4

² MGA Report clause 3.2

- (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

³ Bicton Decision per Buss J at [70]

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

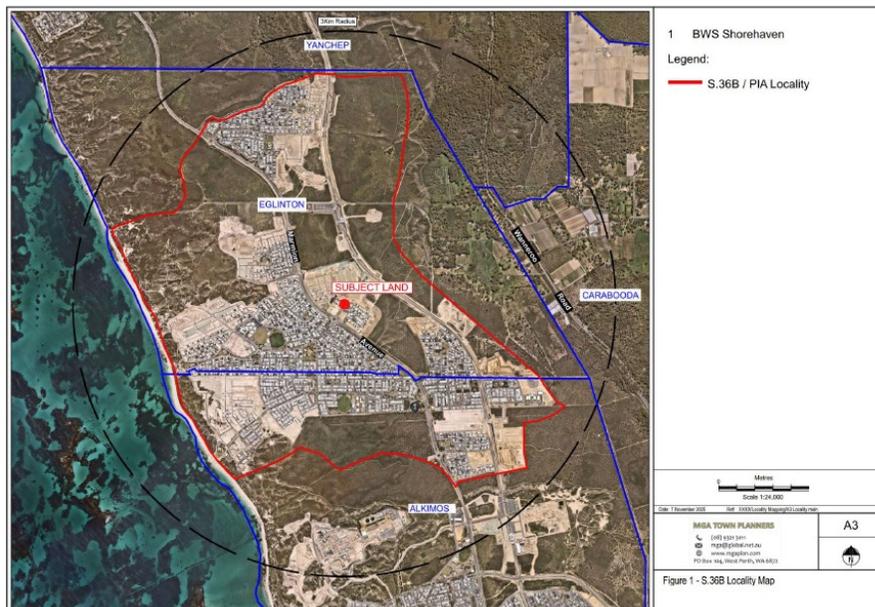
3 Addressing the Requirements Test

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 purposes of the Application, applying the principles laid down by Archer J in the Liquorland Karrinyup Decision.
- (b) MGA Town Planners concluded that the relevant area is the area outlined by the red line shown on the map below.



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]

- (c) Full details and reasons supporting this conclusion are provided in MGA Town Planners report, a copy of which is included in the Applicant’s Evidence (**MGA Report**)(refer clause 4). A key factor is that the area is a relatively discrete area defined by reserves, rural zones and the coast.⁸
- (d) MGA Town Planners also concluded that it is appropriate for the area comprising the “Locality” of the Application for the purposes of the public interest assessment under Section 38 of the Liquor Control 1988 (**S38 Locality**) to be the same as the area comprising the S36B Locality.⁹

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.¹⁰ It also involves consideration of shopper convenience and preferences, including notorious facts such as the convenience of one-stop shopping.¹¹
- (b) To ascertain the requirements of consumers of packaged liquor in the S36B Locality, the Applicant commissioned a market survey (**Market Survey**). It has long been accepted that a market survey can provide evidence of the subjective requirements of the public.¹²
- (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:¹³

STRATEGIC AIM

To assist Endeavour Group in the liquor licence application process by providing a comprehensive understanding of the local market dynamics and community sentiment towards the proposed Eglinton BWS store.

Informational Objectives:

1. Understand community demand for a new BWS liquor store in Eglinton, offering a diverse range of packaged liquor alongside grocery shopping for a convenient one-stop shopping experience.
2. Assess the adequacy of existing liquor outlets in the local area, identifying any gaps in product range, convenience, pricing, accessibility, or parking compared with the proposed BWS store.
3. Evaluate community support or opposition towards the proposed BWS store, exploring reasons behind these views and concerns, especially regarding the convenience of takeaway liquor availability and proximity to other retail services.
4. Test the appeal of the proposed BWS Eglinton store features, including its modern design, product range, co-location with Woolworths, competitive pricing, exclusive product offerings, and the potential for improving the convenience of purchasing takeaway liquor.
5. Address the Public Interest (Section 5 (1) (c)) and Requirements (Section 36B) Tests.

⁸ MGA Report clause 4.6

⁹ MGA Report clause 4.6

¹⁰ Liquorland Karrinyup Decision, Archer J at [40] and [79]

¹¹ Liquorland Karrinyup Decision, Archer J at [79]; *Woolworths v Director of Liquor Licensing* (2013) 45 WAR 446, Buss J at [75]-[79]

¹² *Hay Properties Pty Ltd & Anor v Roshe! Pty Ltd* Fct Sct Library 9804965 1998

¹³ Market Survey slide 7

- (d) All households within the S36B Locality were given the opportunity to participate in the Market Survey.¹⁴ A total of 323 surveys were completed, providing a good representative sample.¹⁵
- (e) Key findings from the Market Survey relating to the requirements of residents of the S36B Locality include:
 - (i) Access to packaged liquor is limited, with no liquor stores co-located with a supermarket within the immediate area.
 - (ii) There is a mismatch between residents' current behaviours and their preferences, with significantly more residents reporting a preference for one stop shopping for groceries and liquor than those who currently purchase liquor in that way.¹⁶ This indicates a gap in the market.¹⁷
 - (iii) 100% of residents who currently prefer one stop shopping reported that a deficiency of their current preferred store was that it was not co-located with a supermarket.¹⁸
 - (iv) Not being located next to, or co-located with, a supermarket or other shopping facilities was a major pain point for the three liquor stores currently patronised most by, and preferred by, residents.¹⁹
- (f) No longer having to travel out of Eglinton was ranked as the number one most appealing feature of the Proposed Store.²⁰ This was followed by:²¹
 - (i) Being co-located with a Woolworths Supermarket where supermarket/grocery shopping can also be done.
 - (ii) The convenience of having a BWS near to work / home.
 - (iii) Being easily accessible / convenient to get to.
- (g) It is also observed that:
 - (i) Nearly 90% of residents support the Proposed Store when undecided participants are prompted.²²
 - (ii) Convenience is the core appeal of the Proposed Store.²³
 - (iii) 80% of residents state they would be likely to shop at the Proposed Store if it opened.²⁴
 - (iv) Around two thirds of residents consider the Proposed Store would better meet their needs. This is especially true among residents who already shop at BWS and those who like to do all their shopping in one location.²⁵

¹⁴ Market Survey slide 8

¹⁵ Market Survey slide 8

¹⁶ Market Survey slides 31, 37, 41, 43, 44, 45 and 46

¹⁷ Market Survey slides 31, 37, 41, 43, 44, 45 and 46

¹⁸ Market Survey slide 34

¹⁹ Market Survey slide 35

²⁰ Market Survey slide 60

²¹ Market Survey slide 60

²² Market Survey slide 3

²³ Market Survey slide 3

²⁴ Market Survey slide 3

- (h) In addition to the Market Survey, consideration ought to be given to general research completed by the Applicant to identify the requirements of Australian consumers for packaged liquor. Tim McGrath, Head of Customer Advocacy for the Applicant, states as follows:²⁶

“EGL carries out regular, extensive market research to obtain insights into consumer purchasing patterns, motivations and trends in retail packaged liquor. This research is essential for EGL’s strategic planning and to ensure the products and services it offers are relevant to consumer needs and requirements.”

- (i) 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.

- (j) 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.²⁷

- (k) As identified in the PIA, research by the Applicant evidences that there are different consumer segments for packaged liquor and that these segments have distinct and different shopping preferences.²⁸ These findings include:²⁹

- (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.

- (l) Other findings include:

- (i) One of the primary reasons why retail packaged liquor shoppers choose to shop at a BWS liquor store attached, or near, to a supermarket is convenience.³⁰

²⁵ Market Survey slide 3

²⁶ Statement of Tim McGrath clause 3.1

²⁷ *Woolworths v Director of Liquor Licensing* (2013) 45 WAR 446, per Buss J at [84]

²⁸ PIA Annexure 1 clause 13.3

²⁹ Statement of Tim McGrath clause 4.1

³⁰ Statement of Tim McGrath clause 5.4(c)

- (ii) Customers of BWS liquor stores attached, or near, to a supermarket are primarily on a planned shopping trip, where the shopping mission or occasion is to stock up.³¹
- (m) The above confirms the results of the Market Survey. That is, that the BWS brand and business model is sought out; 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. And, most relevantly, that residents of the Locality want the convenience of being able to purchase liquor at the same time as they do their grocery and other shopping at the Centre.
- (n) 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 44.³² 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."*³³

3.4 Existing premises in the S36B Locality

- (a) Currently there is one licensed premises within the S36B Locality that sells packaged liquor to the general public.³⁴ This is BWS Beer Wine Spirits Shorehaven liquor store located at the corner of Shorehaven Boulevard and Marmion Avenue, Alkimos.
- (b) The map at **clause 3.2(b)** shows the geographic location of this premises in relation to the Proposed Store.
- (c) Details of the BWS Shorehaven store, as reviewed by the Applicant, are provided in the PIA.³⁵ In summary, it is a drive through liquor located in a small commercial complex. There is no supermarket nearby.

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

- (a) There is a demand for packaged liquor in the S36B Locality as 72% of residents currently purchase packaged liquor at least once a month.³⁶ Of these 57% purchase packaged liquor weekly or fortnightly.³⁷

³¹ Statement of Tim McGrath clauses 5.4(d) and 5.5

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

³³ LC 32/2022 para 146

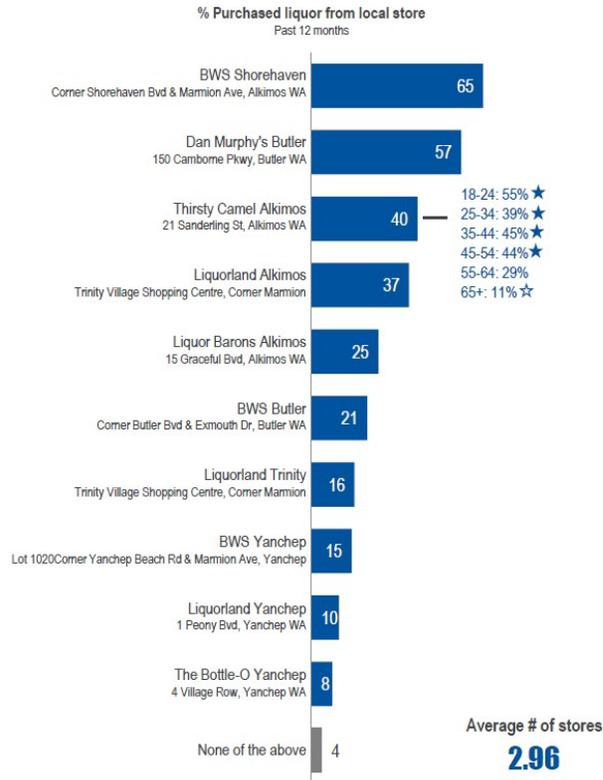
³⁴ MGA Report clause 9

³⁵ PIA Annexure 1 clause 6

³⁶ Market Survey slide 16

³⁷ Market Survey slide 16

- (b) The BWS Shorehaven liquor store is the store most frequented by residents to purchase packaged liquor. However, residents chose to shop at a variety of stores and brands, as shown below.³⁸ On average residents have shopped at 3 of the stores on average in the last 12 months.



- (c) The above is consistent with the Applicant's findings that consumers have a variety of packaged liquor requirements and needs, depending on the purchase occasion and purchase driver.³⁹
- (d) Predominantly residents choose to shop at the BWS Shorehaven because of convenience.⁴⁰ In particular, that it is close to home / work.⁴¹
- (e) A number of residents are dissatisfied with the outlets they currently patronise, with key pain points being:⁴²
- (i) Having to travel to another suburb – being too far away.
 - (ii) Not being located next to, or co-located with, a supermarket or other shopping facilities.
 - (iii) Not having a good range of liquor products, or a limited product range.
 - (iv) Lack of available parking / too busy or chaotic.

³⁸ Market Survey slide 19

³⁹ PIA Annexure 1 clauses 13.3 and 13.4

⁴⁰ Market Survey slide 31

⁴¹ Market Survey slide 31

⁴² Market Survey slide 34

The above are general findings, with the question asked being “Are there any specific limitations, deficiencies or things you don’t like about your most preferred takeaway liquor store”.⁴³

- (f) More specifically, the major pain point for residents who currently prefer to shop at BWS Shorehaven is that it is not located next to, or co-located with, a supermarket or other shopping facilities.⁴⁴ And for the Dan Murphy’s Butler and Thirsty Camel stores (being the 2nd and 3rd ranked preferred stores), that residents have to travel to another suburb to the store to purchase takeaway liquor.⁴⁵
- (g) The Market Survey clearly demonstrates that the opportunity for one stop / one trolley shopping for liquor and groceries is an amenity desired by residents of the S36B Locality, that is not being satisfied by the sole, existing outlet.⁴⁶ This is confirmed by a significant number of residents (77%) indicating a strong preference to be able to buy packaged liquor at the same time as they do their grocery shopping and the fact that a proportion of residents already shop in this manner (31%).⁴⁷ However, as noted above, this amenity is not currently available in the S36B Locality. This discrepancy indicates a mismatch between current behaviours and preference. That is, residents want one stop/one trolley shopping for liquor and groceries, but currently don’t shop in that manner as it is not currently available to them in their local area.⁴⁸ The closest co-located liquor store and major supermarket is 4.7km to the south of the S36B Locality or 7km to the north.⁴⁹ As observed by Painted Dog:⁵⁰

“While many residents feel they can manage with current options, this does not reflect their preferred way of shopping or the convenience they would like to have locally.”

- (h) Being co-located with a Woolworths Supermarket was the second top ranking feature of the Proposed Store and also the second top ranking reason why residents stated they would purchase from the Proposed Store (if it opens).⁵¹
- (i) A number of S36B Locality residents report the reason why they shopped at their nominated, preferred liquor store, was because it offered “one stop shop / combined grocery and liquor purchase”.⁵² However to access this amenity currently residents have to travel a considerable distance out of their local area to access this amenity.
- (j) Overall two thirds of residents agree that the Proposed Store will better satisfy their takeaway liquor purchasing needs.⁵³ The extent to which residents consider the Proposed Store will better satisfy their specific packaged liquor

⁴³ Market Survey slide 34

⁴⁴ Market Survey slide 35

⁴⁵ Market Survey slide 35

⁴⁶ Market Survey slide 34

⁴⁷ Market Survey slides 37, 41, 43, 44 and 45

⁴⁸ Market Survey slides 45 and 46

⁴⁹ MGA Report clause 6.11

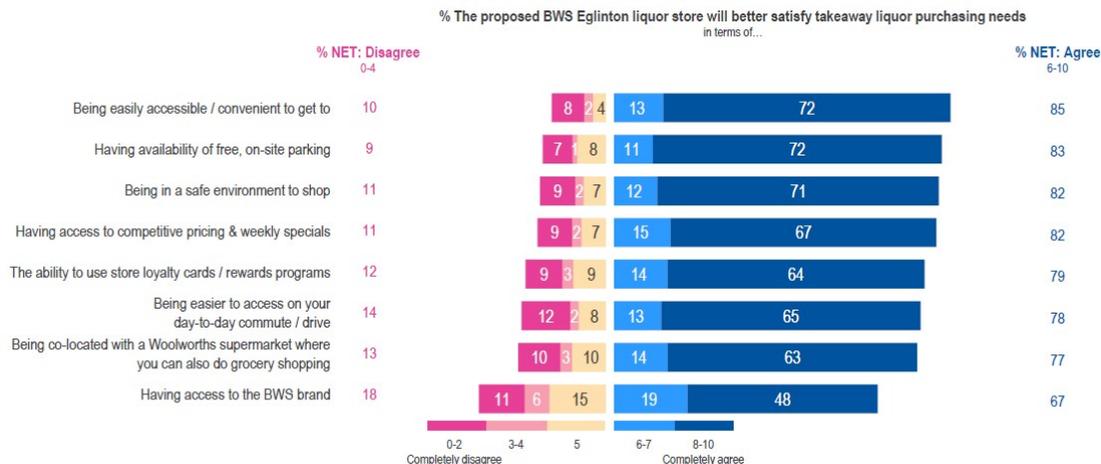
⁵⁰ Market Survey slide 40

⁵¹ Market Survey slides 58 and 74

⁵² Market Survey slide 30

⁵³ Market Survey slide 83

purchasing needs is set out in the results from the Market Survey shown below:⁵⁴



- (k) In short, as noted by Painted Dog:

“Over 90% will have at least one of their needs better met by the proposed BWS!”
- (l) Even though the Proposed Store will be a BWS branded store, the same as the existing BWS Shorehaven outlet, offering similar products and services, there will be distinct differences. This is because they are each designed to cater to different packaged liquor consumer needs and requirements and therefore will each meet specific consumer needs. As noted in the Applicant’s Evidence:
 - (i) Where and when a person purchases packaged liquor is driven by a number of factors, including the shopping “mission”, purchase occasion, convenience and the person’s shopping preferences.⁵⁵
 - (ii) Each type of BWS store (i.e. stand alone, drive through and attached to a supermarket) are designed to service a distinct and vital consumer need.⁵⁶
- (m) The BWS Shorehaven store is designed for customers who want to drive in and be served with alcohol purchases while they remain in their vehicles.⁵⁷ This is particularly appealing to customers such as tradies, who often have expensive tools in their vehicle which they don’t want to leave unattended; parents with young children in the car that they do not want to get in and out; or people with mobility issues.⁵⁸ In contrast the Proposed Store is designed to cater to people who want to purchase packaged liquor at the same time as doing their grocery or other shopping.⁵⁹ As noted above, this is a packaged liquor requirement sought out by residents of the S36B Locality, but is not available.

⁵⁴ Market Survey slide 92

⁵⁵ Statement of Tim McGrath clauses 4.1(b), 4.1(c) and 5.4

⁵⁶ Statement of Tim McGrath clause 5.5

⁵⁷ Statement of Anthony Smith clause 13.3

⁵⁸ Statement of Anthony Smith clause 13.5

⁵⁹ Statement of Anthony Smith clause 13.5

- (n) The above findings clearly show that the certain requirements of residents of the S36B Locality are 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 for:
 - (A) a liquor store that:
 - (1) is associated with the Woolworths Supermarket at the Centre; and
 - (2) is within the suburb of Eglinton; and
 - (B) the specific services and facilities of a BWS liquor store at the Centre,

by packaged liquor consumers 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) 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.
 - (v) 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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Solicitors for the Applicant